Neutral Citation Number: [2023] EWHC 2524 (Fam)

Case No: RG19P01136

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

B	**Applicant**
- and -	
C	**Respondent**
-and-	
The Secretary of State for Justice	**Intervener**

- -
- -

Mr Michael Gration KC and Ms Julia Townend (instructed by **KJ Smith Solicitors**) for the **Applicant**
The Second Respondent did not appear and was not represented
Ms Carine Patry KC and Mr Alex Laing (instructed by **the Government Legal Department**) for the **Intervener**

Hearing date: 27 July 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In these proceedings, I am concerned with the question of whether this court should terminate parental responsibility conferred on a person by operation of Spanish law in circumstances amounting to fraud and subsisting in this jurisdiction by operation of Art 16(3) of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter 'the 1996 Convention'). It is a question of some complexity.

2. The subject child is A. The applicant is the mother of A, B (hereafter 'the mother'). The mother is represented *pro bono* by Mr Michael Gration of King's Counsel and Ms Julia Townend of counsel. The court is grateful to them for so acting in a case that has required a very large amount of detailed legal research and preparation. The biological father of the child, as confirmed by DNA testing, is C. He is currently serving a twenty-three year sentence of imprisonment for child sexual offences in circumstances that I will come to. C did not attend the final hearing and is not represented before the court. Whilst he was given proper notice of the final hearing and a production order was made by the court to enable C to attend by way of video link, he declined to leave his cell.

3. The person with parental responsibility for A, in circumstances that I will again come to below, is D. On 9 February 2023 I determined that D should be given notice of these proceedings. My reasons for so deciding are set out in my judgment of that date, published as *B v C (Foreign Parental Responsibility)* [2023] EWHC 291 (Fam). That judgment should be read with this one. Whilst D has now been given proper notice of these proceedings, D has not engaged with them. He therefore does not appear and is not represented before the court.

4. In circumstances where the legal issues raised by this case are of potentially much wider significance, the Secretary of State for Justice accepted an invitation to intervene in these proceedings. The Secretary of State is represented by Ms Carine Patry of King's Counsel and Mr Alex Laing of counsel. The Secretary of State for Justice leads the case on behalf of the Crown given his responsibility for the 1996 Convention and s.4(2A) of the Children Act 1989 dealing with the termination of parental responsibility.

5. In determining this matter I have read the court bundle and have had the inestimable assistance of the erudite and comprehensive written and oral submissions of leading and junior counsel. Given the nature and complexity of the issues raised in this case, I reserved judgment and now set out my decision and my reasons.

BACKGROUND

6. As I noted in my first judgment in this matter, the circumstances of this case are highly unusual, if not unique. The background facts can be stated shortly.

7. The mother and father met in Spain in 2016 via the Tinder dating app. During the course of the parents' relationship in that jurisdiction the father claimed to be a man

called 'D' and possessed a passport in the name of 'D'. After A was born on 14 November 2017, his birth was registered in Spain at the Civil Registry Office on 29 November 2017 using the mother's passport and the passport in the father's possession. In the circumstances, the father's name was recorded as 'D' on A's Spanish birth certificate. The court has before it a copy of the Spanish birth certificate and an apostille, made under the 1961 Hague Convention, dated 15 May 2020 certifying the authenticity of the signature on the Spanish birth certificate. The court also has before it certified translations of the Spanish birth certificate and of the apostille.

8. It transpired subsequently that the passport used by the father to register A's birth in Spain on 29 November 2017 had been stolen from the person who was in fact D and that the father's name was in fact C. It further transpired that C was wanted in the United Kingdom in connection with a series of serious child sex offences against the children of his former wife, he having absconded from the United Kingdom in November 2015 whilst on bail awaiting trial for those offences. In these circumstances, it is clear that C conducted a relationship with the mother under a false identity, leading to the conception of A at a time when his true identity, and the sexual offences he had committed, were not known to the mother. It is further apparent that C used a false identity, stolen from another and being used to evade law enforcement, to register A's birth.

9. C was subsequently arrested in Spain in July 2018 and extradited to the jurisdiction of England and Wales, where he was convicted in the Crown Court of seven counts of rape, two counts of assault by penetration and 3 counts of causing a child under the age of 13 to engage in sexual activity. As I have noted, he was sentenced to twenty-three years in prison.

10. The parents had agreed to separate in January 2018 and the mother and A left Spain for a holiday in the United Kingdom in January 2018, prior to the mother becoming aware of the offences that C had committed. The mother alleges that she was subjected to abusive conduct by C which, following the birth of A, she could no longer tolerate. She alleges that conduct comprised abusive, intimidating, coercive and controlling behaviour, including stalking. The mother became aware of the father's offences following the father's arrest in Spain in July 2018. The mother did not return to Spain with A. No party disputes that A is now habitually resident in England and Wales for the purposes of Art 5 of the 1996 Convention and that, accordingly, this court has jurisdiction to take measures directed to the protection of A's person or property.

11. The procedural history of this matter is somewhat involved and has, regrettably, been beset by very considerable delay. By an application dated 12 August 2019, the mother originally applied to terminate the parental responsibility for A that she believed was held by C. The proceedings followed the standard course for proceedings under Part II of the Children Act 1989 until 26 February 2020, when it became apparent that parental responsibility had been registered in Spain in the name of D. On 26 February 2020, the District Judge made an order that the proceedings be "transferred to the Family Division of the High Court". I pause to note that in circumstances where, pursuant to FPR 2010 r.29.17(3), only a full puisne judge, the President of the Family Division or the Court of Appeal can transfer proceedings to

the High Court, the order of 26 February 2020 was of no effect. The application has, however, proceeded before a judge of the Division from that date.

12. On 20 March 2020, Russell J gave the mother permission to instruct an expert in Spanish law to enumerate the law in that jurisdiction concerning parental responsibility. On 17 April 2020 the proceedings were adjourned following C raising the issue of paternity and requesting a DNA paternity test. Russell J stayed the order for an expert report on Spanish law, directed DNA paternity testing and relisted the matter on a date to be fixed. On 17 September 2020, DNA testing confirmed that C was the father of A and, thus, that D is *not* A's father. The hearing which was due to have taken place following receipt of the DNA test results appears never to have been listed. As a result there was a significant delay to the proceedings.

13. The matter was eventually re-listed before me on 2 March 2022. On that date, and although C was not produced from prison, I lifted the stay on the directions for expert evidence on Spanish law, varied those directions to provide for a report by an alternative expert to be filed by 22 April 2022 and listed the matter for final hearing on 5 October 2022 having regard to the availability of junior counsel representing the applicant *pro bono*. That final hearing was further adjourned after additional questions for the expert on Spanish law arose and required to be answered.

14. At a directions hearing on 2 November 2022, and in circumstances where the expert on Spanish law had by that time confirmed that D held parental responsibility under Spanish law, leading and junior counsel for the mother confirmed that the mother would seek to argue that, in circumstances where s.4(2A) of the Children Act 1989 did not permit the termination of foreign parental responsibility subsisting in this jurisdiction pursuant to Art 16(3) of the 1996 Convention, s.4(2A) of the Children Act 1989 was incompatible with the Human Rights Act 1998 and should be read down to permit the mother to apply to terminate D's parental responsibility or a declaration of incompatibility with the ECHR made. In the alternative, the mother sought to argue that that a power existed under the inherent jurisdiction of the High Court to terminate D's parental responsibility and that that power should be exercised. In these circumstances, I invited the Crown to intervene in the proceedings and adjourned the matter to 9 February 2023. On 16 November 2022, the mother issued a C2 application seeking the relief summarised above.

15. The Secretary of State for Justice accepted the court's invitation to intervene on behalf of the Crown. On 3 February 2023, the Secretary of State for Justice applied for a further adjournment to allow additional time for preparation of a Skeleton Argument in circumstances where the case raised a novel and important point of law, had potentially wider consequences for government policy and required instructions to be taken from multiple government departments. On 9 February 2023, I acceded to the application for a further adjournment and, as I have noted, determined that D should be given notice of these proceedings for the reasons set out in *B v C (Foreign Parental Responsibility)* [2023] EWHC 291 (Fam). Whilst D has received notice of these proceedings by way of a letter dated 28 March 2023 (following the court making disclosure orders against the Department For Work and Pensions, His Majesty's Passport Office, His Majesty's Revenue and Customs and the National Health Service), he has not engaged with the proceedings or sought to become involved in A's life.

16. On 28 April 2023, the Secretary of State for Justice applied for permission to instruct an additional expert in Spanish law. The court granted that application by consent on 4 May 2023. In the circumstances, this court now has the benefit of reports from two experts in Spanish law. Namely, Lola Lopez, a family law advocate practising in Spain, whose reports are dated 21 April 2022 and 30 October 2022, and from Joaquin Bayo Delgardo, a former family Appellate Court Judge in Spain, whose reports are dated 30 May 2023 and 15 June 2023.

17. Having regard to the background summarised above, it is clear that the situation in which the mother and A find themselves is a very difficult one. As will become apparent when I turn to consider in detail the expert evidence on Spanish law, D has parental responsibility for A under Spanish law. As will further become apparent, pursuant to Art 16(3) of the 1996 Convention D's parental responsibility can subsist in the jurisdiction of England and Wales following A's change of habitual residence to this jurisdiction. By reason of A's change of habitual residence, the competent authorities in Spain no longer have jurisdiction to take measures of protection dealing with the termination of D's parental responsibility. In the circumstances, the only remedies available under Spanish law to divest D of his parental responsibility for A are the rectification of the Civil Registry in Spain by administrative procedure (Mr Delgado considering it unlikely, however, that a change of parenthood would be accepted by the Registrar via this simple registry procedure) or the recognition by the Spanish court or the Registrar of the Civil Registry of a judgment of a court in England and Wales with respect to parentage and/or parental responsibility. As A is now habitually resident in the jurisdiction of England and Wales, the English court does have jurisdiction to take measures of protection dealing with the termination of parental responsibility. The English court's power to revoke parental responsibility is, however, limited by statute. In respect of parental responsibility conferred by registration, s. 4(2A) of the Children Act 1989 confines the exercise of the power to revoke parental responsibility to circumstances in which the subject child's birth has been registered under the Births and Deaths Registration Act 1953. That is not the case here.

18. It is in this difficult context that these proceedings come before the court for final hearing and the context in which I now turn to consider the competing submissions of the mother and the Secretary of State for Justice.

SUBMISSIONS

19. Once again, the court is grateful to leading and junior counsel in this case for their extremely thorough written and oral submissions that ranged, entirely appropriately, over a wide legal landscape in order to assist the court with the difficult questions that fall for determination. I mean no discourtesy to leading and junior counsel by merely summarising below the central tenets of those learned submissions.

The Applicant

20. Through Mr Gration and Ms Townend, the mother formulates the primary question for the court as being how, under *domestic* law, this court should terminate the parental responsibility for A held by D in circumstances where the English court has jurisdiction in respect of A pursuant to Art 5 of the 1996 Convention. The mother posits four methods by which the English court can divest D of his parental

responsibility for A. First, to 'read down' s.4(2A) of the Children Act 1989 so as to allow the mother to apply to terminate D's subsisting parental responsibility notwithstanding that parental responsibility does not arise by registration under the Births and Deaths Registration Act 1953. Second, to exercise the inherent jurisdiction of the High Court to terminate D's parental responsibility. Third, to rely on Art 22 of the 1996 Convention to refuse to apply Spanish law as designated by Art 16(3) of the 1996 Convention on the grounds that to do so would be manifestly contrary to public policy taking into account A's best interests as a primary consideration. Fourth, to make a declaration that s.4(2A) of the Children Act 1989, when operating in conjunction with Art 16(3) of the 1996 Hague Convention, is incompatible with the European Convention on Human Rights and Fundamental Freedoms 1950 (hereafter the ECHR).

21. As I will come to, the submissions of Ms Patry and Mr Laing on behalf of the Secretary of State for Justice subsume one of the four methods posited on behalf of the mother, in circumstances where the Secretary of State contends that the solution to the situation faced by the court in this case is to be found in the applicable law provisions of Chapter III of the 1996 Convention, and in particular Art 22. However, Mr Gration and Ms Townend seek to persuade the court that Art 22 is not a measure of protection and that the better solutions are those provided by either reading down s.4(2A) of the Children Act 1989, the inherent jurisdiction or a declaration of incompatibility. It is those options that would, they submit, result in D's parental responsibility being terminated definitively, as opposed to the inherently uncertain situation of it not subsisting in this jurisdiction on public policy grounds but subsisting under Spanish law.

22. Mr Gration and Ms Townend further submit that it would not be a solution in this case simply to proscribe the exercise by D of his parental responsibility for A (for example by way of prohibited steps or specific issue orders under s.8 of the Children Act 1989 or orders under s.91(14 of the 1989 Act as recently considered by the Court of Appeal in *Re A (Parental Responsibility)* [2023] EWCA Civ 689). They submit that A's situation is fundamentally different to the domestic cases in which this solution has been adopted and that this approach would leave the mother having to prove an entitlement to make decisions unilaterally every time such decisions came to be made.

23. Dealing with these submissions in a little more detail, with respect to the operation of the 1996 Convention, Mr Gration and Ms Townend submit that Art 16(3) operates to transport (to use their word) the parental responsibility held by D under Spanish law into the jurisdiction of England and Wales, rendering questions of its exercise and termination justiciable in this jurisdiction. Mr Gration and Ms Townend submit that this transport occurs immediately upon habitual residence changing and is not dependent on certain conditions being met, whether of public policy or otherwise. From this point, they submit that the Convention intends that the competent authorities of the child's new habitual residence can take measures of protection with respect to parental responsibility, including with respect to termination of the Convention, applying domestic law. They draw support for this proposition from the fact that Art 3(a) makes clear that the termination of parental responsibility is within the scope of the Convention, that Art 16(3) provides for parental responsibility acquired in one Contracting State to subsist in another Contracting State following a change of habitual residence and that Art 18 provides that the parental responsibility

referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under the Convention, which pursuant to Art 15(1) fall to be taken applying domestic law.

24. Thus, submit Mr Gration and Ms Townend, the United Kingdom is party to a Treaty that brings the termination of D's parental responsibility within its scope and, following the change of A's habitual residence to the jurisdiction of England and Wales, provides for parental responsibility acquired by D in Spain by operation of Spanish law to subsist in England and Wales, that confers substantive jurisdiction on the courts of England and Wales to take measures of protection dealing with the termination of D's parental responsibility and that provides for the termination of D's parental responsibility to be dealt with by measures taken under the Convention by the competent authorities in England and Wales applying the law of England and Wales. In these circumstances, Mr Gration and Ms Townend submit that the absence of a power in s.4(2A) of the Children Act 1989 to terminate parental responsibility arising by operation of law in another Contracting State and subsisting here under Art 16(3) of the 1996 Convention must be a legislative oversight where the Convention has otherwise been incorporated into the domestic jurisdictional scheme by way of amendments to the Family Law Act 1986 and other primary and secondary legislation.

25. Within the foregoing context, Mr Gration and Ms Townend submit that, in circumstances where the mother's and A's rights under Art 8 of the ECHR are engaged, the absence of a power under s.4(2A) of the Children Act 1989 to terminate parental responsibility arising by operation of law in a foreign jurisdiction breaches the mother's and A's Art 8 rights, in circumstances where that right incorporates a right to identity including the legal parent child-relationship, and is discriminatory when Art 8 of the ECHR is read with Art 14. Mr Gration and Ms Townend contend that the absence of a domestic remedy to remove D's parental responsibility means that, contrary to the mother's and A's Art 8 rights, A's paternity will be formally recorded incorrectly and that, as a matter of English law, a person with whom A does not have any biological connection, and with whom he does not and will not have any relationship, will be recognised as his father and as someone who has substantive responsibility for him. They further submit that this breach of the mother's and A's Art 8 rights arises from treating A, as a child born in a foreign country now habitually resident in England in respect of whom an adult holds parental responsibility over which the English court has jurisdiction pursuant to the 1996 Convention, differently from the analogous or relevantly similar situation of a child born in this jurisdiction and habitually resident in England in respect of whom an adult holds parental responsibility over which the court has jurisdiction pursuant to the 1996 Convention. Mr Gration and Ms Townend contend that this difference in treatment arises solely by reason of A having been born in another Contracting State to the 1996 Convention before he became habitually resident in England and Wales, and that the difference in treatment is without objective justification.

26. In these circumstances Mr Gration and Ms Townend submit that, in the absence of a power in s.4(2A) of the Children Act 1989 to terminate parental responsibility arising by operation of law in another Contracting State and subsisting here under Art 16(3) of the 1996 Convention, the court is required to read down s.4(2A) of the Children Act 1989 in order to avoid a breach of the mother's and A's Art 8 rights. They argue

that reading down s.4(2A) in order to provide a power to terminate D's parental responsibility would be compatible with the underlying thrust of the legislation and would "go with its grain" (per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] UKHL 30). Alternatively, Mr Gration and Ms Townend submit the court should make a declaration of incompatibility pursuant to s.4(2) of the Human Rights Act 1998 that s.4(2A) is incompatible with the ECHR.

27. If the court were not minded to read down s.4(2A) of the Children Act 1989, or declare that statutory provision incompatible with the ECHR, Mr Gration and Ms Townend submit that the court can engage the inherent jurisdiction of the High Court as the "great safety net" (per Lord Donaldson of Lymington MR in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 13). To do so would, they submit, provide the mother with a remedy in this case in circumstances where there is a gap left in the law by the absence of a power in s.4(2A) of the Children Act 1989 to terminate parental responsibility arising by operation of law in another Contracting State and subsisting here under Art 16(3) of the 1996 Convention. In this context, Mr Gration and Ms Townend submit that there is no competing, or indeed any, legislative scheme for the exercise of the inherent jurisdiction to cut across. Mr Gration and Ms Townend concede that to terminate the parental responsibility of D would constitute an extension of the common law but contend that this is appropriate on the facts of this case in circumstances where there is no other means to achieve the outcome that is manifestly in A's best interests.

28. Finally, and as I have noted, Mr Gration and Ms Townend posit Art 22 of the 1996 Convention as a solution to the difficult situation that the mother and A find themselves in. They submit that, in circumstances where having a stranger hold parental responsibility for him by operation of Art 16(3) would be plainly contrary to A's best interests, this case crosses the high bar to the court declining to apply the law designated by Chapter III of the Convention on the grounds that to do so would be manifestly contrary to public policy taking into account those best interests.

29. As also noted above, Mr Gration and Ms Townend submit that this outcome would be far from ideal, in circumstances where it would leave D with parental responsibility for A under Spanish law. In that context, during their oral submissions, Mr Gration and Ms Townend sought to characterise Art 22 as a back stop not intended by the 1996 Convention to operate as a "primary remedy" and a provision aimed at removing only the most egregious cases from the operation of the Convention. In circumstances where the question of applicable law arises only under the 1996 Convention, they submit that a decision that Art 22 applied in this case would not be capable of recognition and enforcement in Spain in any way that might have some meaningful effect. Mr Gration and Ms Townend further submitted that the approach to Art 22 taken by the Secretary of State amounts to using that provision to assess best interests under a provision that is not drafted in accordance with the demands of Art 3 of the United Nations Convention on the Rights of the Child (hereafter 'the UNCRC'), in circumstances where the primary consideration of Art 22 is that of public policy.

The Secretary of State

30. On behalf of the Secretary of State for Justice, Ms Patry and Mr Laing caution the court to decide *this case*, rather than engage as a matter of generality with the wider

questions raised by the submissions Mr Gration and Ms Townend regarding the extent to which the current domestic statutory regime concerning termination of parental responsibility arising by operation of foreign law is compatible with the requirements placed on the United Kingdom as a Contracting State to the 1996 Convention. Ms Patry and Mr Laing submit that the highly unusual, if not unique, facts of this case militate against an outcome that will result in significant changes to domestic statute or common law as proposed on behalf of the mother and that, in any event, the facts of this case do not require such an outcome having regard to the operation of Art 22 of the Convention.

31. In this context, on behalf of the Secretary of State, Ms Patry and Mr Laing take issue with the primary question for the court as formulated by Mr Gration and Ms Townend. Ms Patry and Mr Laing submit that, properly analysed, the question before the court on the facts of this case is not one of the adequacy of *domestic* law in circumstances where this court now has jurisdiction in respect of A, but rather one of private international law. It is in that legal framework that Ms Patry and Mr Laing submit the solution to the difficult situation in which the mother and A find themselves is itself to be found. Adopting the narrow focus on the particular facts of this case that they urge upon the court, Ms Patry and Mr Laing accordingly submit that, whilst in the field of family law the satisfactory determination of jurisdiction has often meant that the question of applicable law does not arise, in *this* case and under the 1996 Convention, the question of whether D holds parental responsibility under domestic law is to be found in the applicable law rules of Chapter III of the 1996 Convention, and in particular the public policy exception under Art 22, notwithstanding that the English court now has jurisdiction in respect of A pursuant to Art 5.

32. Within the foregoing context, Ms Patry and Mr Laing submit that it is only if the court determines that under Spanish law D had parental responsibility on A's change of habitual residence to England *and* that Spanish law should be applied as designated by Art 16(3) despite the terms of Art 22 of the Convention, that D's parental responsibility travelled (to use Ms Patry and Mr Laing's term) to this jurisdiction and that this court is, accordingly, required to consider the mother's case with respect to reading down, the use of the common law or incompatibility.

33. Dealing with these submissions in a little more detail, whilst formally neutral as to the facts, on behalf of the Secretary of State Ms Patry and Mr Laing recognise that if A was habitually resident in Spain at the time of the registration at the Civil Registry Office on 29 November 2017 then the applicable law by which D acquired parental responsibility by operation of law was Spanish law. They further submit that, immediately prior to A's habitual residence changing from the jurisdiction of Spain to the jurisdiction of England and Wales, the expert evidence tends to demonstrate that D continued to hold parental responsibility for A under Spanish law.

34. Ms Patry and Mr Laing submit, however, that in deciding whether the parental responsibility held by D under Spanish law travelled to and subsisted in this jurisdiction pursuant to Art 16(3) *following* A's change of habitual residence the court must, on the facts of this case, ask itself whether pursuant to Art 22 the application of Spanish law (i.e. the applicable law that has the effect of conferring the parental responsibility on D which would then subsist in this jurisdiction under Art 16(3)) is manifestly contrary to public policy taking into account A's best interests. On behalf

of the Secretary of State, Ms Patry and Mr Laing submit that the public policy exception in Art 22 represents a lower bar in the context of the applicable law provisions of Art 16, where no welfare decision has been taken, than in the context of recognition and enforcement, where the existence of a prior welfare decision drives the greater need for comity and mutual respect.

35. With respect to the application of Art 22 to the facts, Ms Patry and Mr Laing point to what they submit is an essential contradiction in the case advanced by the mother. Namely, that it is very difficult to see how the acquisition of parental responsibility by D under Spanish law in the circumstances that occurred in this case, and without a welfare decision, can be a fundamental breach of the mother's and A's Art 8 rights (such as to require the reading down of s.4(2A) of the Children Act 1989 or a declaration of incompatibility) but *not* be manifestly contrary to public policy taking into account the best interests of A for the purposes Art 22 of the 1996 Convention. Applying the long established principles governing public policy exceptions, Ms Patry and Mr Laing accordingly submit that the facts relied on by the mother to argue that s.4(2A) should be read down or a declaration of incompatibility made demonstrate, rather, that Art 22 *must* operate in this case to prevent D's parental responsibility for A from ever having subsisted in this jurisdiction pursuant to Art 16(3), in circumstances where the application of foreign law designated by Art 16(3) has the effect of breaching fundamental human rights such that its application is manifestly contrary to public policy taking into account A's best interests.

36. In support of the latter submission, the Secretary of State relies on the fact D acquired parental responsibility for A by operation of Spanish law in circumstances where a now-convicted child sex offender, C, conducted a relationship with the mother under a false identity, leading to the conception of A at a time when his true identity and sexual offences were not known to the mother (which, Ms Patry and Mr Laing submit is a potentially serious criminal offence under domestic law); where at the time of these events C was a fugitive from justice, having fled the United Kingdom whilst on bail, and classified as one of Europe's 'most wanted' by Europol; where A's birth was registered by C using not only a false identity, but one stolen from a third party and deliberately falsified; where the false identity used to register A was also being used to evade law enforcement; where following the birth of A C was, on the mother's case, abusive, intimidating and controlling; where the mother and A escaped from C to the United Kingdom; where C was arrested, extradited, convicted, and sentenced to 23 years in prison, including for child rape, child sexual assault and causing a young child (under 13) to engage in sexual activity; where the person who acquired parental responsibility by operation of Spanish law is not A's biological father, a fact proven by DNA evidence commissioned by the English court; and where despite being contacted on a number of occasions and served with relevant documents, D has chosen not to engage in the case, nor sought to be involved in A's life.

37. In the context of the foregoing unchallenged facts, Ms Patry and Mr Laing submit that the question of whether it is in A's best interests for D to share parental responsibility for him must be answered in the strongest negative, particularly where parental responsibility was acquired in the foregoing circumstances by automatic operation of law and without any welfare analysis. In that context, Ms Patry and Mr Laing submit that to apply Spanish law, with the result that D's parental responsibility subsists in this jurisdiction under Art 16(3), notwithstanding that is an outcome effected by a

fraudulent deception by a fugitive and now convicted sex offender, is manifestly contrary to public policy pursuant to Art 22. Ms Patry and Mr Laing further submit that invoking Art 22 in this case would, in the circumstances, be both protective of A and the mother's fundamental rights generally and consistent with the right under Art 8 to adequate legal recognition of biological and social family ties.

38. In any event, in respect to the remedies contended for by the mother, and in circumstances where the antecedent question in this case is one of applicable law and the operation of Art 22 of the 1996 Convention, Ms Patry and Mr Laing further submit that the domestic remedies sought by the mother do not fall for consideration on *either* outcome of the prior Art 22 exercise.

39. If the court were to conclude that Art 22 of the 1996 Convention *does* operate in this case as set out above, then Ms Patry and Mr Laing submit that at the point domestic relief falls for consideration there is nothing against which to grant such relief as the responsibility held by D under Spanish law would not subsist in the jurisdiction of England and Wales. Further, applying the *lex fori*, D would not acquire parental responsibility under the Children Act 1989. There is thus no parental responsibility in respect of which this court is required to have recourse to domestic law under Art 15(1). In such circumstances, Ms Patry and Mr Laing submit that the absence of a provision permitting termination cannot constitute an interference in the Art 8 rights of A and the mother, there is no victim for the purposes of s.7(1) of the Human Rights Act 1998 and no remedy is required. In such circumstances, the question of whether, where the United Kingdom is a Contracting State to the 1996 Convention, the absence of a power in s.4(2A) to terminate foreign parental responsibility acquired in another Contracting State breaches the mother's and A's rights becomes an academic one, divorced from the facts of this case and without the exceptional circumstances that a large number of similar cases exist or are anticipated and the decision is not fact-sensitive (per Silber J in *Zoolife International Ltd, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs* [2007] EWHC 2995 (Admin)).

40. If, by contrast, the court concludes that Art 22 *does not* operate in this case, then Ms Patry and Mr Laing submit that, at the point that domestic relief falls for consideration, the court would necessarily have already concluded that D having parental responsibility in the circumstances of this case is *not* manifestly contrary to public policy, taking into account A's best interests. As such, they submit that at the point the court asks whether reading down s.4(2A) of the Children Act 1989 or a declaration of incompatibility is merited, the court will have already discharged its duty under s.6 of the Human Rights Act 1998 and have concluded that A and the mother's human rights are *not* breached, thereby removing the justification for reading down s.4(2A) of the Children Act 1989 or a declaration of incompatibility.

41. In light of the conclusions I have reached in this case, it is not necessary for me to consider in further detail the arguments of the Secretary of State with respect to reading down s.4(2A) of the Children Act 1989, applying the inherent jurisdiction of the High Court and the making of a declaration of incompatibility.

THE LAW

42. For the purposes of determining the issues before the court, it is necessary to examine in some detail the legal framework within which the issues in this case fall to be determined. I commence with the 1996 Convention.

43. Both the United Kingdom and the Kingdom of Spain are parties to the 1996 Convention. At the point these proceedings were commenced, the Convention was incorporated into domestic law by s.2(1) of the European Communities Act 1972 (by virtue of its specification as a treaty by the European Communities (Definition of Treaties)(1996 Hague Convention on Protection of Children etc.) Order 2010 (SI 2010/232)). During the transition period following the departure of the United Kingdom from the European Union, the rights, obligations etc given direct effect by s.2(1) of the European Communities Act 1972 were saved by s.1A of the European Union (Withdrawal) Act 2018. Following the end of the transition period, the 1996 Convention is now directly implemented in domestic law by amendments made to the Civil Jurisdiction and Judgments Act 1982 by s.1 of the Private International Law (Implementation Agreements) Act 2020. In the context of conflict of law rules being primarily national in origin, Dicey, Morris & Collins: Conflict of Laws (16th edn) describes the 1996 Convention at [1-011] as one of the Conventions negotiated under the auspices of the Hague Conference on Private International Law that has radically affected the English rules of conflict of laws.

44. In circumstances where the proceedings commenced on 12 August 2019, the jurisdictional rules and the rules governing recognition and enforcement contained in Council Regulation (EC) 2201/2003 (hereafter 'BIIa') are also engaged pursuant to Art 67(1)(c) and Art 67(2)(b) of the UK-EU Withdrawal Agreement. Art 1 of BIIa brings within the scope of BIIa matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility. No party seeks to suggest, however, that the court is concerned with the question of recognition and enforcement of a judgment relating to parental responsibility pursuant to Art 2(4) made in Spain.

45. Returning therefore to the 1996 Convention, the Convention falls to be interpreted in accordance with principles contained in Part III, s.3 of the Vienna Convention on the Law of Treaties 1969. In *Derbyshire County Council v Mother & Ors* [2022] EWHC 3405 (Fam), Lieven J took the view that the Explanatory Report for the 1996 Convention by Paul Lagarde is not an agreement between the parties regarding the interpretation of the 1996 Convention or application of its provisions, within the terms of Art 31(3) of the Vienna Convention on the Law of Treaties 1969, and noted that Explanatory Reports are not listed as part of the context of a Convention under Art 31(2) of the Vienna Convention. The Hague Permanent Bureau describes the Explanatory Reports as being intended to provide information to the public as to the sense intended by the Diplomatic representatives for a particular instrument. In the circumstances, whilst in my view it remains unclear whether the Explanatory Report is an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" for the purposes of Art 31(3) of the Vienna Convention, Art 32 in any event provides for recourse to supplementary means of interpretation where interpretation in accordance with the principles set out in Art 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

In the foregoing circumstances, I am satisfied that it remains appropriate to use the Explanatory Report as an aid to interpreting the 1996 Convention where necessary.

46. Within the context of a Preamble that articulates the wish of the Contracting States to the Convention to "avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children" and confirms that "the best interests of the child are to be a primary consideration", Chapter I of the 1996 Convention sets out its scope. Art 1 of the Convention provides as follows in this regard:

> "**Article 1**
>
> (1) The objects of the present Convention are -
>
> a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
>
> b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
>
> c) to determine the law applicable to parental responsibility;
>
> d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
>
> e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
>
> (2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

47. Article 3 of the 1996 Convention provides a non-exhaustive list of those matters which the measures referred to in Art 1 may deal with, including the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation:

> "**Article 3**
>
> The measures referred to in Article 1 may deal in particular with -
>
> a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
>
> b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
>
> c) guardianship, curatorship and analogous institutions;

d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f) the supervision by a public authority of the care of a child by any person having charge of the child;

g) the administration, conservation or disposal of the child's property."

48. Article 4 of the 1996 Convention sets out the areas that the Convention does not apply to, including the establishment or contesting of a parent-child relationship:

"**Article 4**

The Convention does not apply to -

a) the establishment or contesting of a parent-child relationship;

b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

c) the name and forenames of the child;

d) emancipation;

e) maintenance obligations;

f) trusts or succession;

g) social security;

h) public measures of a general nature in matters of education or health;

i) measures taken as a result of penal offences committed by children;

j) decisions on the right of asylum and on immigration."

49. Chapter II of the 1996 Convention deals with jurisdiction. The primary rule of jurisdiction is provided by Art 5 of the Convention:

"**Article 5**

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

50. Chapter III of the 1996 Convention deals with applicable law (often referred to in other contexts as 'choice of law') and, in satisfaction of the object articulated by Art 1(1)(c), the law applicable to parental responsibility. On behalf of the Secretary of State, Ms Patry and Mr Laing point out that the instrument that previously predominated in family cases involving cross border issues between the United Kingdom and Member States of the European Union, namely BIIa, contains no applicable law provisions, with that instrument moving straight from jurisdiction to recognition and enforcement. By contrast, Chapter III of the 1996 Convention sets out the rules governing the extent to which a Contracting State should apply its own substantive law or the substantive law of another Contracting State when dealing with matters within the scope of the Convention. A further distinction between BIIa and the 1996 Convention in this context is that, whereas the public policy exception in BIIa is engaged only at the recognition and enforcement stage under Art 22(a) and Art 23(a), the public policy exception in the 1996 Convention is also engaged at the applicable law stage under Art 22.

51. With respect to the provisions of Chapter III of the 1996 Convention, Paragraph 6 of the Explanatory Report states as follows regarding the aim of the applicable law provisions in Chapter III of the Convention:

> "Chapter III on the applicable law follows, while making it more flexible, the principle of the 1961 Convention according to which every authority taking a measure of protection applies its own internal law (Art. 15). It is likewise in this chapter that the provisions on the relationship of authority existing by operation of law are to be found (Art. 16-18). The Convention clarifies and effectuates this idea by speaking of attribution or extinction of parental responsibility by operation of law. Above all, it subjects such responsibility to the law of the child's habitual residence (and no longer to his or her national law), thus unifying the law applicable to parental responsibility and measures of protection. This chapter tries finally to resolve the consequences of the removal of the child on the law applicable to parental responsibility (the mobile conflict)."

52. Article 15(1) of the 1996 Convention provides that in exercising their jurisdiction under the provisions of Chapter II of the Convention, the competent authorities of the Contracting States shall apply their own law (*lex fori*) subject, in exceptional circumstances, to applying or taking into account the law of another State:

> "**Article 15**
>
> (1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
>
> (2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
>
> (3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence."

53. Article 16 of the Convention provides as follows with respect to the law applicable to the attribution or extinction of parental responsibility arising by operation of law in a Contracting State without the intervention of a judicial or administrative authority:

> "**Article 16**
>
> (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
>
> (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.
>
> (3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
>
> (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."

54. In *R (on the application of GA & Ors) v Secretary of State for the Home Department* [2021] EWHC 868 (Admin) (a decision upheld on appeal in *Secretary State for the Home Department v GA & Ors* [2021] EWCA Civ 1131), Chamberlain J noted that Art 16 does not contain the limiting words in Art 15 of "[i]n exercising their jurisdiction under the provisions of Chapter II, indicating that (subject to the other provisions of the Convention) Art 16 is intended to determine the law applicable to parental responsibility more generally in accordance with the object in Article 1(1)(c)). The Explanatory Report states at paragraph 12 that in mentioning in Art 1(c) the determination of the law applicable to parental responsibility as set out above, the Convention indicates that the rule in Art 16 that deals with that subject is a rule of conflict of laws and not a simple rule of recognition.

55. Article 18 of the Convention provides as follows with respect to the termination of parental responsibility arising by operation of law referred to in Art 16 of the Convention:

> "**Article 18**
>
> The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention."

56. Finally with respect to the applicable law provisions of Chapter III of the 1996 Convention relevant on the facts of this case, Art 22 of the Convention provides as follows:

> "**Article 22**
>
> The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child."

57. Article 22 comprises a public policy exception of the type commonly seen in Conventions concerning private international law. It requires the court to consider whether application of the law designated by Chapter III would be manifestly contrary to public policy. In deciding that question, Art 22 expressly requires that the court take into account the best interests of the subject child. With respect to best interests, reference to recital four to the Preamble to the 1996 Convention suggests that, in the context of Art 22, the best interests of the child are to be a primary consideration, consistent with the demands of Art 3(1) of the UNCRC. The principle that the child's best interests will be a primary consideration (which comprises a substantive right to have best interests assessed and treated as a primary consideration, a rule of procedure for decision making processes concerning children and a principle of interpretation) requires consideration of the specific circumstances of the individual child. The individual circumstances of the child that will inform his or her best interests will include the child's wishes and feelings, the child's physical, emotional and educational needs, the child's particular identity, the child's family environment and relationships and the child's health and wellbeing.

58. In this context, in *R (on the application of GA & Ors) v Secretary of State for the Home Department* Chamberlain J articulated the task to be completed under Art 22 as follows at [127]:

> "To decide whether that ground is made out, this Court has to decide whether Article 22 applied or not. That is a question of law. Answering it involves deciding whether the application of the law of Country X would be "manifestly contrary to public policy, taking into account the best interests of the child". So, an assessment of what is in the best interests of the child is a necessary part of this Court's function of deciding whether HMPO erred in law. That is the inevitable consequence of giving the 1996 Hague Convention (including Article 22) the force of law in the UK."

And at [129]:

> "I bear in mind that the hurdle set by Article 22 is a high one. The application of the law of the State of the child's habitual residence must be manifestly contrary to public policy, taking into account the best interests of the child. The need to take into account the best interests of the child shows that the test is fact-specific."

59. As Chamberlain J made clear in *R (on the application of GA & Ors) v Secretary of State for the Home Department*, the question of whether Art 22 is engaged is a question of law, the answer to which legal question is informed in each case by taking account of the best interests of the subject child as a primary consideration. As such, in determining the question of whether Art 22 applies, the court will need to have regard to the relevant legal principles that govern the application of the doctrine of public policy. For the purposes of Art 22, the Explanatory Report suggests, logically,

at paragraph 16 that the law governing the determination of questions of public policy in cases in which the 1996 Convention is engaged will be the law of the country that has jurisdiction under the Convention.

60. Dicey articulates the domestic public policy rule in general terms as follows at [5R-001]:

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such a right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

61. In *Richardson v Mellish* (1824) 2 Bing 229, 252, Burrough J described public policy as "a very unruly horse" and one that "when . . . you get astride it you never know where it will carry you". The classic exposition of the field boundaries of the doctrine of public policy are set out in the decision of *Fender v St John-Mildmay* [1938] AC 1 at 12, in which Lord Atkin stated as follows:

> "…Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide."

62. Within this context, a number of further general domestic principles governing the doctrine of public policy fall to be considered on the facts of this case and, in particular, in circumstances where the court is concerned with the applicable law provisions of Chapter III of the 1996 Convention in a case with an international dimension.

63. First, when applied in the context of conflict of laws, it is all the more important that the doctrine of public policy be kept within its proper limits. In *Kuwait Airways Corp v Iraqi Airways Co & Anor* [2002] 2 AC 883 the House of Lords held:

> "[15] Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse

> to the foreign law. If the laws of all countries were uniform there would be no "conflict" of laws.
>
> [16] This, overwhelmingly, is the normal position. But, as noted by Scarman J in *In the Estate of Fuld, deed (No 3)* [1968] P 675, 698, blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.
>
> [17] This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal": see *Loucks v Standard Oil Co of New York* (1918) NE 198, 202.
>
> [18] Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish emigres of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

64. Second, in cases concerning questions of public policy with respect to the operation of foreign laws, a distinction can be made between the foreign law itself and the effect of the application of that foreign law. As Dicey notes at [5-004], the court will be understandably reluctant to hold that a foreign law as such is contrary to public policy. That does not prevent the court however, in an exceptional case, from declining to apply a foreign law on grounds of public policy having regard to the *effect* of applying the foreign law. In *Belhaj v Straw* [2017] AC 964 Lord Neuberger held as follows:

> "[153] It is well established that the first rule, namely that the effect of a foreign state's legislation within the territory of that state will not be questioned, is subject to an exception that such legislation will not be recognised if it is inconsistent with what are currently regarded as fundamental principles of public policy- see *Oppenheimer v Cattermole* [1976] AC 249, 277—278, per Lord Cross of Chelsea. This exception also applies where the legislation in question is a serious violation of international law- see *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1081, para 29, per Lord Nicholls of Birkenhead."

65. Third, and as again made clear in Dicey at [5-007], under domestic law the doctrine of public policy will only be engaged to disapply foreign applicable law where considerations of international public policy and not purely domestic public policy are engaged. Thus, in *RBRG Trading v Sinocore International* [2018] EWCA Civ 838, [2019] 1 All ER (Comm) 810 at [25], Hamblen LJ (as he then was) held:

> "Where, on the facts found, there is no illegality under the governing law but there is illegality under English law, public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely domestic public policy. This is in accordance with the rules at common law and under the Rome 1 Regulation (Article 21) in relation to the refusal of the application of the governing law on public policy grounds – see generally Dicey, Morris & Collins Rule 229 at 32R-181. In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 Ll Rep 361 Phillips J referred to the heads of public policy which would be engaged as being those 'based on universal principles of morality'. In *Westacre* the court stated ([1999] CLC 1176 at 1186; [2000] QB 288 at 304F) that what the *Lemenda* case decided was that:
>
> > 'there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic'".

66. With respect to international norms relevant on the facts of this case, it is clearly established that there exists a fundamental right to identity, which fundamental right encompasses children. The preamble to the 1996 Convention states that the common provisions established by the Convention take account of the UNCRC. Art 7 of the UNCRC provides that a child shall be registered immediately after birth and have the right to a name. Accurate registration at birth constitutes a decisively important step to ensure the child is recognised as a person and is fundamental to the efficacy of the child's right to identity. As I observed in *Osborne v Arnold (Parentage: Revocation of Adoption)* [2023] 1 FLR 549:

> "[38] Within this context and as I noted during the hearing, whilst having a superficially bureaucratic character, administrative steps such as the registration of a birth are absolutely fundamental to an individual's identity (both as a unique and separate individual and as a recognised member of society), legal status and familial relationships. Within this context, Art 7 of the United Nations Convention on the Rights of the Child stipulates that a 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, a right to know and be cared for by his or her parents. Within this context, the seemingly mundane administrative act of correctly registering a birth carries with it enormous significance for child and parents. It is a decisively important step both in ensuring legal proof of identity and civil status and as the foundation on which a personal identity is built."

67. Under Art 8 of the UNCRC, State parties must respect the right of the child to preserve his or her identity, name and family relations. The right to respect for private and family life under Art 8 of the ECHR likewise includes the right to identity. In *Bensaid v United Kingdom* (2001) 33 EHRR 205, the court held that Art 8 protects a right to identity and the right to establish and develop relationships. In *R (Countryside Alliance) v A-G* [2008] 1 AC 719, Baroness Hale described Art 8 as protecting the inviolability of the personal and psychological space within which each individual develops his own sense of self and relationships with other people. In *Phinikaridou v Cyprus* (2008) Application No. 2390/02 at [45] the court concluded as follows:

> "… birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. 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. This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents."

68. Finally with respect to the relevant principles of public policy, in this case I am satisfied on the unchallenged evidence before the court that the grant of parental responsibility to D by operation of Spanish law was founded on a fraudulent deception. In this context, I note the observation of Lord Bingham in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349 (itself based on the observation of Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712) that:

> "…fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all… once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever'".

69. Before leaving the relevant law, I deal finally and briefly with the domestic law with respect to parental responsibility and the revocation of that status. Section 3 of the Children Act 1989 defines parental responsibility as meaning "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property." In *Re H-B (Contact)* [2015] EWCA Civ 389 at [72], Sir James Munby described the concept of parental responsibility as follows:

> "However, and I wish to emphasise this, parental responsibility is more, much more, than a mere lawyer's concept or a principle of law. It is a fundamentally important reflection of the realities of the human condition, of the very essence of the relationship of parent and child. Parental

responsibility exists outside and anterior to the law. Parental responsibility involves duties owed by the parent not just to the court. First and foremost, and even more importantly, parental responsibility involves duties owed by each parent to the child."

70. Section 4 of the Children Act 1989 provides as follows with respect to the power of the court to make an order that a person shall cease to have parental responsibility:

"**4 Acquisition of parental responsibility by father.**

(1) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth, the father shall acquire parental responsibility for the child if—

(a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);

(b) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or

(c) the court, on his application, orders that he shall have parental responsibility for the child.

(1A) The enactments referred to in subsection (1)(a) are—

(a) paragraphs (a), (b) and (c) of section 10(1) and of section 10A(1) of the Births and Deaths Registration Act 1953;

(b) paragraphs (a), (b)(i) and (c) of section 18(1), and sections 18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c) sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(1B) The Secretary of State may by order amend subsection (1A) so as to add further enactments to the list in that subsection.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—

(a) it is made in the form prescribed by regulations made by the Lord Chancellor; and

(b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.

(2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

> (3) The court may make an order under subsection (2A) on the application—
>
> (a) of any person who has parental responsibility for the child; or
>
> (b) with the leave of the court, of the child himself, subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).
>
> (4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application."

71. The enactments referred to in s.4(1)(a) and specified in s.4(1A) do not include the 1996 Convention. Art 16 of the 1996 Convention is, however, addressed in the Family Procedure Rules 2010. Rule 12.71 came into force on 6 April 2011. The rule deals with the question of whether a person has or does not have parental responsibility, and the question of the extent of that parental responsibility, by virtue of the application of the 1996 Convention:

> "**Application for a declaration as to the extent, or existence, of parental responsibility in relation to a child under Article 16 of the 1996 Hague Convention**
>
> **12.71**
>
> (1) Any interested person may apply for a declaration –
>
> (a) that a person has, or does not have, parental responsibility for a child; or
>
> (b) as to the extent of a person's parental responsibility for a child,
>
> where the question arises by virtue of the application of Article 16 of the 1996 Hague Convention.
>
> (2) An application for a declaration as to the extent, or existence of a person's parental responsibility for a child by virtue of Article 16 of the 1996 Hague Convention must be made in the principal registry and heard in the High Court.
>
> (3) An application for a declaration referred to in paragraph (1) may not be made where the question raised is otherwise capable of resolution in any other family proceedings in respect of the child."

72. Having regard to the conclusion I have reached in this case, it is not necessary for the purposes of this judgment to set out a detailed exegesis of the law governing the reading down of statutes under the Human Rights Act 1998, the use of the inherent jurisdiction and declarations of incompatibility under the Human Rights Act 1998.

DISCUSSION

73. Having considered carefully the detailed written and oral submissions made on behalf of the mother and the Secretary of State for Justice, I am satisfied in this case that,

taking into account A's best interests as a primary consideration, it would be manifestly contrary to public policy to accept in this case the application of Spanish law as designated by Art 16(3) of the 1996 Convention. The consequence of that decision is that D does not hold parental responsibility for A in the jurisdiction of England and Wales. My reasons for so deciding are as follows.

74. Foreign law must be proved in each case, this court being able to take judicial notice of the law of England and Wales but not of the law of another State. No party has sought to dispute the expert evidence in this case concerning the content and application of Spanish law. Within that context, I am satisfied that it is appropriate for the court to make the following findings with respect to Spanish law, having regard to the unchallenged expert evidence before the court:

i) Under Art 113 of the Spanish Civil Code, parenthood arises by registration in the Civil Registry, a document or court decision legally determining parentage, by presumption of matrimonial paternity and, in the absence of these methods, by possession of status.

ii) By reference to the contents of the Civil Registry, under Spanish law D is the parent of A for all legal purposes, with registration in the Spanish Civil Registry constituting proof of the facts registered pursuant to Art 17(1) of the Spanish Civil Code. The fact that D is not the *biological* father of A is irrelevant under Spanish law because Art 16.2(2) of the 2011 Civil Registry Act provides, in the translation provided to the court in the expert evidence, that "It is presumed that the registered facts exist and the acts are valid and exact as long as the corresponding entry is not rectified or cancelled in the manner provided by law."

iii) Under Spanish law, and in the absence of a final judicial or administrative decision providing to the contrary, parenthood confers parental responsibility.

iv) None of the exceptions under Art 111 of the Spanish Civil Code to the conferment of parental responsibility following legal parenthood apply to D.

v) In the circumstances, where D is a real person and was registered as the father in the Civil Registry on 29 November 2017, and where no judicial decision has removed parental responsibility from D, under Spanish law he has parental responsibility for A. D's parental responsibility for A is an automatic consequence of parenthood as recorded in the Civil Registry.

vi) D has parental responsibility for A under Spanish law notwithstanding the circumstances in which registration at the Civil Registry took place in this case. There is no basis under Spanish law for a decision that D's parental responsibility is void or voidable by reason of fraud or biological inaccuracy.

vii) Under Spanish law C did not acquire parental responsibility for A in circumstances where he did not register A in the Civil Registry in his own name but impersonated the identity of another person, D.

viii) There is no procedure under Spanish law for a person to renounce their parental responsibility by choice, although parents can agree between them

that parental responsibility will be exercised by only one of them under Art 92.4 of the Spanish Civil Code, due to the manifest impossibility of one of the parents exercising parental responsibility.

ix) In the circumstances, under Spanish law the options for *removing* D's parental responsibility for A, and the caveats to those options on the facts of this case, are as follows:

a) An application to remove D's parental responsibility under Art 170 of the Spanish Civil Code by judicial process, wherein the grounds for deprivation of, or termination of, parental responsibility are proved. Under Art 71 of the Civil Registry Law 2011, judicial resolutions affecting extinction, deprivation, suspension and recovery of parental responsibility are registrable in the Civil Registry. The removal of D's parental responsibility would not automatically confer parental responsibility on C. A judicial decision to remove parental responsibility (as opposed to a determination that D is not a parent of A) would not have retrospective effect. More fundamentally, in circumstances where A is now habitually resident in the jurisdiction of England and Wales pursuant to Art 5 of the 1996 Convention, the Spanish court does not have jurisdiction to remove D's parental responsibility in this manner.

b) An application to challenge D's biological parenthood of A in order to exclude him from parental responsibility pursuant to Art 111(2) of the Spanish Civil Code with retrospective effect. Under Art 71 of the Civil Registry Law 2011, judicial resolutions affecting ownership of parental responsibility are registrable. If a resolution is made that D is not the father, the Civil Registry will rectify the birth certificate and D will no longer appear as parent and holder of parental responsibility. If no action were thereafter taken to demonstrate that C is the father of A, nothing will be recorded in the Civil Registry with respect to the father. A statute of limitations applies a one year time limit contained in Art 137.2 of the Civil Code to D challenging parenthood, albeit the mother could make an application without limitation during the lifetime of A per the Judgment of the Spanish Supreme Court nº. 18/2017, of 17 January. Whilst the expert evidence that the jurisdiction of the Spanish courts to determine a challenge to D's parenthood is excluded by Art 5 might be doubted in circumstances where Art 4 excludes from the scope 1996 Convention the establishment or contesting or a parent-child relationship, in any event the domestic Spanish law also excludes the jurisdiction of the Spanish court pursuant to Art 22 of the Organic Law on Judicial Power.

c) An application claiming parenthood for C (which would also require an application to challenge D's parenthood to be included in the claim, as the application to contest paternity and the application claiming paternity must be filed at the same time if the Civil Registry is to be capable of rectification). A decision in Spain that C was the parent would lead to his automatic acquisition of parental responsibility with retrospective effect upon confirmation of paternity, but his conviction

for child sexual offences and his use of a stolen identity to register the birth may be sufficient grounds for deprivation of his parental responsibility thereafter. As above, under Art 71 of the Civil Registry Law 2011 judicial resolutions affecting ownership of parental responsibility are registrable in the Civil Registry. Again, a statute of limitations applies a one year time limit contained in Art 133.2 of the Civil Code for a claim by C of fatherhood, albeit the mother could make an application without limitation during the lifetime of A. Again, whilst the expert conclusion that the jurisdiction of Spanish courts to determine a claim to parenthood by C and a concurrent challenge to D's parenthood is excluded by Art 5 might be doubted in circumstances where Art 4 excludes from the 1996 Convention the establishment or contesting of a parent-child relationship, in any event the domestic Spanish law also excludes the jurisdiction of the Spanish court pursuant to Art 22 of the Organic Law on Judicial Power.

d) Taking criminal proceedings for falsehood of identification and impersonation, following which the final sentence could be used to rectify the entry in the Civil Registry pursuant to Art 114.2 of the Spanish Civil Code and Art 293 of the Implementing Regulation of the Civil Registry Act. Pursuant to Art 114 of the Spanish Civil Code, entries in the Civil Registry contradicted by facts declared in a criminal sentence may be rectified at any time. However, there is a statute of limitations on the criminal complaint of five years from 29 November 2017.

e) Following the rectification procedure under Art 91 of the Civil Registry Law 2011 via petition to the Civil Registry Office, in respect of which procedure Spain has exclusive jurisdiction under Art 22(c) of the Organic Law on Judicial Power. However, it is unlikely change of parenthood would be accepted by the Registrar only with the use of the simple registry procedure.

f) Seeking recognition by the Spanish court of a decision of the English court confirming the biological parenthood of A. If an English court determined that D is proved not to be the father of A then, if the English judgment had the appropriate *exequatur*, the decision of the English court would be recognised in Spain under the general rules on exequatur under Title V of the Act on International Judicial Co-operation in Civil Matters, subject to broad grounds for refusing recognition. The English judgment would need to indicate that it was proved that D is not the father of A and request rectification of the Civil Registry. To avoid refusal on Spanish public interest grounds for refusal of recognition, both C and D must have been given the chance to respond to the proceedings, although proceedings in the English court aimed only at declaring that D is not the father of A would not be against Spanish public interest if C was not involved.

g) Seeking recognition by the Spanish Registrar of the Civil Registry of the judgment of the English court. Pursuant to Art 96 of the Civil Registry Law 2011, in circumstances where (i) there was a final

judgment of the English court that D is proved not to be the father of A, (ii) the judgment had the appropriate exequatur, (iii) the regularity and formal authenticity of the documents presented had been demonstrated, (iv) the English court had based its international jurisdiction on criteria recognised by Spanish law, (v) all parties had had notice of the procedure and sufficient time to prepare, and (vi) registration of the English decision was not manifestly incompatible with Spanish public order, the presentation of the English judgment with the exequatur would cause the rectification of the Civil Registry. Mr Delgado describes this procedure as preferable.

75. Notwithstanding that C was given proper notice of these proceedings, and a production order was made to enable him to attend the final hearing, he refused to participate. Accordingly, he has not challenged any of the evidence before the court. D was likewise given proper notice and likewise has not sought to challenge the evidence in this case. In these circumstances, I am further satisfied that the court is able to find, on the basis of the uncontested evidence before it, the following facts concerning the egregious circumstances in which Spanish law operated (without any knowledge of these facts) to confer parental responsibility on a person who is a stranger to A:

i) C conducted a relationship with the mother under false pretences using a stolen and doctored identity, which led to the conception of A at a time when C was deceiving the mother as to his true identity and concealing from her his grave sexual offences against the children of a former partner.

ii) At the time of his relationship with the mother and the conception of A, C was a fugitive from justice in circumstances where he had absconded from the United Kingdom to Spain whilst on bail.

iii) Following the birth of A, C registered A's birth using a false identity stolen from D and deliberately falsified it in order to evade law enforcement agencies, thereby deliberately deceiving the Spanish Civil Registry.

iv) Following the birth of A, C was abusive, intimidating and controlling towards the mother, causing her to leave Spain with A and return to the jurisdiction of England and Wales.

v) In July 2018, C was arrested in Spain. He was thereafter extradited to the United Kingdom where he was convicted of serious sexual offences comprising seven counts of rape, two counts of assault by penetration and 3 counts of causing a child under the age of 13 to engage in sexual activity and sentenced to 23 years in prison.

vi) As demonstrated by scientific testing, comprising PCR single locus DNA testing directed by the English court, D is *not* the biological father of A.

vii) Notwithstanding that he has been served with these proceedings, and is aware of them, D has not engaged with the proceedings and has not sought to become involved in A's life.

76. Although formulating the ultimate question for the court in different terms, the starting point for the submissions of both the mother and the Secretary of State for Justice is Chapter III of the 1996 Convention. Thus, Mr Gration and Ms Townend submit that Art 16(3) in Chapter III operates on the foregoing facts to transport the parental responsibility that has arisen by operation of Spanish law into the jurisdiction of England and Wales, thereby rendering it susceptible to revocation by this court pursuant to Art 18 through the granting of measures of protection under English law by deploying the jurisdiction conferred on the English court by Art 5, subject to the need to read down s.4(2A) of the Children Act 1989, deploy the inherent jurisdiction or declare s.4(2A) incompatible with the ECHR when operating in the context of Art 16 of the 1996 Convention. Against this, Ms Patry and Mr Laing submit (and Mr Gration and Ms Townend concede in what they argue is a lesser option) that Art 22 in Chapter III operates on the foregoing established facts to preclude the operation of Art 16, in circumstances where, taking into account A's best interests as a primary consideration, it would be manifestly contrary to public policy to apply Spanish law as designated by Art 16(3).

77. In addition to being satisfied that D holds parental responsibility for A by operation of Spanish law, I am satisfied that following the mother and A returning from the jurisdiction of Spain to the jurisdiction of England and Wales A's habitual residence changed from the jurisdiction of Spain to the jurisdiction of England and Wales. In these circumstances, absent the engagement of Art 22 of the Convention in this case, I am satisfied that Art 16(3) of the Convention would operate to transport the parental responsibility held by D by operation of Spanish law into the jurisdiction of England and Wales, thereby rendering it susceptible to termination or modification by this court pursuant to Art 18 through the granting of measures of protection under English law under the jurisdiction conferred on the English court by Art 5, insofar as permitted by English law pursuant to Art 15(1).

78. Paragraph 105 of the Explanatory Report makes clear that the terms of Art 16(3) seek to chart a middle path between mutability, whereby each change of habitual residence would result in a change in the law applicable to the attribution and extinction by operation of law of parental responsibility, and continuity of protection, where the law applicable would remain the law that originally attributed or extinguished parental responsibility. In this context, pursuant to Art 16(3) the parental responsibility attributed by operation of law without the intervention of a judicial or administrative authority in the child's State of habitual residence will subsist following a change of habitual residence.

79. Under Art 16(3) therefore, where a change of habitual residence occurs, parental responsibility existing under the law of the original State of habitual residence, in this case Spain, will remain in force or in effect in the new State of habitual residence, in this case England. The Explanatory Report expressly contemplates at paragraph 105 that where this situation of subsisting parental responsibility results in more than one holder of parental responsibility then, in the case of a disagreement between them, the remedy lies in protective measures requested in the child's *new* State of habitual residence:

> "This co-existence of several holders of parental responsibility vested with such responsibility in application of different laws will only be able to function if there is agreement between these persons. In case of

> disagreement between them, the conflict can be determined by a measure which one or the other of them will request from the competent authority of the State of the new habitual residence (cf. Art. 5, paragraph 2)."

80. Art 18 of the Convention provides that the parental responsibility referred to in Art 16, which will include any parental responsibility subsisting after a change of habitual residence pursuant to Art 16(3), may be terminated, or the conditions of its exercise modified, by measures taken under the Convention. The Explanatory Report makes clear at paragraph 110 that following a change of habitual residence, it will be the *new* State of habitual residence, in this case England, that will give effect, if needed, to the terms of Art 18 of the Convention concerning termination or modification of subsisting parental responsibility:

> "The existence of parental responsibility by operation of law cannot, therefore, any longer be a hindrance to measures of protection which turn out to be necessary. This Article 18 may, moreover, be utilised following a change in the habitual residence of the child, if the competent authorities think that the cumulative application to parental responsibility by operation of law of the laws of the successive habitual residences will lead to a paralysis of the child's protection."

81. In the foregoing context, were this court to apply Spanish law as designated by Art 16(3), being the law of the State of the A's habitual residence under which D's parental responsibility originally existed, then following A's change of habitual residence, the parental responsibility arising in favour of D by operation of Spanish law would remain in force or in effect in the jurisdiction of England and Wales pursuant to the terms of Art 16(3). By the terms of the Art 18, this court could take measures of protection concerning the termination or modification of the parental responsibility thereby subsisting in favour of D pursuant to the substantive jurisdiction conferred on the English court by Art 5, insofar as permitted by English law pursuant to Art 15(1). That this would be the position if the court applied in this case the law designated by Art 16(3) is made clear by again making reference to paragraph 6 of the Explanatory Report:

> "It is likewise in this chapter that the provisions on the relationship of authority existing by operation of law are to be found (Art. 16-18). The Convention clarifies and effectuates this idea by speaking of attribution or extinction of parental responsibility by operation of law. Above all, it subjects such responsibility to the law of the child's habitual residence (and no longer to his or her national law), thus unifying the law applicable to parental responsibility and measures of protection. This chapter tries finally to resolve the consequences of the removal of the child on the law applicable to parental responsibility (the mobile conflict)."

82. However, whilst satisfied that the foregoing would be the position *if* the court applied in this case the law designated by Art 16(3), on the particular facts of this case I am further satisfied that, having regard to A's best interests as a primary consideration, it would be manifestly contrary to public policy to take that course and apply Spanish law as designated by the provisions of Art 16(3).

83. The term "provisions of this Chapter" in Art 22 indicates that Art 22 applies to each of the other Articles in Chapter III of the Convention, including Art 16(3). For the purposes of Art 22, the law designated by Art 16(3) will be the law of the State of the child's habitual residence under which parental responsibility originally existed, in this case Spanish law, and the law of the State to which the child's habitual residence changes and in which that parental responsibility subsists, in this case the law of England and Wales.

84. Having regard to the terms of Art 22, I am satisfied that it is near axiomatic that it is not in A's best interests for parental responsibility, arising by operation of law founded on a fraudulent deception by a now convicted sex offender, to be held by a stranger who has no biological, psychological or emotional link with him. Such a situation results in an unrelated adult unknown to A having, by reason of a fraud practised on a foreign competent authority, all the rights, duties, powers, responsibilities and authority which by law a parent of A has in relation to him and his property. Whilst it is unlikely that D would ever seek to press his rights and powers, to allow his parental responsibility arising out of a fraudulent registration to subsist in this jurisdiction would leave A exposed to continuing inaccuracy, uncertainty and insecurity regarding his legal proof of identity and civil status. A would remain uncertain as to the status of D in relation to him and in relation to D's ability to take decisions concerning fundamental aspects of his life. Again, whilst it is unlikely that D would ever seek to press his rights and powers, from the *child's* perspective A would be required to live with the possibility that at any given moment D might decide to intercede in his life. This cannot in my judgment be in A's best interests given the foundational implications of registration and the existence of parental responsibility for his identity and emotional development.

85. As I noted in *H v R (No.2) v Attorney General* [2021] Fam 376 at [24], the task of the court when determining whether the doctrine of public policy applies is not to decide what public policy should be but, rather, to measure the step under consideration, in this case the application of Spanish law as designated by Art 16(3), against the relevant principles of public policy recognised by the domestic and, in this case, international law. I further acknowledge that public policy exceptions represent a high bar generally. Whilst the argument of the Secretary of State that public policy in the context of applicable law represents a lower hurdle than it does in the context of registration and enforcement, in circumstances where only the latter follows a welfare assessment, is superficially attractive, I am satisfied that when applied in the context of conflict of laws it is all the more important that the doctrine of public policy be kept within its proper limits and that Art 22 also constitutes a high bar. Taking into account A's best interests as a primary consideration however, that bar is still crossed in this case.

86. Having regard to the best interests analysis set out above, to apply in this case Spanish law as designated by Art 16(3) would be manifestly contrary to both the fundamental public policy of English law and fundamental international norms. It would be manifestly contrary to English public policy to endorse a status based on fraud and a status the existence of which is wholly antithetic to A's best interests. Applying Spanish law as designated by Art 16(3) on the facts of this case would lead to a legal status resulting from the fraudulent deception of the Spanish authorities, by which status a stranger would hold all the rights, duties, powers, responsibilities and

authority which by law a parent of A has in relation to him and his property subsisting in this jurisdiction with demonstrably adverse consequences for A's welfare. In short, were it to apply Spanish law as designated by Art 16(3) on the facts of this case, the court would perpetuate the fraud committed by C and the damaging consequences of the uncertainty and insecurity inherent in a stranger holding parental responsibility for A. Such an outcome must be anathema to English law in circumstances where fraud unravels all. Further, having regard to A's right to respect of private and family life under Art 8 of the ECHR, which encompasses the right to identity, and the terms of Art 7 and Art 8 of the UNCRC, I am satisfied that to apply Spanish law as designated by Art 16(3) in this case with the consequences I have described would also be to breach fundamental principles concerning the protection of human rights and fundamental freedoms. The application of Spanish law in this case would permit a status to subsist that is based on a fraud and is wholly corrosive of a decisively important step for A's identity and the foundation of his personal identity, namely that of accurate registration of his birth and the ascribing of parental responsibility consequent thereon. I am satisfied that, given the foundational implications of registration and the existence of parental responsibility for A's identity and emotional development, this would amount to a breach of A's fundamental rights.

87. In the circumstances, having considered carefully the evidence and submissions in this case, having regard to the principles governing the application of the public policy doctrine and taking into account the best interests of A as a primary consideration, I am satisfied that applying Spanish law as designated by Art 16(3) would be manifestly contrary to public policy in this case. To adopt the words of Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways Co & Anor*, to conclude otherwise would affront the basic principles of justice and fairness which the courts seek to apply in the administration of justice.

88. This conclusion is not to impugn Spanish law. As noted, a distinction can be made between the foreign law itself and the *effect* of the application of that foreign law. In this case, it is not Spanish law in the abstract that is in question, but rather the effect of its application as designated by Art 16(3) in England and Wales on the very particular, if not unique, facts of this case. Given the effect of the application of Spanish law in these singularly egregious circumstances, this court cannot but conclude that Art 22 of the 1996 Convention is engaged.

89. Finally, Mr Gration and Ms Townend suggested during the course of their submissions that the term "can be refused" in Art 22 admits of a discretion, creating the space for their submission that, whilst they concede that Art 22 is engaged in this case, the court should prefer the alternative options they advance for resolving the difficulty that A and the mother find themselves in. The question of the existence of a discretion under Art 22 was not dealt with in the written submissions on behalf of the mother and hence not addressed in writing by the Secretary of State. The point was not pursued to any significant extent during oral submissions by either. As noted, on behalf of the mother Mr Gration and Ms Townend themselves advanced Art 22 as one of the legitimate means by which the existence of D's parental responsibility arising out of the fraud perpetrated by C can be dealt with.

90. I am in any event satisfied that, having determined that to apply Spanish law as designated by Art 16(3) would be manifestly contrary to public policy in the egregious circumstances I have described, it would not be appropriate to exercise a

discretion in favour of applying Spanish law, if such a discretion exists. In *Re M (Children)(Abduction: Rights of Custody)* [2008] 1 AC 1288, Baroness Hale considered the circumstances in which a court might exercise the discretion conferred by Art 13(b) of the 1980 Convention to return the child notwithstanding the court had concluded there was a grave risk of harm that the child's return would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. Lady Hale considered that in deciding whether to exercise the discretion, the court could take account of the policy of the 1980 Convention, the circumstances which gave the court a discretion and the wider considerations of the child's fundamental rights and welfare.

91. The policy of the 1996 Convention, as articulated in its preamble, is to ensure the protection of children in cases with an international element, recognising that the child's best interests are a primary consideration and taking account of the child's fundamental human rights as enshrined in the UNCRC. Art 22 specifically enjoins the competent authority to take account of the best interests of the child when considering the question of public policy. In these circumstances, having examined A's best interests as a primary consideration and concluded in that context that the application of Spanish law as designated by Art 16(3) would be manifestly contrary to public policy where the effect of doing so would perpetuate a fraud resulting in a stranger having parental responsibility for A and permitting a status to subsist that is wholly corrosive of a decisively important step for A's identity and the foundation of his personal identity, it would not be appropriate thereafter to exercise a discretion to apply Spanish law notwithstanding these conclusions.

92. The effect of the decision of the court to apply Art 22 in this case is that D does not have parental responsibility for A in the jurisdiction of England and Wales. In these circumstances, the question of whether the domestic provisions dealing with the revocation of parental responsibility should be read down, substituted with the inherent jurisdiction or declared incompatible with the ECHR does not arise.

93. It is the case that D will continue to have parental responsibility for A under Spanish law. This court, however, has found as a fact that D is not the father of A. As the expert evidence on Spanish law makes clear, if the English court determines that D is not the father of A and requests rectification of the Civil Registry then, provided there is a final judgment of the English court that D is proved not to be the father of A, the judgment has the appropriate exequatur, the regularity and formal authenticity of the documents presented has been demonstrated, the English court has based its international jurisdiction on criteria recognised by Spanish law, all parties have had notice of the procedure and sufficient time to prepare, and registration of the English decision is not manifestly incompatible with Spanish public order, the presentation of the English judgment with the exequatur will cause the rectification of the Civil Registry.

94. In the circumstances I reiterate that, as demonstrated by scientific testing comprising PCR single locus DNA testing directed by the English court, this court finds as a proven fact that D is *not* the biological father of A. That conclusion is evidenced in a formal report setting out the DNA test results, which I am satisfied is genuine. This court makes the finding that D is not the father of A in exercise of the substantive jurisdiction conferred on the court by s.55A(2)(b) of the Family Law Act 1986 based on A's habitual residence in the jurisdiction of England and Wales. As noted above,

both D and C have each been given the chance to respond to these proceedings by being served with the proceedings and given proper notice of this hearing. Both D and C have chosen not to participate in this final hearing. In these circumstances, being satisfied that D is not A's father, this court respectfully requests the rectification of the Spanish Civil Registry in order to reflect the proved fact that D is not the parent of A.

CONCLUSION

95. As I noted in my first judgment, the relative simplicity of the facts in this case belie the complexity of the legal situation to which those facts give rise. It is important that the court acknowledges that, although the questions before the court have centred on complex matters of law, the stress and emotional pain this situation has caused the mother has been acute. The cynical and calculated fraud perpetrated by C has had grave consequences that continue to echo in A's life and in the life of the mother.

96. For the reason set out above I find that, taking into account A's best interests as a primary consideration, it would in this case be manifestly contrary to public policy to apply Spanish law as designated by Art 16(3) and I decline to do so. In the circumstances, D does not have parental responsibility for A in this jurisdiction. I will make declarations accordingly.