HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 48

on appeal from: [2004] EWCA Civ 225

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
Secretary of State for Work and Pensions (Respondent)
***ex parte* Kehoe (FC) (Appellant)**

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

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Respondents:
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David Forsdick
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LORD BINGHAM OF CORNHILL

My Lords,

1. The appellant (Mrs Kehoe) married Mr Kehoe in 1983. They had four children. The marriage broke down in May 1993, a petition for divorce was filed by Mrs Kehoe in December 1993 and Mr Kehoe left the family home at the beginning of 1994. The children remained with Mrs Kehoe, who invoked the services of the Child Support Agency ("the CSA") to obtain financial support for the upbringing of the children from Mr Kehoe. Over the next ten years significant sums of money for the support of the children were paid by Mr Kehoe in response to demands by the CSA, but the process of obtaining payment was protracted and difficult and substantial arrears built up from time to time. Mrs Kehoe strongly feels, perhaps rightly, that direct action by her against her former husband would have yielded more satisfactory results. She contends that, properly understood, the Child Support Act 1991 gives her a right to recover financial support for the children from Mr Kehoe and that the provisions of the Act purporting to deny her a power of direct enforcement against him are inconsistent with the right of access to a court guaranteed by article 6 of the European Convention on Human Rights. At issue in this appeal is the correctness of that contention.

2. The detailed facts of this case and the relevant statutory provisions have been clearly and comprehensively summarised by Wall J sitting in the Administrative Court at first instance ([2003] EWHC 1021 (Admin), [2003] 2 FLR 578), by the Court of Appeal (Ward, Latham and Keene LJJ) [2004] EWCA Civ 225, [2004] QB 1378) and by my noble and learned friend Lord Hope of Craighead in his opinion. I gratefully adopt and need not repeat their accounts.

3. It is necessary first to examine whether Mrs Kehoe has a right to recover financial support for the maintenance of the children (which I shall call "child maintenance") from Mr Kehoe under the domestic law of England and Wales: *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163, para 3. Under the law as it stood before 1991 it was clear that she had such a right under the Matrimonial Causes Act 1973, the Domestic Proceedings and Magistrates' Courts Act 1978, the Matrimonial and Family Proceedings Act 1984 and the Children Act 1989: see the judgment of Ward LJ, paras 11-16 and section 8(11) of the 1991 Act. But these procedures were judged by the government of the day to be unsatisfactory, for reasons summarised in para 2 of the Summary in a White Paper "Children Come First" vol I (Cm 1264) presented to Parliament in October 1990:

> "2. The present system of maintenance is unnecessarily fragmented, uncertain in its results, slow and ineffective. It is based largely on discretion. The system is operated through the High and county courts, the magistrates' courts, the Court of Session and the Sheriff Courts in Scotland and the offices of the Department of Social Security. The cumulative effect is uncertainty and inconsistent decisions about how much maintenance should be paid. In a great many instances, the maintenance awarded is not paid or the payments fall into arrears and take weeks to re-establish. Only 30 per cent of lone mothers and 3 per cent of lone fathers receive regular maintenance for their children. More than 750,000 lone parents depend on Income Support. Many lone mothers want to go to work but do not feel able to do so."

It was proposed (Summary, para 6) to create a Child Support Agency which would have responsibilities for the assessment, review, collection and enforcement of maintenance payments, with powers to collect information on incomes and obligations, make a legally binding assessment of what was payable, determine methods of payment, monitor and (where necessary) collect maintenance and enforce payment where payments failed. Once the CSA was fully established, all claims for maintenance and reviews of maintenance would be handled by the CSA and not by the courts (Summary, para 8). The CSA was to have responsibility for the assessment, collection and enforcement of maintenance payments (chapter 2, para 2.2). It was regarded as important that, as far as possible, all the services relating to child maintenance provided to the public should be delivered by one single authority, the CSA, for which it should be a priority to secure

payment to the caring parent as quickly and accurately as possible (chapter 5, para 5.2). It was to take appropriate enforcement action at an early date when payments were not made (chapter 5, para 5.3). The White Paper outlined the proposed means of enforcement, and stated (chapter 5, paras 5.20, 5.24):

> "**Taking enforcement action**
>
> 5.20 If enforcement action is to be effective, it has to be taken quickly. It is therefore proposed that, when a parent first commissions the Child Support Agency to take enforcement action on her behalf, that parent should give a standing authority for the Agency to take action if and when full payment is not made on time. If the Agency were required to seek specific authority to act in every instance, then that could only cause additional delay.
>
> 5.24 The final stage, and very much a last resort, would be for the Agency to apply to the court for the court to take action. It is to be expected that the other measures, already described, will be more effective and it should be necessary to apply to the courts only very rarely. In England and Wales, the courts have the power to impose deferred prison sentences, where the debtor is committed to prison if the debt has not been paid in a specified period of time, or immediate prison sentences."

It was to be open to parents who were able to reach agreement to resolve the issue of child maintenance between themselves, whether or not in a sum assessed by the CSA, provided the caring parent was not in receipt of benefit from the state (chapter 5, para 5.26).

4. The Child Support Act 1991 gave effect to the scheme foreshadowed by the White Paper. It imposed a responsibility for maintaining a qualifying child on each parent (section 1(1)). It imposed a duty on the absent or non-resident parent to make payment of child maintenance in any periodical sums assessed (section 1(3)). It obliged the Secretary of State, on the application of either parent, to assess the child maintenance payable according to a statutory formula (sections 4, 11). It empowered the Secretary of State to take enforcement action if authorised to do so (sections 4, 6). It gave the Secretary of State significant powers (sections 14, 15, 30, 31, 33, 35, 36, 39A). While the role of the courts was preserved in relation to consensual settlements reached by parents not in receipt of state benefit (section 8), and there can be no doubt of the Secretary of State's duty to account to the caring

parent for sums which he has received from the paying parent, subject to any appropriate deduction of benefit, the Act conferred no right of recovery or enforcement on a caring parent such as Mrs Kehoe against an absent or non-resident parent such as Mr Kehoe.

5. In *Department of Social Security v Butler* [1995] 1 WLR 1528 the issue was whether the court could grant a Mareva injunction to the Secretary of State against an absent or non-resident parent who had failed to make the payments assessed under the 1991 Act. Evans LJ, at pp 1531-1532 said:

> "The following observations may be made on these statutory provisions. (1) The Act of 1991 together with regulations made under it provide a detailed and apparently comprehensive code for the collection of payments due under maintenance assessments and the enforcement of liability orders made on the application of the Secretary of State. (2) The only method provided for enforced collection before a liability order is made is a deduction from earnings order made by the Secretary of State himself under section 31. (3) Although section 1(3) provides for a duty which arises when the maintenance assessment is made, this duty is not expressed as a civil debt. Mr Crampin accepts that the duty could not be directly enforced by action in any civil court, or by any means other than as provided in the Act. (4) There is no provision for precautionary or *Mareva*-style relief."

Morritt LJ agreed at pp 1540-1541:

> "As I have indicated the Secretary of State claims in respect of the statutory right correlative with the obligation expressed in section 1(3) of the Act of 1991. But that obligation and right is not a civil debt in any ordinary sense. First, the obligation may only be enforced by the Secretary of State and not by any other person who may be stated to be the payee in the maintenance assessment. Secondly, the Secretary of State's powers of enforcement do not enable him to sue for the arrears in the ordinary way. In the first instance his choice lies between a deduction of earnings order directed to the employer or an application to justices for a liability order. In my

judgment, neither of those rights is such as would entitle this court, consistently with the decision in *The Veracruz I* [1992] 1 Lloyd's Rep. 353 to grant *Mareva* relief.

The Child Support Act 1991 introduced a wholly new framework for the assessment and collection of the sums required for the maintenance of children by their parents. There is no provision for the enforcement of any maintenance assessment except by the Secretary of State and his methods of enforcement are limited in the way I have mentioned. It seems to me that it would be inconsistent with the Act as a whole in general and with section 33 in particular if the Secretary of State were to be at liberty to apply for *Mareva* injunctions in the High Court. If the conditions in section 33(1) are satisfied then Parliament has clearly laid down that the Secretary of State should proceed first in the magistrates' court and then in the county court. If those conditions are not satisfied then Parliament has clearly ordained that the Secretary of State should not be entitled to enforce the maintenance assessment by court process at all.

No doubt clear words or a necessary implication are required to exclude the jurisdiction of the court. The suggested exclusion in this case is of the High Court's ordinary civil jurisdiction which includes the power to grant injunctions. In my judgment, the detailed provisions contained in the Act of 1991 which I have described show clearly that Parliament intended that all questions concerning the enforcement of maintenance assessments should be determined exclusively by the Secretary of State, the magistrates' court or the county court. The civil jurisdiction of the High Court is, in my view, necessarily excluded. I agree with Evans LJ that the judge was right and that this application should be dismissed."

Simon Brown LJ also agreed, at p 1541:

"For my part I believe that the argument fails at both stages albeit for what in the last analysis may be thought essentially the selfsame reason. Put shortly my conclusions are, first, that *Mareva* relief is only obtainable where there is already available to the applicant a cause of action properly so called, viz. a right to litigate or arbitrate an existing monetary claim, and, secondly, that the Act of 1991 affords to the Secretary of State no such cause of

> action, and indeed no rights at all save only those expressly conferred upon him by section 4(2) to arrange in certain circumstances either for the 'collection' of maintenance payable under an assessment or for the 'enforcement' of the obligation to pay such maintenance, in each instance as thereafter expressly provided for in sections 29 et seq. of the Act of 1991."

In *Huxley v Child Support Officer* [2000] 1 FLR 898, 908, Hale LJ, with the concurrence of Auld and Pill LJJ, helpfully characterised the regime established by the 1991 Act:

> "The child support system has elements of private and public law but fundamentally it is a nationalised system for assessing and enforcing an obligation which each parent owes primarily to the child. It replaces the powers of the courts, which can no longer make orders for periodical payments for children save in very limited circumstances. Unless she can secure a voluntary agreement at least as high as that which the CSA would assess, the PWC is expected to look to the Agency to assess her child support according to the formula, whether or not she is on benefit. The fact that it does her no direct good if she is on means-tested benefits, and that much CSA activity so far has been in relation to parents on benefit, does not alter the fundamental characteristics of the scheme."

6. That a caring parent in the position of Mrs Kehoe was given no right of recovering or enforcing a claim to child maintenance against an absent or non-resident parent was not a lacuna or inadvertent omission in the 1991 Act: it was the essence of the new scheme, a deliberate legislative departure from the regime which had previously obtained. The merits of that scheme are not for the House in its judicial capacity to evaluate. But plainly the scheme did not lack a coherent rationale. The state has an interest, most directly in cases where public funds are disbursed, but also more generally that children should be adequately supported. It might well be thought that a single professional agency, with the resources of the state behind it and an array of powers at its command, would be more consistent in assessing and more effective and economical in enforcing payment than individual parents acting in a random and uncoordinated way. It might also be thought that the interposition of an independent, neutral, official body would reduce the

acrimony which had all too frequently characterised applications for child maintenance by caring against absent or non-resident parents in the past which, however understandable in the aftermath of a fractured relationship, rarely enured to the benefit of the children. For better or worse, the process was deliberately changed.

7. The 1991 Act cannot in my opinion be interpreted as conferring any right on a parent in the position of Mrs Kehoe. She is of course the person to whom child maintenance will be paid, directly or indirectly and subject to any deduction of benefit, as the person who incurs the expense of bringing up the children. But the right which she had enjoyed under the former legislation was removed, and the right to recover the maintenance has been vested in the CSA.

8. This conclusion is not fatal to Mrs Kehoe's argument, but it is very highly damaging. For while the Strasbourg authorities are not bound by the classifications of national law, it is clear that the function of article 6 of the Convention is to guarantee certain important procedural safeguards in the exercise of rights accorded by national law and not ordinarily to require that particular substantive rights be accorded by national law: *James v United Kingdom* (1986) 8 EHRR 123, para 81; *H v Belgium* (1987) 10 EHRR 339; *Z v United Kingdom* (2001) 34 EHRR 97, paras 87 and 98; *Matthews v Ministry of Defence* [2003] 1 AC 1163, paras 3, 51, 142. Thus, if national law conferred on Mrs Kehoe a right to recover child maintenance from her former husband, article 6 would guarantee her access to an impartial and independent court where her claim would be fairly determined. But article 6 does not require that she have such a right.

9. I do not think that any of the Strasbourg jurisprudence to which the House was referred throws doubt on that conclusion. In *Golder v United Kingdom* (1975) 1 EHRR 524, it is true, the Court found a violation of Mr Golder's rights under article 6(1) in the denial of access to a solicitor. But the Court interpreted article 6(1) as conferring a right of access to a court (see paras 28-36 of the judgment); it was plain that this right would have been valueless had Mr Golder been unable to obtain legal advice; and there was no doubt about his right in principle to sue for defamation. I do not think any principle can be extrapolated from this case to assist Mrs Kehoe. In *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 54, the Court found it unnecessary to decide whether the right which the applicant sought to assert in this country was, in Convention terms, a "civil right". In *Philis v Greece* (1991) 13 EHRR 741 the right which the applicant had sought to assert in the

national court was to professional fees for which he had contracted and which (he claimed) he had earned. There is, again, no principle which can be extrapolated to assist Mrs Kehoe.

10. Sympathetic though one must be with Mrs Kehoe, who appears to have suffered extreme frustration and a measure of loss, one cannot in my opinion ignore the wider principle raised by this case. This is that the deliberate decisions of representative assemblies should be respected and given effect so long as they do not infringe rights guaranteed by the Convention. As they have made clear, it is not for the Strasbourg institutions, under the guise of applying the procedural guarantees in article 6, to impose legislative models on member states. Whether the scheme established by the 1991 Act is on balance beneficial to those whom it is intended to benefit may well be open to question, but it is a question for Parliament to resolve and not for the courts, since I do not consider that any article 6 right of Mrs Kehoe is engaged.

11. I agree with the majority of the Court of Appeal and with my noble and learned friends Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood, and would accordingly dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

12. The appellant, Mrs Mary Kehoe, was for many years one of those many thousands of lone parents caring for children who are dependent on the system for the payment of child support maintenance that was set up by the Child Support Act 1991. She was married in 1983 and has four children. They were born in 1982, 1984, 1987 and 1989. In 1992 she and her husband moved from Dublin to the United Kingdom. The marriage broke down in 1993. On 17 December 1993 Mrs Kehoe filed a petition for divorce. On 24 December 1993 she applied to the Child Support Agency under section 4(1) of the 1991 Act for a maintenance assessment to be made for her four children. On 1 January 1994 her husband moved out of the family home. The children were left in her care. She needed her husband's help to support them.

13. The history of Mrs Kehoe's relationship with the Child Support Agency ("the agency"), of the various maintenance assessments and of the steps which the agency took to try to enforce them against Mr Kehoe is lengthy and complex. The essential facts are set out in Wall J's careful judgment in the Administrative Court [2003] 2 FLR 578, paras 32 to 41 and in Ward LJ's equally careful judgment in the Court of Appeal [2004] EWCA Civ 225; [2004] QB 1378, paras 31 to 37. It is not necessary to set them all out again here. It is enough to provide the following outline by way of background.

The facts

14. There was an initial delay by the agency in sending a maintenance inquiry form to Mr Kehoe. It lasted for well over a year, for which Mrs Kehoe has been compensated. The form was eventually sent to him on 25 May 1995. This was the date as from which his liability was to be calculated. He provided insufficient information for a full assessment to be made at that stage, so an interim maintenance assessment was made with effect from 5 October 1995. A full maintenance assessment was made later, but arrears of maintenance due by him since May 1995 began to accumulate. In June 1996 the agency applied in the magistrates' court for a liability order to be made against him under section 33(3) of the 1991 Act. At a hearing on 13 August 1996, at which Mrs Kehoe was not present, Mr Kehoe disputed the amount of the arrears. The hearing had to be adjourned for the dispute to be resolved. On 23 September 1996 the agency decided to withdraw the application because the amount of the arrears could not be substantiated.

15. Arrears continued to accumulate, so the agency made a second application for a liability order to cover arrears that had arisen between 25 May 1995 and 11 September 2000. On 15 December 2000 this application was granted. Bailiffs were instructed to levy distress, but this was unsuccessful. A deduction from earnings order was issued on 9 October 2001 and it was followed by a further order for an increased amount on 21 February 2002. But Mr Kehoe was a director of the company on which the orders were served, and these steps too were unsuccessful. When he was interviewed by the agency on 21 October 2002 Mr Kehoe alleged that two of the children had been living with him for five years and that a third child had moved to live with him recently. He also said that Mrs Kehoe had moved to Spain where she was living with the fourth child. The agency established that Mrs Kehoe had moved to Spain permanently, so it closed her file on 13 January

2003 with effect from 30 September 2002. But arrears remain due to Mrs Kehoe which the agency is still seeking to enforce against Mr Kehoe.

16. Mrs Kehoe was for a time in receipt of child benefit. But she had a part-time job when Mr Kehoe left the family home, and in October 1994 she obtained full-time employment as a secretary. Although she had to struggle to make ends meet, she did not claim income support, family credit or any other benefit of the kind prescribed for the purposes of section 6 of the 1991 Act. So she is not and never has been one of those persons with care who may be required under section 6(1) to authorise the Secretary of State to take action under the Act to recover child support maintenance from the absent parent. Her position is that she was entitled under section 4 of the 1991 Act to apply to the Secretary of State for the making of a maintenance assessment. This was done on her own initiative.

17. Section 4(2) of the 1991 Act provides:

> "Where a maintenance assessment has been made in response to an application under this section the Secretary of State may, if the person with care or absent parent with respect to whom the assessment was made applies to him under this subsection, arrange for –
>
> (a) the collection of the child support maintenance payable in accordance with the assessment;
>
> (b) the enforcement of the obligation to pay child support maintenance in accordance with the assessment."

The issues

18. The question which lies at the heart of this case is whether the provisions of the 1991 Act which preclude a person with care from playing any part in the enforcement of maintenance assessments made against the absent parent in response to an application made under section 4 of the Act are compatible with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It should be noted that no challenge is being made in this case to the system which the 1991 Act lays down for the making of the assessments for child support maintenance by the agency. It is not

suggested that this part of the system is incompatible with the Convention. It is the enforcement stage of the process only that is being brought under scrutiny. Nor are we concerned in this case with the various situations where the courts retain jurisdiction over claims for the enforcement of the right of children to be maintained by their parents which are outside the system for which responsibility has been placed by the 1991 Act on the agency: for a convenient list, see Wilkinson and Norrie, *Parent and Child,* 2nd ed (Edinburgh 1999), paras 14.13-14.

19. Mrs Kehoe's complaint is that the agency delayed unreasonably in taking enforcement action against Mr Kehoe, that the facts asserted by Mr Kehoe which were accepted by the agency when he disputed the amount of the arrears were not correct and that she was precluded by the statutory scheme from intervening on her own behalf for the enforcement of the maintenance assessments. She claims that the effect of the scheme was to restrict her right of access to a court for the determination of her civil rights within the meaning of article 6(1). She seeks a declaration under section 4(2) of the Human Rights Act 1998 that the provisions of the 1991 Act are incompatible with her Convention rights under that article. She also seeks a declaration that her Convention rights were breached by delay on the part of the agency. She claims damages under sections 7 and 8 of the Human Rights Act 1998 with respect to the agency's acts and failures to act for the period from 2 October 2000 when the relevant sections of that Act came into force.

20. The first question is whether Mrs Kehoe's right to the collection and enforcement of a maintenance assessment made in response to an application made under section 4 of the 1991 Act is a "civil right" within the meaning of article 6(1) of the Convention. If that question is answered in the affirmative, two further questions then arise: whether the scheme which the 1991 Act lays down is nevertheless compatible with the Convention because the duties of the Secretary of State under the Act, being amenable to judicial review, are subject to control by a court having full jurisdiction to deal with the case as the nature of the case requires so as to fulfil the *Alconbury* criteria (*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295, 320-322, paras 49-54, per Lord Slynn of Hadley; p 330, para 88, per Lord Hoffmann); and, if not, whether the restriction on the right of the parent's access to a court for the enforcement of the maintenance assessment is nevertheless compatible with article 6(1) because it is proportionate.

The scheme of the 1991 Act

21. A comprehensive description of the scheme of the 1991 Act, as amended by the Child Support Act 1995 and the Child Support, Pensions and Social Security Act 2000, is set out in the judgments of Wall J in the Administrative Court [2003] 2 FLR 578, paras 18 to 27 and of Ward LJ in the Court of Appeal [2004] 2 WLR 1481, paras 21 to 30. I can confine myself to the essential details.

22. The basic principles are set out in sections 1 to 10 of the 1991 Act, as originally enacted. It is necessary, to set the scene for this judgment, to mention only some of them. Section 1(1) provides that, for the purposes of the Act, each parent of a qualifying child is responsible for maintaining him. Section 1(2) provides:

> "For the purposes of this Act, an absent parent shall be taken to have met his responsibility to maintain any qualifying child of his by making periodical payments of maintenance with respect to the child of such amount, and at such intervals, as may be determined in accordance with the provisions of this Act."

Section 3 defines the expressions "qualifying child", "absent parent" and "person with care". A child is a qualifying child if one or both of his parents is, in relation to him, an absent parent. The parent of any child is an absent parent in relation to the child if that parent is not living in the same household with the child and the child has his home with a person who is, in relation to him, a person with care. A person is a person with care in relation to any child if he is a person with whom the child has his home and usually provides day to day care for the child. That person need not be an individual: see section 44(2).

23. Section 4(1) provides that a person who is, in relation to any qualifying child or any qualifying children, either the person with care or the absent parent may apply to the Secretary of State for a maintenance assessment to be made under the Act with respect to that child or any of those children. That provision is to be contrasted with section 6(1), which provides that where income support, family credit or any other benefit of a prescribed kind is claimed by or in respect of, or paid to or in respect of, the parent of a qualifying child she shall, if she is a person with care of the child and she is required to do so by the

Secretary of State, authorise him to take action under the Act to recover child maintenance support from the other parent. The Secretary of State has power to require a parent to authorise the making of an assessment as soon as benefits of the kind there specified are claimed. That is not what happened in Mrs Kehoe's case. So your Lordships are concerned with only maintenance assessments made under section 4, the making of an application for which is at the option of either the person with care or the absent parent.

24. Section 11 provides that any application for a maintenance assessment made to the Secretary of State shall be referred by him to a child support officer, and that the amount of child support maintenance to be fixed by any maintenance assessment shall be determined in accordance with the provisions of Schedule 1 which provides for its calculation according to an elaborate formula. Once this stage is reached we are in the field of algebra. But fortunately it is not necessary to probe into these details in this case.

25. I have already quoted the terms of section 4(2) in full, as they lie at the centre of this dispute: see para 17. In summary, it provides that, where a maintenance assessment has been made in response to an application under section 4 and either the person with care or the absent parent with respect to whom the assessment was made applies to him under that subsection, the Secretary of State may arrange for the enforcement of the obligation to pay child support in accordance with the assessment. Section 4(2) must be read together with section 4(3), which provides that where an application for the enforcement of the obligation authorises the Secretary of State to take steps to enforce the obligation whenever he considers it necessary to do so, the Secretary of State may act accordingly. These subsections must also be read together with section 2, which provides that where the Secretary of State is considering the exercise of any discretionary power conferred by the Act, he shall have regard to the welfare of any child likely to be affected by his decision. In practice, of course, applications under section 4 are made not to the Secretary of State himself but to the agency. It is the agency that decides whether or not, in any given case, the discretionary powers which the section confers on the Secretary of State with regard to the enforcement of the obligation to pay child support maintenance should be exercised.

26. Section 8 deals with the role of the courts with respect to maintenance for children. Subsection (1) provides that it applies in any case where a child support officer would have jurisdiction to make a

maintenance assessment with respect to a qualifying child and an absent parent of his on the application of a person entitled to apply for that assessment. The basic rule is set out in subsection (3), which provides:

> "In any case where subsection (1) applies, no court shall exercise any power which it would otherwise have to make, vary or revive any maintenance order in relation to the child and absent parent concerned."

27. The jurisdiction of the courts to make orders for the maintenance of children is preserved in the various circumstances described in the remaining subsections of section 8. These include cases such as where the court is satisfied that the circumstances of the case make it appropriate for the absent parent to make payments under a maintenance order in addition to the child support maintenance payable by him in accordance with the maintenance assessment: see subsection (6). Parents who have previously been able to agree in writing the level of child maintenance may obtain an order from the court by consent: see subsection (5). Section 9(2) provides that nothing in the Act shall be taken to prevent any person from entering into an agreement for the making of periodical payments by way of maintenance to or for the benefit of any child. But it is unnecessary to explore these details further, as none of these exceptions apply in the case of Mrs Kehoe.

The rights and obligations under the 1991 Act in domestic law

28. In *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163, 1169, para 3 Lord Bingham of Cornhill said that an accurate analysis of a claimant's substantive rights in domestic law is an essential first step towards deciding whether he has, for purposes of the autonomous meaning given to the expression "civil rights" by the Convention, a "civil right" such as will engage the guarantees in article 6. I would respectfully follow this guidance. So I must now take a closer look at the effect of the provisions of the 1991 Act, as seen against the background of the previous law which the scheme of the Act was designed to replace.

29. The extent of parents' duty to maintain their children at common law and the statutory procedures that were introduced to enable courts to make orders for maintenance to be paid to or for a child's benefit have been described by Ward LJ in the Court of Appeal [2004] 2 WLR 1481,

paras 7 to 16, and by my noble and learned friend Baroness Hale of Richmond. At the outset of his summary Ward LJ makes the point that, while there was a common law duty to maintain, the common law provided no remedy. Under English law a wife could neither claim nor enforce any right to maintenance, either for herself or the children, in the civil courts. The gap was filled for the first time by section 35 of the Matrimonial Causes Act 1857, which enabled the divorce courts to make provision with respect to the custody, maintenance and education of children, and by section 52 of that Act which provided for the enforcement of these orders. The jurisdiction was continued and enlarged upon in a series of later statutes. For example, the Guardianship of Infants Act 1925 enabled the court to make an order against a parent to pay such weekly or other periodic sum towards the maintenance of his child as, having regard to the means of that parent, it might think reasonable. The current powers are set out in section 15 of and Schedule 1 to the Children Act 1989 and, in regard to Scotland, sections 1 to 6 of the Family Law (Scotland) Act 1985. These provisions have not been repealed. But the effect of section 8(3) of the 1991 Act is that the court's power to make maintenance orders under those statutes in relation to a child is no longer available where a child support officer would have jurisdiction to make a maintenance assessment under the 1991 Act.

30. The effect of the 1991 Act, then, is to replace the existing statutory framework with an entirely new scheme. The background to its introduction was explained in paragraph 2 of the summary in the White Paper, *Children Come First* (October 1990) (Cm 1264), which stated:

> "The present system of maintenance is unnecessarily fragmented, uncertain in its results, slow and ineffective. It is based largely on discretion. The system is operated through the High and county courts, the magistrates' courts, the Court of Session and the sheriff courts in Scotland and the offices of the Department of Social Security. The cumulative effect is uncertainty and inconsistent decisions about how much maintenance should be paid. In a great many instances, the maintenance awarded is not paid or the payments fall into arrears and take weeks to re-establish. Only 30 per cent of lone mothers and 3 per cent of lone fathers receive regular maintenance for their children. More than 750,000 lone parents depend on income support. Many lone mothers want to go to work but do not feel able to do so."

31. The defects identified in this paragraph were due in part to the fact that the assessment of the amounts to be paid as maintenance for children by their parents was left to the courts, leading to inconsistency; and in part to the fact that the initiative lay with the parent in whose favour an order was made to ensure that payments were kept up to date and that, where necessary, the order was enforced, with the result that in many cases the amounts due were not paid. Hitherto the approach had been to confer a right on the parent with care to claim maintenance for the child and, if the sums which the court ordered to be paid were not paid, to take proceedings in her own name for their recovery. The system depended on the traditional view that the solution to problems created by gaps in the common law was to create new rights and obligations by statutory enactment. The enforcement of these rights and obligations would then follow the ordinary course, whereby it was up to the party whose rights were infringed to take proceedings to enforce them.

32. The 1991 Act departs entirely from this approach. As Hale LJ said in *Huxley v Child Support Officer* [2000] 1 FLR 898, 908, the child support system which was introduced by this Act is fundamentally a nationalised system for assessing and enforcing an obligation which each parent owes primarily to the child. It replaces the powers of the courts to make orders for periodical payments to be made for children. And it replaces the system which left it to parents to apply for the enforcement of these orders with a system that places the responsibility for enforcement on the Secretary of State and through him on the agency.

33. The Act starts by asserting in section 1(1) that, for its purposes, each parent of a qualifying child is responsible for maintaining him. It describes the maintenance of any qualifying child of his by an absent parent in section 1(2) as a "responsibility". Section 1(2) states that the absent parent will have met this responsibility by making such periodical payments of maintenance as may be determined in accordance with the provisions of the Act. The Act uses the word "duty" in section 1(3), where it refers to the duty of the absent parent with respect to whom the assessment was made to make the payments, and the word "obligation" in section 4(2)(b), where it refers to the enforcement of the obligation to pay child support maintenance in accordance with the assessment. But nowhere in the Act is it said that the absent parent owes a duty, or is under an obligation, to pay that amount to the person with care. Nor is it said anywhere that the person with care has a right which she can enforce against the absent parent.

34. The effect of the Act is that the obligation to pay the maintenance assessment is owed in respect of the qualifying child but that it is enforceable by the Secretary of State. As Morritt LJ said in *Department of Social Security v Butler* [1995] 1 WLR 1528, 1540, the Secretary of State claims in respect of the statutory right which is correlative with the obligation expressed in section 1(3). Both the person with care and the absent parent are given the right by section 4(1) to apply to the Secretary of State for the making of a maintenance assessment. Where an assessment is made, they are both then given the right by section 4(2) to apply to the Secretary of State to arrange for its collection and enforcement. But enforcement is not something which they can demand. Section 4(2) makes it clear that enforcement of the obligation to pay child support maintenance is at the discretion of the Secretary of State, not at the discretion of the person who applies for its enforcement.

35. I would conclude that the 1991 Act has deliberately avoided conferring a right on the person with care to enforce a child maintenance assessment against the absent parent. Enforcement is exclusively a matter for the Secretary of State. It follows that the person with care has no right to apply to a court for the enforcement of the assessment. A child who has attained the age of 12 years and is habitually resident in Scotland is given the right to apply to the Secretary of State for a maintenance assessment by section 7(1). But here too the enforcement of any assessment is a matter for the Secretary of State, not for the child. The system has been designed on the assumption that a system of child support maintenance which is run by the state will operate more efficiently than one that relies on private enterprise. Experience has shown that its operation in practice has fallen far short of what was expected of it. But that is the system that Parliament has laid down, and we must take it as we find it. It does not permit a person with care to intervene in proceedings for its enforcement which are not being conducted as efficiently or as effectively as she would like. This is a consequence of the fact that she has no right against the absent parent which she can enforce in any court. It is a matter of substantive law, not of procedure.

Does the 1991 Act create a "civil right" for the purposes of article 6?

36. Article 6(1) of the Convention provides that in the determination of "his civil rights and obligations" everyone is entitled to a fair hearing by an independent and impartial tribunal established by law. This provision must be read in the light of the rule of law referred to in the preamble to the Convention, of which the principle whereby a civil

claim must be capable of being submitted to a judge is an integral part. In *Golder v United Kingdom* (1975) 1 EHRR 524, 535-536, paras 35-36, the European Court said that this principle ranks as one of the universally recognised fundamental principles of law and that the right of access constitutes an element which is inherent in the right stated in article 6(1). In *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 546-547, para 57, the court said that limitations applied by the state on the right of access must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. But in order to invoke this principle one must first be able to say that the individual has a claim for the infringement of a "civil right".

37. The approach which the European Court takes to this issue was explained by the Commission in *Pinder v United Kingdom* (1984) 7 EHRR 464, 465, para 5. It is worth quoting the following sentences from that important paragraph:

> "The Commission … recalls that the concept of 'civil rights' is autonomous. Thus, irrespective of whether a right is in domestic law labelled 'public', 'private', 'civil' or something else, it is ultimately for the Convention organs to decide whether it is a 'civil' right within the meaning of article 6(1). However, in the Commission's view, article 6(1) does not impose requirements in respect of the nature and scope of the relevant national law governing the 'right' in question. Nor does the Commission consider that it is, in principle, competent to determine or review the substantive content of the civil law which ought to obtain in the State Party any more than it could in respect of substantive criminal law. As it has stated in App No 7151/75: *Sporrong and Lönnroth v Sweden*, series B:
>
> Whether a right is at all at issue in a particular case depends primarily on the legal system of the State concerned. It is true that the concept of a 'right' is itself autonomous to some degree. Thus it is not decisive for the purposes of article 6(1) that a given privilege or interest which exists in the domestic system is not dassified or described as a 'right' by that system. However, it is clear that the Convention organs could not create by way of interpretation of article 6(1) a substantive right which has no legal basis whatsoever in the State concerned."

38. As this passage indicates, each of the two words in the phrase "civil right" has a part to play in the assessment as to whether the guarantee in article 6(1) is engaged. The exercise may be broken down into stages in this way. First it must be demonstrated that the applicant is seeking access to a court to enforce what the European Court will accept, according to the autonomous meaning which it gives to this word, is a "right". It must then be demonstrated that this is a right which the European Court will classify, again according to the autonomous meaning that it gives to it, as a "civil" right. Then there is the question whether the "civil right", if it is subject to some degree of limitation by the national law, is restricted or reduced to such a degree or to such an extent that the very essence of the right is impaired. This is because, while the right of access to a court is not the subject of an absolute guarantee in article 6(1), the rule of law must be maintained and the individual must be protected against the exercise of arbitrary power by the executive. If it is so restricted or reduced, the Convention right will have been breached.

39. Each of these three stages presents its own problems. It is the question whether there is a 'right' at all that is in issue in Mrs Kehoe's case. Her case can be contrasted with *Golder v United Kingdom* (1975) 1 EHRR 524, where there was no doubt that the right which the applicant was seeking to enforce was a "right" and that it was a "civil right" too, as his complaint was that he was being prevented from instituting libel proceedings against a prison officer. It can be contrasted also with *Ashingdane v United Kingdom* (1985) 7 EHRR 528, where it was contended that the applicant did not have a "civil right" to challenge the legality of his continued detention in a secure hospital. The court said at p 546, para 54, that it did not consider it necessary to settle that dispute as it had come to the conclusion that, even assuming article 6(1) to be applicable, the requirements of that provision were not violated. In *Philis v Greece* (1991) 13 EHRR 741 a consultant engineer claimed that he had been denied access to a court for the recovery of fees that were owed to him, so here too there was an undoubted "right". In *Hornsby v Greece* (1997) 24 EHRR 250 the complaint was that a judicial decision in the applicants' favour had not been implemented. There was no issue in that case either as to whether there was a "right".

40. The problem in this case differs also from that which was considered in *Matthews v Ministry of Defence* [2003] 1 AC 1163, where the issue was whether the limitations that had been imposed on the serviceman's right of action was the product of rules of procedure which would engage the article 6(1) guarantee or was the product of substantive law which was for the State party itself to determine. We do

not need in this case to trace the dividing line between what the court in *Fayed v United Kingdom* (1994) 18 EHRR 393, 430, para 67 referred to as the procedural and substantive limitations of a given entitlement under domestic law. Lord Hoffmann explained in his speech in *Matthews*, paras 29-38 how that issue should be approached. In these paragraphs he makes the point that the purpose for which this distinction exists is to prevent contracting states from imposing restrictions on the right to bring one's dispute before the judicial branch of government in a way that threatens the rule of law and the separation of powers: see para 35. In the present case, however, the issue is much more clear cut. It is whether Mrs Kehoe was given a right of any kind by the 1991 Act which could be classified as a "right" within the meaning of article 6(1).

41. The key to this case lies in the point of principle that was identified by the Commission in *Pinder v United Kingdom* (1984) 7 EHRR 464, 465, para 5. This is that, while the concept of a "right" is autonomous to some degree because it does not depend on how the privilege or interest concerned is classified in the domestic system, it is not open to the European Court when it is applying article 6(1) to create a substantive right which has no legal basis in that system at all. Article 6(1), on its own terms, has nothing to say about the content of the individual's civil rights. Nor does it impose an obligation on the state party to confer any particular rights in substantive law on the individual. As the European Court said in *James v United Kingdom* (1986) 8 EHRR 123, 157-158, para 81:

> "Article 6(1) extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law: it does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States."

In *Z v United Kingdom* (2001) 34 EHRR 97, 134, para 87 the Court quoted these words which I have taken from its decision in *James v United Kingdom*, which it said was part of "its constant case law". At p 137, para 98 the Court said:

> "As it has recalled above in paragraph 87 it is a principle of Convention case law that article 6 does not in itself guarantee any particular content for civil rights and obligations in national law, although other articles such as

> those protecting the right to respect for family life and the right to property may do so. It is not enough to bring article 6(1) into play that the non-existence of a cause of action in domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm."

42. The last sentence of the passage that I have quoted from *Z v United Kingdom* can, I think, be applied directly to the present case. It is not enough to bring article 6(1) into play to assert that, as the whole object of the scheme is that the person with care is the person who will ultimately benefit from the enforcement process, Mrs Kehoe should be allowed at least some say in how that process is conducted. I respectfully agree with Latham LJ that it seems unsatisfactory that she should not have that right, as the agency's priorities are inevitably different from those of the person with care of the child, who may disagree profoundly with the agency as to how the proceedings in which she has such an obvious interest should be conducted: [2004] QB 1378, 1414, para 102. But the fact is that the 1991 Act itself, which is the only source from which it could be derived, does not give her that right. The scheme of the 1991 Act is not designed to allow the person with care to play any part in the enforcement process at all. It is not possible to envisage how that might be done without re-writing the scheme which the Act has laid down. In my opinion this is not even a case where it can be said that the existence of a right to participate in this process is arguable.

Conclusion

43. I would hold that Mrs Kehoe's argument that the system which prevents her from playing any part in the enforcement process is incompatible with article 6(1) fails at the first stage. This is because she has no substantive right to do this in domestic law which is capable in Convention law of engaging the guarantees that are afforded with regard to "civil rights and obligations" by that article. I appreciate the force of her complaint that the agency has failed to take action within a reasonable time to enforce the assessments. But, as article 6(1) is not engaged, the conclusion must be that the agency cannot be said to have acted unlawfully within the meaning of section 7(1) of the Human Rights Act 1998. The result is that that Act cannot provide her with a remedy. I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

44. I have had the great advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. I am in full agreement with their opinions. The Child Support Act 1991 as amended did not give Mrs Kehoe any right to participate directly in the process of enforcing a child support maintenance assessment against Mr Kehoe, in the sense of her being able to bring proceedings in her own name against him. That is, in the circumstances of her case, prohibited by section 8 of the 1991 Act.

45. I would only add that I would not accept (and I do not understand my Lords to be expressing the view) that Mrs Kehoe has no enforceable rights whatever in respect of the enforcement process. If the Child Support Agency were to refuse to enforce a claim because it made some error of law (such as misunderstanding the extent of its statutory powers) Mrs Kehoe could take proceedings by way of judicial review, and in that way she could hope to influence the enforcement process. She would plainly have a sufficient interest to bring such proceedings.

46. Whether she would (in any such judicial review proceedings) be securing the determination of a civil right is, I think, open to debate. She would be acting to obtain through a social welfare agency a pecuniary benefit in which she had a direct personal interest, but in the enforcement of which the agency had a measure of discretion. The trend of the Strasbourg jurisprudence is towards an ever-widening interpretation of "civil rights": see *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, 439, para 6 (Lord Bingham of Cornhill); pp 454-456, paras 61 to 69 (Lord Hoffmann) ; pp 459-461, paras 84-94 (Lord Millett).

47. There are, I think, parallels with private law relationships in which an individual may have interests which would generally be regarded as important legal rights, but which are not normally enforceable by direct action. A shareholder has an interest in seeing that his company's assets are not misappropriated, and a member of an occupational pension scheme has a similar interest in respect of assets in the pension fund. Well-settled principles of company law and trust law (to which there are also well-settled exceptions) require him to call on

the company or the trustees to enforce rights of action which are vested, not in him, but in the company or the trustees. If they fail to act the shareholder or beneficiary may have to embark on domestic proceedings as an indirect means of trying to enforce his interest. The absence (as a normal rule) of a direct right of action is not a deprivation of his Article 6 (1) rights, but is a reflection of substantive principles which are part of the content of British company law or English trust law. Mrs Kehoe's position under the 1991 Act is essentially the same.

48. I agree that the appeal should be dismissed.

BARONESS HALE OF RICHMOND

My Lords,

49. This is another case which has been presented to us largely as a case about adults' rights when in reality it is a case about children's rights. It concerns the obligation to maintain one's children and the corresponding right of those children to obtain the benefit of that obligation. The issue is whether the restrictions placed on direct access to the courts to enforce that obligation by section 8(1) and (3) of the Child Support Act 1991 are compatible with article 6 of the European Convention on Human Rights. Article 6 is concerned only with the fair and impartial adjudication and enforcement of the rights recognised in domestic law. It does not guarantee any particular content to those rights. Put another way, the issue is whether the 1991 Act has defined the extent of that obligation and that right or whether it has merely altered the machinery for assessing and enforcing them. If it is the latter, then the underlying right still exists and the Act's provisions may be regarded as procedural only. If it is the former, then all that survive are the rights set out in the Act itself. In my view, it is not possible to answer that question by looking only at the rights contained in the 1991 Act itself. They have to be set in the context of the scope of the parents' obligations and the children's rights as a whole. The Child Support Act is only one of a number of ways in which the law recognises these.

The development of the parental obligation to maintain

50. It is difficult to think of anything more important for the present and future good of society than that our children should be properly cared for and brought up. We who are nearing the end of our productive lives will depend more than most upon the health, strength and productivity of the following generations. The human infant has a long period of dependency in any event. But we have added to that by our requirements that they be educated up to the age of 16 and disabled from earning their own living until then. Someone must therefore provide for them. Blackstone (*Commentaries*, book 1, chapter XVI) regarded this as a matter of natural law:

> "The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish, By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, so far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents."

He goes on to say that:

> "It is a principle of law, that there is an obligation on every man to provide for those descended from his loins; and the manner in which this obligation shall be performed, is pointed out ..."

This is so even for children born out of wedlock:

> "Let us next see the duty of parents to their bastard children by our law, which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved;.."

51. Our law has always recognised the right of a child who is too young to fend for herself to be provided for by her parents. The problem has always been to find an effective method of enforcement. The child was too young to do so and the married mother had no separate right to sue her husband. Hence the machinery of enforcement was laid down in the Poor Laws. As Lindley LJ put it in *Thomasset v Thomasset* [1894] P 295, at p 299, "As regards maintenance, the parents' obligations were measured both at law and in equity by the Poor Laws".

52. But the fact that the father's obligations were measured by the Poor Laws did not mean that the courts of law and equity would ignore them. The principles underlying the later statutory concept of 'wilful neglect to maintain' a wife or child, even the later liability to reimburse the public purse for benefits expended, were those developed by the common law. Hence, just as the husband's common law duty to maintain his wife would normally be discharged by providing the home which they shared, the father's duty to maintain his children would be discharged by providing them with a home: see eg *McGowan v McGowan* [1948] 2 All ER 1032, per Lord Hodson at 1034.

53. The common law courts would not intrude into the matrimonial relationship, or trespass upon the jurisdiction of the ecclesiastical courts over that relationship, by ordering the husband to make payments to his wife. But a wife who was living with her husband did have the apparent authority to contract as his agent for the expenses of the household. And if they were living apart, the common law recognised her agency of necessity, the right to pledge her husband's credit for necessaries according to her station in life. Unlike the housekeeping authority, this could not be countermanded by the husband. But the agency of necessity subsisted only if the wife was justified in living apart from her husband. Hence she would lose it for ever if she was guilty of adultery, no matter how badly her husband had behaved: see *Govier v Hancock* (1796) 6 Term Rep 603; it would be suspended while she was in desertion: see *Jones v Newtown and Llanidloes Guardians* [1920] 3 KB 381; but if they were obliged to live apart through no fault of hers, for example because of illness, the obligation continued: see *Lilley v Lilley* [1960] P 169.

54. For a while there seems to have been a view that a child might have a similar agency of necessity to enforce the father's duty to maintain him, the moral obligation being if anything stronger than that towards a wife: see *Urmston v Newcomen* (1836) 4 Ad & El 899. It was eventually firmly established in *Mortimore v Wright* (1840) 6 M & W

482 that a father was not liable for his son's debts, even for necessaries, unless the father had agreed to this, whether expressly or by implication; see also *Shelton v Springlett* (1851) 11 CB 452. But these were cases of near-adult sons who might be expected to fend for themselves. On the other hand, it was recognised that if a father placed his young children in the care of a servant or nurse, he might be liable for necessaries supplied by her or at her request: see *Hesketh v Gowing* (1804) 5 Esp 131; *Cooper v Phillips* (1831) 4 C & P 581. But these may have been cases of implied authority rather than agency of necessity. However, once it became possible for the wife to obtain custody of a child even against the father's will, the law recognised that her agency of necessity extended to necessaries for a child in her custody as well as for herself: see *Bazeley v Forder* (1868) LR 3 QB 559.

55. A further recognition by the common law of a duty to maintain was the opinion of the judges that it was an indictable misdemeanour at common law for a person under a duty to provide for an infant of tender years to neglect to do so and thereby injure his health: see *R v Friend* (1802) Russ & Ry 20. A comprehensive offence of ill-treating, neglecting, abandoning or exposing a child was enacted in the Prevention of Cruelty to, and Protection of Children Act 1889, the forerunner of the present offence of child cruelty under section 1 of the Children and Young Persons Act 1933. A parent or person 'legally liable to maintain' a child is deemed to have neglected him for this purpose if he has failed to provide adequate food, clothing, medical aid or lodging, even if he is not living with the child. Until the Family Law Reform Act 1987, the expression 'parent' did not include the father of an illegitimate child; but the expression 'legally liable to maintain' did include a putative father if he had been adjudged to be such.

56. Statutory recognition of the parental duty to maintain dates back to the Elizabethan poor laws, culminating in the Poor Relief Act of 1601, 43 Elizabeth c 2, s 7 of which provided that

> " . . . the father and grandfather, and the mother and grandmother, and the children of every poor . . . person . . . being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed; upon pain that every one of

them shall forfeit 20s for every month which they shall fail therein."

The practice was to order, not only payment for the future, but also repayment of money already spent by the overseers of the poor: see Neville Brown, "National Assistance and the Liability to Maintain One's Family" (1955) 18 MLR 110, at p 113. Thus the principle of family responsibility or solidarity was laid down. The Poor Relief (Deserted Wives and Children) Act 1718, 5 Geo I, c 7, allowed warrants for the seizure of deserting husband's property in order to recoup relief given to his wife and children. The procedure for obliging the putative father of a child born out of wedlock to maintain the child was rather different, but according to Professor Brown, more commonly used. For if the children of married parents were poor, their parents would also be poor; but it by no means followed that if an unmarried mother was poor, the father would also be poor.

57. The new Poor Law Act of 1834 made it a great deal more difficult to recover the cost of poor relief from the father of a child born outside wedlock. It repealed the laws allowing the mother or Overseers of the Poor to charge or affiliate a man as the father, and substituted a procedure whereby the Overseers could seek an order from the Quarter Sessions for reimbursement. But, far from reducing the problem of illegitimacy (by deterring the mothers), as the Poor Law Commissioners had hoped, this seems to have increased it (by failing to deter the fathers). At all events, it led to the Poor Law Amendment Act 1844. This gave the unmarried mother the right to apply for an order for maintenance from the putative father, in what later became affiliation proceedings. These remained essentially unchanged until the Family Law Reform Act 1987 removed most of the legal distinctions between the children of married and unmarried parents. They were, however, the first in the modern line of statutes giving one parent the right to claim an order for periodical payments against the other.

58. The married mother had to wait until the Matrimonial Causes Act 1857 transferred the matrimonial jurisdiction of the ecclesiastical courts to grant decrees of nullity or divorce *a mensa et thoro*, now called judicial separation, to a new Court for Matrimonial Causes. It also gave that court the power to grant a divorce. Pending and on making those decrees, the court could also make orders for the custody, maintenance and education of the children (s 35). This power was later made available after the final decree (Matrimonial Causes Act 1859, s 4) and then to decrees for restitution of conjugal rights (Matrimonial Causes

Act 1884, s 6). The great majority of married mothers, who could not afford to go to the new court, had to wait until the Matrimonial Causes Act 1878 first gave them the right to apply (in very limited circumstances) to a magistrates' court for a separation and maintenance order and for custody of children up to the age of 10. The grounds for making such orders were soon extended, first by the Married Women (Maintenance in Case of Desertion) Act 1886 and then by the Summary Jurisdiction (Married Women) Act 1895, to include, among other things, wilful neglect to provide reasonable maintenance for her or her infant children whom her husband was 'legally liable to maintain' (1895 Act, s 4). A separate power to award limited weekly maintenance for a child in her custody was given by the Married Women (Maintenance) Act 1920, s 1. Meanwhile, a succession of 19th century Acts gave the mother the independent right to apply for the custody of the children, and the Guardianship of Infants Act 1925, s 3(2), gave the court power to order the father to make weekly payments (originally up to 10 shillings a week) for a child in her custody.

59. These were the origins of the four private law systems under which one parent might be ordered to make payments to or for the benefit of a child being looked after by another: (i) as an ancillary to matrimonial causes, which until 1967 were always in the High Court; (ii) in matrimonial proceedings in magistrates' courts; (iii) in Guardianship of Minors Act proceedings in the High Court, county courts or magistrates' courts; and (iv) in affiliation proceedings in magistrates' courts, which were until 1987 the only means of obtaining support from the father of an illegitimate child. The Family Law Reform Act 1987 removed the discrimination between legitimate and illegitimate children by expanding the powers under the Guardianship of Minors Acts to include the capital provision which is available for the children of married parents in matrimonial causes and making them available to both. The Guardianship of Minors Act powers were replaced by Schedule 1 to the Children Act 1989; but this left intact the powers in matrimonial causes and matrimonial proceedings so as to avoid having to consider financial provision for the child separately from provision for the adults.

60. There is also a separate system, descended from the Poor Law, for recovering the costs of public assistance from 'liable relatives'. We have already seen the extent of the family obligations between parents, grandparents and children which dates back to the Elizabethan poor law. Obligations towards wives, and then husbands, came later. The position which had been reached by 1927 was consolidated in section 41 of the Poor Law Act of that year, which was repeated in section 14 of the Poor

Law Act 1930. The power of the poor law authorities to recoup from liable relatives was widely used until the outbreak of World War I. According to Sir Morris Finer and Professor O R McGregor in their invaluable 'The History of the Obligation to Maintain' (published as Appendix 5 to the Report of the Committee on One-Parent Families, chaired by Sir Morris Finer, 1974, Cmnd 5629),

> '. . . the poor law authorities were much better placed to arraign liable relatives and to enforce claims for reimbursement of poor relief against them. But even their success was illusory because . . . the result in no less than half the cases before 1914 was not reimbursement but the imprisonment of the liable relative.'

61. The Poor Law was abolished by the National Assistance Act 1948. In the post war welfare state, it was expected that most areas of need would be covered by national insurance benefits and that means-tested benefits would be a safety net for the few who were not covered by the national insurance scheme. The 1948 Act retained the possibility of recovery from a 'liable relative' but reduced those liable: under section 42, a man was liable to maintain his wife and children, including illegitimate children of whom he had been adjudged putative father, and a woman was liable to maintain her husband and children. Neither was liable to maintain a *former* spouse.

62. It was also intended that the receipt of national assistance, later to become supplementary benefit, and later still income support, should not carry a stigma. As Dr Stephen Cretney relates, in his masterly history, *Family Law in the Twentieth Century, A History*, 2003, at p 460, in keeping with this new entitlement-based approach the benefit authorities changed their policy about seeking recovery from liable relatives. Instead of routinely seeking this, they would try to reach agreement with the husband or father, and accept any offer which they considered reasonable. Rather than take proceedings themselves, they would encourage the mother to do so. The disadvantage for the mother was that she would then not know from week to week how much benefit she would get, because it all depended upon how much maintenance the husband or father had paid that week. The sensible solution eventually found was that she would assign or 'divert' any payment made into the magistrates' court to the benefit authorities. They could then issue her with an order book which she could safely cash each week. Although the benefit authorities retained their power to seek recovery from the liable relative, in practice this was rarely done even in cases where the

wife or mother had, for whatever reason, chosen not to bring proceedings.

63. It was scarcely surprising that the courts would have this changed climate in mind when deciding what orders for financial provision should be made. They were not supposed to take means-tested benefits into account as a resource available to the wife and mother, but neither were they supposed to order a sum which would reduce the husband and father's income below that which he would receive for himself and his new family were he also on benefit: see *Barnes v Barnes* [1972] 1 WLR 1381. Furthermore, there has never been a legal liability to support a *former* spouse, and divorce was becoming more and more readily available, so that fewer and fewer separated spouses would remain married and thus liable to support one another.

64. It became common for divorcing parties to agree a 'clean break', in which the wife and children would retain the family home, where the mortgage interest would be met by the benefit authorities, while the husband was relieved of any further maintenance liabilities. This approach may even have been accelerated by the encouragement given to a clean break and the ending of private maintenance for divorced wives by the Matrimonial and Family Proceedings Act 1984. The fact that there were still both private and public law liabilities to maintain the children receded into the background, especially as the risk that the benefit authorities would proceed against the absent parent were so slim. This trend culminated in *Delaney v Delaney* [1991] 2 FLR 457, where the court proclaimed that 'among the realities of life is that there is a life after divorce'. If, having regard to reasonable financial commitments undertaken by the husband, there was insufficient left properly to maintain the wife and children, the court could have regard to the social security benefits available to them and avoid making an order which would be 'financially crippling' to the husband. So an order that he should pay £10 per week in respect of each of his three children was reduced to an order for 50 pence each per year.

The Child Support Act 1991

65. To sum up, until the passing of the Child Support Act 1991, the position was as stated by Professor Peter Bromley in his leading textbook on *Family Law* (8th ed, 1992, p 651): "At common law a father is under a duty to maintain only his legitimate minor children and to provide them with food, clothing, lodging and other necessities." Save

for its limited enforcement through other people, however, this duty was always unenforceable in the courts. But it was reinforced and expanded by two kinds of statutory obligation: a private law obligation to make the payments ordered by a court under the various statutes listed earlier; and a public law obligation to reimburse the state for benefits paid for the children.

66. The reality was, however, that in the many separated families who were dependent in whole or in part upon state benefits that obligation was not enforced. Indeed, in many cases it was not translated into an order at all. For those who were not dependent upon state benefits, however, it might remain an important part of their finances after separation. Husbands were often happier to pay maintenance for their children than for their former wives. Nevertheless, it is not surprising that the Government complained, in *Children Come First*, 1990, Cm 1263, vol II, para 1.4.5, that 'The contribution made by maintenance to the income of lone parent families therefore remains too low."

67. The solution chosen has three essential features. First, instead of the quantum of basic child support being left to the variable discretion of the courts, it is worked out according to a fixed formula. The formula has been greatly simplified by the Child Support, Pensions and Social Security Act 2000, but the principle is still the same. Secondly, the task of assessing that support, tracing absent parents and collecting it from them, whether voluntarily or compulsorily, was transferred from the courts to the new Child Support Agency, the successor to the old 'liable relative' branch of the Department of Social Security. Thirdly, the courts were prohibited from making periodical payment orders for the benefit of the child in any case where a child support officer would have jurisdiction to make a maintenance assessment: see the 1991 Act, s 8(1) and (3).

68. It is important to note, however, that neither the private nor the public law obligation, nor the corresponding right of the child to the benefit of that obligation, has been taken away. The public law liabilities, carried over from the old Poor Law, are defined by section 78(6) of the Social Security Administration Act 1992:

> "(a) a man shall be liable to maintain his wife and any children of whom he is the father;

(b) a woman shall be liable to maintain her husband and any children of whom she is the mother."

It is still an offence persistently to refuse or neglect to perform that obligation, as a result of which income-based benefits are paid in respect of a spouse or child: see s 105(1). And the Secretary of State may still apply for an order against such a liable person: see s 106(1).

69. The private law liabilities have also been retained in the new scheme. Unlike the father's common law guardianship of his legitimate children, his common law obligation to maintain them has never been abolished, although the wife's agency of necessity was abolished in 1970. Furthermore, the courts' powers to make the full range of orders for the benefit of children remain on the statute book. Despite the general prohibition in section 8(1) and (3) of the 1991 Act, already referred to, the courts remain able to give effect to the parental obligation in a number of ways:

(i) by making 'top up' orders for periodical payments where the income of the non-resident parent is above a threshold where it may be appropriate for him to pay more than is payable under the formula (s 8(6));
(ii) by making 'school fees orders' for children who are being educated privately (s 8(7));
(iii) by making orders to cover expenses attributable to the child's disability (s 8(8));
(iv) by making lump sum and property adjustment orders for the benefit of children under the Matrimonial Causes Act 1973 or the Children Act 1989. Although these are mainly used to make provision for housing or other capital expenditure rather than as a substitute for periodical maintenance, it has been held that they may be used for maintenance purposes if the child support machinery has not been invoked: see *V v V (Child Maintenance)* [2001] 2 FLR 799;
(v) by making and varying consent orders which embody periodical payments for a child (s 8(5) to (11); Child Maintenance (Written Agreements) Order 1993). Unless the parent with care receives relevant social security payments, this precludes any further application for a child support assessment. Thus parents can, in effect, avoid the intervention of the Child Support Agency by agreeing a nominal sum in periodical payments at the outset and then returning to court for it to be varied: see again *V v V*;

(vi) by making an order for spousal maintenance which includes the costs of supporting the children and will be reduced *pro tanto* if and when a maintenance assessment under the 1991 Act is made (a so-called 'Segal order' named after the judge who invented it);

(vii) by enforcing a maintenance agreement made between the parents for the benefit of their children, although such an agreement cannot prevent a person making an application to the Agency for a maintenance assessment, nor does the court have jurisdiction to vary it if the Agency would have jurisdiction to make an assessment (s 9(3), (4) and (5)).

70. It is obvious, therefore, that the obligation of a parent to maintain his children, and the right of those children to have the benefit of that obligation, is not wholly contained in the 1991 Act. Far from it. The Act left all the previous law intact, merely precluding the courts from using their powers in cases where the Agency was supposed to do it for them. The situation could not be more different from cases such as *Matthews v Ministry of Defence* [2003] 1 AC 1163, where Parliament clearly did *not* intend that the servicemen should be able to seek compensation in tort; instead they were to be limited to their service pension rights. The Child Support Act 1991 contemplates that, as a minimum, children should have the benefit of the maintenance obligation as defined under the formula; but it does not contemplate that children should be limited to their rights under that Act; in appropriate circumstances, they may be supplemented or replaced in all the ways recounted earlier.

71. That being the case, it is clear to me that children have a civil right to be maintained by their parents which is such as to engage article 6 of the European Convention on Human Rights. Their rights are not limited to the rights given to the parent with care under the Child Support Act. The provisions of that Act are simply a means of quantifying and enforcing part of their rights. I appreciate that the line between a procedural and a substantive bar is not always easy to draw: see *Matthews* at para 3. A distinction can readily be drawn between that part of the child support scheme which lays down the formula and machinery for assessing the extent of the basic obligation and that part of the scheme which provides for its enforcement. The formula is a substantive definition of the extent of the basic right. But in my view the continued existence of the wider rights, together with the fundamental objective of the 1991 Act to improve the provision made for children by their non-resident parents, places the collection and enforcement provisions of the Act on the procedural rather than the substantive side of the line. A civil right to be maintained exists and *prima facie* children

are entitled to the benefit of the article 6 rights in the determination and enforcement of that right.

72. The problem is that this is exactly what the system is trying to do. It is trying to enforce the children's rights. It is sometimes, as this case shows, lamentably inefficient in so doing. It is safe to assume that there are cases, of which this may be one, where the children's carer would be much more efficient in enforcing the children's rights. The children's carer has a direct and personal interest in enforcement which the Agency, however good its intentions, does not. Even in benefit cases, where the state does have a direct interest in enforcement, it is not the sort of interest which stems from needing enough money to feed, clothe and house the children on a day to day basis. Only a parent who is worrying about where the money is to be found for the school dinners, the school trips, the school uniform, sports gear or musical instruments, or to visit the 'absent' parent, not only this week but the next and the next for many years to come, has that sort of interest. A promise that the Agency is doing its best is not enough. Nor is the threat or reality of judicial review. Most people simply do not have access to the Administrative Court in the way that they used to have access to their local magistrates' court. Judicial review may produce some action from the Agency, but what is needed is money from the absent parent. Action from the Agency will not replace the money which has been irretrievably lost as a result of its failure to act in time.

73. To sum up, in my view the correct analysis of the situation is this. The children's civil right to the benefit of the parental obligation to maintain them survives the Child Support Act. The extent of that obligation is defined by the Act together with the remaining private law powers. But the Act operates, not only as a limit to the extent of the obligation but also as a limit to its enforcement. This is throughout a private civil right. Even in a benefit case the money paid by the non-resident parent is the children's money. All the Act does is take away the carer's right to enforce payment. That places the enforcement provisions on the procedural side of the line. The parallel with *Philis v Greece* (1991) 13 EHRR 741 is very close. Article 6 is therefore engaged.

74. Indeed, the Act was designed to improve the enforcement of the children's civil right. That must be a legitimate aim. But was it a proportionate response to that legitimate aim to remove the right of the parent with care to enforce the substantive obligation directly? I do not find that an easy question to answer. The comparative study prepared for

this case by Professor Wikeley shows that it is not a necessary feature of comparable child support schemes elsewhere in the common law world. While the child support scheme was under review in the late 1990s, there was considerable debate about whether the courts should regain their power to make the basic award on the application of the parent with care. The formula would remain the same in all cases, but parents who were not receiving means-tested benefits would be able to apply to the courts rather than the Agency to award it. This was, however, rejected after careful consideration by the Government (their final conclusions on the role of the courts can be seen in *A new contract for welfare: Children's rights and parents' responsibilities*, 1999, Cm 4349, chapter 8). One can see why. The Government did not want to create 'one law for the rich and one for the poor'. It would be difficult to apply to the common case where the parent with care is sometimes in receipt of relevant benefits and sometimes not. The families who can be sure that they will never claim such benefits can still, with careful planning and advice, make use of the courts' residual powers to avoid the Agency if that is what they wish to do. Contrary to popular belief, there are many separating parents who are not at loggerheads with one another and who both want to do the best they can for their children. Sensible parents who know that they will have to go on co-operating in bringing up their children for some time to come may well prefer to make their own arrangements. Others may prefer the arm's-length intervention of the Agency, together with its enhanced collection and enforcement powers, to the face to face confrontation in court.

75. This is just the sort of policy choice in a socio-economic field which the courts are usually prepared to leave to the judgment of Parliament. Parliament, with the guidance of Government, is better able to make the decision as to which scheme will most effectively secure the recognition and enforcement of the children's rights generally. It would be difficult to hold that the scheme as a whole is incompatible with the children's rights to a speedy determination and enforcement of their claims.

76. But if I am right that the children's civil rights to be properly maintained by their parents are engaged, it follows that the public authority which is charged by Parliament with securing the determination and enforcement of their rights is under a duty to act compatibly with their article 6 right to the speedy determination and effective enforcement of those rights. Indeed, Mr Jay did not seek to argue that they were not. He accepted, for the sake of the issue before the House, that if article 6 was engaged in this case, the claim under section 7 of the Human Rights Act 1998 for failing to act in compliance

with those rights should proceed. It stands to reason that if the state is going to take over the enforcement of a person's civil rights it has a duty to act compliantly with article 6 in doing so. Just as the courts, as public authorities, have to act compliantly with the Convention rights, so does the Agency. The remedies, however, may be different if they do not.

77. It follows that I have reached the same conclusion, albeit by a slightly different route, as Wall J in the Administrative Court. This comes as no surprise. I would allow this appeal and restore the order that he made.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

78. The critical question for your Lordships' decision is whether Mrs Kehoe's (or indeed her children's) article 6 rights were engaged whilst the Child Support Agency (CSA), pursuant to the Child Support Act 1991 (the 1991 Act), were charged with the enforcement of her ex-husband's assessed maintenance obligation. Did she (or the children) have a civil right, akin to the engineer's undoubted right to his fees in *Philis v Greece* (1991) 13 EHRR 741, thwarted here as there by an enforcement scheme which denied to the claimants themselves any direct access to the courts? In my judgment she did not.

79. Having now had the advantage of reading in draft the opinions of all my noble and learned friends, I find myself in agreement with the majority. The 1991 Act introduced, for all those voluntarily or compulsorily seeking the CSA's help, an entire scheme, substituting for whatever rights the parent with care (or, indeed, qualifying children) might otherwise have had, the benefit of the scheme itself (with, necessarily, any incidental dis-benefits). The only right now enjoyed by those in Mrs Kehoe's position is to look to the CSA for the proper discharge of its public law obligations under the statute, a right which of course is itself sustainable under the courts' supervisory jurisdiction.

80. In short, I remain unpersuaded that Mrs Kehoe (or her children) retained any right to maintenance payments here such as to engage article 6 and thereby allow her to complain of procedural failures on the part of the CSA in its attempt to enforce payment by her ex-husband. I too would dismiss this appeal.