'Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of the child':¹ Barring in the best interests of the child?

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In Re P (Adoption: Unmarried Couple) [2008] UKHL 38, [2008] 2 FLR 1084 the House of Lords held that a bar on adoption by unmarried couples is unlawful discrimination contrary to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). In R v Secretary of State for Health and Kent County Council, ex p B [1999] 1 FLR 656, the High Court found that a bar on fostering by convicted sex offenders is lawful. In what follows, I argue that the reasoning in Re P applies mutatis mutandis to individuals such as those in ex p B prevented from adopting or fostering under vetting and barring schemes, the most prominent being the scheme introduced by the Safeguarding Vulnerable Groups Act 2006. I first consider various ways in which such individuals could bring themselves within the grounds protected by Article 14, and I argue that ‘sex offender’ itself could be a protected status, because sex offenders have the personal characteristic of ‘risk’. I next analyse whether the bar on adoption and fostering, and vetting and barring schemes in their entirety, would fall within the ambit of a substantive Article of the ECHR, and I conclude that the whole Safeguarding Vulnerable Groups Act scheme would come within the scope of Article 8. Finally, I consider whether the bar on adoption and fostering by risky individuals is objectively justified, and I conclude that the argument that convinced the House of Lords in Re P applies equally in this context: it is impermissible to turn a reasonable generalisation into an irrebuttable presumption for individual cases, given the duty to treat the best interests of the child as paramount.

INTRODUCTION

In Re P (Adoption: Unmarried Couple),² a case emanating from Northern Ireland, a heterosexual couple who had been living together for a number of years were ineligible to adopt the woman’s child because they were unmarried. The majority of the House of Lords held that it was inconsistent with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) ‘for a couple to be excluded from consideration as adoptive parents of a child

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on the ground only that they are not married’.3 While the state was entitled to take the view that it is generally better for children to be brought up by married couples, the prohibition was ‘based upon a straightforward fallacy, namely, that a reasonable generalisation can be turned into an irrebuttable presumption for individual cases’.4 Social legislation might on occasions require the drawing of ‘bright lines’ for administrative or other reasons, but in this situation there was no rational basis for having a bright line rule, because adoption law required the court to consider the best interests of the child on a case-by-case basis.

A decade earlier in R v Secretary of State for Health and Kent County Council, ex p B,5 the grandparent applicants fared less well. Here the grandparents were barred from fostering their grandchildren because the grandfather was a convicted sex offender. The applicants argued that this bar was ultra vires because it was inconsistent with the principle that the best interests of the child are paramount, but the High Court responded that the prohibition was directed to furthering children’s welfare in general, and the Secretary of State was entitled to prefer the good of the many to the detriment of the few. While decision makers had a duty to act in the best interests of children, this duty was inevitably subject to the statutory framework.

There are glaring differences, but also remarkable similarities, between these cases. In both cases, the applicants were barred from adopting or fostering respectively on the basis that a group to which they belonged posed a particular risk to children’s well-being. In each case, the generalisation about the group was accepted, but in only one case was the group generalisation determinative. The biggest legal difference between the cases is the introduction of the Human Rights Act 2000 during the interlude. Accordingly, in what follows, after outlining vetting and barring law in relation to adoption and fostering, I consider whether the grandfather in ex p B, and the many other people prohibited from interacting with children on the ground that they pose a risk to children’s safety, could pray in aid human rights in general and Re P in particular.

The issue in Re P was whether the Adoption (Northern Ireland) Order 1987,6 which prohibited adoption by unmarried couples, breached the protection against discrimination guaranteed by Article 14 of the ECHR. Article 14 does not prohibit all discrimination, but applies only to discrimination on a specified list of grounds followed by the open-ended phrase, ‘or other status’. The specified list of grounds do not include marital status, so the initial question that the House of Lords needed to determine was whether Article 14 of the ECHR covered discrimination against unmarried couples. The House of Lords found little difficulty in holding that being unmarried was a status included within the phrase ‘or other status’, and therefore protected.

This would be a much more challenging hurdle for an individual barred because of the risk he posed to children’s safety, as at first glance he would seem to have excluded himself because of his own previous misbehaviour. However, I consider below three possible routes for such an individual to bring himself within the protected grounds of discrimination, like the couple in Re P. First, I consider the circumstances in which one of the expressly listed grounds in Article 14, namely ‘political or other opinion’, could directly apply. Secondly, I discuss some scenarios in which a barred person could argue that his misconduct stemmed from a protected ground, drawing on

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3 Ibid, at p 179, per Lord Hoffmann.
4 Ibid, at p 184, per Lord Hoffmann.
5 [1999] 1 FLR 656.
6 No 2203 (N.I. 22), Art 14.
the precedent of Thlimmenos v Greece. After examining these two arguments, both of limited applicability, I analyse whether the status of sex offender could itself be a protected status under Article 14, and I conclude that it could be, because the sex offender has the personal characteristic of ‘risk’.

Article 14 is also limited in a second way, in that it does not seek to prevent discrimination in any area, but rather to ensure that ‘enjoyment of the rights and freedoms’ guaranteed elsewhere in the ECHR are secured without discrimination. This has been interpreted as requiring that the discrimination falls within the ambit of an ECHR right. In Re P, the House of Lords had even less difficulty with this limitation, as the Crown had conceded that the right to adopt a child fell within the ambit of Article 8 of the ECHR, which protects inter alia the right to respect for private and family life. It follows that the grandfather in ex p B would likewise be able to show that his claim fell within the ambit of Article 8. The more intricate question, which I discuss further below, is whether vetting and barring schemes in their entirety might come within the scope of the right to respect for private life.

The most substantial question in Re P was whether this particular example of differential treatment of the unmarried was justified. The argument set out above convinced the House of Lords that it was not: eligibility to adopt is only the first step in a process that merely opens the door to thorough scrutiny, therefore the door should be thrown open as wide as is reasonably possible. This would be the final stage of the argument for the grandfather and his ilk, a stage I discuss in the final section of the article. I argue that the reasoning in Re P applies mutatis mutandis to the grandfather in ex p B, addressing objections based on the concrete differences between unmarried couples and those individuals whose previous behaviour suggests that they pose a risk to children’s safety. I conclude that not only the absolute bar on adopting and fostering but also discretionary decision-making under the Safeguarding Vulnerable Groups Act 2006 (SVGA) is unjustified discrimination contrary to Article 14 of the ECHR.

ADOPTION, FOSTERING AND RISK

In R v Secretary of State for Health and Kent County Council, ex p B, the two young children had been living with the grandparents under a care order, with a care plan that envisaged the arrangement continuing long term, the parents being unable to care for the children. However, the grandfather had a conviction for unlawful sexual intercourse with a 15 year old girl, an offence that he had committed 36 years previously at the age of 29. He was prevented from continuing to foster by the introduction of the Children (Protection from Offenders) (Miscellaneous Amendments) Regulations 1997.

The Children (Protection from Offenders) (Miscellaneous Amendments) Regulations 1997 have now been replaced in relation to adoption by Regulation 23 of the Adoption Agencies Regulations 2005 (AAR), made under the Children Act 1989 and Adoption and Children Act 2002, and in relation to fostering by Regulation 27 of the Fostering Services Regulations 2002 (FSR), made under the Children Act 1989 and Care Standards Act 2000. Regulation 23(2) of the AAR and Regulation 27(5) of the FSR provide that the adoption agency or fostering service provider is barred from considering the applicant eligible to adopt or foster if he or any member of his household aged 18 or over has been convicted or cautioned, in the case of cautions so long as the caution was accompanied by an admission of guilt, in relation to a wide

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7 Thlimmenos v Greece (App No 34369/97) [2000] ECHR 34369/97.
9 SI 1997/2308, made under Children Act 1989, s 23(2)(a) and Adoption Act 1976, s 9.
range of offences, which include the grandfather’s offence of unlawful sexual intercourse with a girl below the age of consent.10

As is well known, the SVGA 2006 is poised to radically reform the vetting of those whose paid or voluntary work brings them into contact with children.11 The Act, pioneered by the previous administration, creates the Independent Safeguarding Authority (ISA),12 with responsibility for establishing and maintaining the ‘children’s barred list’,13 that is, a list of those prohibited from carrying out ‘regulated activities’, which encompass a wide range of activities involving children. These activities include fostering but not adoption,14 because adoption falls within the category of family or personal relationships, excluded from the purview of the SVGA scheme.15

There are three routes to inclusion in the children’s barred list: automatic inclusion with no representations,16 automatic inclusion subject to consideration of representations,17 and discretionary barring,18 which is discussed further below. Automatic inclusion with no representations applies only to those who have been found to have committed a sexual offence against a child of the utmost seriousness when they were over the age of 18, the paradigm being child rape.19 Automatic inclusion subject to consideration of representations is triggered by a much wider range of offences, which include the grandfather’s offence of sexual intercourse with a minor, as well as a number of other offences that are neither sexual nor committed against a child.20

Presumably in the light of ex p B itself, in relation to both current and proposed fostering regimes but not adoption, there is an exception to the effect that a barred person may act as foster parent if either the barred person or a member of his household is a relative of the child or the barred person is already acting as a foster parent, so long as the fostering service provider is satisfied that the child’s welfare requires this result.21 Under the SVGA schema, if the grandfather’s representations fell on deaf ears leading him to be barred then this exception would allow him still to foster,22 but the proposed regime would prohibit him from undertaking any other regulated activity, including accompanying his grandchildren on any of their school trips.23

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10 AAR 2005, reg 23(2) and FSR 2002, reg 27(7).
11 SVGA 2006 establishes parallel provisions in relation to vulnerable adults, which are beyond the scope of this article.
12 Ibid, s 1.
13 Ibid, s 2(1)(a).
14 Ibid, s 53 and Sch 4.
16 SVGA 2006, Sch 3, para 1.
17 Ibid, Sch 3, para 2.
22 See below.
23 See below.
Following the recent General Election, the future of the SVGA scheme is in question. On 15 June 2010, the Home Office announced that registration for new employees and those moving job, which had been due to come into effect on 26 July 2010, would be halted, pending a review of the operation of the vetting and barring scheme. In the meantime, the ISA will continue to make barring decisions and maintain the children’s barred list, a role that it has been performing since January 2009. The terms of the review have not yet been announced.24

COULD A BARRED PERSON BRING HIMSELF WITHIN THE GROUNDS ON WHICH DISCRIMINATION IS PROHIBITED?

As outlined above, Article 14 of the ECHR does not prohibit discrimination for any reason but only discrimination on certain specified grounds, as well as, by way of the open-ended but limited final clause, ‘other status’. In Re P, the House of Lords had little difficulty finding that being unmarried was covered by the catch-all, mainly on the basis that since being married was clearly a status, being unmarried must also be a status. In contrast, someone in the position of the grandfather in ex p B would seem to have excluded himself by way of his own prior conduct, at first glance an insurmountable obstacle to bringing a successful claim under Article 14.

Political or other opinion

The only argument that would bring a barred person directly within any of the expressly listed grounds in Article 14 would be that he was being discriminated against because of his opinion. This may at first sight appear a startling argument, but it is important to appreciate that, despite the grandfather’s previous offence, under the SVGA regime a barred person will not necessarily have previous convictions or cautions, or even have done anything. For the third route to inclusion, discretionary barring, the ISA must include an individual in the barred list based on as little as their being satisfied that the individual may put a child at risk of harm, if it appears to them appropriate to include the person in the list.25 The Guidance Notes for the Barring Decision Making Process make plain that this does not necessarily depend on past conduct: ‘The initial action is to determine . . . whether the case indicates that a person has . . . engaged in “relevant conduct” or, if there is no suggestion of relevant conduct, whether there is anything to suggest that a person may harm or in any way cause or put at risk of harm a child’.26 In such a case among others, the Guidance recommends use of the ‘Structured Judgement Procedure’,27 which focuses on risk factors linked to future harm, divided into four broad areas, one of which concerns ‘[t]hinking, attitudes and beliefs’.28

Risky thinking under this heading includes the beliefs that ‘children can consent to sex, that it is not harmful, that children can enjoy sex or any other attitude that would endorse sexual behaviour between adults and children’,29 described as ‘child abuse supportive beliefs’.30 These are all legal, if not legitimate, opinions,31 repression of

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28 Ibid, p 27.
29 Ibid, p 27.
which is a danger to be balanced against the dangers of the views themselves. Nathaniel Pallone tells the cautionary tale of a meta-analysis of the research on the effects of child sexual abuse, published in the *Psychological Bulletin* by the American Psychological Association in 1998, that argued that the effects of such abuse might have been exaggerated by clinicians, researchers and the press. He reports that, following press misinterpretation of this research, ‘the APA backpedaled [sic] so rapidly as to make the terms “freedom of inquiry” and “scientific truth” seem like yesterday’s empty political slogans.’

Another risky attitude according to the Structured Judgement Procedure is the belief that one is entitled to ‘act outside of recognised safeguarding advice/guidance.’ The word ‘entitled’ is strange here (as it is elsewhere in this section of the Guidance), since its strong legal connotation can literally mean only that the person was mistaken as to the legal position. But to make sense, the Guidance must be interpreted as referring to a person’s belief that he has the right, in some sense other than legal, to ignore current advice. Given the respectable view that current safeguarding advice inhibits normal adult-child interactions, the opinion that it is right, if not that one has the right, to act outside advice seen as damaging is more than defensible.

Where the ISA bars an individual as a result of his risky beliefs, there is a plausible argument that he could bring himself within Article 14 of the ECHR because he would have been discriminated against on the ground of his ‘political or other opinion’.

### Misconduct Stemming from a Protected Ground

An applicant cannot generally complain of different treatment that is a direct result of his own prior misconduct. This proposition is supported by *Gerger v Turkey*, in which the applicant complained that he was being treated less favourably in relation to automatic parole because he had been convicted of a terrorist offence rather than under the ordinary law. The European Court of Human Rights (ECtHR) held that ‘the distinction is made not between different groups of people, but between different types of offence, according to the legislature’s view of their gravity. The Court sees no ground for concluding that that practice amounts to a form of “discrimination” that is contrary to the Convention’. However, Strasbourg case law suggests that an applicant can complain of different treatment that results from even a criminal conviction, so long as the conviction stems

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37 Ibid, at para [69].
from one of the grounds protected under Article 14. In *Thlimmenos v Greece,* the applicant was barred from becoming a chartered accountant because he had previously been convicted of a felony. Specifically, he had been convicted of insubordination as a result of his refusal to wear military uniform, such refusal stemming from his religious beliefs. The court found for the applicant, summarising his argument as follows: ‘In essence, the applicant’s argument amounts to saying that he is discriminated against in the exercise of his freedom of religion . . . in that he was treated like any other person convicted of a felony although his own conviction resulted from the very exercise of this freedom’. The court did not expressly address the question of what status was being protected, but it can only have been Thlimmenos’ religion, one of the grounds expressly listed in Article 14. Following the reasoning in *Thlimmenos,* if the misconduct leading an individual to be barred from adopting or fostering stemmed from a status protected under Article 14 then the individual could rely on this protected status to bring the barring within the purview of Article 14.

There are a number of ways in which such misconduct could stem from a protected status. One example that springs to mind, following the discussion in the previous section, is the applicant’s political or other opinion: for example, if a campaigner for a lower age of consent were convicted of an obscenity offence, leading him to be barred from adopting and fostering, he could argue that the conviction and therefore the discrimination stemmed from his political or other opinion. Another obvious route would be misconduct stemming from the individual’s (homo)sexual orientation, one of the statuses protected under the catch-all ‘other status’. There is no doubt that discrimination against (lesbians and) gay men has been erased from the face of the criminal statute books; nor is there any doubt that the ISA Guidance is highly attuned to avoidance of such discrimination, making plain that ‘[t]he general rule is that homosexual and heterosexual behaviour is treated in the same way for the purposes of making a barring decision’. Nevertheless, as Aaron Baker discusses, there is also little doubt that gay men are still convicted of behaviour in which heterosexuals do not often engage and for which, when they do engage, heterosexuals are not generally prosecuted or convicted. A final, more modern, example could be an individual convicted for abuse of trust by engaging in sexual activity with a 17 year old, with whom he is cohabiting or perhaps in a stable relationship: given that section 23 of the Sexual Offences Act 2003 makes it a defence to this charge that the individual is married to or in a civil partnership with the young adult, in these circumstances the applicant could argue that his conviction and subsequent different treatment stemmed from his (lack of) marital status, which as we have seen is protected following *Re P.*
Other status

Personal characteristic

In circumstances where the above arguments do not pertain, the barred person would need to bring himself within the catch-all ‘other status’. We thus need to determine the meaning of these words at the end of Article 14. Because this is not a straightforward matter, in this section I consider the meaning of ‘other status’ in the abstract, before turning in the next section to the question of how ‘other status’ might apply to barred individuals.

In Kjelsden v Denmark, the ECtHR defined ‘other status’ as meaning ‘personal characteristic’, and this definition was unanimously adopted by the House of Lords in R (S and Marper) v Chief Constable of South Yorkshire Police [2004] UKHL 39.

It is true that there are rumblings that the formulation in Kjelsden v Denmark no longer represents the Strasbourg position. According to Clare Ovey and Robin White, showing that discrimination is based on a personal characteristic is not a formal requirement for Article 14 but simply makes the task of bringing the discrimination within Article 14 a little easier for the applicant. More profoundly, Lord Neuberger has commented obiter that the ECtHR does not always consider the ground of the discrimination as a free-standing question but instead tends to deal with the overall case more holistically, concentrating on the question of whether the discrimination is justified and glossing over the question of the comparator. Moreover, certain Law Lords have voiced reservations about the test. Despite these express reservations, in a string of later cases, the House of Lords have made plain that they are not prepared to depart from the ‘personal characteristic’ tag, given their decision in Marper. Perhaps Lord Bingham best summed up the judicial view with his admission in R (On the Application of Clift) v Secretary of State for the Home Department [2006] UKHL 54 that he found the elusive test of personal characteristic hard to apply, closely followed by his comment in R (Countryside Alliance and Others) v Attorney-General and Another [2007] UKHL 52 that the ‘expression “other status” is clearly incapable of precise definition [so] it may be hard to formulate any test which is more precise’. It is quite clear that, as far as the United Kingdom courts are concerned, at least for the moment ‘other status’ means ‘personal characteristic’.

45 (1976) 1 ECHR 711, at pp 732–733. See also Kafkaris v Cyprus [2008] ECHR 21906/04, at para [160].
46 [2004] 1 WLR 2196, at p 2213.
50 Ibid, at p 328; R (On the Application of Clift) v Secretary of State for the Home Department [2006] UKHL 54, [2007] 1 AC 484, at p 500, per Lord Hope.
52 [2007] 1 AC 484, at p 496.
53 [2008] 1 AC 719, at p 748.
Personal characteristic not historical fact. So much is straightforward, but ‘deciphering the limits to “personal characteristic[s]” is not an easy exercise’. In R (S and Marper) v Chief Constable of South Yorkshire Police, the applicants had been arrested but never convicted, and the issue was whether retention of their DNA and fingerprints constituted discrimination. Lord Steyn, speaking for a unanimous House of Lords, counterpoised ‘historical fact’ to ‘personal characteristic’ and concluded that this difference in treatment between those who had and had not been investigated for a criminal offence reflected the former, and was unrelated to the latter.54

In R (On the Application of RJM) v Secretary of State for Work and Pensions [2008] UKHL 63, Lord Neuberger gave the closely related reformulation that ‘the concept of “personal characteristic” (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him’.56 Likewise, in R (Countryside Alliance and Others) v Attorney-General and Another, Lord Hope, with the agreement of the whole House of Lords, declined to find that being a fox hunter was a personal characteristic because:

‘it is the activity of hunting with hounds for sport that has been singled out for differential treatment, not participation in it by a particular sort of people or by people having a particular characteristic . . . The real reason for it lies in the nature of the activity, not in the personal characteristics of the many people of all kinds and social backgrounds who participate in hunting.’57

This was also the reason that, in R (On the Application of Clift) v Secretary of State for the Home Department, Baroness Hale, and Lord Hope with some reluctance, declined to find a personal characteristic in Clift’s position as a prisoner serving a determinate sentence of more than 15 years and thereby denied the right to be released from custody on the recommendation of the Parole Board which he would have had if he had been serving either a determinate sentence of less than 15 years or a life sentence. The reason for the differential treatment was what Clift had done, not who or what he was.58 Clift is also authority for the proposition that a personal characteristic cannot be defined purely with reference to the differential treatment which the applicant has experienced.59 These definitions of personal characteristic suggest a fortiori that an applicant cannot generally complain of discrimination that is a direct result of his own prior misconduct.60

Nuanced Approach. However, these interpretations of ‘personal characteristic’ have proved contentious in both the domestic and the Strasbourg arenas. At the domestic level, in R (On the Application of RJM) v Secretary of State for Work and Pensions, the House of Lords held that the applicant’s exclusion from disability benefit purely on the basis that he was homeless, was discrimination contrary to Article 14, the decision that ‘homelessness’ was an ‘other status’ eliciting a nuanced approach to ‘personal characteristic’ from Lord Walker:

55 [2004] 1 WLR 2196, at p 2214. The applicants were later successful before the ECtHR on other grounds: S and Marper v United Kingdom (Applications 30562/04 and 30566/04) S and Marper v United Kingdom (Applications 30562/04 and 30566/04) (2008) 48 EHRR 1169.
57 [2008] 1 AC 719, at pp 761–762.
58 [2007] 1 AC 484, at p 502, per Lord Hope, and p 505, per Baroness Hale.
59 Ibid, at pp 496 and 501.
60 See above.
‘“Personal characteristics” is not a precise expression and to my mind a binary approach to its meaning is unhelpful. “Personal characteristics” are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality . . . Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with whom they are; but they may still come within art 14 . . . I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope).’

Lord Neuberger agreed with this passage, emphasising that whether or not a condition was a matter of choice was not of much, if any, significance in determining whether it fell within ‘other status’ in Article 14. In similar vein, Lord Hope emphasised in R (Countryside Alliance and Others) v Attorney-General and Another that he regarded as close to the borderline the decision in Clift that being a prisoner with a determinate sentence of more than 15 years did not constitute a personal characteristic. More generally, the House of Lords have commented that the grounds on which discrimination is impermissible should be interpreted generously or liberally.

There is also reason to doubt that the dichotomy between ‘historical fact’ and ‘personal characteristic’ is borne out by Strasbourg case law. Most strikingly, in Sidabras and another v Lithuania, the ECtHR found discrimination contrary to Article 14 of the ECHR in relation to a domestic law in Lithuania that barred the applicants from holding a range of jobs in both the public and private sectors solely on the basis that they were former KGB officers, undoubtedly both a historical fact and something that they had done rather than something that they were. This case among other factors has led John Wadham et al to describe the dichotomy between ‘personal characteristic’ and ‘historical fact’ as ‘an excessively narrow and unsustainable approach to the definition of “other status”’.

**Tiered Scrutiny.** Lord Walker concluded his nuanced discussion of ‘personal characteristic’ in R (On the Application of RJM) v Secretary of State for Work and Pensions by suggesting that the ‘more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify’. Drawing on ECtHR pronouncements that very weighty reasons are necessary to justify discriminating against people on particularly sensitive grounds, the House of Lords has taken up the idea that a more flexible approach to ‘personal characteristic’ implies different

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63 [2008] 1 AC 719, at p 761.
66 (App Nos 55480/00 and 59330/00) [2004] ECHR 55480/00.
levels of scrutiny. In *R (On the Application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, Lord Hoffmann considered it necessary to distinguish between ‘those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification’.70 He continued:

‘There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds . . . That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (eg on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government. There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other . . . But there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy.’71

Ovey and White tie in this tiered scrutiny with their disagreement that there is any need to show a personal characteristic, suggesting that where the discrimination is based on something other than a personal characteristic, it will be easier for the state to justify.72

**Could a Barred Person Bring Himself within ‘Other Status’?**

**ISA Character Assessment as Personal Characteristic.** As noted above, although in many, probably most, cases there will be some prior behaviour, in some discretionary barring cases the person may have done nothing – there may be no historical fact. Such cases will be decided using the ‘Structured Judgement Procedure’ which divides risk factors into four broad areas, one of which has previously been considered. The other three areas are as follows: first, harmful interests or intrinsic drives, which include inter alia a sexual preference for children and excessive or obsessive interest in sexual activity; secondly, difficulties in managing relationships, for example severe emotional loneliness, the inability to manage or sustain emotionally intimate relationships with age appropriate adults, and a strong sense of emotional congruence with children; thirdly, difficulties in self management and lifestyle, including poor coping skills and the presence of an impulsive, chaotic or unstable lifestyle.73

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70 Ibid, at p 182.
This sounds like a deep judgment on the person himself, never mind his personal characteristics. In the context of US civil commitment laws, Eric Janus has warned: ‘[o]nce a person is caught in the spotlight . . . everything the individual says or does is subject to interpretation, woven into the professional’s diagnosis and prediction’,74 with subtle acts taking on larger meanings.75 The ISA is making a judgment on those ‘most personal characteristics that are innate, largely immutable, and closely connected with an individual’s personality’76 that Lord Walker placed at the middle of the concentric circles. If homelessness is a state of being not an activity,77 then a fortiori the ISA character assessment.

Construction of Sex Offenders as Personal Characteristic. It would be possible to extend this line of argument to those barred individuals who have previously misbehaved, especially where this involved a sexual transgression concerning children, the paradigm case. ‘Once a paedophile, always a paedophile’ is a popular view,78 and adopting this view would allow the argument that committing sexual offences is part of the individual’s identity and therefore a personal characteristic. But this argument is both unsupported by the evidence and politically unwise. It is evidentially unsupported in that sex offenders have relatively low reconviction rates,79 particularly compared with other types of offenders,80 of about 20%–25%.81 It is

75 E. Janus, Failure to Protect: America’s Sexual Predator Laws and the Rise of the Preventive State (Cornell University Press, 2006), at p 34.
politically unwise for three reasons: first, it places the paedophile ‘outside society, beyond reform, redemption and rehabilitation’;\(^8\) secondly, it reinforces the current tendency that ‘men who sexually abuse children are routinely homogenised (as “paedophiles”) in a way which negates consideration of diversities between offenders’;\(^8\) thirdly, it allows sex offenders to escape moral responsibility for their actions. The better view is that having committed a sexual offence against a child is inherently a matter of historical fact, not a personal characteristic.

A less reactionary argument is that the contemporary response to sex offenders has turned ‘sex offender’ into a personal characteristic. Current attitudes to sexual offences ‘have served within the field of the popular knowledge, the press and official government responses (in the form, for example, of shifts in and amendments to criminal justice policy) to constitute the paedophile as a distinct . . . social and legal subject in need of regulation, discipline and surveillance’.\(^8\)

Looking first at ‘popular knowledge [and] the press’, sex offenders have been ‘branded as demons or folk devils’.\(^8\) This response carries the classic hallmarks of ‘moral panic theory’, where public fears and anxieties are projected onto a stigmatised group.\(^8\) The level of media and popular approbation makes the identity of sex offender solid and fixed,\(^8\) and thereby a personal characteristic for the purposes of Article 14.

Turning to ‘official government responses’, a ‘panoply of legislation pertaining to sexual offending has been enacted’.\(^8\) Dangerous sex offenders, along with violent

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offenders, may be given an indeterminate sentence of imprisonment. After release, sex offenders must, in person and in some cases for the rest of their life, regularly notify the police of a range of personal information including their home address and any foreign travel plans in detail. They can be subject to restrictions on otherwise lawful activity, by way of Sexual Offences Prevention Orders, Foreign Travel Orders, and Risk of Sexual Harm Orders. Police may enter and search sex offenders’ homes for the purpose of assessing risk. Finally, as we have already seen, in many cases sex offenders are barred from adopting, fostering, working or volunteering with children. This is but a selection of the more significant recent measures: the SVGA itself is only ‘the most recent in a long line of legislative measures on pre-employment vetting’. There is no doubt that a vast legal framework singles out sex offenders for special treatment.

But there is far more that is special about this framework than its size. Regulation of sex offenders makes ‘past harmful behaviour only a contingent feature of risk’, detaching crime from sanction in three ways. First, as we have seen, there may be no crime at all. Secondly, the sanction may be out of all proportion with the crime: what is important in this framework is the significance of the crime in terms of future risk, not past wrongdoing. Thirdly, the framework applies most vigorously to those who have served their sentence: sex offender laws have destroyed the principle that a prisoner pays his debt by serving his sentence and then may re-enter society on equal terms; these laws ‘create a reduced-rights zone, an alternate system of justice, for a group of degraded outsiders’. A legal identity of sex offender has been constructed, hallmarked by the inapplicability of liberal legal norms. This legal identity is far more self-defining than Clift’s categorisation as a prisoner serving a determinate sentence of more than fifteen years, described by Lord Hope as close to the borderline.

Risk as Personal Characteristic. Moreover, the severing of the link between punishment and crime means that sex offender cases are not about what the person has done but about who he is — ‘what his character is, what his “propensities” are, what “risk” he poses’. Risk, not guilt, is the basis for placing sex offenders into the ‘reduced-rights zone’. Assessing risk is based on assigning individuals to groups in which the probability of exhibiting the requisite behaviour can be measured; attaching the risk to the individual creates an essential instead of coincidental tie between the individual and the group. In other words, probabilistic calculations about populations

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89 Criminal Justice Act 2003, s 227.
90 Sexual Offences Act 2003, s 82.
91 Ibid, s 104.
92 Ibid, s 114.
93 Ibid, s 123.
94 Ibid, s 96B.
97 Ibid, at p 10.
98 See above.
100 E.S. Janus, Failure to Protect: America’s Sexual Predator Laws and the Rise of the Preventive State (Cornell University Press, 2006), at p 33.
are used to justify deterministic conclusions about individuals.102 Sex offender laws ‘reify risk, make it concrete, and ascribe it to the individual . . . He is dangerous, he has risk’.103 Ultimately, the Article 14 personal characteristic that the sex offender has is ‘risk’; the fact that the sex offender is unable to shake off this characterisation makes this personal characteristic one of the inner circles of identity.

According to this argument, ‘the laws are based on the notion that the risky person is different at some essential level – or, to put it another way, that he is a different kind of person . . . risk [is] the real marker of otherness’.104 The paradox is that regulating through risk also works against the notion of otherness. On the one hand, risk thinking is amenable to the identification of particular risky individuals, the public and political demand for precautionary measures leading to strategies to identify and exclude the ‘potentially monstrous’ exceptional case.105 On the other hand, because risk, unlike guilt, exists on a continuum, risk thinking blurs the distinction between the monstrous and the commonplace. This is well illustrated by the core assumption behind the SVGA scheme that all adults should be presumed monstrous unless and until checked, the main justification the incoming Home Secretary gave for halting the scheme pending a review.106 Although Nikolas Rose is no doubt right that both ideas of risk can co-exist, the vetting and barring scheme in particular suggests that there is a pull away from the creation of a discrete outsider group.

Such a pull is perhaps unsurprising: ‘[t]he option of acting in the present in order to manage the future rapidly mutates into something like an obligation’.107 Therefore, when strategies of exclusion fail to prevent rare tragedies, as is inevitable, the tendency is to lower the threshold and widen the net.108 Because the most frightening category of sex offenders is those who have never been detected, the state replaces measures tailored to assess risk in particular individuals with blanket mechanisms that treat the whole populace as potentially dangerous, the paradigm being the vetting and


104 Ibid, at p 101.


barring scheme. These tendencies to extend and expand are exacerbated by the precautionary nature of contemporary culture.

Even so, the current halting of the SVGA scheme suggests that there is a push as well as a pull, that the tendencies to extend and expand have an end point: ‘One can see how this arbitrary and inconsistent net-widening has transpired, because the scheme is vulnerable to an endless series of “what ifs?” always and necessarily modified by the knowledge that there are some levels of state interference and control that simply will not be tolerated and cannot be policed or enforced’. The idea of a particularly risky sub-group thus remains a strong thread in current policy. Society has created ‘the category of the paedophile’, to such an extent that ‘the paedophile appears, perhaps more so than any other offender, to be a man who speaks the Truth of his being through his crime(s)’.

Although this constructionist argument is less politically dangerous than the essentialist argument rejected above, its drawback is that recognition of the sex offender as a status within Article 14 further reinforces and reifies the category. Still, rather than uniquely affecting the category of sex offender, this danger inflicts even the traditional discrimination categories of race and sex. Accordingly, I maintain that within the purview of Article 14, being a sex offender is a personal characteristic, though there is nothing natural, inherent or inevitable about this categorisation.

**COULD A BARRED PERSON BRING HIMSELF WITHIN THE AMBIT OF ARTICLE 8 OF THE ECHR?**

As far as adopting or fostering a child is concerned, there is no difficulty with the requirement that the barred person bring himself within the ambit of Article 8. As noted above, in *Re P* it was conceded that adopting a child fell within the ambit of the right to respect for family life in Article 8, and there is no reason that this would not extend to at least some forms of fostering as well.

Outside the context of family life, some instances of vetting and barring would fall within the ambit of other ECHR Articles, most obviously Article 10, which protects freedom of expression. As discussed above, in *Thlimmenos v Greece*, the applicant was barred from becoming a chartered accountant because he had previously been convicted of a felony that stemmed from his religious beliefs. On these facts, the court held that the discrimination fell within the ambit of Article 9, which protects freedom of

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113 Ibid, at p 230.

114 I am grateful to Daniel Monk and Peter Ramsay for this point.


religion. If an individual were barred from activities with children as a result of misconduct stemming from the exercise of his freedom of expression then, following Thlimmenos, this different treatment could fall within the ambit of Article 10.117

More broadly, it is arguable that the entire SVGA vetting and barring scheme would fall within the ambit of Article 8. While the ECHR provides no general protection of the right to work or volunteer, two recent cases lend support to this possibility.

In Sidabras and Another v Lithuania, the ECtHR held that discrimination against former KGB officers fell within the ambit of Article 8, on the basis that ‘a far-reaching ban on taking up private-sector employment does affect “private life”’.118 The Court found that the ban 'affected the applicants’ ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life.'119

In R (Wright and Others) v Secretary of State for Health and another [2009] UKHL 3,120 the applicants were registered nurses who had been provisionally placed on, but eventually removed from, the Protection of Vulnerable Adults List, laid down under Part VII of the Care Standards Act 2000, the precursor to the ‘adults’ barred list’ under the SVGA 2006. In a judgment with which the rest of the Lords agreed, Baroness Hale declared that provisional listing pending a judicial hearing was incompatible with the applicants’ rights under Articles 6 and 8 of the ECHR. Her view on Article 8 was as follows:

‘There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life and others for whom it may not. The scope of the ban is very wide, bearing in mind that the worker is placed on both the POVA and the POCA [Protection of Children Act] lists. The ban is also likely to have an effect in practice going beyond its effect in law. Even though the lists are not made public, the fact is likely to get about and the stigma will be considerable. The scheme must therefore be devised in such a way as to prevent possible breaches of the article 8 rights.’121

The applicants in Sidabras were prevented from entering a wide range of professions including law, security, banking and teaching, for a period of 10 years from the introduction of the ban.122 In Wright, Baroness Hale explained that the list applied to any care worker, defined extremely widely so as to cover not only professional carers, such as registered nurses, but people employed in a range of capacities in care homes. The scheme applied to both paid and unpaid work, so that not only professionals but also voluntary workers who regularly visited care homes would be included.123 The process of investigation could take months, during which time the care worker would be provisionally listed and therefore unable to work in the field of care.124

118 [App Nos 55480/00 and 59330/00] [2004] ECHR 55480/00, at para [47].
119 Ibid, at para [48].
120 [2009] AC 739.
121 Ibid, at p 754.
122 [App Nos 55480/00 and 59330/00] [2004] ECHR 55480/00, at para [24].
124 Ibid, at p 746.
The restrictions imposed by the SVGA are at least as profound as those in either Sidabras or Wright. The former Secretary of State for Children, Schools and Families, Ed Balls, estimated that over 9m people would need to register with the ISA – essentially anyone carrying out ‘regulated activity’, that is anyone whose work or volunteering brings them into frequent, intensive or overnight contact with children.125

The reach of the scheme is likely to be less extensive as a result of the currently planned review, intended ‘to allow the government to remodel the scheme back to proportionate, common sense levels.’126 Nevertheless, those actually placed on the children’s barred list are even more restricted than is suggested by the contours of registration. Only frequent, intensive or overnight regulated activity attracts the initial duty to register, but if an individual has already been barred then it is a serious criminal offence for him to undertake any regulated activity, even as a one-off: so for instance, a barred parent commits a criminal offence if he accompanies, or tries or offers to accompany, his child’s class on a school day trip.127 This restriction is so profound as to have necessitated the creation of a special defence for emergency situations, allowing for example a barred doctor to provide first aid to a child without committing a criminal offence, so long as he does so for no longer than is strictly necessary and has checked that there is no one else available to do so.128 Given the extensive nature of these restrictions, it is arguable that the whole vetting and barring scheme would fall within the ambit of Article 8 of the ECHR.

IS DISCRIMINATION AGAINST BARRED PERSONS OBJECTIVELY JUSTIFIED?

Let us re-cap the reasoning in Re P. The case concerned eligibility to adopt: the interests of the child required eligibility to be as wide as reasonably possible because it ‘simply opens the door to the careful and exacting process that must follow before a recommendation is made’.129 Otherwise, there would be a risk of excluding unmarried couples whose ‘personal qualities and aptitude for child rearing are beyond question’,130 ‘their virtues else, be they as pure as grace, as infinite as man may undergo’.131 At the macro level, there was justification for the view that it is better for children to be adopted by a married couple, therefore if a bright line rule were rational then this bar would be legitimate. Although on occasions blanket rules are required, in this situation a rule was irrational, because it contradicted the principle that the court must consider whether adoption is in the best interests of the child: ‘A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on

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130 Ibid, at p 194, per Lord Hope.
131 Ibid, at p 181, per Lord Hoffmann.
a case-by-case basis’. This discrimination was irrational because it was ‘based upon a straightforward fallacy, namely, that a reasonable generalisation can be turned into an irrebuttable presumption for individual cases’.

In my opinion, this reasoning applies mutatis mutandis to the grandfather in exp B and the many others barred from adopting or fostering on the basis of the risk they pose to children’s safety. Although at the macro level, there may be justifications for the view that it is generally desirable for children to be adopted or fostered by those who have not committed serious offences, particularly sexual offences against children, a blanket ban is irrational because it contradicts the principle that the court must consider the best interests of the child, turning a reasonable generalisation into an irrebuttable presumption. Eligibility to adopt or foster opens the door to ‘the careful and exacting process’ of scrutiny, therefore it is in the interests of the child for the door to be opened as wide as is reasonably possible, otherwise there is a danger of excluding those ‘their virtues else, be they as pure as grace, as infinite as man may undergo’.

Could a convicted child sex offender have pure and infinite ‘virtues else’? It would be possible to conjure up thought experiments, but that would be otiose in the light of exp B. In the event, it was agreed on all sides that removal of the children from the grandparents’ care was unthinkable. Nor was this by any means an isolated example of the undesirable consequences of the bar: 11 other cases were brought to the High Court’s attention. Although the Secretary of State for Health accepted that there were and would be instances in which the prohibition was having and would have a detrimental effect on children’s welfare, Scott Baker J took the view that the Secretary of State had underestimated the number of these instances. Scott Baker J was in no doubt that the restriction would operate to the detriment of some children, including the applicants’ grandchildren, for whom he suggested that the escape route of a residence order in favour of the grandparents might be the only realistic solution.

As we have seen, following exp B, a narrow exception for relatives and pre-existing foster carers has been carved out, which would cover the precise facts of exp B should they recur. But the creation of this exception only strengthens the argument that a blanket ban is unjustified. Parliament has recognised that placement with even a convicted child sex offender could in some circumstances be the best option for a child. There is no principled reason to draw a line around family members and those barred after becoming foster carers, given that affectionate adult-child relationships recognise no such boundary.

An objection could be made that the concrete differences between Re P and exp B matter more than any analytical similarities. On this view, there is reliability in the generalisation that those caught by vetting and barring schemes make unsuitable parent figures, albeit that exp B may demonstrate the existence of a few unfortunate exceptions. In contrast, the generalisation that married couples make better adoptive parents than unmarried couples is too rough and ready, albeit reasonable.

Re P gives little support to this line of argument. Quite the reverse, most of the judgments make plain that they regard marriage as a good proxy for stability, though Lord Mance had his doubts: 

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132 Ibid, at p 183, per Lord Hoffmann.
133 Ibid, at p 184, per Lord Hoffmann.
134 Ibid, at p 194, per Lord Hope.
135 Ibid, at p 181, per Lord Hoffmann.
136 See Re RJ (Minors) (Fostering: Person Disqualified) [1999] 1 WLR 581; Re RJ (Minors) (Fostering: Wardship) [1999] 1 FLR 618.
137 [2009] AC 173, at p 184, per Lord Hoffmann; p 211, per Baroness Hale; p 220, per Lord Mance.
‘The fact that proposed adopters are a married couple is on any view a material factor. Society is entitled to place weight on the existence of such a bond. But that does not mean that every married couple are suitable or every unmarried couple unsuitable as adopters... In today’s world, failure to tie the knot is not to be equated with lack of actual commitment; and one would have thought that a joint wish to adopt was itself, at least to some extent, a counter balancing factor.’

These doubts were not however shared by Baroness Hale:

‘All children need a “stable and harmonious home” in which to grow up. The stability of the parental relationship is therefore an important factor in assessing a couple’s suitability to adopt. This in itself would not justify treating married and unmarried couples differently, because both kinds of relationship are capable of breaking down. ... But being married does at least indicate an initial intention to stay together for life. More important, it makes a great legal difference to their relationship ...

It is therefore appropriate to look with deep suspicion at the reasons why a couple who wish to adopt are unwilling to marry one another... The only rational reason to reject the legal consequences of marriage is the desire to avoid the financial responsibilities towards one another which it imposes on both husband and wife. Why should any couple who wish to take advantage of the law in order to become the legal parents of a child be anxious to avoid those responsibilities which could become so important to the child’s welfare if things went wrong in the future?’

After outlining circumstances in which this strong presumption would not hold good, Baroness Hale asked whether it was ‘nonetheless justifiable to keep a “blanket ban” which will be appropriate in the great majority of cases even if there are a few where it will not’. The general picture then in Re P is not that the House of Lords rejected this particular generalisation on grounds of unreliability or obnoxiousness but rather that they had an objection in principle to turning any reasonable generalisation into an irrefutable presumption, given the duty to consider the child’s best interests on a case-by-case basis.

In a different context, the Supreme Court has accepted the fallibility of the generalisation that those convicted of serious sexual offences continue indefinitely to pose a risk. R (F and Thompson) v Secretary of State for the Home Department [2010] UKSC 17 concerned the requirement, imposed by section 82 of the Sexual Offences Act 2003 on all those sentenced to at least 30 months’ imprisonment for a sexual offence, to notify the police of their abode and foreign travel for the rest of their lives. The issue was whether the absence of a right to review rendered these notification requirements incompatible with Article 8 of the ECHR.

Lord Phillips, in a judgment with which all the other Lords agreed, regarded the question at the heart of the appeal as being whether ‘the nature of sexual offences was such that it was never possible to be sure that someone who had been guilty of a serious sexual offence posed no significant risk of re-offending’, either on the basis that ‘all sexual offenders had a (possibly) latent predisposition to commit further sexual

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138 Ibid, at p 220.
139 Ibid, at pp 211–212 [emphasis added].
140 Ibid, at p 212 [emphasis added].
141 [2010] 2 WLR 992.
142 Ibid, at pp 1007–1008.
offences or, if some did not, it was impossible to identify who these were'. Lord Phillips found that the existence of uncertainty on this crucial question did not justify the absence of review. He concluded: ‘I think that it is obvious that there must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted to the extent that the continuance of notification requirements is unjustified’.

Arguably, the generalisation that cohabiting relationships are unstable is more reliable than the generalisation that convicted sex offenders pose an indefinite risk. According to the Centre for Social Justice Green Paper on the Family, cohabiting relationships are more than twice as likely to break down as equivalent marital relationships: a third of unmarried couples, but less than a tenth of married couples, separate before their child’s fifth birthday. In contrast, we have already noted that about three-quarters of sex offenders are never reconvicted. Moreover, because risk not guilt is the reason for regulation, the generalisation about sex offenders does not rely only on the assumption that what has been done before may be done again but also on the assumption that there is a progression from minor to major wrongdoing. The link between the tendency to watch child pornography and the tendency to assault a child, for example, is both tenuous and contentious.

But perhaps, in the context of adoption and fostering, those sex offenders with the greatest tendency to transgress select themselves: there is an argument that those individuals most likely to abuse a child would be particularly incentivised to adopt and foster; a proportion of these offenders would inevitably pass individualised scrutiny, leading to a greater incidence of child abuse overall. Empirically, this claim is highly speculative: it must be acknowledged that there are many less taxing, less scrutinised and more anonymous ways for a potential child abuser to gain access to a child than by adopting or fostering. Theoretically, the self-selection argument proves too much: on this argument, those with violent tendencies would be most likely to apply for a gun licence or to join the police force; those who want access to our bodies for nefarious reasons would be most likely to train as doctors or nurses etc. The implication of the argument is thus to bar any individual who belongs to a risky group from any activity requiring trust. This implication extends to cohabitants who wish to adopt: those cohabitants with unstable relationships might be the most prone to apply to adopt or foster, in a sometimes vain attempt to repair their relationship. This argument is ultimately no more than a version of the Groucho Marx joke, that we should not let anybody join a club of which he wants to be a member.

But one could respond that a blanket ban is justified in relation to convicted sex offenders but not in relation to cohabiting couples because in the former but not the latter case the consequences of failure to predict are so catastrophic. While the disastrousness is self-evident in relation to the sexual murder of a child, the

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143 Ibid, at p 1008.
144 Ibid, at p 1009.
145 Ibid, at p 1009. See also ibid, at p 1011, per Lord Rodger.
148 I am grateful to one of the anonymous referees for this suggestion.
consequences of, for example, ‘sexually tinted touches’ \(^\text{150}\) may or may not have more serious consequences for the child than the breakdown of their carers’ relationship, depending on all the circumstances: it is possible to imagine ‘a new cycle of thinking about sex crime that would place more emphasis on its variety and reduce its status to one of a number of harms that may threaten the young and the vulnerable’. \(^\text{151}\)

In relation to the most catastrophic variety of sex crime against children, it is important to remember that ‘the number of offences involving the murder of children by sexual predators has shown virtually no change since 1970’. \(^\text{152}\) There is little reason to believe that any vetting and barring scheme could alter the small number: ‘Finding the next rapist-murderer, like finding a needle in a hay-stack, is largely a matter of chance’. \(^\text{153}\)

This sombre assessment acknowledges that there is no sure-fire method of predicting and preventing tragedies. Perhaps then, in the absence of more reliable, more sophisticated, methods, blanket bans are the best available technique: on this argument, if there is as much as a whiff that someone belongs to a group that is more likely to abuse children then he should be prevented from adopting or fostering.

Curiously, this line of reasoning leads us back to \textit{Re P}. In an analysis of public inquiry reports into the fatal abuse of 35 children over 19 years, Robert Whelan found that, for children living with their natural mother and a man who was not their biological father, the risk of fatal child abuse was eight times greater when the mother was cohabiting with, rather than married to, the father figure. \(^\text{154}\) Discussing this research, Patricia Morgan concludes: ‘If the most safe (sic) family environment is one where both biological parents are married to each other, then the most unsafe of all family environments is where the mother is living with someone who has neither a biological or (sic) legal tie to her child’. \(^\text{155}\)

This was of course the family type in \textit{Re P}: the cohabiting couple barred from adopting belonged to the family form with the greatest risk of child abuse. The obvious objection to this line of reasoning is that the child in \textit{Re P} was already living in the risky environment, and preventing the couple from adopting would do nothing to enhance that child’s safety. \(^\text{156}\) But this is also the case with regard to the blanket ban on adoption and fostering by sex offenders: there is no general prohibition on children living with adults who have committed a sexual offence against a child, as illustrated by \textit{ex parte B}, where, just like \textit{Re P}, it was not contested that the children would continue to reside with the risky adults. In \textit{ex parte B}, just like \textit{Re P}, the issue was purely the way in which the living arrangements were to be legally conceptualised. If we believe that blanket bans are an effective and legitimate means to protect children against child abuse then we should no more allow cohabiting couples to adopt or foster than convicted sex offenders.

\begin{footnotes}
\item[152] Ibid, at p 5.
\item[154] R. Whelan, \textit{Broken Homes and Battered Children: A study of the relationship between child abuse and family type} (Family Education Trust, 1994), at p 32. I am grateful to Valerie Riches for drawing this research to my attention.
\end{footnotes}
Following *Re P*, an absolute bar on offenders’ adopting or fostering does not even meet the requirement of rational justification necessary for the lower level of scrutiny, let alone the very weighty reasons necessary to justify discriminating against people on particularly sensitive grounds,\(^{157}\) which, let us recall, ‘cannot be justified on merely utilitarian grounds [as this] offends the notion that everyone is entitled to be treated as an individual and not a statistical unit’.\(^{158}\) The absolute bar is unjustified discrimination under Article 14 of the European Convention.

**Past the automatic bar?**

The automatic bars under AAR 2005 and FSR 2002, and automatic inclusion under the proposed SVGA vetting and barring scheme, fall foul of Article 14. Under the SVGA regime, however, automatic inclusion without representations applies only to a narrow band of offences of the utmost severity.\(^{159}\) What of automatic inclusion subject to representations and discretionary barring (applicable to fostering not adoption)?

In relation to automatic inclusion subject to representations, it is important to note that there is a presumption towards inclusion.\(^{160}\) According to the ISA *Guidance Notes for the Barring Decision Making Process*, automatic barring with the right to make representations ‘covers other serious offences that indicate a very probable risk of harm to children or vulnerable adults, but not necessarily in every conceivable case. . . . the ISA will not remove a bar unless it is satisfied that the individual does not pose a risk of harm to children’.\(^{161}\) This does not sound too promising a basis for disputing inclusion, especially since ‘caseworkers will not interview the people they contemplate barring’.\(^{162}\)

‘Rather, they require everyone to make written submissions, even though many people do not have the skills to argue their case in writing. This is particularly true of people whose first language is not English. I have interviewed people unfairly placed on barred lists who have made clear and convincing cases in person as to why they should be taken off them, but they would not have had the skills to do so in writing.’\(^{163}\)

Mervyn Barrett regards this as the ‘greatest flaw in the decision-making process’.\(^{164}\)

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\(^{158}\) Ibid, at p 182.

\(^{159}\) See above.


\(^{164}\) Ibid, at p 11.
The issue here is whether the spirit of Re P is breached by a legal presumption in favour of barring. Ursula Kilkelly treats as an open question whether the challenge in Re P would have succeeded had it concerned a presumption against an unmarried couple that was ‘rebuttable, however difficult’. On the one hand, it was ‘the blanket and irrebuttable nature’ of the exclusion that particularly concerned the House of Lords, Lord Hoffmann referring specifically to the fallacy of turning a reasonable generalisation into an irrebuttable presumption. On the other hand, the House of Lords stressed that the interests of the child required eligibility to be as wide as reasonably possible.

More broadly, it is arguable that irrespective of any discretion the binary nature of ISA decision-making makes the decision discriminatory. Either the individual is approved for all purposes or he is placed on the barred list and prevented from carrying out any regulatory activity of whatever nature under any circumstances (except in an emergency!). This binary decision offends against Lord Hoffmann’s stricture in Re P that the law requires the interests of the child to be considered on a case-by-case basis. In the ISA’s general calculation whether to bar or not, ‘the interests of the particular child . . . have disappeared from sight, sacrificed to a vague and distant utilitarian calculation. That seems to me to be wrong’.

The binary nature of the decision also discriminates by running the risk of excluding those ‘their virtues else, be they as pure as grace, as infinite as man may undergo’: the decision to bar takes no account of the specific type of regulated activity in which the individual might seek or wish to engage and so does not consider the extent to which the person might be particularly well suited to that activity. In the case of fostering, this means that no account is taken of the individual’s aptitude for child rearing: their warmth, love and affection, ability to set behavioural boundaries or help with homework. These two dangers of the binary process overlap, since one aspect of the individual’s aptitude for child rearing could be his or her suitability to care for the particular child in question.

To avoid discrimination, the decision to prevent an individual from fostering would need to be rich in context, taking into account the interests of the individual child and any actual or potential relationship between adult and child, as well as viewing the potential carer as a whole person, with an individualised assessment of any risk posed. Such a rounded judgment could only be made by a decision-maker with in-depth personal knowledge of both adult and child, but the ISA, a remote and bureaucratic non-departmental public body, makes this compartmentalised judgment without knowing or even meeting the individuals concerned. As presently formulated, the ISA reduces the barred individual from a multi-dimensional rights-bearer to a one-dimensional risk-bearer, suggesting that ‘it is acceptable to treat people – or some

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166 Ibid, at p 130.
167 And excepting the limited circumstances in which a barred person may foster: see above.
169 Ibid, at p 181, per Lord Hoffmann.
people—like objects, examining them, assessing them, and then grading and labeling [sic] them in the same way that we might grade and label various types of nuclear waste'.

**Past Adoption and Fostering?**

At first glance, the question whether the bar is objectively justified would seem to have the same answer where the bar concerns working and volunteering with children as opposed to adopting and fostering children. But this would be to fail to recognise the extent to which the reasoning in *Re P* rests on the principle that the best interests of the child are paramount.

In *Re P*, it was the fact that the best interests of the child needed consideration in every case of adoption that made a bright line rule irrational. It was because the 'aim sought to be realised in regulating eligibility for adoption is how best to safeguard the interests of the child' that eligibility had to be thrown open as wide as possible. Lord Hoffmann made plain that the paramountcy principle in adoption was integral to his judgment that a bright line rule was irrational:

‘The question therefore is whether in this case there is a rational basis for having any bright line rule. In my opinion, such a rule is quite irrational. In fact, it contradicts one of the fundamental principles … that the court is obliged to consider whether adoption “by particular . . . persons” will be in the best interests of the child. A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on a case-by-case basis.’

For Baroness Hale, the paramountcy principle was pivotal:

‘If one were only looking at this case from the point of view of a couple who could marry but chose not to do so, I would be inclined to say that the difference in treatment was not disproportionate . . . But if one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment does indeed become disproportionate.’

Writing extra-judicially, Baroness Hale has made her stance even plainer: ‘Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children’.

For all the assenting Lords in *Re P*, the paramountcy principle was an important, if not the most important, reason that they were prepared to intervene in a matter of

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173 Ibid, at p 183, [emphasis added]. See also ibid, at p 220, per Lord Mance.

174 Ibid, at p 212.

175 Baroness Hale, ‘Law Lords at the margin: who defines Convention rights?’ (2008) 5 JJ 10, at p 15, [emphasis added]. See further *Re B* [2009] UKSC 5, [2009] 1 WLR 2496, in which the Supreme Court made plain that assumptions about what is generally best for children must be subordinated to the judgment of what is best for the child in the particular instance. For support for the proposition that bright line rules are legitimate in the absence of countervailing considerations such as the paramountcy principle, see in addition to the cases cited in *Re P*: *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2005] Fam 1; *Evans v United Kingdom* [2007] ECHR 6339/05; *R (On the Application of Wilson) v Wychavon District Council and Another* [2007] EWCA Civ 52, [2007] QB 801.
controversial social policy even in the absence of clear Strasbourg precedent. The best interests of the child were the main basis on which Lord Hoffmann dismissed the concern that allowing unmarried couples to adopt would de-value marriage: ‘the question for the court is whether these concerns have any rational basis, and, even more important, whether it is right to take them into account in a case in which the law gives priority to the interests of the child’. Similarly, Lord Hope held that the bar in Re P allowed ‘considerations favouring marriage to prevail over the best interests of the child’.

The legal difference between barring someone from adopting or fostering on the one hand and barring him from working or volunteering on the other is that in the latter case there is no statutory duty to prioritise the best interests of the child. When employing a school bus driver, there is no requirement to consider whether his appointment will best promote the interests of the children concerned; when choosing a teacher, there is no duty to consider the interests of the school-children on a case-by-case basis. The law is freer here to pursue broader social policies at the macro level, even to engage in a ‘vague and distant utilitarian calculation’, because there is no restraining duty to promote the interests of a particular child.

CONCLUSION

In this article, I have argued that individuals barred on the basis of the risk that they pose to children’s safety could bring themselves within the *ratio decidendi* of Re P. Despite the fact that they would typically have been barred from interacting with children as a result of their own prior misconduct, there are a number of routes to bring such cases within the grounds of discrimination protected under Article 14, the most generally applicable being that barred persons have the protected status of being risk-bearers. Nor would the requirement to come within the ambit of one of the substantive Articles of the ECHR prove an obstacle, since such cases would generally fall within the scope of Article 8, the right to respect for private and family life. Moreover, I have claimed that there is no objective justification for the bar on risky individuals’ adopting and fostering: the reasoning that convinced the House of Lords otherwise in Re P applies *mutatis mutandis* in this context.

The final question that I considered was whether Article 14, in addition to preventing a bar on adopting and fostering, would extend to the prevention of the entire SVGA vetting and barring scheme. It was at this final hurdle that the argument failed, because the reasoning in Re P is built on the principle that the best interests of the child are paramount, and this is not a relevant legal principle in decisions about working or volunteering with children.

The irony of the argument falling at this particular hurdle is palpable. The explicit justification for tightening vetting and barring, as given in the 2005 Queen’s Speech, was that this tightening was judged to be in the best interests of children: ‘My government believes that the welfare of the child is paramount. A bill will be introduced to establish a barring and vetting scheme, and other measures to provide better protection for children and vulnerable adults’. A scheme that was introduced to

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177 Re P [2009] AC 173, at p 184, [emphasis added].
178 Ibid, at p 195.
179 Ibid, at p 183.
safeguard children’s welfare is most vulnerable to legal challenge in just those situations in which the welfare of the child counts; the vetting and barring scheme might be lawful only in those situations in which children’s welfare does not matter to the law.

In many ways, this conclusion is extremely satisfying: although outside the scope of this article, it is highly arguable that the proposed vetting and barring scheme damages rather than promotes children’s welfare at the macro as well as the micro level. But it is worth pausing for thought: this means that policies introduced legitimately even if misguided to promote the interests of children in general are vulnerable to legal challenge purely on the basis that they might harm the interests of a particular child.181

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