

How important is the Human Rights Act for vulnerable children and families?

Briefing

by

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1. About Family Rights Group

Family Rights Group advises and supports parents and wider family members in England and Wales who are involved with local authority children's services about the needs, care and protection of their children. The Charity was founded in 1974. We promote the involvement and support of family members in making safe plans for their children that will enhance their welfare.

Family Rights Group campaigns to challenge injustice, to improve access to effective services, and to increase the voice children and families have over decisions affecting their lives. Our free telephone and email advice service advises over 7000 parents and relatives per year.

2. The purpose of this briefing

This briefing outlines how we think the Human Rights Act has influenced child welfare and family justice law in England and Wales, and how the duties imposed by the Act on local authorities has resulted in fairer and more transparent decision making for vulnerable children and their families. It is informed by our direct work with families who are involved with local authority and judicial decision-making processes in respect of the safety and well-being of their children.

3. How has the European Convention been key to protecting the rights of vulnerable children?

Since 1966, both children and adults in England and Wales have had the right to apply to the European Court of Human Rights if they wanted to make a claim that the State had over-reached its powers in breach of their rights under the European Convention of Human Rights and Fundamental Freedoms (known as Convention Rights). The key rights conferred by the Convention in relation to children and family law are the right to be free from inhuman and degrading treatment (art 3), the right to respect for privacy and family life (art 8) and the right to a fair hearing (art 6).

Until the Human Rights Act was implemented, domestic courts and local authorities could not directly apply the Convention when making decisions about vulnerable children, and did not have to take into account the decisions of the European Court. However it was possible, through a cumbersome, time-consuming and expensive process, for children and adults to challenge the decisions of these bodies when they felt their Convention rights had been breached. Indeed when family law cases did reach the European Court, a number of claims were upheld, and, accordingly, were highly influential in shaping law and practice in the UK.

Protecting children from inhuman and degrading treatment

The European Commission¹ of Human Rights found that the protection of children requires not only criminal law provisions that punish offenders who harm children, but also, in appropriate circumstances, that there is a **positive obligation** on the state to take preventative measures to protect a child who is at risk from another individual. For example:

The case of A v UK² concerned a boy who was physically beaten by his step-father. The step-father was acquitted of any criminal offence. The Court found a breach of Article 3 (the prohibition of inhuman and degrading treatment) as the domestic law did not provide adequate protection against the ill-treatment of the child applicant. In due course, this judgment led to a change in the law (now found in s58 Children Act 2004), removing the defence of 'reasonable punishment' to a criminal charge of assault against a child.

In Z v UK³ the European Commission unanimously found a violation of Article 3 arising from the failure of the local authority to take action in respect of the serious ill-treatment and neglect caused to four siblings over a period of more than four years.

Protecting the right to family life

The European Court has stressed that the taking a child into the care of the state (local authority care) should normally be a temporary step and that any measures taken should be consistent with the ultimate aim of reuniting the natural parent and the child – Olsson v Sweden⁴. For example in P, C and S v UK⁵ the Court emphasised that the removal of a child from his mother at or shortly after birth is a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons" under Article 8 (the right to respect for family and private life).

The decision of the European Court in McMichael v UK⁶ showed that Article 8 also extends to the way in which decisions are made by local authorities outside the court process. The Court found a breach of Article 8 where the local authority had failed to disclose certain documents to the parents during care proceedings that meant they had not been sufficiently involved in the decision making process.

4. How has the Human Rights Act made a difference?

Since the implementation of the Human Rights Act 1998, individuals do not have to apply to the European Court to enforce their Convention rights. Instead the Human Rights Act imposes a duty on 'public authorities', including the courts and local authority children's services, to ensure that they do not breach the Convention rights of children and adults affected by their decisions.

Section 6 of the Human Rights Act provides that it is "unlawful for any public

authority to act in a way which is incompatible with a Convention Right". Section 7 of the Act allows an individual to bring proceedings based on Convention rights, or to rely on Convention rights in any proceedings in which they are involved.

Both family courts and local authority children's services are 'public authorities' within the meaning of the Act. So, as well as binding the courts to consider fundamental rights when making decisions about children, the Human Rights Act places a duty on individual social workers to act in a way that is human rights compliant. It has meant that local authorities have had to train social workers to incorporate human rights within their decision making processes. It has also made it possible for children and adult family members to challenge, in the domestic courts, the procedural decisions of the local authority when they believe that the local authority's actions have breached their Convention rights. This includes actions that are made either before, or after, legal proceedings are concluded, for example as part of child protection decisions or those made about children in care,

We have set out below a number of examples of the Act being used in domestic proceedings which we hope will illustrate how crucial it is for children and families that the Act, and in particular the duty on public authorities and the right of individual action in domestic courts, is retained.

4.1 Fairness in decision making procedures

Article 6 of the Convention protects the right to a fair trial. In care proceedings, Article 6 has been applied to ensure legal representation for parents who wish to be represented, Re G (Adoption Proceedings: Representation of Parents)⁷. On the third day of a final care hearing, lawyers representing the parents withdrew. An application for an adjournment to allow for new lawyers to be instructed was refused. The Court of Appeal held that it was important, in cases where the outcome could be the permanent loss of their children, for the parents to have equality of representation and to have a sense that a full and sympathetic hearing had taken place. The mother had an extremely low IQ, which was a factor in her ability to take part in the proceedings without representation. The appeal was allowed and an adjournment granted.

Article 8 of the Convention protects the right to family life. Article 8 of the Convention says that an interference with family life can be justified, if it is necessary and proportionate. An action of the state that interferes with family life can only be justified if the process that resulted in that action is also fair.

Reliance on Articles 6 and 8 has enabled children and families to ensure that they are properly consulted and included in local authority decision making concerning their children. In Re M (Care: Challenging Decisions by Local Authority)⁸ the decision of a local authority planning meeting which effectively ruled out any chance of the child being reunited with his father, and to which the father was not invited, was overturned because the local authority had unwittingly failed to involve the father at the relevant time.

Importantly for families, the Act has made it much easier to challenge procedural decisions made by the local authority that have a significant impact on family life. For example, when the local authority decides to act in a way substantially different to that set out in the care plan, without consultation with the child's family. In G v N County Council⁹ a care order was made with a care plan under which the child was to remain in his parents' care. Following the parents' separation, concern grew for the child remaining in his mother's sole care. At a review at which the mother was not present, a decision was made to remove the child from school that day and to place him in foster care. The mother was informed later that day. The mother challenged the lawfulness of the local authority's decision. The court found the local authority's actions had breached the mother's rights under Article 8.

In Re CA (A Baby)¹⁰ the High Court considered the issue of a mother's consent to voluntary accommodation of her child into the care system under s20 Children Act 1989. The child was removed immediately after birth under a s20 agreement (where the mother agreed to her child being taken into foster care). The mother had initially refused to consent to the section 20 agreement, but when approached again, after being medicated with morphine, she consented. In this case, the local authority agreed that their actions, in failing to obtain proper informed consent from the mother, and in failing to establish whether she had capacity to consent, had breached the mother and child's Article 8 rights. The judgment highlights the need to have regard to Article 6 and 8 rights both when getting parental consent to removal of a child, and in relation to the fairness and proportionality of the decision to remove.

Courts have nevertheless been careful to ensure that procedural defects do not cause delay for children where there would be no substantive impact on the outcome Re: J (Care; assessment; fair trial)¹¹.

The courts additionally have the power to make an injunction (either to stop something happening or to make a party take a particular action) where a breach of ECHR is alleged (W & Ors (children)¹², an important step necessary to prevent a local authority from overreaching its power.

Although in many instances a procedural defect may have little impact on the substantive outcome of the case, it is vitally important for families, and for the general public that all parties involved feel they have had a fair hearing and been properly involved in these crucial decisions affecting their children.

4.2 Removal of children from the home must be necessary and proportionate

Even temporary removal of children from the parental home is a serious interference with family life. Article 8 of the Convention says that an interference with family life can be justified, if it is necessary and proportionate.

In Re S (Children)¹³ interim care orders were made in respect of several

children, with care plans for them to remain living with their mother. At a domestic violence injunction hearing, the local authority put forward amended care plans for the immediate removal of the children, which were endorsed by the judge. On appeal, the Court of Appeal found there had been a clear infringement of the Article 8 rights of the mother and children, the local authority had not shown there was a need for immediate removal, nor had the mother been given a proper opportunity to participate fully in the decision making process and to challenge the change to the care plan.

Relying on their Convention rights, families are able to argue that wherever possible, parents should be consulted prior to removal of children from the home, even in an emergency situation. In Re D (Unborn); Bury Metropolitan Borough Council v D¹⁴ the local authority asked the court whether it would be lawful not to tell the mother about the proposed removal of her child at birth. The court declared the proposed action was compliant with Article 8, relying on the highly unusual circumstances of the case. However, the court also made clear that in all but exceptional cases, it would be appropriate to engage the parents fully and frankly in the pre-birth planning process.

In Re M (Care Proceedings: Judicial Review)¹⁵ the parents sought an injunction to stop the local authority from applying for an emergency protection order and interim care order. Dismissing the application, the court noted that in emergency applications relating to children, the fullest possible information had to be given to the court to justify the removal, and the parents had to be given proper notice of evidence to be relied on, if Article 8 requirements are to be satisfied.

4.3 Continuing duty to protect the rights of children within the care system

Where a child has been removed from the home, there is a continuing duty on the local authority to protect the child's Convention rights while they are in care. The office of the Independent Reviewing Officer (IRO) was introduced to ensure that the local authority complied with their duties to children in their care, and to enable children to challenge the local authority in court if they failed in those duties. Section 25B(3) of the Children Act 1989 allows an IRO to refer a child's case to the Children and Family Court Advisory Support Service (CAFCASS) if they consider the local authority is failing in their duties to a child. CAFCASS may then bring court proceedings on behalf of the child, including any claim under the Human Rights Act. Without the Human Rights Act, this mechanism oversight and review of a child's care by the local authority would be severely undermined.

A and S (Children) v Lancashire CC¹⁶ was a case where two brothers were first taken into care in 1998, aged just 3 and 6 months' old, after their mother abandoned them. A (adoption) freeing order was made, severing all ties with their birth family. However, no adoptive placement was found for the boys, and the boys were passed from one foster carer to another over the course of the next 14 years. At least two sets of foster carers were abusive. The local authority and the IRO agreed to declarations that they acted incompatibly with

the ECHR in no fewer than ten ways, involving breaches of Articles 3, 6 and 8 of the Convention.

4.4 Permanent removal from the home – How the right to respect for family life is protected in adoption

The requirement on judges to have clearly considered Convention rights before making an adoption order, has added another layer of protection to children and families when state interference in family life could result in the permanent removal of the child from his/her birth family and severance of all legal ties. In the matter of B (A Child)¹⁷ the child was removed from her parents at birth. The mother suffered from psychiatric conditions resulting in her making multiple complaints to medical professionals for which no adequate physical explanation could be found. In addition, she was found to be manipulative and dishonest in her relationships with social workers. The Supreme Court gave careful consideration to the mother and child's Article 8 rights. It held that there were a number of features relative to the personalities B's parents, and to the psychiatric conditions of the mother, which raised a real possibility that, in their care, B would suffer impairment of her emotional development. The key feature of this case which justified the judge's decision not only that the threshold conditions for making a care order were satisfied but that such an order was necessary and proportionate under Article 8 was that B's parents were unable to offer the elementary cooperation with professionals that her safety in their home would require. Adoption was the only viable option for B's future.

A series of cases following the decision of Re B in the Supreme Court have held that the making of a care order, with a plan for adoption, can only be necessary and proportionate under Article 8, where all other options have been considered, and adoption is 'the last resort'. Judges must apply a rigorous approach to considering evidence of all possible permanence options before making a decision that adoption is the best plan for the child – see Re B-S (Children)¹⁸.

In Re B-S two children were removed from their mother and placed in adoptive placements. Two years later, but before adoption orders were made, the mother sought permission to oppose the adoption order. By the time of her application, her circumstances had changed dramatically. She was in a new stable marriage with a new child who was living with her. The Court of Appeal held that despite the significant change in circumstances, leave to oppose the adoption was refused, but the judgment sets out key guidance, drawing heavily on Article 8 of the Convention, restating the principle that whilst the child's interests are paramount, the court must never lose sight of fact that those interests include being brought up in the natural family by the natural parents or at least one of them, unless the overriding requirements of child's welfare make that not possible.

5.5 Adoption – informing absent father of plans to adopt

Positive obligations on the State under Articles 6 and 8 have been interpreted

to mean that a mother can only withhold the fact of a child's birth and of adoption proceedings in 'exceptional circumstances' . In M v F and Others¹⁹ the mother and father were married, with adult children. The mother had conceived a further child of which the father was unaware. She wished to place the child for adoption without giving notice to the father. She was concerned for the impact on the father's mental health, the welfare of the child and of her position in the local community if the fact of the adoption was revealed. The court held that the facts of the case did not satisfy the very high threshold of exceptionality to justify depriving the father of his right to be informed of the existence of his legitimate child so that he could exercise his parental responsibility and to be involved in any legal proceedings concerning him.

6. Conclusion

This short summary of the application of the Human Rights Act in public law children's cases shows how important it is that there continues to be a duty on public authorities to act in a way that is compatible with Convention rights, and that the Convention continues to be directly actionable in domestic law, without qualification. To revert to a system where litigants had first to exhaust domestic procedures before beginning the slow and expensive process of taking cases to the European Court of Human Rights would be highly detrimental to childcare law and practice. For cases involving children, a European Court of Human Rights judgment many years after the event which cannot undo the effect of (for example) wrongful removal of children from their home, takes the UK many steps backwards in its protection of the right to family life.

¹ From 1954 to the entry into force of Protocol 11 of the [European Convention on Human Rights](#), individuals did not have direct access to the [European Court of Human Rights](#); they had to apply to the Commission, which if it found the case to be well-founded would launch a case in the Court on the individual's behalf. Protocol 11 which came into force in 1998 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.

² A v UK (1999) 27 EHRR 611

³ Z v UK (1999) 28 EHRR CD 65

⁴ Olsson v Sweden (No.1)(1989) 11 EHRR 259

⁵ P, C and S v United Kingdom [2002] 2 FLR 631

⁶ McMichael v UK (1995) 20 EHRR 205

⁷ Re G (Adoption Proceedings: Representation of Parents) [2001] 1 FCR 353

⁸ Re M (Care: Challenging Decisions by Local Authority) [2001] 2 FLR 1300

⁹ G v N County Council [2009] 1 FLR 774

¹⁰ Re CA (A Baby) [2012] EWHC 2190 (Fam)

¹¹ Re: J (Care: assessment; fair trial) [2006] 2 FCR 107

¹² W & Ors (children) [2001] EWCA Civ 757

¹³ Re S (Children) [2010] EWCA Civ 421

¹⁴ Re D (Unborn); Bury Metropolitan Borough Council v D (2009) 2 FLR 313

¹⁵ Re M (Care Proceedings: Judicial Review) [2003] 2 FLR 171

¹⁶ A and S (Children) v Lancashire CC [2012] EWHC 1689 (Fam) 21 June 2012

¹⁷ In the matter of B (A Child) [2013] UKSC 33

¹⁸ Re B-S (Children) [2013] EWCA Civ 1146

¹⁹ M v F and Others [2011] 1 FCR 533