Commission on a Bill of Rights
Discussion Paper

'Do we need a UK Bill of Rights?'

Family Rights Group's Response

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For further information contact
Cathy Ashley (cashley@frg.org.uk)
Andrea Hopkins (ahopkins@frg.org.uk)
Bridget Lindley (blindly@frg.org.uk)

Family Rights Group
The Print House
18 Ashwin Street
London E83DL
Tel: 0207 9232628
www.frg.org.uk

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 which will enhance their welfare. We campaign 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 6,500 parents and relatives per year about their legal rights and the options open to them:

- Within the local authority decision-making processes for supporting and safeguarding vulnerable children, particularly before care proceedings are issued and when children are looked after in the care system; and
- When a court application is made by the local authority for an emergency protection order, care order or placement order.

We also:

- Publish a wide range of advice sheets on all aspects of child care law and practice which can be downloaded from our website at www.frg.org.uk/advice_sheets.html;
- Run a web-based electronic discussion board and set up support groups for family and friends carers, including grandparents who are raising children unable to live with their parents;
- Convene the Kinship Care Alliance and national Family Group Conference Network;
- Run training courses on a regular basis for child care professionals including Independent Reviewing Officers;
- Run action research programmes, for example on how social care services work with domestically abusive fathers and lobby for improvements in childcare law and practice.

This submission is informed by our direct work with over 6,500 families per year who are involved with local authority and judicial decision-making processes which are concerned with the safety and well-being of their children.

2. Do we need a UK Bill of Rights ?

In our view, it is crucially important that the rights contained in the European Convention on Human Rights, and its protocols to which the United Kingdom is party, continue to be actionable in domestic law. At present this is achieved through the Human Rights Act 1998. A Bill of Rights that merely replicates this would, in our view, be a costly and unnecessary exercise.

A Bill of Rights that attempted to reduce the extent to which those Convention rights are actionable in domestic law would force individuals to revert to the slow and expensive process of taking cases to the European Court of Human Rights.

To go further and draft a Bill of Rights that restricted enjoyment of Convention rights, would necessitate withdrawal from the ECHR itself or inevitably bring the UK law once more into conflict with Strasbourg. Furthermore it would seriously undermine any claim that the UK is a modern democracy that adequately protects the human rights of its citizens.

A UK Bill of Rights could expand the number and extent of rights currently enjoyed by individuals within the UK, as is the case with the draft Northern Ireland Bill of Rights. This could be done by expressly including rights that Strasbourg jurisprudence has found implied in order to give effect to the substantive right as set out in the Convention; for example:

- as an addition to Article 2 ECHR, the right to an investigation where the state is involved in a killing;
- as an addition to Article 5 and the right to have a legal representative present during questioning by the police.

Or a Bill of Rights could include additional rights not currently included within the HRA; for example

- a right to expression of identity and culture,
- a right to education in minority languages;
- a right to health;
- a right to an adequate standard of living.

However, the time span over which the Northern Ireland Bill of Rights was drafted, 1998 – 2010, and the fact that it has still not been given effect in law, is evidence of the difficulties inherent in drafting a Bill of Rights that is acceptable to multiple sectors of society, and seeks to include social and economic rights and to make them justiciable.

In our view the Human Rights Act 1998 is, at present, the most appropriate way of securing Convention rights within the jurisdiction of England and Wales.

3. Other views

As the Commission will be aware, the original purpose of the European Convention on Human Rights was to create a system whereby all States that ratified the Convention would be bound by its provisions and by the rulings of the European Court of Human Rights. The right of individual petition under the Convention has enabled individual citizens to bring a claim against the State when it over-reaches its powers in breach of Convention rights. When invoked in relation to family law, the Convention has proved to be an essential safeguard for family life. Key cases in Strasbourg have influenced UK domestic legislation concerning children and have guided the application of Convention rights to family law cases in the domestic courts. For example,

3.1 Article 3 – The European Commission on Human Rights has found that the protection of children requires not just criminal law provisions that punish offenders who harm children, but also in appropriate circumstances places a positive obligation on the authorities to take preventative measures to protect a child who is at risk from another individual. In A v UK (1999) 27 EHRR 611, a case where a boy was physically beaten by his step-father, who was acquitted of any criminal offence, the Court found a breach of Article 3 as the domestic law did not provide adequate

protection against the ill-treatment of the child applicant, a judgement which in due course led the amendments now found in s58 Children Act 2004. And in Z v UK (1999) 28 EHRR CD 65 the 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.

3.2 Article 8 – The Court has stressed that the taking into care of a child should normally be a temporary measure and that any measures taken should be consistent with the ultimate aim of reuniting the natural parent and the child – Olsson v Sweden (No.1)(1989) 11 EHRR 259. For example in P, C and S v United Kingdom [2002] 2 FLR 631 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.

Certain procedural rights are also protected by Article 8, in McMichael v UK (1995) 20 EHRR 205 the Court found a breach of Article 8 where the failure of the local authority to disclose certain documents to the parents during care proceedings meant they had not been sufficiently involved in the decision making process.

4. Application of the Human Rights Act in public law family cases

Against this background, the Human Rights Act has made a profound difference to families involved in legal proceedings by allowing them to bring their Convention claims in the ***domestic*** court and it has been relied upon extensively in family proceedings. Time is always of the essence in family cases. For a child or family member involved in public law proceedings, the option of taking a case to Strasbourg is of course valuable, and may be significant for future cases, but offers no real redress for that particular family, not least because the time it takes to bring a case to the European Court of Human Rights means that for them, it is too late even if the decision is in their favour.

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 is retained.

Section 6 of the HRA provides that it is *"unlawful for any public authority to act in a way which is incompatible with a Convention Right"*. A local authority is a 'public authority' within the meaning of the Act. It is vital for vulnerable children and their families to be able to rely on the HRA where they believe that local authority actions are not compatible with children and families' Convention rights.

4.1 Fairness in decision making procedures

In care proceedings, ***Article 6 has been applied to ensure legal representation for parents where they wish to be represented***, Re G (Adoption Proceedings: Representation of Parents) [2001] 1 FCR 353 - On the third day of a final care hearing the advocates for each parent became professionally embarrassed and withdrew. An application for an adjournment to allow for new advocates to be instructed was refused. The Court of Appeal, hearing an appeal in the middle of the first instance proceedings, held that it was important for parents 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.

Reliance on Articles 6 and 8 has enabled children and families to ensure that they are properly consulted and included in local authority administrative decision making concerning their children. In Re M (Care: Challenging Decisions by Local Authority [2001] 2 FLR 1300 the decision of a permanency planning meeting (to which the father was not invited),which effectively ruled out any chance of the child being reunited with him following the making of a care order, was quashed because the local authority had unwittingly failed to involve the father at the relevant time.

Families are able to argue under the HRA 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 D [2009] EWHC 446 (Fam) (2009) 2 FLR 313 the local authority sought anticipatory declaratory relief as to 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 compliant with Article 8, relying on the highly unusual circumstances of the case. However, the court 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.

The domestic courts have accepted that the right to a fair trial (Article 6) is not confined to the purely judicial part of the proceedings: unfairness at any stage in the litigation process might involve not merely of a breach of Article 8, but also of Article 6. Accordingly ***a failure to give proper disclosure or to involve parents in decisions made prior to proceedings can lead to a finding of an unfair trial***. In Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam), [2002] 2 FLR 730 the mother had a 4 month old baby who had died with non accidental injuries and probable suffocation. She moved to mother and baby unit with her next child for a 3 day assessment. Their advice was that a further residential assessment would be worthwhile. Various meetings took place where the mother was not invited or permitted to attend. The mother was not told of the meetings but the psychiatrist prepared a new report advising against a residential assessment. The care plan was changed to adoption. The mother then made an application for a residential assessment. It was held: Article 6 rights were not confined to the purely judicial part of the proceedings. The decision making process had not properly involved the mother and she had been wrongly excluded. Nevertheless the earlier unfairness had been overcome because the psychiatrist's change of view came about from the mother's lack of acknowledgment of responsibility which had been investigated and confirmed during the hearing.

Importantly for families, applying these rights to decisions made outside of the court room but within the administrative decision-making processes of the local authority 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 substantially different way to that set out in the care plan, without consultation with the child's family. In G v N County Council [2009] 1 FLR

774 a care order was made with a care plan under which the child was to remain in his parents care. Following their separation, concern grew for the child remaining in his mother's sole care. At a statutory 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 procedural and substantive rights under Article 8.

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) [2006] 2 FCR 107.

The courts additionally have the power to grant injunctive relief where a breach of ECHR is alleged (W & Ors (children) [2001] EWCA Civ 757) 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

Removal of children from the parental home is clearly an interference with family life which must be justified. The ***additional need for judges to have clearly to considered the Convention right in adoption proceedings, even if not directly referencing it, has added another layer of protection to children and families when state interference in family life is threatening division of the family***. In two Court of Appeal judgments, the court has held that reference to Article 8 should be explicit in a judgement making a placement order - EH v Greenwich LBC & AA EWCA Civ 344 (2010)FCR 106; G v (1) Neath Port Talbot County Borough Council [2010] EWCA Civ 821 . More recently, the Court of Appeal has held that whilst there did not have to be a reference to the "doctrine of proportionality" in every case, a judge's disposal of a case had to be proportional to the gravity of destroying the ability of a child to grow up with his or her natural parents. Nevertheless, it was not compulsory for a judgment to recite Article 8 - S-H (children) CA 10/9/2010.

The need to consider ***Article 8 also applies in the context of emergency removal of children***. In Re M (Care Proceedings: Judicial Review) [2003] EWHC 850 (Admin) [2003] 2 FLR 171 the parents sought an injunction to restrain 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.

Removal of children under interim care orders also constitutes an infringement of Article 8 rights which must be fully justified in accordance with Article 8(2) and the

parents must be allowed to participate fully in the decision making process. In Re S (Children) [2010] EWCA Civ 421 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 challenge the change to the care plan.

4.3 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 from the father or dispense with service upon him of adoption proceedings in 'exceptional circumstances'*** . In M v F and Others [2011] EWCA Civ 273, 1 FCR 533 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.

5. Conclusion

This short summary of the application of the Human Rights Act in family law shows how important it is that the Convention continues to be directly actionable in domestic law. To revert to a system where litigants had first to exhaust domestic procedures before taking their case to the European Court in Strasbourg would be an enormous step backwards, and remove an important safeguard for the citizen against potential abuse of government power. Moreover, the Commission's own interim recommendation suggests that such a step would be contrary to the ethos of the Convention, and should be (even if not currently) itself a violation of the convention. ***"It is essential to ensure that the Member States and their national institutions – legislative, executive and judicial – assume their primary responsibility for securing the Convention rights*** *and provide effective remedies for violations. Failure to put in place the necessary machinery for compliance should itself constitute a violation of the Convention" Interim recommendation 1*