

## Protection of children's rights under the Human Rights Act – some examples<sup>1</sup>

*Human rights principles developed in other Human Rights Act cases<sup>2</sup> will obviously also apply to children, but this briefing sets out some examples specifically relating to children. In many of these cases it is difficult to see how these outcomes could have been achieved through specific legislation or the common law.*

### Positive obligations to protect children

- **Positive obligation to protect children from neglect and abuse**

Four siblings successfully complained that their local authority had failed to protect them from inhuman and degrading treatment (prohibited under Article 3) where social services were aware of the neglect and abuse they suffered at home (before they were eventually taken into care). The court\* ruled that States were required to take measures designed to ensure that individuals were not subjected to torture, inhuman or degrading treatment, including protecting children and other vulnerable people and taking reasonable steps to prevent ill-treatment which the authorities knew or ought to have known about. Compensation was awarded for the breach of Article 3.<sup>3</sup>

- **Positive obligation to protect children from degrading physical violence**

A child of nine who had been beaten with a garden cane by his step-father, suffered ill treatment of sufficient severity to amount to inhuman and degrading treatment (under Article 3). The court\* ruled that States were required to adopt measures to ensure the protection of those within their jurisdiction and prevent them from suffering torture or inhuman or degrading treatment or punishment, with children and the vulnerable deserving particular protection in the form of effective deterrence. At the step-father's trial, the onus had been on the prosecution to prove beyond reasonable doubt that the beating went beyond the "reasonable chastisement" of a child permitted by English law and the step-father was acquitted. English law as it stood failed to provide adequate and effective protection for children against corporal punishment which was degrading, and the Government's failure in this respect constituted a violation of Article 3.<sup>4</sup>

### Hearing children's voices

- **Procedural rights for children in decisions affecting their family life**

The right to respect for private and family life (under Article 8) affords children procedural rights in relation to decision-making processes which fundamentally effect their family life. If the child has sufficient understanding, and direct participation in such proceedings would not pose an obvious risk of harm, separate representation may be required. The court ruled that they had to accept, in the case of articulate teenagers, that the right to freedom of expression and participation outweighed the paternalistic judgement of welfare.<sup>5</sup>

- **Considering the best interests of child includes hearing child's own views**

An important element of considering the best interests of the child was discovering the child's own views. When considering the deportation of a mother, the immigration authorities had to be prepared to consider hearing directly from a child who wished to

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<sup>1</sup> Some European Court of Human Rights decisions have also been included as illustrations of the development of human rights law which, as a result of the Human Rights Act (section 2), the domestic courts are bound to "take into account". Prior to the HRA, European Court of Human Rights decisions were not part of the domestic legal framework. Some examples of the HRA having effect on the decisions of public authorities outside the courts are also included.

<sup>2</sup> A briefing on landmark cases under the Human Rights Act is available from <http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx>

<sup>3</sup> *Z v UK* European Court of Human Rights, 10/5/2001

<sup>4</sup> *A v UK* European Court of Human Rights (1999) 27 EHRR 611

<sup>5</sup> *Mabon v Mabon* [2005] EWCA Civ 634

express a view and was old enough to do so. While their interests might be the same as their parents', that should not be taken for granted.<sup>6</sup>

## Privacy

- **Local authority snooping on family is intrusion of private life**

A council's surveillance of a mother and her children to determine whether they lived within a school catchment area was ruled unlawful and a breach of their right to respect for private life (Article 8). The council used surveillance powers given to it by the Regulation of Investigatory Powers Act 2000 but a tribunal found their use of the powers was improper and unnecessary.<sup>7</sup>

## Curfews

- **No power to use force to 'remove' law-abiding children**

On behalf of W, a 14 year old boy, the human rights organisation Liberty brought a challenge to the police's power to take young people under the age of 16 home from designated areas if they were out after 9pm, under the Anti-Social Behaviour Act 2003. Among other arguments, Liberty relied on W's rights under Articles 5, 8 and 14 (rights to liberty, private life and right not to be discriminated against). The court ruled that the power in the Anti-Social Behaviour Act 2003 to use force to 'remove' a person under 16 could only be used to remove children who are involved in, or at risk from, actual or imminently anticipated anti-social behaviour. It did not confer a power to remove law abiding children simply because they were in a designated area at night.<sup>8</sup>

## Identity

- **Naming a deceased father on children's birth certificate**

Dianne Blood successfully challenged the provision of the Human Fertilisation and Embryology Act 1990 which prevented her from registering her deceased husband as the father of her two children conceived by IVF on the children's birth certificates. The provision was declared to be incompatible with the right to respect for private and family life (Article 8) and the prohibition on discrimination (Article 14).<sup>9</sup> The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.

- **Child's right to know true parentage**

An alleged father's application for an order entitling him to DNA tests to establish paternity was allowed, even where the mother did not consent to the tests, on the basis that the right to respect for family life (Article 8) included a sense of having knowledge of one's identity, including paternity. The child had a right to know its true parentage and any interference with the rights of others due to the testing was proportionate to the legitimate aim of giving the child full knowledge as to parentage.<sup>10</sup>

## No corporal punishment in schools

- **Right to religion did not allow corporal punishment in private schools**

Although the ban on corporal punishment in schools did interfere with parents and teachers right to manifest their religion (under Article 9), this interference was necessary in a

<sup>6</sup> *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

<sup>7</sup> *Paton v Poole Borough Council*, decided by the Investigatory Powers Tribunal, 2 August 2010.

<sup>8</sup> *R (W) v Commissioner of Police for the Metropolis and others* [2006] EWCA Civ 458

<sup>9</sup> *Blood and Tarbuck v Secretary of State for Health*, 2003, unreported.

<sup>10</sup> *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190

democratic society for the protection of the rights of children. The court ruled that corporal punishment involved deliberately inflicting physical violence and its ban was intended to protect children against the distress, pain and other harmful effects this infliction of physical violence might cause. The means chosen to achieve that aim were appropriate and not a violation of the right to manifest one's religion.<sup>11</sup>

## Disabled children

Outside courts:

- **Young girl with learning disabilities secures school transport**  
A local authority had a policy of providing school transport for children with special educational needs living more than 3 miles from their school. A young girl with learning disabilities lived 2.8 miles from the special school she attended but was denied the transport, despite being unable to travel independently. A parent supporter helped the girl's mother to challenge the decision using the right to respect for private life (Article 8), given the failure to consider her special circumstances, and the decision was reversed.<sup>12</sup>

## Adoption and fostering

- **Lower rates of benefits to foster carers who were family members of the child than to non-relative foster carers was discriminatory**  
A successful challenge was made to a council's blanket and inflexible application of limits on payments to family fosterers. The council had failed to submit any evidence justifying the levels paid. The benefit payments were encompassed by the local authority's positive duties to respect family life (Article 8) so should not be made in a discriminatory manner. There was an unjustified difference in treatment on grounds of family status and therefore a breach of the prohibition on discrimination (Article 14).<sup>13</sup>
- **Ban on unmarried couples adopting contradicted best interest of the child principle**  
The Adoption (Northern Ireland) Order 1987, which said only married couples or single people could be considered as adoptive parents, was successfully challenged under the HRA by an unmarried couple as discriminatory (Article 14). The court ruled that, although the state was entitled to consider that generally it was better for a child to be brought up by parents who were married, it was altogether another thing to say that no unmarried couples could be suitable adoptive parents. The presumption in the Adoption Order contradicted the fundamental adoption principle of the best interest of the child and was disproportionate. The court declared that the unmarried couple were entitled to apply to adopt a child.<sup>14</sup>

Outside courts:

- **Fostered children secure visits to their mother in supported care**  
A mother with mental health problems was placed in 24 hour supported care and her children were fostered. The agreed three meetings per week for the children were gradually reduced to just one a week due to the authority's lack of staff. This greatly distressed the mother and children. The mother's advocate invoked the children's right to respect for family life (Article 8) and convinced the mental health team to invite children's services staff to the next care programme approach meeting so that the children's interests could be represented. The three visits per week were restored as a result.<sup>15</sup>

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<sup>11</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15

<sup>12</sup> 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

<sup>13</sup> *R (L and others) v Manchester City Council*, High Court, 26.09.01

<sup>14</sup> *Re P and others* [2008] UKHL 38

<sup>15</sup> 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

## Fair trial

- **Child defendants must be able to participate effectively in their trial**

There was a breach of the right to fair trial (under Article 6) where two children (aged 10 at the time of their offence and 11 at the trial) were tried in an adult Crown Court because they were unable to participate effectively in the proceedings. Although special measures had been taken in view of their young age to promote understanding of the proceedings, the court\* ruled that the formality and ritual of the Crown Court must have seemed incomprehensible and intimidating for a child of 11. In view of their immaturity, medical evidence said it was very doubtful they understood the situation and were able to give informed instructions to their lawyers.<sup>16</sup>

- **Specialist tribunals for children**

There was a breach of the right to fair trial (Article 6) where an 11 year old with learning difficulties was tried in the Crown Court. Although measures were taken to make the trial informal, he had been unable to understand the proceedings. The court\* ruled that when the decision is taken to deal with a child by way of criminal proceedings, who risks not being able to participate effectively because of his young age and limited intellectual capacity, it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for his particular difficulties, and adapt its procedure accordingly.<sup>17</sup>

- **Child witnesses giving evidence via video is compatible with right to fair trial**

Allowing child witnesses (aged under 18) to give their evidence via a live video link or a video recording in cases involving violence and sexual offences<sup>18</sup> does not breach a defendant's right to a fair trial (Article 6). However, the court did accept the principle that child *defendants* also need similar safeguards and said courts have the power to make such an order in relation to a child defendant if necessary.<sup>19</sup>

## In detention

- **Positive obligations on Prison Service in relation to children**

The prohibition on inhuman and degrading treatment (Article 3) and the right to respect for private life (Article 8) imposed positive obligations on the Prison Service in relation to children detained in Young Offenders Institutions (YOI). The duty involved taking reasonable and appropriate measures designed to ensure that children were treated - both by Prison Service staff and fellow inmates - "with humanity, with respect for their inherent dignity and personal integrity as human beings, and not in such a way as to humiliate or debase them". A second aspect was a duty to prevent child detainees from being subjected to behaviour impacting "adversely and disproportionately on their physical or psychological integrity". Such measures would need to "strike a fair balance between the competing interests of the particular child, and the general interests of the community as a whole (including other inmates)", but always having regard to: i) the welfare principle – that the child's best interests is at all times a primary consideration; ii) the "inherent vulnerability of children" in YOI; iii) the need for the state to take effective deterrent steps to prevent, and provide children in YOI with effective protection from, ill treatment of which the Prison Service has or ought to have knowledge.

The duties owed by local authorities to children under Children Act 1989 did not cease because a child was detained in a YOI. The court observed that it would therefore be possible for an individual child to bring free-standing proceedings using s7 HRA, in relation to treatment falling short of the standards identified, and found that guidance by the Home

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<sup>16</sup> *V v UK; T v UK* (European Court of Human Rights Grand Chamber, 16 Dec 1999) (2000) 30 EHRR 121

<sup>17</sup> *SC v UK* European Court of Human Rights (2005) 40 EHRR 10

<sup>18</sup> Under s21 of the Youth Justice and Criminal Evidence Act 1999.

<sup>19</sup> *R v Camberwell Green Youth Court* [2005] UKHL 4

Secretary stating that the Children Act did not apply to children in prison had been wrong in law.<sup>20</sup>

- **Unnecessary physical restraint of young people in custody is a breach of HRA**  
The Secure Training Centre (Amendment) Rules 2007 allowed officers working in these institutions for young offenders to physically restrain and seclude a young person to ensure 'good order and discipline'. These amendments were passed with very limited consultation and with no race equality impact assessment. The court ruled that any system of restraint that involves physical intervention against another's will and carries the threat of injury or death, engages the prohibition on inhuman and degrading treatment (Article 3). This is particularly so when it applies to a child who is in the custody of the state. The Secretary of State could not establish that the system was necessary for ensuring 'good order and discipline' and the Rules breached Article 3. The Rules were quashed.<sup>21</sup>
- **Detention of children of failed asylum seekers should be last resort**  
Whilst the government policy relating to detaining failed asylum seekers with children was lawful and complied with the Convention on the Rights of the Child, the UK Border Agency had not applied the policy properly. The detention of families with children should be authorised only in exceptional circumstances and as a last resort. The detention of two failed asylum seekers and their children was unlawful and a breach of their right to respect for their private and family lives (Article 8).<sup>22</sup>

### Separation from parents

- **Separation of mother and baby in prison requires flexibility**  
Following a challenge to the blanket Prison Services rule, requiring compulsory removal of all babies from imprisoned mothers at 18 months, the Prison Service amended the requirements for the operation of Mother and Baby Units. The removal of the child had to be a proportionate interference with her right to respect for family life (Article 8). It was necessary to consider the individual circumstances and whether it was in the child's best interest to be removed.<sup>23</sup>
- **Best interest of child a primary consideration in decision to deport mother**  
The best interests of children who were British citizens had to be a primary consideration when considering whether a decision to remove the children's mother to another country was proportionate with the right to respect for family life (Article 8). The best interest of the child involved asking whether it was reasonable to expect the child to live in another country. It was not enough to say that a young child might readily adapt to life in another country, particularly when they had lived in Britain all their lives and were being expected to move to a country they did not know and where they would be separated from a parent (their father). The children had rights which they would not be able to exercise if they moved to another country and it would be disproportionate to deport their mother.<sup>24</sup>

### Outside courts:

- **Family fleeing domestic violence helped to find accommodation**  
A woman fleeing her violent husband, who moved towns with her children whenever he tracked them down, eventually arrived in London and was referred to the local social services department. Social workers told the mother that she was an 'unfit' parent and that she had made the family intentionally homeless. An advice worker helped the mother challenge this claim using the right to respect for family life (Article 8) and prevented the

<sup>20</sup> *R (The Howard League for Penal Reform) v Home Secretary* [2003] 1 FLR 484.

<sup>21</sup> *R (C) v Secretary of State for Justice* [2008] EWCA 882.

<sup>22</sup> *R (Reetha Suppiah et al) v Secretary Of State For The Home Department (Liberty and Bedford Local Safeguarding Children's Board intervened)* [2011] EWHC 2 (Admin)

<sup>23</sup> *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151

<sup>24</sup> *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

children being placed in foster care. Instead the family was offered help to secure accommodation.<sup>25</sup>

### Children of convicts

- **An offender naming scheme must safeguard children's privacy**

An 'offender naming scheme', introduced by Essex Police with the aim of reducing crime, involved displaying posters of convicted offenders giving their name, the nature of their offence and the sentence being served, to deter others from committing offences (this is not to be confused with 'wanted posters' about suspects/convicts on the run wanted by the police). The court was asked to pronounce on the lawfulness of the scheme in principle, which it refused to do because legality would depend upon the circumstances (The court said there was a general presumption that information should not be disclosed by the police, in view of the potentially serious effect on the ability of convicted people to live normal lives and the risk of violence towards such people, but there was a public interest in favour of disclosure where necessary for the prevention or detection of crime or the protection of vulnerable people, and each case must be considered on its particular facts). However, the court stressed that the family of an offender, and in particular any children of an offender, had rights to respect for their private life (Article 8) which might be interfered with by the scheme. The need to safeguard children was particularly important. There was a real question as to whether it would ever be appropriate to nominate a father of young children for the scheme. Damage could be done to the family even if a former partner and child had changed their names.<sup>26</sup>

### Due process for juveniles

- **Indefinite notification requirements for sex offenders, with no opportunity for review is breach of right to private life**

F had been detained for sexual offences which he had committed when aged 11. Under the Sexual Offences Act 2003, the nature of his offence and length of sentence meant he had to notify the police of his personal details, address and details of travel for an indefinite period. Whilst considering how important the notification requirements are in furthering the aims of preventing crime and protecting potential victims of crime, the court made a formal declaration under s4 HRA that the indefinite notification requirements were incompatible with the right to respect for private life (Article 8) because there was no opportunity for review. In F's case the indefinite notification requirement would affect the whole of his adult life, which "makes it all the more important for the legislation to include some provision for reviewing the position and ending the requirement if the time comes when that is appropriate".<sup>27</sup> Following a declaration of incompatibility under s4 HRA, it is for Parliament to decide whether and how to remove the incompatibility.<sup>28</sup>

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May 2011

\* In this case the European Court of Human Rights

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<sup>25</sup> 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

<sup>26</sup> *R (Ellis) v Chief Constable of Essex Police* [2003] EWHC 1321 (Admin)

<sup>27</sup> Lord Rodger, para 66.

<sup>28</sup> *R (F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17