



Consultation Response/ Ymateb i Ymgynghoriad

Date / Dyddiad: 8 March 2022

Subject / Pwnc: Human Rights Act Reform: A Modern Bill of Rights

As the Children's Commissioners for Northern Ireland, Scotland and Wales, we will focus on issues affecting children and their families in the devolved nations. While our statutory functions differ¹, we are all Independent Children's Rights Institutions established in accordance with UN principles.² Our remits centre upon the promotion and protection of children's rights, particularly under the UN Convention on the Rights of the Child (UNCRC), informed by children's views and experiences.

By incorporating the European Convention on Human Rights (ECHR) into domestic law, the Human Rights Act has been critical to advancing children's rights in the UK. Under the promise of 'bringing rights home', the Act has empowered children whose rights have been violated to obtain a remedy in national courts, rather than having to go to the European Court of Human Rights in Strasbourg. The requirement for public authorities to act compatibly with ECHR rights under Section 6 has embedded human rights into the delivery of public services, thereby reducing the need for children and those representing their interests to resort to litigation to enforce rights.

The ECHR has been a force for positive change in our society, impacting not just development of our laws but also our attitudes. Its impact cannot be overstated. In this regard, we would highlight the jurisprudence of the European Court of Human Rights on corporal punishment. In 1982, the court considered the cases of Mrs Campbell and Mrs

¹ See The Children's Commissioner for Wales Act and Regulations 2001; Commissioner for Children and Young People (Scotland) Act 2003; and The Commissioner for Children and Young People Order (Northern Ireland) 2003

² Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993; and Committee on the Rights of the Child General Comment no. 2 (2002): The role of independent national human rights institutions in the promotion and protection of the rights of the child

Cosans, two Scottish mothers who objected to the use of corporal punishment at the state schools their sons attended. The court found that Article 2 of Protocol 1, and specifically the parents' right to ensure the education of their children in conformity with their philosophical convictions, had been violated. Legislation was subsequently introduced which banned corporal punishment in state schools. In addition, a landmark Strasbourg judgment in 1998 on corporal punishment in the home found that English law "did not provide adequate protection" for children against treatment or punishment contrary to Article 3.³ Law reform on this issue has culminated in the Scottish Parliament in 2019 removing the defence of justifiable assault from Scots law.⁴ The Welsh Parliament/Senedd Cymru followed suit a year later with the removal of the defence of reasonable punishment.⁵

The Human Rights Act also forms a central part of the devolution settlement in the UK. The role played by the ECHR in the devolution statutes has helped to embed respect for human rights in executive and administrative action in Scotland, Northern Ireland and Wales.⁶

In all three nations there has been a move to enhance human rights protections for children. For example, in January 2011, the Rights of Children and Young Persons (Wales) Measure 2011 was passed which placed a duty on all Welsh Ministers to have due regard to the substantive rights and obligations within the UN Convention on the Rights of the Child (UNCRC) and its Optional Protocols. In March 2021, after over 10 years of campaigning by children, young people and wider civil society, the Scottish Parliament passed the UNCRC (Incorporation) (Scotland) Bill, which will fully and directly incorporate the UNCRC into Scots Law. The Scottish Government has committed to take forward proposals to incorporate other international human rights treaties into Scots Law.⁷

We are of the firm opinion that children in the UK need the protection of both the Human Rights Act (covering ECHR rights) and UNCRC rights in domestic law.⁸

The proposals set out in the Government's consultation paper⁹ will significantly weaken the protection of children's rights in the UK. We are not convinced that the rationale to "prevent the incremental expansion of rights without proper democratic oversight" has been borne out in case-law and in practice. We are concerned that the proposals will negatively impact on the ability of children and their representatives to enforce their rights. We are also concerned that the proposals will impair the interpretation of certain rights, particularly Article 8. We do not consider that the consultation paper has fully considered the impact that the proposals will have on the devolution framework. Finally, the

³ A v United Kingdom, application no. 25599/94

⁴ The Children (Equal Protection from Assault) (Scotland) Act 2019

⁵ Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020

⁶ Joint Committee on Human Rights, The Government's Independent Review of the Human Rights Act, Third Report of Session 2021–22, Published on 8 July 2021, Paragraph 237. Available at: <https://committees.parliament.uk/publications/6592/documents/71259/default/>

⁷ <https://www.gov.scot/news/next-step-towards-scottish-human-rights-bill/>

⁸ We agree with the written evidence from Article 39, HRA0017. <https://committees.parliament.uk/writtenevidence/22958/pdf/>

⁹ Human Rights Act Reform: A Modern Bill of Rights – consultation, published 14 December 2021. Available at: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>

proposals will weaken the UK's commitment to the ECHR, and will risk damaging relations between the UK and the Council of Europe (particularly the European Court of Human Rights).

Under Chapter 3 of these proposals, the cited criticisms of the Human Rights Act are that there has been a growth of rights culture, which has created legal uncertainty and that the expansion of rights presents a risk to public protection. As Commissioners whose legislative remits are firmly and proudly grounded in children's international human rights, we cannot disagree more strongly with any proposals that seek to minimise the important growth in awareness, understanding and appreciation of others' human rights. Moreover, our statutory purposes place us in diametric opposition with the UK Government's proposals in this regard.

We expand on each of these concerns below.

Human Rights Act and Devolution

Any change to the Human Rights Act will impact on the people and governance of Wales, Scotland and Northern Ireland. This is because, amongst other reasons, the devolved administrations are required to act compatibly with ECHR rights when legislating. For example, section 81 of the Government of Wales Act 2006 states that Welsh Ministers have no power to make or approve any form of legislation that is incompatible with any of the Convention rights.

Northern Ireland

The consultation document recognises the central importance of robust mechanisms to protect human rights in the peace settlement in Northern Ireland, including the following commitment in the Belfast (Good Friday) Agreement 1998:

"(t)he British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."¹⁰

Paragraph 9 of this section of the Agreement outlined the steps the Irish Government committed to take to ensure an equivalency of rights across the island.

Over recent years, following the referendum on the UK withdrawal from the EU, the potential impact on rights protections in Northern Ireland, and the ramifications for the peace process, have become a matter of great concern. Article 2 of the Northern Ireland protocol of the Withdrawal Agreement states that:

"The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in

¹⁰ NIO, 1998, The Belfast (Good Friday) Agreement 1998, Paragraph 3 of the of the 'Rights, Safeguards and Equality of Opportunity' section.

the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.”

We are pleased that the government declares its full commitment to the Belfast (Good Friday) Agreement in the consultation document.¹¹ However, there is no detail as to how the government plans to continue to meet these obligations, but rather a vague reassurance is provided: “our proposed reforms will not undermine that Agreement.”

While it is correct that the Agreement does not specify how the ECHR would be incorporated into the law of Northern Ireland, the statement that “any reform will keep the Convention rights incorporated into the Northern Ireland law and indeed UK law” appears to be out of step with the rest of the consultation document which outlines how the government proposes to replace the Human Rights Act with a Bill of Rights with more limited provisions and applications. Any reduction in the ECHR rights, or in the remedies open to individuals for breaches of these rights will be a direct breach the Belfast (Good Friday) Agreement and the Northern Ireland Protocol.

The consultation document also recognises the commitment in the Agreement to a Bill of Rights for Northern Ireland but suggests that Bill of Rights processes for the UK and for NI could run in parallel and be mutually reinforcing. However, the Bill of Rights for Northern Ireland is explicitly to contain rights in addition to the ECHR, as opposed to the British Bill of Rights which is proposed to replace the ECHR. It would appear that to date little thought has been given in these proposals on the impact of the repeal of the Human Rights Act on the peace settlement in Northern Ireland. We advise that moving ahead with these proposals to repeal the Human Rights Act without clearer, specific proposals for actions to honour the commitments in the Belfast (Good Friday) Agreement and Northern Ireland Protocol to the Withdrawal Agreement would potentially have major repercussions for the stability of the political institutions, and the fragile peace in Northern Ireland.

Scotland

The Scotland Act 1998 puts the ECHR at the heart of devolution. The powers of the Scottish Parliament and the Scottish Government are limited by the requirement to act compatibly with ECHR obligations. Under Section 29, legislation that is incompatible with ECHR rights, defined by reference to the Human Rights Act, is outside the competence of the Scottish Parliament. Section 57 provides that Scottish Ministers have no power to act incompatibly with ECHR rights. According to the Scottish Human Rights Commission, “Convention rights have become a very strong part of the fabric of Scotland’s laws or judicial analysis and, crucially, the legislative competence of the Scottish Parliament” because of the embedding of the Human Rights Act within the Scotland Act.¹²

Important aspects of Scots law have been led and influenced by ECHR rights. For example, parental involvement in the relevant processes of the Children (Scotland) Act 1995 have been given greater emphasis through the courts’ considerations of Article 8

¹¹ Consultation document p14

¹² Judith Robertson, Oral evidence to the Joint Committee on Human Rights, The Government’s Independent Human Rights Act Review, HC 1161, 10 March 2021. Available here: <https://committees.parliament.uk/oralevidence/1871/html/>

ECHR.¹³ In addition, a consequence of the legal duty on public authorities under Section 6 has been the incremental development of a human rights-based approach across Scotland.¹⁴ The Human Rights Act has also had a significant impact on the use of Strasbourg-style language and jurisprudence in Scots law.

Nowhere is this more pronounced than in the Children's Hearing System, where the Human Rights Act has played a critical role in helping to embed ECHR rights protections. It continues to drive the development of good practice, particularly in moving the system from a purely welfare-based model to one in which children are recognised and respected as rights holders.

For example, in 2001¹⁵ the Inner House of the Court of Session found that the Children's Hearings Rules (as they were then) breached children's right to a fair hearing, as protected by Article 6 ECHR. This was because at the time funded legal representation was not available in two situations: where sending a child to secure accommodation is under active consideration, and where a child would not, without legal representation, be able effectively to participate at the hearing. In 2009, the Inner House also found that the failure to provide state-funded legal representation for 'relevant persons', in this case an unmarried father, amounted to an "in-built systemic flaw in the legal aid scheme as it applied to the children's hearing system".¹⁶ Partly as a result of this series of cases, the Scottish Parliament passed the Children's Hearings (Scotland) Act 2011, which among other reforms sets out circumstances where legal aid for children is made automatically available.

More recently in 2020,¹⁷ the UK Supreme Court dealt with a challenge against the compatibility of the Children's Hearing system with the rights of siblings in terms of Article 8 ECHR. The Supreme Court ruled that, following changes made to Children's Hearing system since the case started, it now complied with the principles of the right to family life under Article 8 ECHR in relation to siblings and other family members. However, in recognising the legitimacy of the challenge to the operation of the system, the court highlighted that:

"[...] the initiation of these challenges has served to uncover a gap in the children's hearings system which has had to be adapted to meet the requirements of article 8 in relation to siblings and other family members. There is now a clear recognition of the interest of both the child and the sibling in maintaining a sibling relationship through contact (or through placement if both are subject to CSOs) in most cases [...] There needs, in short, to be a bespoke enquiry about the child's relationship

¹³ See, *C v Principal Reporter*, 2010 Fam. L.R. 14 where a child was subject to a supervision requirement under the condition that contact with the mother was at the discretion of the child did not violate article 8 either, given the act's extensive rights of review and appeal

¹⁴ Scottish Human Rights Commission, *Inquiry: 20 Years of the Human Rights Act 1998*, September 2018. Available here: <https://www.scottishhumanrights.com/media/1796/shrc-submission-to-the-jchr-on-hra-1998-13-september-2018.pdf>

¹⁵ *S v Miller* 2001 SLT 531. See article by Kenneth Norrie, *Hearing and Speaking*, 18 January 2010, Available here: <https://www.lawscoot.org.uk/members/journal/issues/vol-55-issue-01/hearing-and-speaking/>

¹⁶ *K v Authority Reporter* 2009 SLT 1019

¹⁷ *ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland)*, [2020] UKSC 26

with his or her siblings when the children's hearing is addressing the possibility of making a CSO"¹⁸

Following the judgment, the Scottish Parliament passed the Children (Scotland) Act 2020, which paves the way for a new category of participation rights for siblings (and potentially other family members in the future), so that they are able to participate in a children's hearing when they are not a relevant person (see section 25 of the 2020 Act).¹⁹

While the Government's proposals at this stage are vague, we are concerned that some of the proposals (particularly in relation to the balancing of rights under Articles 8-11 ECHR) will negatively impact on how children's rights are interpreted in Scotland. It is also unclear how the proposals to weaken the power of the courts to interpret legislation compatibly with ECHR rights and to remove the power to strike down rights-abusive secondary legislation will work procedurally in Scotland, where courts currently have specific powers under the Scotland Act and Human Rights Act to ensure devolved legislation upholds ECHR rights.²⁰

The proposals are also at odds with the Scottish Government's agenda for human rights development. Following the recommendations of the First Minister's Advisory Group on Human Rights Leadership (FMAG), the Scottish Government has committed to bring forth a Bill that 'will provide further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural, as well as environmental rights'.²¹ As mentioned above, the UNCRC (Incorporation) (Scotland) Bill, once brought into force, will make it unlawful for public authorities to act incompatibly with the incorporated UNCRC requirements, giving children, young people and their representatives the power to go to court to enforce their rights.

We are concerned that this will create a two-tier system in Scotland whereby ECHR rights will be subject to weaker enforcement mechanisms than UNCRC rights.

We recognise that there is no clear consensus as to the extent to which human rights are a devolved matter.²² Para 7(2) of Schedule 5 to the Scotland Act makes clear that the observation and implementation of human rights are excepted from reservation, and it is widely accepted that the observation and implementation of the ECHR is a specifically

¹⁸ Para 52

¹⁹ Stand Up for Siblings, Meeting siblings' rights to participate in Children's Hearings, 9 November 2020. Available here: [https://www.standupforsiblings.co.uk/2020/11/09/meetings-siblings-rights-to-participate-in-childrens-hearings/#:~:text=The%20new%20Children%20\(Scotland\)%20Act,section%2025%20of%20the%20Act](https://www.standupforsiblings.co.uk/2020/11/09/meetings-siblings-rights-to-participate-in-childrens-hearings/#:~:text=The%20new%20Children%20(Scotland)%20Act,section%2025%20of%20the%20Act)

²⁰ Amnesty International UK, A guide on the Consultation on Human Rights Act Reform. Available at: https://www.amnesty.org.uk/files/2022-02/HRA%20Consultation%20FINAL.pdf?VersionId=mRkIDIRm2sPbNw2o0iDFLIEZ_F3FoZ6c

²¹ See First Minister's Advisory Group on Human Rights Leadership, Recommendations for a new human rights framework to improve people's lives, Report to the First Minister, 'FMAG Report' (December 2018). Available at <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf>

²² JCHR Report, 8 July 2021, para 254. Available at: <https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/89/8913.htm#footnote-029>. See also Devolution and Human Rights Report, JUSTICE, <https://justice.org.uk/devolution-human-rights-2/> B

devolved matter.²³ We note that the consultation document does not address what conversations, if any, have already been had with the Scottish Government on reform of the Human Rights Act. The issue of whether legislative consent will be sought is also not addressed.

Positions of the Scottish and Welsh Governments

It is clear from their joint statement published on 2nd March 2022 that the Welsh and Scottish Governments strongly object to these proposals in their entirety.²⁴

They are critical of the UK Government for not listening to evidence from civil society and the legal profession and taking forward these proposals when the Independent Review of Human Rights found “no good case for making significant changes”.

As the Children’s Commissioners for Scotland, Wales and Northern Ireland, we agree with the Welsh and Scottish Governments’ “grave and deep-seated concerns in relation to both the current proposals and the UK Government’s longer-term direction of travel”.

We also agree with the following statement that “the proposals for a ‘modern Bill of Rights’ are both unwelcome and unnecessary. We are clear that the interests of people in Scotland, Wales and Northern Ireland are best protected by retaining the Human Rights Act in its current form.

Section 2: the relationship between domestic courts and the European Court of Human Rights

The proposals to amend Section 2 of the Human Rights Act and to assert that the UK Supreme Court is the ‘ultimate judicial arbiter’ of the implementation of human rights in the UK risks weakening our commitment to international law. As a founding member of the Council of Europe, it will also have a negative impact on the collective respect for and enforcement of ECHR rights by Council of Europe member states. We agree with Lord Carnwarth that the proposals are entirely at odds with the stated aim of the Bill of Rights to “continue to respect the UK’s international obligations as a party to the Convention”.²⁵

In any case, we consider that the rationale underlying the proposals, namely that Section 2 gives rise to legal uncertainty and promotes an over-reliance on the Strasbourg case law, misrepresents the relationship between the UK Supreme Court and the ECtHR. In this respect, we draw attention to the evidence of Baroness Hale of Richmond²⁶ (former

²³ Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland. A briefing paper for the Civil Society Brexit Project, by Professor Nicole Busby. Available at: <https://hrcscotland.org/wp-content/uploads/2021/02/Final-IRHRA-Nicole-Busby-January-2021.pdf>

²⁴ <https://gov.wales/devolved-nations-criticise-unwelcome-and-unnecessary-uk-government-plans-drop-human-rights-act>

²⁵ Lord Carnwarth, Lecture on Human Rights Act reform – is it time for a new British Bill of Rights? Lecture transcript available at: <https://constitutionallawmatters.org/2022/02/lord-carnwarth-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/>

²⁶ Baroness Hale of Richmond, oral evidence to the Joint Committee on Human Rights on the Government’s Independent Human Rights Act Review. Available at: <https://committees.parliament.uk/oralevidence/1661/html/>

President of the Supreme Court) and Judge Eicke and Judge Spano²⁷ (current judges of the European Court of Human Rights) to the Joint Committee on Human Rights. Their evidence demonstrates that informal and formal judicial dialogue between the two courts is working well. In particular, the operation of Section 2 clearly allows for very healthy state of judicial dialogue in the form of judgments.

We are concerned that the proposals risk destabilising the relationship between the Supreme Court and the European Court of Human Rights.

Incorporation of Treaty bodies

Due to the lack of full incorporation of the UNCRC into domestic law in the UK, it is usual for children's rights claims to be brought under the Human Rights Act 1998. The Human Rights Act directly incorporated the majority of the rights and freedoms in the ECHR, allowing UK citizens, including children and families, to seek protection of their rights through domestic courts, and also preserving the ability to go to the European Court of Human Rights thereafter if domestic remedies fail.

However, the ECHR is not a child-specific international instrument. It is therefore common to refer to UNCRC rights in Human Rights Act proceedings. A claim under the Human Rights Act can be a 'gateway' to introducing specific children's rights issues.

The European Court of Human Rights has repeatedly referred to the UNCRC in its decision-making and judgments. They have used the UNCRC to interpret children's rights in a number of cases.²⁸ Section 2 of the Human Rights Act places a duty on UK courts to take into account jurisprudence from the European Court of Human Rights, and this is one of the key reasons why this provision should be preserved.

We have set out below several cases where national courts have relied upon the UNCRC in proceedings brought under the Human Rights Act.

Case studies

In *R (Williamson) v Secretary of State for Education*²⁹, Baroness Hale referred to commentary by the UN Committee on the Rights of the Child. In that case teachers and parents from four independent Christian schools challenged the legal prohibition on corporal punishment in schools as being incompatible with their rights under the ECHR, specifically their right to manifest their religion guaranteed under Article 9 ECHR and their right to have their children educated according to their philosophical convictions under Article 2 of the First Protocol. Their application failed in the High Court, the Court of Appeal and in the House of Lords.

Baroness Hale referred to the UN Committee's concerns and recommendations relating to the UK's failure to protect children from all corporal punishment in education settings,

²⁷ Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011). Available at: <https://committees.parliament.uk/writtenevidence/22906/html/>

²⁸ See among many other examples, *Strand Lobben and others v. Norway*, [GC] application no. 37283/13

²⁹ *R (on the application of Williamson and others) v Secretary of State for Education and Employment and others* [2005] UKHL 15 [84]

following its first review of the UK in 1995. Following the second review, in 2002, the UN Committee welcomed the abolition of corporal punishment in all schools, which was noted by Baroness Hale.

The case of ZH (Tanzania)³⁰ highlights how the requirement to give primary consideration to the best interests of the child under the UNCRC has been successfully advanced in a case. The central issue in this case was the best interests of children where a decision was taken to deport a parent. The case involved the deportation from the UK to Tanzania of a mother of two children. The children were both born in the UK and were not subject to immigration proceedings. Their mother's deportation would inevitably mean the children would also be forced to leave the UK with her. The court also considered what would happen if the children had to remain in the UK with their father.

The Asylum and Immigration Tribunal and the Court of Appeal had both held that the children could reasonably be expected to follow their mother to Tanzania. The children's father was diagnosed with HIV; he was living on disability allowance; residing with his parents and new partner; and was reported to be consuming a large amount of alcohol. Despite these facts, the Tribunal felt that there would not necessarily be any practical difficulties if the children were to live with their father, or indeed for the father to visit the children in Tanzania. The Court of Appeal said that the Tribunal's finding that the children could live with their father was susceptible to criticism as having no rational basis, but nevertheless upheld the Tribunal's decision that the children could reasonably be expected to follow their mother to Tanzania.

The decision before the Supreme Court on appeal from the Court of Appeal was around whether deportation of the mother would infringe the right to respect for the family life of each parent and of the two children under Article 8 ECHR and, if so, whether this could be properly justified by the immigration authorities.

The judgment contains a lengthy consideration of international human rights provisions and specifically the UNCRC, stating that in this case, the most relevant national and international obligation is contained in Article 3(1) UNCRC. As Baroness Hale explained:

"This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty ... to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."

³⁰ ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4

Baroness Hale further stated that the jurisprudence of the European Court of Human Rights makes it clear that the Court will expect national authorities to apply Article 3(1) of the UNCRC and treat the best interests of the child as a primary consideration.

The Supreme Court considered a number of factors, including the children's education in the UK, their social links and positive relationship with their father. It also considered the children's citizenship and in that context referred to the UNCRC (Articles 7 and 8). The court concluded that, in making a proportionality assessment under Article 8 ECHR, the best interests of the child must be a primary consideration, meaning it must be considered first, albeit it may be that the strength of other considerations outweighs the best interests of the child.

It was vital that the claim could be brought under ECHR rights, thus allowing the UNCRC rights to also be read within the court's considerations. In addition, in this case the mother had made three unsuccessful claims for asylum, one in her own identity and two in false identities. The mother's behaviour in this case may have prevented a claim from being brought on behalf of the children who were British citizens and had done nothing to deserve their rights being curtailed, in accordance with this consultation's proposals. A claim may have been prevented from being brought on the basis of the mother's conduct and "responsibilities"; it is vital to note how this would have had a significant and detrimental impact on the children and may have prevented the remedy that was granted and/or even prevented the case from being brought in the first place.

*Murray v Express Newspapers plc and another*³¹ concerned an Article 8 ECHR claim brought by the author J. K. Rowling against the defendants, who had published a photograph of her 19 month-old son. It was argued on the child's behalf that he had a right to privacy under Article 8 ECHR. The Court of Appeal considered Article 16 UNCRC in its deliberations, and its emphasis on the need to protect the child from unlawful interference with privacy, family or home. In ruling that a child's right to respect for his private life under Article 8 ECHR may, in some cases, outweigh a publisher's right to freedom of expression under Article 10 ECHR, the court said:

"... In our opinion it is at least arguable that [child's name] had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought. The courts have recognised the importance of the rights of children in many different contexts and so too has the international community ... and the United Nations Convention on the Rights of the Child, to which the United Kingdom is a party."

This case demonstrates how children are reliant on others to protect their rights when they are too young to do this themselves; it is therefore important that the ability to pursue claims on behalf of dependent children is preserved. The parents' actions could have been seen to waive any privacy rights due to the mother's position of international fame and note, but this has to be treated separately from the child's own rights.

In the Northern Ireland case *King v Sunday Newspapers Ltd* 2011 NICA 8, the Sunday World published a series of articles about the Applicant, accusing him of involvement in serious

³¹ *Murray v Express Newspapers PLC and another* [2008] EWCA Civ 446

criminal activity as part of a Loyalist paramilitary group. The paper published details of the Applicant's address, a photograph of him with his partner, the fact that his partner was a Catholic and the baptism of their child as a Catholic. The articles also contained further information about the Applicant's partner and her family. The information had been published in a way that allowed the child to become identifiable as it was the child of the Applicant and his named partner.

Articles 8 and 10 were considered by the court in the context of the tort of misuse of private information and / or an action for breach of privacy. The court balanced the rights under Article 8 and Article 10 and found that there had been an unjustifiable breach of the child's privacy.

The right to freedom of expression is specifically singled out and afforded extra protection in the Human Rights Act. Any further protection as set out in the government's proposals is likely to reduce the right to privacy and the ability to obtain redress for breaches of the right to privacy, including the rights to privacy of children. This is therefore likely to have a negative impact on the rights of children.

It has been difficult, however, for specific children's rights claims to be successful due to the lack of full incorporation of the UNCRC.

In the case of SC, CB and 8 children, and Secretary of State for Work and Pensions³² the Supreme Court rejected a challenge against the two-child limit on the individual element of child tax credit payments. In a unanimous judgment, the Court held that the provision imposing the limit was not contrary to the appellants' ECHR rights.

The Court found that the rule was potentially indirectly discriminatory against women, as well as children living in households with more than two children. However, any such discrimination could be validly justified and was considered to be proportionate on the basis of 'protecting the economic well-being of the country'.

The appellants' central arguments were that the two-child limit was contrary to the right to family life under Article 8 ECHR read in conjunction with the prohibition of discrimination under Article 14.

The Court was unpersuaded by the appellants' contention that the limit was contrary to Article 8.

To successfully advance a claim of discrimination under the ECHR, it is necessary to do this within the 'ambit' of another right. To establish discrimination, it must be shown that there was a difference in treatment on the basis of a relevant characteristic. The Court accepted the appellants' arguments that the case came under the ambit of either Article 8 or, alternatively, the right to property under Article 1 of the First Protocol to the Convention.

The Court accepted that the provision could be indirectly discriminatory against woman as compared to men, considering that women made up 90% of single parents bringing up children. The Court also accepted that the provision could be indirectly discriminatory against children living in households with more than two children, who were

³² SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors [2021] UKSC 26

disadvantaged as compared to those with two or fewer. However, it was possible for the measure to be justified.

The appellants argued that the two-child limit violated the UNCRC. Lord Reed emphasised that the UK is a dualist as opposed to a monist state, meaning that: “it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom”.

He criticised some previous case commentary which had appeared to suggest the opposite. He pointed to the weight that many of these judgments had placed on assessing whether the UNCRC had been violated, such as in *Mathieson and Secretary of State for Work and Pensions*,³³ where it was said that the relevant delegated legislation did not comply with the UNCRC.

Lord Reed did think that consideration of whether the two-child limit respected the best interests of the child could be a relevant factor in the assessment of whether the discrimination was justified.

However, the Court concluded that the two-child limit was justified on grounds of economic policy and the reduction of public expenditure. The Court also found that the discriminatory effect on children living in households with more than two children was similarly capable of justification, even when considering the best interests of the children involved.

The two-child limit remains one of the most significant breaches of children’s rights under the UNCRC on the statute book of the UK at present. Children are entitled to equal treatment regardless of their parents’ background or status in accordance with Article 2 UNCRC but the position of the UK Government remains at odds with the UNCRC and our views in this regard. We have written jointly to the Secretary of State³⁴ on this issue twice in the last year but, despite our requests to meet to discuss this further, we have not been successful in securing such a meeting.

It is notable that, in this case, there was criticism of the involvement of campaigning organisations in helping to bring cases like this as an attempted second bite of the cherry, as they will have had the opportunity to lobby against legislation at the Bill stage. Whilst this case fits within the proposals at hand to preserve the sovereignty of Parliament, this does nothing to overall protect and advance much needed support for children’s human rights, in accordance with the state party’s obligations under, for example, Article 4 UNCRC. The proposals to limit Human Rights Act claims and further qualify rights and access to justice will have a detrimental impact on the rights of children (see further below).

Section 6 and public authorities

³³ *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47

³⁴ [Children’s Commissioners in devolved nations urge UK Government to stop violating children’s rights to an adequate standard of living - Children’s Commissioner for Wales \(childcomwales.org.uk\)](https://www.childrenscommissioner.gov.uk/press-releases/childrens-commissioners-in-devolved-nations-urge-uk-government-to-stop-violating-childrens-rights-to-an-adequate-standard-of-living) this is the first letter which was published as an open letter. The second letter from September 2021 has not been published, nor has the first response from the DWP. There has been no response to the second letter.

We are of the view that the current definition of public authorities in Section 6 should be maintained. However, we recognise that the definition has been problematic in terms of the way that functions of a public nature have been interpreted by the courts (most notably in the case of *YL v. Birmingham City Council*³⁵ and *Ali (Iraq) v. Serco Ltd*³⁶). To be clear, children's rights must be protected even where services are contracted out to private or third sector organisations.

We are concerned that if an unduly narrow definition is to prevail, then private bodies that enter into contracts to provide services for children, such as housing, residential accommodation, immigration services, education support, provision of food/ school meals, health services, provision of care/ adoption or fostering services, social security related services, among other examples, may not be required to comply ECHR rights. This falls short of international human rights law requirements.

In relation to the UNCRC, the UN Committee on the Rights of the Child has emphasised that states are not exempted from their obligations under the CRC when they outsource or privatise services that impact on the fulfilment of children's rights.³⁷

Whilst in Wales there is partial incorporation of the UNCRC, through a duty of due regard on Welsh Ministers, this does not permit individuals to bring a challenge against a public authority. It is notable that the proposals seek to make a conscious move away from citizens' abilities to make claims against public authorities, but this is the primary way in which the majority of people interact with 'the State'. Although national guidance and legislation should be applied evenly and consistently by relevant public authorities, there is a lot more nuance around decision making beyond what guidance will technically call for or mandate, and this is where the majority of poor practice issues affecting children and families are likely to occur. Not least in relation to decisions about funding (individual provision or maintaining settings and organisations' funding), providing care and support service, access to education provision particularly for those with additional needs, housing provision and support and many more areas.

As noted above, the inability for individual children or families to bring a claim against a public authority for breach of their rights under the UNCRC means that the Human Rights Act is the only avenue open to a challenge on human rights grounds.

Paragraph 150 of the proposals states that the UK Government takes "a principled view that decisions on the allocation of resources should be determined by elected law-makers, and by operational professionals in possession of the full facts, **who are answerable to the public.**" [emphasis added]. This is at odds however with the rest of the proposals that seek to prevent claims being made against public authorities wherever possible, provided that they are trying to act in accordance with the will of Parliament. But very often, this can only be properly determined when a claim is made and explored in full to test this out. The balance of power would shift considerably if claims could not be brought where it is deemed that those public authorities are 'doing their best' and therefore should be allowed to continue with their actions unchecked. This does not in any way describe a system that is answerable to the public, particularly children who lack the

³⁵ [2007] UKHL 27

³⁶ [2019] CSIH 54

³⁷ UNCRC General Comment No. 16 (2013)

ability to vote in elections. An election every few years similarly does not give sufficient access to justice to a person whose rights have been curtailed or breached by the decision or actions/omissions of a public authority.

In addition, the proposal wording about public authorities “giving effect” to primary legislation is too broadly drawn to be workable as a definition and would itself invite a number of claims, one might anticipate, to be able to give any substantive meaning to what “giving effect” constitutes in practice.

Paragraph 192 of the proposals seeks to shift the approach to interpreting Convention rights by providing that domestic courts must first consider whether a rights issue can be resolved by reference to a specific domestic statute or the common law, before considering Convention rights and Strasbourg case law. In practice, this would phase out rights-based language and approaches in the vast majority of cases as the UK Government is not required to act compatibly with the Convention when creating domestic statutes, and so any incompatibilities would be left unchallenged and allowed to continue.

The Supreme Court case in respect of the Scottish Bill to incorporate the UNCRC into their domestic legislation reaffirmed that the UK Government seeks to continue to legislate without reference to the rights of treaties and Conventions that they themselves have signed and ratified. These proposals unfortunately further confirm this position, which is unacceptable and incompatible with the position of a contracting state party to those international instruments.

Further clarity would also be required from these proposals as to what status any new Bill of Rights would hold; as a ‘domestic statute’ how would this fit in the proposed hierarchy of legislation for the purposes of interpretation of Convention rights?

Access to justice

We do not consider the Government has made a case to support the introduction of a permission stage.

The consultation document does not provide any statistics (for example, the number of human rights cases struck out at an early stage) to support the assertion that ‘trivial and unmeritorious’ cases are being brought before national courts in large numbers, thereby using up court time and public resources.

The Government states that frivolous claims affect trust in the system and devalue the whole concept of human rights.³⁸ It is difficult to understand how the bringing of a human rights challenge would devalue the concept of rights when this is very often the only way to seek full interpretation of rights in a particular situation. Unsuccessful cases should not be seen as automatically indicating that something has gone wrong or that parties have acted inappropriately in bringing claims. Many cases will be decided by a majority of judges in the higher courts and do not require unanimous decisions; dissenting judgments very clearly indicate where cases have come down to very complex interpretations and/or where the complexity is such that even a panel of experienced judges have found it difficult to agree on the interpretation of a vaguely drafted law or

³⁸ At paragraph 219

provision. It is only when legislation is applied to real life scenarios that the true nature of the in-depth clauses and text can be properly tested out and sometimes it will be necessary to resort to the courts to assist in interpreting this. This is the point of the judicial system and the separation of powers, and should not therefore be seen as an indication of merit or otherwise in the claim being brought.

In any case, a claimant bringing a judicial review (the most common form of human rights claim) in England and Wales, or in Scotland will need to apply for permission for judicial review. For example, in Scotland the Court of Session can only grant permission for an application for judicial review to proceed if "it is satisfied...that the application has a real prospect of success".³⁹ According to case-law, the rule is "not to be interpreted as creating an unsurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course".⁴⁰

The proposal to introduce a permission stage will require amendments to court rules in Scotland, which is ordinarily a devolved matter. The consultation document does not address whether any legislative consent will be sought.

Finally, we are of the view that introducing a permission stage and a 'significant disadvantage' condition poses a significant access to justice issue. If applied with excessive formality, it is likely that less human rights cases will be heard at a substantive hearing. In these circumstances, there is a risk that the condition could constitute a breach of Article 6 ECHR, on the basis that the practical and effective nature of the right of access to a court has been impaired.⁴¹

We also note that 'significant disadvantage' is not defined. There is no guidance as to what is significant; whether the test is to be determined subjectively or objectively; or as to the meaning of disadvantage.

Further, the requirement to "have suffered" a significant disadvantage would not allow claimants who have not yet suffered any disadvantage and who are trying, by issuing proceedings, to prevent any disadvantage occurring to them. Such claimants would have to wait until they had suffered such a disadvantage before bringing proceedings, and it would often then be too late. This is particularly the case where a claimant is attempting to prevent publication. A failure to be able to prevent publication is likely to have a negative impact on children as they are likely to be more affected by publications about them in the future.

The Northern Ireland case JR159 [2021] NIQB 68 illustrates that type of case that would have been difficult to progress given the above requirement to "have suffered" a significant disadvantage under the new proposed "permissions stage". The Applicant was born prematurely and was due to start primary school in September 2021. The Applicant's parents were concerned that the child was not ready for primary school and wished to defer this for a year. The education legislation did not allow for deferrals. The court found that there was a breach of Article 8 ECHR. The court found that the statutory scheme was disproportionate in its operation by reason of its lack of flexibility and, thus, its incapacity to deal adequately with a case where requiring a child to commence full-time education at

³⁹ Section 27B(2), Court of Session Act 1988

⁴⁰ *Wightman v Advocate General* 2018 SC 388, paragraph 9

⁴¹ See for example *Zubac v. Croatia* [GC], no. 40160/12, 5 April 2018, para 97.

the current compulsory school starting age is clearly and demonstrably contrary to that child's best interests and unjustified by the aims pursued by the legislation.

These proposals will be detrimental for child claimants. Children are not in control of their cases. Children rely on the adults around them to bring claims on their behalf and to successfully navigate the requirements of instructing a solicitor; obtaining funding and bringing proceedings. The more hurdles that are placed in their way, the more likely they are not to succeed in what may well be a meritorious claim. Whilst this is likely to affect all human rights claimants, the negative impact is likely to be more significant for children given their reliance on others to protect their rights.

Qualified and limited rights

We fundamentally disagree that the principle of 'proportionality', which underpins decision making in relation to qualified rights under the ECHR (i.e. Articles 8-11), has "created uncertainty". We are also of the view that courts are inherently capable of balancing competing rights in difficult cases without the need for statutory guidance.

We note the rationale behind proposals in relation to qualified rights stem from perceived 'judicial extension' of ECHR rights. The consultation paper provides little to support this assertion. We believe this mischaracterises the often difficult and nuanced balancing exercise which courts undertake when considering cases involving qualified rights, which of course, will involve competing rights.

Nowhere is this delicate balance more pronounced than in cases involving children's right to a private and family life under Article 8 ECHR. We have referred to the UK Supreme Court's judgment in *ZH (Tanzania) v Secretary of State for the Home Department*⁴² above, which we consider demonstrates how a proper balancing exercise can ensure that the particular circumstances of a case and the family's lives are fully considered, including the best interests of the child.

We believe that guidance or rules which limit how courts ought to carry out balancing of rights could unduly constrain courts and prevent them from considering and giving weight to all relevant factors in a case, including the rights of children.

In a recent case before the European Court of Human Rights,⁴³ the Court held that the deportation of a Nigerian national had breached his Article 8 rights. In reaching this conclusion, the Court found that the Upper Tribunal had merely applied the Immigration Rules without carrying out a full balancing exercise under Article 8. This meant that the Tribunal failed to properly consider the best interests of the applicant's children when determining whether his deportation was proportionate.

We also note the evidence of the European Court of Human Rights, which further demonstrates that national courts are generally striking the correct balance when dealing with qualified rights:

"Analysis of Strasbourg case-law by UK domestic courts and in particular its superior courts shows an in-depth understanding of the Court's case-law. This has been significantly reinforced and built up over the last twenty years since the

⁴² [2011] UKSC 4

⁴³ *Unuane v. the United Kingdom*, application no. 80343/17

coming into force of the Human Rights Act [...] The fact that there are so few violations found against the UK would also argue in favour of the fact that the UK courts are successfully applying the Convention at the domestic level.”

Rights and responsibilities

The consultation document states an intention to ensure the system strikes “the proper balance of rights and responsibilities”.⁴⁴ However, human rights are universal and unconditional. They are an inherent part of being a human and do not require certain conditions or responsibilities to be satisfied in order to apply to everyone. Legislation that sets out the fundamental basis of any human rights simply spells out these rights; the rights are inherently applicable to all however they are written down or spoken about.

Human rights are the freedoms and protections to which all people are entitled. Human rights are universal: this means that we are all equally entitled to our human rights. Human rights are inalienable: this means they should not be taken away, except in specific situations and according to a process. All human rights are also indivisible and interdependent. This means that one right cannot be experienced fully without experiencing all the other rights.

The statements throughout the consultation document concerning rights and responsibilities are therefore at odds with the commitment that the Government will “remain faithful to the basic principles of human rights”.⁴⁵

It is the “responsibility” of state parties to give effect to any rights from the treaties they have signed and ratified. This is confirmed in the preamble text of the ECHR:

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto”.

The only other references to responsibilities in the Convention ECHR are in respect of qualified rights, such as freedom of expression under Article 10. Others have duties and responsibilities towards each other in the exercise of this right because of the ability for free speech to impact others’ human rights. This does not appear to be what the proposals refer to in terms of responsibilities however. Instead, the examples set out primarily refer to “flagrant disregard” for others’ rights through the commission of crimes. The proposals throughout use examples of extreme cases that appear to have been hand-picked for political advantage or point scoring, such as claims made by serving prisoners or in relation to prisoners’ voting rights.

Similarly, in the UNCRC, responsibilities are only mentioned in respect of parents and the State:

“Governments must respect the rights and responsibilities of parents and carers to direct and guide their children as they grow up, so that they can enjoy their rights properly” and in article 18 “Both parents share responsibility for bringing up their child and should always consider what is best for the child. Governments must

⁴⁴ Page 3 of consultation document

⁴⁵ See page 5 of consultation document

support parents by giving them the help they need, especially if the child's parents work" (Article 5 UNCRC).

Paragraph 125 of the proposals refers to rights having been "decoupled from our responsibilities as citizens" with reference to the ECHR and to Article 29 of the UN Declaration of Human Rights, the latter of which apparently making the notion of responsibilities "explicit". Duties in the community are not the same as an explicit reference to responsibilities going hand in hand with the enjoyment of rights however. Many human rights, including in the ECHR, are qualified rights that can be curtailed to some degree in the pursuit of others' enjoyment of their own rights or states having to exercise necessary duties. This does not however equate to responsibilities on individual citizens, and since as far back as 1948, international jurisprudence has made it clear that some rights cannot be limited at all, and others can be limited only under certain conditions: restrictions can only be prescribed by law; they must serve one of the purposes listed by international law; and they must be proportionate to the purpose in terms of their severity and intensity.

Whilst the substantive rights in the ECHR are to be retained in any new Bill of Rights, the exercise of those rights appears to be intended to be curtailed based on conduct and behaviours, or "responsibilities" as the paper describes it.

In addition, at paragraph 112, the proposal is to leave in place the aspects of the Human Rights Act that "have not proved problematic in practice". It is neither ethical nor appropriate to 'pick and choose' which aspects of human rights are palatable or politically advantageous; human rights are indivisible and all encompassing.

Underpinning our concerns regarding this narrative is a concern for access to justice for the most vulnerable, including children, if the ability to even commence a claim is unfairly curtailed.

For the reasons above, we are of the view that the proposals set out in the consultation paper will significantly weaken the protection of children's rights in the UK. We therefore recommend that the Human Rights Act be maintained in its current form.

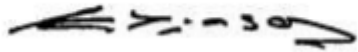
Bruce Adamson

Children and Young People's Commissioner Scotland

A handwritten signature in black ink, appearing to read 'B Adamson', written in a cursive style.

Koulla Yiasouma

Northern Irish Commissioner for Children and Young People



Professor Sally Holland

Comisiynydd Plant Cymru/Children's Commissioner for Wales

