

Coram Children's Legal Centre submission to the Joint Committee on Human Rights inquiry '20 years of the Human Rights Act', September 2018

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, works in the UK and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information; research and policy work; law reform; training; and international consultancy. CCLC has undertaken amicus curiae interventions in a number of significant cases, including in the European Court of Human Rights, the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children's rights and best interests.

1. Coram Children's Legal Centre (CCLC) welcomes the Joint Committee on Human Rights' inquiry into 20 years of the Human Rights Act (HRA). The HRA is central to CCLC's work protecting the rights of children and this submission looks at whether, and how, the HRA has improved children's individual rights in the UK and future challenges.

Improving individual children's rights in the UK

2. The Human Rights Act 1998 (HRA) 'gives further effect' to rights and freedoms guaranteed under the European Convention on Human Rights and Fundamental Freedoms (ECHR). This means that:
 - The UK must interpret its domestic legislation in a way that is compatible with the ECHR;¹
 - It is unlawful for a public authority to breach a person's Convention rights (and if they do that interference must be in pursuit of a legitimate aim and be justified as necessary and proportionate measure to take).
3. The HRA has significantly improved the individual rights of children, acting as a vital safety net in a legal context where children's rights under the United Nations Convention on the Rights of the Child (UNCRC) are not justiciable in domestic law. The last twenty years has seen the development of a body of law that imports children's rights considerations from the UNCRC into domestic judgments through the HRA, both establishing and strengthening the minimum rights standards for children through the courts and tribunals in England and Wales.
4. The UNCRC is a set of minimum standards for the treatment of all children. It is a binding international treaty and by ratifying it the UK Government has committed itself to giving children the rights and protections contained in it. As a result of the UK's dualist system, and non-incorporation of the UNCRC directly into domestic law, the HRA serves as a filter through which the UNCRC has been used as an interpretative tool on issues relating to children's particular interests and protection needs. Children whose rights under the UNCRC have been breached by a public authority cannot take a case to court under the UNCRC itself. Instead they would bring their case to court via the HRA (pleading breach of a Convention right in a free-standing HRA application or within existing proceedings); asking the court to use the UNCRC to help guide its decisions. The political landscape has not moved as fast as the judiciary at times and in the case

¹ If it cannot, it must make a declaration of incompatibility

of *R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, the UK Supreme Court makes clear the limits of the UNCRC in the domestic landscape.²

5. The HRA itself has also protected children's rights without regard to the particular considerations under the UNCRC. The HRA has been pivotal in protecting children against human rights abuses. It has, for example, been used to challenge public authorities where they have failed to protect children against abuse in foster care³ and ensured that children are not inappropriately denied contact with their parents. It has been used to protect children against inhuman and degrading treatment,⁴ the use of pain techniques in the secure estate and the harm of immigration detention.⁵ Seminal cases based on a child's right to a private and family life (protected under Article 8 of the ECHR) have helped ensure that the interests of children are properly considered in decisions by public bodies and that children's wishes and feelings are taken into account. They have protected the right to education for *all* children and young people.⁶ The HRA provides a means of accessing justice for everyone in society and a direct way of protecting children.
6. One of the key benefits of the HRA for children has been the ability to bring cases rapidly to national courts and to access immediate remedies. This is particularly important as timescales are important to children and young people who may otherwise age out of protections available only through the ECHR. CCLC would like to see children have the benefit of both the HRA (dealing with Convention rights) and UNCRC rights both in domestic law. At present, although children's rights protected by the UNCRC can only be ventilated to any real effect in arguments about European Convention rights using the HRA.
7. This judgment in *HH v Deputy Prosecutor of the Italian Republic, Genoa* ([2012] UKSC 25)⁷ highlights the way in which the UNCRC, HRA and the Charter of Fundamental Rights interact to confirm the importance of children's rights. The Supreme Court examined children's rights to family life in their country of residence, and the balance to be struck between extraditing those

² See paragraphs 81-86 and in particular at 86 "It is clear, therefore, that the UNCRC can be relevant to questions concerning the rights of children under the ECHR. There are also cases in which, although the court has not referred to the UNCRC, it has taken the best interests of children into account when considering whether an interference with their father's or mother's right to respect for their family life with the children was justified."

³ *A and S (Children) v Lancashire CC* [2012] EWHC 1689 (Fam) <http://www.bailii.org/ew/cases/EWHC/Fam/2012/1689.html>

⁴ For example, the case of *A v UK* (1999) 27 EHRR 611 3 Z v UK (1999) 28 EHRR CD 65 concerned a boy who was physically beaten by his stepfather. The step-father was acquitted of any criminal offence. The Court found a breach of Article 3 (the prohibition of inhuman and degrading treatment) as the domestic law did not provide adequate protection against the ill-treatment of the child applicant. In due course, this judgment led to a change in the law (now found in section 58 of the Children Act 2004), removing the defence of 'reasonable punishment' to a criminal charge of assault against a child.

⁵ http://www.1cor.com/1315/?form_1155.replyids=1341

⁶ See, for example, recent case in Upper Tribunal *C & C v Governing Body* [2018] UKUT 269 (AAC) which held that the Equality Act exemption discriminated against autistic children. See also *R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent)* [2015] UKSC 57. CCLC provided a witness statement in this successful case which examined the Education (Student Support) Regulations 2011 and the 'settlement criterion' for student loan eligibility, which meant that students with limited or discretionary leave to remain in the UK were ineligible. The case was brought by a 20 year old who came to the UK aged 6 from Zambia and was blocked from university because she could not get student finance. The Supreme Court made a declaration that the application of the settlement criterion to the Appellant was a breach of her rights under Article 14 ECHR read with her right of access to education under Article 2 of the First Protocol to the European Convention on Human Rights.

⁷ CCLC intervened in this case on the issue of children's rights in the extradition decisions relating to their parents

who had committed serious offences and the consideration of a child's best interests. Lord Kerr outlined:

*'Article 3.1 of the UN Convention on the Rights of the Child...provides that "in all actions concerning children... the best interests of the child shall be a primary consideration". Analogously article 24.2 of Page 56 the Charter of Fundamental Rights of the European Union (2000/C 364/01) dated 7 December 2000 provides that "in all actions relating to children... the child's best interests must be a primary consideration". The word "concerning" in article 3.1, like the phrase "relating to" in article 24.2, encompasses actions with indirect, as well as direct, effect upon children: the ZH (Tanzania) case, para 26 (Lady Hale). The rights of children under article 8 must be examined through the prism of article 3.1: see paras 21 to 23 of the same case. Thus, in the present inquiry, article 8 affords to the best interests of the three children a substantial weight which, following examination, other factors may earn and even exceed but with which, under the law of the article, they do not start.'*⁸

Family law and the protection of children

8. The HRA imposes a duty on 'public authorities', including the courts and local authority children's services, to ensure that they do not breach the Convention rights of children and adults affected by their decisions.⁹ So, as well as binding the courts to consider fundamental rights when making decisions about children, the HRA places a duty on individual social workers to act in a way that is human rights compliant. This has made it possible for children and adult family members to challenge, in the domestic courts, the procedural decisions of the local authority when they believe that the local authority's actions have breached their Convention rights.
9. One area in which the HRA has had significant positive impact is in the development of procedural aspects of the right to family life and there has been a recognition of the importance of transparency and the participation of family members in the decision-making processes of public authorities which may interfere with their family life. Importantly for families, the HRA has made it much easier to challenge procedural decisions made by the local authority that have a significant impact on family life. For example, when the local authority decides to act in a way substantially different to that set out in a child's care plan or without consultation with the child's family.
10. To give an example, in *A and S (Children) v Lancashire CC*¹⁰ two brothers were first taken into care in 1998, aged just three and six months' old, after their mother abandoned them. A placement order was made, severing all ties with their birth family. However, no adoptive placement was found for the boys, and the boys were passed from one foster carer to another over the course of the next 14 years. At least two sets of foster carers were abusive. The local authority and the IRO agreed to declarations that they acted incompatibly with the ECHR in no

⁸ Para 55. CCLC intervened in this case on the issue of children's rights in the extradition decisions relating to their parents

⁹ Section 6 provides that it is "unlawful for any public authority to act in a way which is incompatible with a Convention Right". Section 7 allows an individual to bring proceedings based on Convention rights, or to rely on Convention rights in any proceedings in which they are involved.

¹⁰ <http://www.bailii.org/ew/cases/EWHC/Fam/2012/1689.html>

fewer than ten ways, involving breaches of Articles 3, 6 and 8 of the Convention.

11. The role of the Independent Reviewing Officer (IRO) was introduced to ensure that the local authority complied with their duties to children in their care, and to enable children to challenge the local authority in court if they failed in those duties. Section 25B(3) of the Children Act 1989 allows an IRO to refer a child's case to the Children and Family Court Advisory Support Service (Cafcass) if they consider the local authority is failing in their duties to a child. Cafcass may then bring court proceedings on behalf of the child, including by way of a claim under the HRA. Without the HRA, this mechanism oversight and review of a child's care by the local authority would be severely undermined.
12. While the Children Act 1989 and associated legislative materials incorporate some of the principles more formally articulated in the ECHR, it is important that parties, especially parents and other family members are able to draw reliance on Convention rights when participating in family proceedings before the England and Wales' Family Court. In public law children proceedings before the Family Court (typically proceedings for care or supervision orders), there can be a tendency to consider the child's best interests as a justification for any decision or step taken, when of course there cannot be a universal formula as to what children's best interests means and it certainly cannot mean the same thing in every case. Thus, to be able to deploy focus to other considerations and rights (some which may be thought to be competing with a child's rights), a fuller analysis and reasoning can be explored.
13. One area in which the HRA has had a particular impact on cases is where children are removed from parents. Where removal is considered under section 31 of the Children Act 1989, then the HRA has impacted on the role of the judiciary in making these decisions.¹¹ Where children are removed under a voluntary arrangement with the local authority (under section 20 of the Children Act 1989) then decisions from the courts have also highlighted the need to have regard to Article 6 and 8 rights both when seeking parental consent to removal of a child, and in relation to the fairness and proportionality of the decision to remove.¹² Relying on their Convention rights, families are able to argue that wherever possible, parents should be consulted prior to removal of children from the home, even in an emergency situation.¹³ Where removal is voluntary, then local authorities must take appropriate steps to ensure that parents understand the process, and that they are able to request the return of their children to their care – the right to respect for family and private life for both the parents and the child require the removal to be genuinely voluntary. In *M & T v Medway County Council* [2015] EWHC Fam the

¹¹ For example, in *Re M (Care Proceedings) (Judicial Review)* [2003] 2 FLR 571, Munby J (as he then was) noted obiter that care proceedings brought with the intention of removal of a newborn from its mother was a "draconian and extremely harsh measure which demands an extraordinarily compelling justification" following the ECtHR precedents in *K and T v Finland* [2001]. In *R (on the application of G) v Nottingham City Council* [2008] EWHC 400 (Admin) the judge considered removal of a child from a mother without either court order or consent under s.20 of the Children Act 1989 to be unlawful as the interference with the family life was not justifiable under Article 8(2).

¹² See, for example, *Re CA (A Baby)* [2012] EWHC 2190 (Fam) in which the High Court considered the issue of a mother's consent to voluntary accommodation of her child into the care system under section 20 Children Act 1989. In this case, the local authority agreed that their actions, in failing to obtain proper informed consent from the mother, and in failing to establish whether she had capacity to consent, had breached the mother and child's Article 8 rights.

¹³ Even temporary removal of children from the parental home is a serious interference with family life. See, for example, *Re S (Children)*.

court awarded damages to the mother and child following a lengthy separation which had made it very unlikely that the family would be reconciled.¹⁴ In this case, the court awarded considerable damages to the mother and the child, in recognition of the significant breaches of their rights under Articles 6 and 8 ECHR. The culmination of these recent cases has been to set out guidelines for voluntary removal of children which are consistent with the family's rights under the HRA. This recent development demonstrates the ways in which the HRA continues to respond and flex to accommodate societal understanding of human rights.

14. In relation to adoption, the role of the court in testing a local authority plan for its rigour and balance based on evidence was substantially reinforced by the Supreme Court in *Re B (A Child)* [2013] UKSC 33¹⁵ and the Court of Appeal in *Re B-S (Children)* [2013] EWCA Civ 1146. The Supreme Court has held that the making of a care order, with a plan for adoption, can only be necessary and proportionate under Article 8, where all other options have been considered, and adoption is 'the last resort'. The ECtHR has itself continuously tested the issue of compliance with Article 8 and the tension between the rights of parents and the rights of the child. The requirement on judges to have clearly considered Convention rights before making an adoption order, has added another layer of protection to children and families when state interference in family life could result in the permanent removal of the child from his/her birth family and severance of all legal ties.

Immigration law

15. One of the areas of law that has seen the most profound shift as a result of the HRA is in immigration law. This is also an area in which there has been considerable media attention over the last twenty years. Article 8 has been relied on as a means of ensuring that children who do not have protection needs but have built their lives in the UK are able to remain in the country. Although the government has attempted to limit the options available for those seeking to rely on Article 8 through the tightening of the immigration rules, the Supreme Court has made clear that the Immigration Rules are not a complete code: the Rules do not permit consideration of the best interests of children in all cases and "*family life is not to be defined by the application of a series of rules*".¹⁶ The interplay between the Immigration Rules and Article 8 'outside the rules' has been subject to a significant amount of litigation.
16. Applying Article 8 has allowed the Courts to interpret domestic legislation in line with the children's best interests principle in migration. For example, in the case of *ZH Tanzania* [2011] UKSC 4, the Supreme Court judgment reflected the jurisprudence on Article 8 and children at the Strasbourg level in the context of immigration and asylum from the earlier decisions in which the Commission and Court appeared to have focused more on the failings of the parents rather than

¹⁴ See https://www.judiciary.uk/wp-content/uploads/2015/10/medway_council_v_t_section_20-declarations_-_damages.pdf

¹⁵ *In the matter of B (A Child)* [2013] UKSC 33 18

¹⁶ *Ali -v- SSHD* [2016] UKSC 60, para 147. Paragraph 17 also states that '*the Rules are not law (although they are treated as if they were law for the purposes of section 86(3)(a) of the 2002 Act: see para 8 above), but a statement of the Secretary of State's administrative practice.*'

the interests of the child.¹⁷ The judgment (Lady Hale at para. 21) also recognised that in immigration cases the ECHR is not to be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Therefore the provisions of the UNCRC were fundamental to the proper interpretation of domestic law. Subsequently in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 the Supreme Court set out seven principles for the analysis and interpretation of children's rights within the HRA framework, the first being that 'the best interests of a child are an integral part of the proportionality assessment under Article 8.'¹⁸

17. However, in CCLC view, the highly politicised nature of the migration debate has resulted in legislative criteria¹⁹ in the form of [check] that are jeopardising how courts can interpret the children's rights imperative set out in *Zoumbas* and *ZH (Tanzania)*. We are concerned that the requirements to consider certain statutory factors in every appeal has limited the ability of the judiciary to conduct a proportionality assessment in light of the best interests of the child. In the case of *MA (Pakistan) v SSHD* [2015] EWCA Civ 705 the court found that there must be 'strong reasons' for interfering with the children's right to family and private life expressed in the '7 year rule' under the Immigration Rules, however the court expressed that it was bound by a previous decision in *MM (Uganda)* that meeting the 7 year rule was a factor of "some weight". Far from the level of judicial activism frequently portrayed in the media, our examination of immigration case-law suggests caution on the part of the judiciary to intervene on the issue of family and private life, even where it would keep pace with determinations from the ECtHR.

Future challenges

18. The HRA maintains parliamentary sovereignty and a primary role for domestic courts in the interpretation of the ECHR. The HRA has led to greater quality and accountability in public service delivery and is central to the arrangements for devolution in Northern Ireland, Wales and Scotland. For children in particular, the HRA has seen a shift in the role of the judiciary to protect children's rights. The legislature has at times been unwilling to keep pace with the development of a body of international consensus on children's rights. We anticipate that this will continue to create lopsided developments for children across the devolved nations.

19. Over the last twenty years, the power of the Executive over the Legislature has clearly increased, in particular, the use of statutory instruments, and Henry VIIIth powers have become a cause for concern. In the Children and Social Work Bill, the Government proposed the creation of sweeping powers to disapply statutory provisions for children and social care. This would have resulted in the power to disapply regulations that have been introduced for the purposes of child protection and the guarantee of children's rights.²⁰ We do not believe that these broad

¹⁷ See *ZH (Tanzania)* [2011] UKSC 4 para 20. The more recent decisions in *Uner v Netherlands*, *Maslov v Austria*, and *da Silva, Hoogkamer v Netherlands* correctly placed due emphasis on the best interests of the child as a significant factor.

¹⁸ At paragraph 10

¹⁹ Section 117B and section 117C of the Nationality, Immigration and Asylum Act, as amended by the Immigration Act 2014

²⁰ See for example the briefing of Article 39 (of which CCLC and Coram BAAF are members) the Children and Social Work Bill, updated briefing for the second reading in the House of Commons, 5 December 2016 (<https://article39dotorgdotuk.files.wordpress.com/2017/12/article-39-hoc-second-reading-cswb-dec-2016-updated.pdf>)

powers would have been appropriate, particularly given the universal importance of child protection, and the right to non-discrimination in the UNCRC.

20. The HRA takes on fundamental importance as the UK prepares to leave the EU. The protections for children's rights engaged in EU law under Article 24 of the Charter of Fundamental Rights will be lost. While the Westminster government states its commitment to children's rights, this has not translated into action in terms of undertaking children's rights impact assessments when introducing law and policy.²¹ In contrast, at a devolved level there have been some important legal advances in protecting children's rights. For example, in Wales, the Rights of Children and Young Persons (Wales) Measure 2011 imposes a duty on the Welsh Ministers to have due regard to the UNCRC when exercising any of their functions. In Scotland, the Children and Young People (Scotland) Act 2014 imposes a duty on Ministers to keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and if they consider it appropriate to do so, take any of the steps identified by that consideration. The loss of the constitutional underpinning of our membership of the EU is likely to have a profound impact on how children's rights develop across the devolved nations. This already disparity on how children's rights are reflected and considered across the UK and further activism from Westminster is required to ensure do not see very different outcomes for children across the four nations.
21. In its response to UNCRC's list of issues, the UK Government set out that *"the Human Rights Act opened the [human rights] system to abuse"* and that *"the Bill of Rights is a way to restore appropriate constitutional balance"*.²² CCLC is convinced that the HRA has struck the appropriate balance in terms of respect for human rights. The idea of a constitutional imbalance which favours the rights of the individual over the majority appears to be a profound misunderstanding of the role human rights, and the HRA plays in the UK constitution. While there is much work left to do, particularly in relation to children's rights to participate in all administrative decisions taken which involve them (UNCRC, Art 12), there has been an overwhelmingly positive use of the HRA to protect and promote the rights of children.
22. CCLC believes that the application of the HRA in cases involving children has shown how important it is that there continues to be a duty on public authorities to act in a way that is compatible with Convention rights, and that the ECHR continues to be directly actionable in domestic law, without qualification. It is crucial for children and families that the HRA, and in particular the duty on public authorities and the right of individual action in domestic courts, is retained.

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²¹ See UNICEF UK, 'The case for child rights impact assessment in England', 2017, at <https://www.unicef.org.uk/publications/unicef-uk-cria-2017/>

²² Replies of the United Kingdom of Great Britain and Northern Ireland to the list of issues, CRC/C/GBR/Q/5/Add.1, 02/03/16, paras 3 and 4. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fQ%2f5%2fAdd.1&Lang=en