Article 39 Evidence to the Independent Human Rights Act Review
March 2021

Introduction

1. Article 39 fights for the rights of children living in state and privately-run institutions in England (boarding and residential schools, children's homes, immigration detention, mental health inpatient units and prisons). We do this through awareness-raising of the rights, views and experiences of children; legal education; practice development; and policy advocacy, research and strategic litigation. We take our name from Article 39 of the UN Convention on the Rights of the Child (UNCRC), which entitles children who have suffered rights violations to recover in environments where their health, self-respect and dignity are nurtured.

2. The questions in the Call for Evidence for the Independent Human Rights Act Review (IHRAR) are very narrow and do not ask about the impact that the Human Rights Act 1998 (HRA) has had both on individuals' lives or the culture and practices of organisations. We believe that this is a missed opportunity to reflect on the changes brought about by the HRA over the last 20 years. At the start of this submission we will outline the positive effect that the HRA has had on the protection of children's human rights, before then addressing the two themes identified in the Call for Evidence. Parts of this submission have been shared with the Joint Committee on Human Rights (JCHR) to help inform its inquiry into the IHRAR.

The protection of children's rights

3. The HRA has significantly advanced the protection of children's rights in the UK by allowing children, young people and families whose rights have been violated to bring cases to the domestic courts and obtain a remedy for those violations. It has helped further entrench children's rights considerations in decision-making and provided a much-needed domestic avenue for ensuring that systemic failings causing great harm to children are investigated and rectified.

4. The HRA has, for example, been used to challenge public authorities where they have failed to protect children against abuse in foster care[1] and ensured that children are not inappropriately stopped from seeing and maintaining their relationships with their parents.[2] It has been used to protect child victims of trafficking from criminalisation[3] and to prevent the use of violent

[1] See, for example, *A and S (Children) v Lancashire CC* [2012] EWHC 1689 (Fam) . This case involved 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 fewer than ten ways, involving breaches of Articles 3, 6 and 8 of the Convention.

[2] For example, in *M & T v Medway County Council* [2015] the court awarded damages to the mother and child following a lengthy separation which had made it very unlikely that the family would be reconciled.

[3] *L, HVN, THN & T v R* [2013] EWCA Crim 991

paininducing techniques in the secure estate (see case study below). Seminal cases based on a child's right to a private and family life (protected under Article 8 of the European Convention on Human Rights (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 seriously.[4] The HRA has helped protect the right to education for all children and young people.[5]

5. The HRA has allowed children, and those representing their rights and interests, to challenge the decisions or actions of public bodies which potentially breach their rights and its importance cannot be overestimated for vulnerable children who are often powerless in relation to public authorities and those performing public functions. Litigation can not only result in a remedy for the individual but also bring about wider improvements to policy and practice which helps many others (see case study in paragraphs 20-23 below).

6. One of the key benefits of the HRA for children has been the ability to bring cases to national courts, rather than having to go to Strasbourg, and to access remedies more swiftly as a result. Timescales are especially critical for children and young people who are often deterred from challenging mistreatment due to long proceedings. For those in institutional settings, there can be a pessimistic sense that pain and suffering will be temporary, so they will endure it. A significant amount of the UK's progress on human rights has been achieved without any need for people to rely on their right of individual petition under Article 34 ECHR and the number of cases heard against the UK by the European Court of Human Rights (ECtHR) in Strasbourg is now low. Of all the substantive decisions made by the ECtHR in 2020, only four related to the UK.[6]

7. The role of the HRA in protecting children's rights is all the more vital given that the majority of children's rights provisions contained in the United Nations Convention on the Rights of the Child (UNCRC) are not justiciable in domestic law. 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 within it. However, due to the UK's dualist system, and the failure of the UK Government to incorporate the treaty into domestic law (it is in the process of being incorporated in Scotland),[7] children whose rights under the UNCRC have been breached by a public authority cannot take a case to court under the UNCRC itself. Instead, a case can be brought under the HRA and the court asked to use the UNCRC to help guide its decision.

8. The UNCRC has been used as an interpretative tool and over the last 20 years a body of law has imported children's rights considerations from the UNCRC into domestic judgments through cases brought on HRA grounds. While children's rights-based decision making in the courts can

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[4] See, for example, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

[5] See, for example, *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, which concerned 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.

[6] Of the 566 judgments made regarding the UK since 1959 (an average of nine a year), in 58% at least one violation of the ECHR was found. See Statistics published by the Council of Europe showing violations of the Convention by Article and by State in the period 1959-2020

[7] The UNCRC (Incorporation) (Scotland) Bill was introduced to the Scottish Parliament on 1st September 2020. The First Minister announced the Bill would incorporate the UNCRC into Scots law "fully and directly", to the maximum extent of the Scottish Parliament's powers and be passed before the end of the current parliamentary term. The main purpose of the Bill is bring the UNCRC into Scots law. See Together Scottish Alliance for Children's Rights, *Incorporation of the UN Convention on the Rights of the Child*

vary,[8] in part due to inconsistency in the use of children's rights based arguments by lawyers, strong examples have been set by UK Supreme Court judges using the UNCRC, particularly the best interests standard enshrined in Article 3.[9]

Theme 1: The relationship between domestic courts and the European Court of Human Rights (ECtHR)

9. Section 2 of the HRA is an integral part of the Act and makes clear that when UK courts are considering whether a public authority has acted compatibly or incompatibly with ECHR rights they must 'take into account' Strasbourg jurisprudence but they are not under a duty to always follow it. As outlined by Lord Neuberger in *Manchester City Council v Pinnock,* where "there is a clear and constant line of decisions [from the ECtHR] whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line".[10]

10. The ECHR is a 'living instrument' that must be interpreted in the light of present-day conditions [11] – this is significant when we look at developments in terms of the wider recognition of children's rights over the years. The ECtHR has a vast jurisprudence on children's rights. Although many cases under Article 8 of the ECHR on the right to respect for private and family life are considered from a parents' rather than children's rights perspective, "cases under other substantive provisions…have a clearer focus on the rights of the children concerned, such as the right to protection from inhuman and degrading treatment (Article 3 of the ECHR) or the right to a fair trial (Article 6 of the ECHR)". [12] As discussed in paragraph 8, the Supreme Court has set some strong examples of children's rights based decision making and both the ECtHR and domestic courts have a part to play in the development and interpretation of the law.

11. It is important to note too that sometimes the UK goes further than the ECtHR's position. For example, in 2002 adoption legislation in both England and Wales (and later in Scotland) allowed unmarried couples, of both the same or opposite sexes, to adopt but the law in Northern Ireland did not. In *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38,[13] the House of Lords emphasised that adoption is meant to serve the best interests of the child and held that being unmarried was a status for the purpose of article 14 and that the outright ban could not be justified. As described by Lady Hale in a 2018 lecture, "that case was also an important step in the development of the UK's own human rights jurisprudence" as at that time "denying adoption to unmarried couples might still have been within the margin of appreciation which Strasbourg would allow to member states". She goes on to describe the Courts as "the guardians of the rights of the minority and also of under-represented groups such as women and children of

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[8] Stalford, H. Hollingsworth. K. and Gilmore, S. (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (2017, Oxford: Hart). Chapters 2 and 3

[9] See, for example, *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 (per Lady Hale and Lord Kerr dissenting); *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 (per Lord Wilson); *Nzolameso v City of Westminster* [2015] UKSC 22 (per Lady Hale); and *ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4 (per Lady Hale). As outlined in Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (see note 8).

[10] *Manchester City Council v Pinnock* [2010] UKSC 45

[11] ECHR, judgment of 25 April 1978, *Tyrer v. UK* (no. 5856/72), para 31. Discussed in European Court of Human Rights, *Dialogue between judges: Proceedings of the Seminar 31 January 2020*

[12] See European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child, 2015

[13] *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173

unmarried parents – whether popular or unpopular – against the decisions of the majority or dominant groups".[14]

12. While at one point Strasbourg may be 'ahead' in its thinking and interpretation, at another time a member state might be, as in the above example. But the benefit of the HRA is that not only does it allow for domestic courts to make decisions that reflect particular traditions, cultures and laws in the UK, it allows ongoing constructive dialogue between the UK courts and the ECtHR over the interpretation and application of Convention rights.[15] Not only can ECtHR decisions help guide domestic decision-making, the UK can also influence the application of the ECHR in Strasbourg.[16]

Theme 2: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

13. Sections 3, 4 and 10 of the HRA[16] work well to preserve parliamentary sovereignty and the separation of powers. Where a court makes a declaration of incompatibility, the law remains in force until Parliament decides whether to address the incompatibility and, if so, how. The government itself explains that Section 4 "respects the supremacy of Parliament in the making of the law" and "there is no legal obligation on the Government to take remedial action following a declaration of incompatibility or on Parliament to accept any remedial measures the Government may propose".[17] The HRA allows the courts to send a clear message concerning incompatible legislation but not to override the sovereignty of Parliament. The Bill of Rights Commission reported that the declaration of incompatibility mechanism "has been widely seen as striking a sophisticated and sensible balance between Parliament and the courts – indeed one that has subsequently been adopted by a number of other common law jurisdictions".[18][19]

14. By July 2020, 43 declarations of incompatibility had been made, of which 8 were addressed by Remedial Order, 15 by primary or secondary legislation (other than by Remedial Order) and the government has proposed to address a further two by Remedial Order. Two are still under consideration.[20] As well as not being an obligation on government, it is also important to note

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[14] Lady Hale, President of the Supreme Court, *British Institute of Human Rights Annual Lecture 2018 - Celebrating 70 years of the Universal Declaration and 20 years of the Human Rights Act*, 7 November 2018

[15] Amos, M. (2012). *The dialogue between UK Courts and the European Court of Human Rights*, The International and Comparative Law Quarterly, 61(3), 557-584. [16]

For example, as a direct result of the UK Supreme Court explaining in detail its disagreement with the ECtHR in *R v Horncastle and others* [2009] UKSC 14 (SC) the ECtHR reversed its approach in *Al-Khawaja*, when the Grand Chamber considered the case in 2011, holding that the UK was not in breach of Article 6. They did so relying on the explanation provided by the Supreme Court on the safeguards in UK procedure around the use of hearsay evidence in criminal trials.

[16] Under Section 3 of the HRA, "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Under Section 4 of the HRA, if a court determines that a provision of primary legislation is incompatible with a Convention right, it may make a "declaration of incompatibility". Ministers have the power (but are not under a duty) to correct that incompatibility, through a 'remedial order' which can be used to amend primary legislation, under section 10 of the HRA. Or they can introduce primary or secondary legislation or, indeed, do nothing at all.

[17] Ministry of Justice, *Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*

[18] *The Commission on a Bill of Rights' report– A UK Bill of Rights? - The Choice Before Us - Volume 1*, 18 December 2012 at para 69. [20]

[19] have been overturned on appeal (and there is no scope for further appeal); 5 related to provisions that had already been amended by primary legislation at the time of the declaration; 8 have been addressed by Remedial Order; 15 have been addressed by primary or secondary legislation (other than by Remedial Order); 1 has been addressed by various measures; 1 has been overturned on appeal but there is scope for further appeal; 2 the Government has proposed to address by Remedial Order; 2 are still under consideration: 30 and 40. Ministry of Justice, *Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*

that often the action that *is* taken can be very slow, as the case study below illustrates, and with legislation remaining in force, the human rights violations continue.

Case study: Children's entitlement to British citizenship

15. The case of *K (A Child) v Secretary of State for the Home Department*[20] involved a child who was informed that they were not a British citizen by birth even though there was DNA proving that that their father is British. This was because section 50(9A) of the British Nationality Act 1981 provides that if a woman is married at the time of a child's birth, for the purposes of British nationality law, her husband will be deemed to be the father.

16. The Court declared this incompatible with Article 14 ECHR, read with Article 8, because it discriminates unlawfully against children whose mothers are married to a man other than the child's father when the child is born. These children will not be entitled to British nationality through the biological father. Their only option instead is to apply to be registered at the 'discretion' of the Home Secretary, at a fee currently of over a thousand pounds[21] and, if aged over 10 years subject to a 'good character' test. The judge concluded that although 'certainty' under the law was a legitimate aim, it did not justify the high fee nor the risks associated with use of discretion in deciding whether to grant citizenship (compared to the right to claim it as the child of a British citizen).

17. By December 2020, 17 months after the judgment and 13 months after the government withdrew its appeal,[22] Ministers were still "considering appropriate legislative options to address the issue raised in" the K case having "amended fee regulations to remove the requirement for a fee to be paid for registration applications from this group".[23] While the fee removal is welcome, this does not sufficiently address the discrimination suffered by children affected by the legislation which is then passed down to the next generation.[24]

18. The HRA review asks about the role of courts and tribunals in dealing with provisions of subordinate legislation that are incompatible with the HRA Convention rights. Currently the remedy for secondary legislation found to be unlawful is that it can be quashed or disapplied – this is not confined to the HRA and is an essential part of the courts' role to ensure that government acts lawfully.

19. Concerns have long been raised about the use of delegated powers and statutory instruments (SI) by government to amend laws without first facing detailed parliamentary scrutiny[26] – while SIs have the 'technical approval' of parliament, scrutiny is often perfunctory, particularly for those passed under the negative resolution procedure.

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[20] *K (A Child) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin); 18 July 2018

[21] Home Office *Immigration and nationality fees: 20 February 2020*, updated January 26 2021

[22] Garden Court Chambers, *Home Secretary withdraws appeal in child's citizenship challenge*, 6 November 2019.

[23] See Ministry of Justice, *Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*

[24] See British Future, *Barriers to Britishness*, October 2020 and Coram Children's Legal Centre, *Evidence for British Future Citizenship Inquiry*, October 2019 [26]

See, for example, Brexit and Children Coalition, *Making Brexit work for children - The impact of Brexit on children and young people*, November 2017, p 5-7 and Public Law Project's SIFT project findings, October 2020.

Case study: Use of restraint on children

20. The case of *R (C) v Secretary of State for Justice* in 2008,[25] before the Court of Appeal, involved a challenge to the introduction of regulations by the government that expanded the use of physical restraint on children as young as 12 detained in secure training centres (STCs), then operated by G4S and Serco. Following the appalling restraint-related deaths of two children, Gareth Myatt and Adam Rickwood, the Joint Committee on Human Rights, serious case reviews and other investigations demonstrated that restraint was being used frequently when the law did not authorise it and that techniques were being used that were inappropriate, excessive, or positively forbidden. Instead of the government ensuring that the two private companies running the STCs complied with the existing law, new rules were introduced which broadened the context in which restraint could be used on children.

21. The Court quashed the new rules as they were introduced without proper consultation, without assessment of their impact, and they breached Article 3 of the ECHR. In considering the Article 3 breach, the Court emphasised that "Convention jurisprudence requires article 3, as it relates to children, to be interpreted in the light of international conventions, in particular the Convention on the Rights of the Child, article 37(c) of which provides that "*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age*".

22. The Court also emphasised the need to consider the view of the UN Committee on the Rights of the Children which provides the "authoritative international view of what the UN convention requires". General Comment 8 of the UN Committee states that deliberate infliction of pain is not permitted as a form of control in respect of children.

23. This case illustrates the unique value of the HRA as a means of ensuring that the impact of legislation and practice on children's rights can be properly examined by domestic courts, and a vehicle by which the UK's fundamental obligations to children under the UNCRC can also be considered. More directly, the HRA and the Courts' ability to quash secondary legislation protected very vulnerable children in closed institutions run by large security companies from being subjected to widespread unlawful force and violence.

24. More recently, concerns regarding the use of secondary legislation were raised when the government introduced the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (known as Statutory Instrument 445, or 'SI445') which removed and diluted 65 safeguards for children in care overnight. There was no public consultation or time given for parliamentary debate, and while a Child Rights Impact Assessment (CRIA) was conducted,[26] it only set out the government's broad policy intentions and contained no proper analysis. No evidence (either quantitative or qualitative) was provided to support or challenge the government's actions and key provisions of the UNCRC were absent from the analysis.

[25] *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882

[26] http://qna.files.parliament.uk/qna-attachments/1198272/original/52285_Child's_Rights_Impact_Assessment.pdf

25. In a legal challenge brought by Article 39, the Court of Appeal held that the Education Secretary had acted unlawfully in failing to consult the Children's Commissioner and other children's rights bodies before amending legislation affecting children in care.[27]

26. Article 39 is of the firm view that the courts should retain powers to quash secondary legislation found to be unlawful. In addition, detailed and meaningful CRIAs should be undertaken for all proposed legislation and policy impacting children (directly or indirectly), as early as possible in the decision-making process, following international guidance.[28] Government ministers and senior officials across all departments should ensure staff are trained and supported to undertake high-quality CRIAs.

Conclusion

27. The HRA provides vital protection for children and young people. It ensures that all governments, of whatever political persuasion, have comprehensive obligations to protect children's rights and it is incontestable that the HRA, together with the independence of the judiciary, provide critical checks and balances on the executive. Any dilution of the HRA, or how it is used, would seriously imperil the protection and well-being of the children we serve at Article 39.

28. A significant change that *is* needed is for further efforts to develop a culture of respect for human rights. We need, as described by the JCHR, a culture in public life where "in their decision making and their service delivery central government, local authorities, schools, hospitals, police forces and other organs and agencies of the state should ensure full respect for the rights of all those involved".[31] As well as improving day-to-day practice and decision-making, human rights awareness-raising would help ensure that litigation is not seen as an adversarial process designed to 'frustrate' government, but as a vital mechanism for upholding the rule of law, defending individuals' rights and ensuring that due process is followed in the development of law and policy.

For any questions in relation to this submission please contact
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[27] *Article 39 v Secretary of State for Education* [2020] EWCA Civ 1577. In the Court of Appeal the claimant did not seek an order quashing the Regulations because they were time-limited. Instead a declaration that the regulations were unlawful by reason of the failure to consult was sought. Read more at https://article39.org.uk/2020/11/24/court-of-appeal-ruleseducation-secretary-acted-unlawfully-in-removing-safeguards-for-children-in-care/

[28] See UN Committee on the Rights of the Child, General Comment No. 5 (2003), *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6)

[31] Joint Committee on Human Rights, *Sixth Report of Session 2002-03, The Case for a Human Rights Commission, HL Paper 67-I/HC 489-I*, at para. 2