

## 5. Human rights

### 5.1 Introduction

The Convention's incorporation into English law has led to some family cases being argued in a significantly different way than has been traditional in the family jurisdiction. As well as arguments based on the substantive legislation and case law, and an emphasis on the exercise of the discretion of the court, parental responsibility, and the paramountcy of the child's welfare, appeals will additionally be made to a party's *rights* under the Convention. This will, in many instances, require the court to balance the competing Convention rights of the various parties, and of any child concerned.

It does not follow that the legislation and case law in this area therefore become secondary, but it does mean that they must be scrutinised to ensure that they are compatible with the Convention rights, as evaluated by the court and, where they are found not to be, a decision must be taken on how to proceed (see below). The Human Rights Act 1998 requires that:

1. Section 2. Where the court is determining a question which has arisen in connection with a Convention right, it must take into account the 'jurisprudence' of the Convention organs (the European Court of Human Rights, the European Commission of Human Rights, and the Committee of Ministers). This means that it will usually be insufficient for a party to rely on the bare text of a Convention right and that relevant case law authority must be presented to the Court. See Practice Direction (Human Rights Act 1998: Citation of Authorities) [2000] 1 WLR 1782.
2. Section 3. So far as it is possible to do so, primary and subordinate legislation (whenever enacted) must be read and given effect in a way which is compatible with the Convention rights.
3. Section 6. A court is a 'public authority' for which it is unlawful to act in a way incompatible with a Convention right. While a court does not act unlawfully by giving effect to primary legislation which is incompatible with the Convention, it is not bound to follow *precedents* which are incompatible. It is therefore open to a court to reconsider issues covered by prior authority which did not take account of the Convention.

See also Family Proceedings (Amendment) Rules 2000 (SI 2000/2267) rule 10 which inserts a new rule 10.26 and provides a procedural code for cases concerning the Human Rights Act 1998.

### 5.2 Articles of the Convention relevant to family cases

The articles most likely to be raised are Articles 6 and 8. However, Article 12 and Article 14 must generally be linked to reliance on one of the substantive articles and not used alone.

#### Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

#### Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Articles 6 and 8 may be raised together in respect of the same point (e.g. that a refusal to permit a person to be joined as a party to proceedings infringes both his Article 6 right to a determination by a court of his 'civil rights' and of the Article 8 right to respect for family life).

### 5.3 Points which may arise for determination

#### 5.3.1 Article 6

##### Article 6(1)

In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The principle underlying Article 6 is that judicial proceedings must be adversarial, that is, all evidence must in principle be produced in the presence of the parties with a view to adversarial argument. Compare Children Act proceedings, which are said to be inquisitorial and non-adversarial, and ancillary relief cases, where the court is required to act inquisitorially in scrutinising proposed arrangements. However, in practice, it will suffice to ensure to all parties the full opportunity to challenge evidence and present argument. Article 6 may be expected to be raised in relation to the following issues:

1. Joining parties and the leave requirements under the Children Act.
2. Separate representation of the child where he/she disagrees with the person representing his/her interests.
3. Denial of legal aid and lack of legal representation.
4. Admissibility of evidence and opportunities to cross-examine witnesses and to respond to applications.
5. Disclosure of evidence.

6. Appointment of experts.
7. Self-incrimination and section 98(2) of the Children Act 1989.
8. Avoidance of delay and the setting of timetables.
9. Encouragement by the court to the parties to settle/attend mediation rather than adjudicate their dispute.
10. Delivery of judgment in public: see paragraph 4.10.
11. Enforcement of judgments.

It is likely that English jurisprudence is compatible with the Convention in relation to each of these, but courts must ensure that judgments and orders take account of the human rights dimension. Particular care must be taken in relation to enforcement of judgments and committal.

### 5.3.2 Article 8

#### Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Arguments may be raised relying on this Article in relation to virtually any aspect of family law. The primary purpose of Article 8 is to prevent interference by the state, so that it is particularly likely to be relied upon in public law cases. However, there may also be positive obligations on a state to take steps to enable family life to be respected, and these may enable a party to claim rights against another family member (e.g. to prevent a violent former partner from coming near the family home or contacting a child). The positive obligation to uphold Article 8 rights includes effective enforcement of such rights. Article 8(2) provides a proviso enabling the court to balance the right being asserted against competing rights and interests. Where the welfare of the child is in issue, it is likely that Article 8(2) can be relied upon, but it will be necessary to establish that the interference under Article 8(1) was clearly justified by the proviso. The following indicate some particular points where a party may seek to rely on Article 8:

1. As a challenge to the applicability of Section 1(1) of the Children Act.
2. For the grant or refusal of section 8 orders.
3. For the grant or refusal of a section 4 parental responsibility order and especially the

revocation of a section 4 parental responsibility order or agreement. (This may be coupled with reliance on Article 14 - discrimination on the basis of status.)

4. In respect of orders under Part IV of the Family Law Act 1996.
5. Against the grant of interim or final care orders rather than section 8 or supervision orders.
6. Against termination of contact.
7. Against dispensing with consent to placement for or agreement to adoption.

As with Article 6, in most instances, English law is compatible with this Article, because it allows a weighing of all the relevant factors before reaching a conclusion. References to Article 8 should normally be incorporated into a judgment - see paragraph 12.1.5.

#### **5.4 Points requiring judicial review: Declarations of incompatibility**

Arguments are likely to be made in respect of which the county court is powerless to respond. There are some weaknesses in the current legislation which may require amendment. The Human Rights Act, section 4, provides that where a court is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility. However, section 4(5) provides that only the High Court or above may make such a declaration. Where it appears, therefore, that such a position may be reached, the case should be transferred to the High Court, or the argument rejected on the basis of reliance on section 6(2) and leave to appeal considered.

One might expect that issues of this kind are most likely to arise in judicial review proceedings. However, rather than by way of judicial review or a free standing application under the Human Rights Act, they are likely to be raised indirectly in substantive family proceedings, e.g. concerning termination of contact, agreement to adoption, etc. The following may arise:

1. Lack of control over local authorities and enforceability of the care plan (Articles 6 and 8).
2. Involvement of parents in the decision making process of the local authority - see e.g. *Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam) and *X County Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam).
3. Adequacy of local authority complaints procedures (Articles 6 and 8).
4. Refusal to approve for fostering/adoption (potential issues under Articles 8 and 12).
5. The whole process of adoption and removal of parental responsibility (Articles 6 and 8).
6. 'Without notice' grant of emergency protection orders (Articles 6 and 8).