

CHILD EXPLOITATION: LEGAL RESPONSES TO NEW CHALLENGES IN CHILD PROTECTION

GETTING IT RIGHT FOR CHILDREN

[1] “Ain’t I a person? Ain’t this my life? Ain’t I got rights? ... ”

This was the cry of a real child, in a society where recognition of the standing of children before the law is rather more limited than in Scotland¹. The child, Tony, was in foster care and wanted to know when someone was going to listen and to treat him as a person, with some standing in his own right before the law. Before we indulge in any smugness about recognition of children’s rights in Scotland we had better look at our own record, and what may still require to be learned. The European Convention on Human Rights has the, perhaps startling, effect of making adult professionals accountable to children.

European Convention on Human Rights

[2] When dealing with children who may be exploited we tread between two key articles of the Convention:

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8

1. Everyone has the right to respect for his private and family life, . . .
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.

[3] On the one hand children must be protected from exploitation. Article 3 is unqualified. It is stated in stark terms. There is an obligation on the state to step in and protect children from inhuman or degrading treatment. On the other hand, the state must respect the private and family lives of the children it protects, and the private and family lives of their parents. However article 8 rights are qualified. In a case that falls within the scope of article 8 the court asks whether interference is in accordance with the law, whether it has a legitimate aim and whether there are relevant and sufficient reasons for the interference which are proportionate to the restrictions imposed on the right. The European Court of Human Rights accords a level of respect to the scope for individual states to reach their own decisions

¹ *What is Right for Children? The Competing Paradigms of Religion and Human Rights*, ed Fineman and Worthington, ch 10 *Advocating for Children’s Rights in a Lawless Nation*, Woodhouse and Hardy.

about what is “necessary in a democratic society”. This is generally referred to as the “margin of appreciation.” The application of article 8 is often a balancing exercise between different claims and interests. This can be seen from the case law.

Protection of children from inhuman or degrading treatment

[4] The overriding requirement to protect children from inhuman or abusive treatment is very clear. The Court has had little time for authorities that fail in their article 3 duties towards children. This can be seen from:

E v United Kingdom (2003) 36 EHRR 31

This case dates from Scottish social work practice in the late 1970s, but illustrates the legal principles. Some of the lessons are worryingly contemporary. The case arose from a long saga involving a family of 8 children who lived with their mother and a man who was the father of the youngest two. Mother was in poor health. One of the girls expressed dislike of her stepfather, but social workers thought that the home had “a warm friendly atmosphere”. Another of the girls then accused her stepfather of an attempt to rape her. He was prosecuted and certain guilty pleas were accepted in relation to indecent behaviour against two of the girls. He was placed on probation, purported to be living away from the family but was oddly there, albeit “just leaving” on occasions when social work turned up at the house. Home circumstances deteriorated and the mother died in 1981. By the late 80s four of the children were reporting serious abuse. The stepfather was again prosecuted. Four children sought damages from the local authority, but on the basis of the law at the time, their claims were dismissed. They were awarded criminal injuries compensation, but took their case to the European Court of Human Rights.

[5] The Court held that:

“Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.”

[6] The Court was prepared to make a finding about the abuse despite the lack of conviction of the stepfather for many of the incidents. They distinguished criminal law liability from international law responsibility under the Convention. The Court is not concerned with reaching any finding as to guilt or innocence under domestic law. The government submitted two reports by Ann Black explaining that in the 1970s there was no real appreciation of the incidence and consequences for victims of child sexual abuse within families. The Court did not consider that this was significant in a case where social services knew that there had been incidences of sexual abuse resulting in criminal offences, and were under an obligation

to monitor the offender's conduct, via his probation order, in the aftermath of a conviction. Social workers had not taken steps to discover the exact extent of the problem. They had not worked with the children concerned, and as a result had not come to an understanding of the family dynamics. Most importantly they had not referred any of the children to the reporter to the children's hearing, despite the fact they had been living with a convicted offender. There was no effective co-operation or exchange of information between school authorities attempting to deal with a persistent truancy problem and social services who had access to information about the wider family situation and history. Complaints to medical personnel were not passed on to other services. No separate issue was found to arise in relation to damage to private life under article 8. The United Kingdom was found liable to pay reparation to the four applicants.

[7] The key points identified by the Court include the following:

- The state has an obligation to protect children from inhuman or degrading treatment.
- Public agencies cannot plead a general lack of appreciation of the extent of child exploitation as a reason not to protect children if they become aware of exploitation in an individual case.
- The available mechanisms must be brought into play to protect children. In Scotland we have a child protection system in the form of the children's hearing. We should use it.
- There must be effective co-operation and exchange of information between agencies.

We should not need the European Court of Human Rights to make these points. They have been made again and again, from Maria Colwell in 1973 to Baby P in 2007.

Respect for children's family life

[8] On the other hand public agencies are required to respect children's family life with their parents. When acting under article 3, the state must continue to observe article 8. This is illustrated by:

AD v United Kingdom (2010) 51 EHRR 8

In this case a five month old baby was found to have rib fractures. A paediatrician concluded the fractures were sustained non-accidentally. The mother raised the possibility that the baby suffered from Osteogenesis Imperfecta ("brittle bone disease") but was thought to be "in denial" about her baby's injuries. "Professor C", a professor of paediatric radiology concurred that the fractures were due to squeezing. She stated that "*rib fractures in children are extraordinarily rare except in non-accidental injury...*" Mother's agents obtained a report from "Dr P" but she was advised not to rely on this as Dr P had been discredited. The (English) local authority applied for an interim care order. In court it was proposed that the family relocate immediately to a Family Resource Centre 150 miles away from their home for the purposes of an assessment. There was confusion about the purpose of the assessment.

The mother thought it was to assess risk. The Centre thought they were carrying out a parenting assessment. At a review the local authority proposed foster care while they carried out a psychological assessment of the mother and her partner and a risk assessment was prepared by the NSPCC. The authority did not pursue consideration of a family placement. On 27 October 1997 the NSPCC told the local authority that the child should be returned to his parents without delay. On 12 November 1997 the child fell and suffered a possible fracture. X-rays showed his bones were thin and osteopenic. On 20 November 1997 the NSPCC risk assessment recommended that the child be returned quickly to the care of his parents. The local authority finally decided to return him on 8 December 1997. In January 1998 "Dr B" from Cambridge diagnosed Osteogenesis Imperfecta.

[9] The European Court of Human Rights examined the case under article 8. They acknowledged that the interference with the family life of the child and his mother had been in conformity with the requirements of domestic law and had pursued the legitimate aim of protecting the rights of the child. Mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible with article 8. But the local authority had been guilty of fundamental errors. These were:

- They had instructed the wrong assessment at the Family Assessment Centre. They had failed to instruct the required risk assessment while the family were there, and as a result the child had thereafter spent four months in foster care. When the assessment was finally prepared speedy return was recommended.
- Less intrusive measures could have been available while the risk assessment was prepared. The family could have been together at an assessment centre, or the child could have been placed with relatives. The option of placement with relatives had been dismissed too quickly.
- The time taken to return the child was too great. The local authority were informed in October of the NSPCC conclusions. There had been an unacceptable delay following the receipt of the final assessment in November.

The United Kingdom were required to pay compensation to the child and mother jointly.

[10] The case indicates the balance that requires to be struck in order to comply with article 8. A child must be protected from suspected abuse, but intervention must be based on clear reasons, that are "relevant and sufficient". Further the intervention must be proportionate to the aim of protecting the child in the particular circumstances of the case. The professional response to issues such as child exploitation has to be well thought out, and tailored to the individual child and family. In other words the Convention endorses what we know to be good practice.

Children's rights or parents' rights?

[11] Some of the most difficult cases arise where the interests of children and parents diverge. This regularly arises in an acute form in relation to adoption. The clash between the rights of parents and those of children was considered by the First Division of the Court of Session in:

S v L [2011] CSIH 38

A child cannot be adopted without parental agreement, unless the courts are prepared to dispense with agreement of the parent. The Adoption and Children (Scotland) Act 2007, section 31, contains a new test for dispensing with agreement. The test is couched in convoluted language but broadly speaking if a parent is unable to discharge parental responsibilities or exercise parental rights and is likely to continue to be unable to do so in the future then consent may be dispensed with. If this condition does not apply but the welfare of the child "otherwise requires the consent to be dispensed with" then there may be dispensation. There has been a clash of views about how this test works². The First Division of the Court of Session were called upon to decide whether the new provisions for dispensation with consent in the 2007 Act are compatible with article 8.

[12] The First Division reviewed the terms of the 2007 Act in the light of the United Nations Convention on the Rights of the Child. This Convention is not directly enforceable, but the United Kingdom's commitment to the Convention means that legislation will, where possible, be construed in a way that is consistent with the Convention. The Division recognised that the United Nations Convention acknowledged the importance of the connection between a child and its biological parents, but likewise acknowledges that states may have a system of adoption which inevitably disrupts that relationship. This was seen to be consistent with the general requirement that in all actions concerning children the best interests of the child are to be a primary consideration. Reference to the United Nations Convention has become a theme in European Convention cases relating to children. There is a general recognition that the United Nations Convention is an appropriate touchstone as it represents a generally agreed standard relating to children.

[13] Adoption is however the most extreme interference with family life. It can be justified only in exceptional circumstances, if motivated by an "overriding requirement pertaining to the child's best interests" (*Johansen v Norway* (1996) 23 EHRR 33 at para 78). The Inner House held that the parental agreement to adoption could only be dispensed with on welfare grounds where welfare "required" consent to be dispensed with, and that this had "the connotation of the imperative, what is demanded rather than what is merely optimal or

² *Norrie*, Welfare and the new grounds for dispensing with parental consent to adoption, 2008 S.L.T. (News) 213; *Scott*, Welfare and the new grounds for dispensing with parental consent to adoption – a reply, 2009 S.L.T. (News) 17.

reasonable or desirable". The use of the welfare test when considering whether a parent's consent to adoption should be dispensed with met the article 8 requirements of being in accordance with the law, having a legitimate aim (the best interests of children) and seeking to achieve that aim by proportionate means.

[14] The decision of the First Division is consistent with the principle expressed by the European Court of Human Rights that where there is a clash between the article 8 rights of a child and those of the parent that cannot be reconciled, then the interests of the child should prevail (*Yousef v Netherlands* (2002) 36 EHRR 345).

Involvement in decision-making

[15] It is fundamental that parents are involved in the decision-making process. This is quite separate from rights being affected by the final decision. The point was driven home for Scotland by the Supreme Court in *Principal Reporter v K* [2010] UKSC 56, where an unmarried father was not allowed to participate in the children's hearing. This was a breach of the right to respect for family life of both the father and the child. The child had a right to have decisions made on a correct factual basis. The involvement of the father was necessary for this purpose. Baroness Hale of Richmond commented that "No child should be brought up to believe that she has been abused if in fact she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has."

[16] This brings the argument back full circle to Tony. He was a child who wanted to be heard in relation to his family and future. The country in which he lived did not recognise his right to a voice as it had refused to ratify the United Nations Convention on the Rights of the Child. Article 12 of the Convention requires states parties to assure to a child who is capable of forming his own views the right to express these in all matters affecting the child, the views being given due weight in accordance with the age and maturity of the child. A child should have the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Not only is Scotland committed to ensuring that this happens, it may actually be a breach of the child's article 8 rights if decisions are taken about his or her private or family life without involving him or her. In a discussion of child exploitation it is important to hold onto the fact that children are not just the subjects of activity by others, they are persons in their own right. This is their lives. A child of an age and maturity to be involved should be heard in any legal process touching upon his or her interests. Children have the potential to hold professionals accountable in a much more direct manner than we have perhaps been used to, but should certainly be aware of as we discuss new challenges in child protection.

Janys M Scott QC

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