

**A CHILDREN'S RIGHTS
PERSPECTIVE: REPEAL
OF THE HUMAN
RIGHTS ACT**

NOVEMBER 2022

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FOREWORD BY THE COMMISSIONER



Human rights protections are in grave danger of being eroded.

The Covid-19 pandemic has disproportionately affected children, particularly those whose rights were already most at risk. As we have started to emerge from the pandemic we have been plunged into a cost-of-living crisis, which is further devastating children's lives. This demands a human rights response.

Human rights are entrenched in the devolution settlement. All Scottish Parliament and Scottish Government decisions must be compatible with the rights set out in the Human Rights Act.

This report explains how the Human Rights Act and its provisions help to protect the rights of children in Scotland. It illustrates the impact the Human Rights Act, and the European Convention on Human Rights that it incorporates, has had on the development of children's rights. It includes analysis of how UK Government proposals to reform the Human Rights Act would undermine children's rights protections in Scotland.

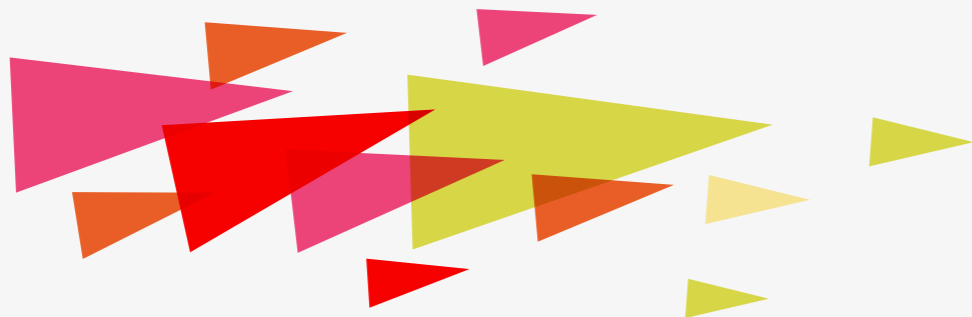
Children described human rights in #7WordStories to mark the 30th anniversary of the United Nations Convention on the Rights of the Child (UNCRC). They told us: "Rights are help before you even ask" and "My rights are my armour to me".

Having rights enshrined in law is a way to build a culture which provides help and support and prevents breaches of rights. Having rights enshrined in law is the best way to ensure that the armour and protection children need is as robust as possible. Having rights enshrined in law means that there is an effective remedy when things go wrong. The Scottish Parliament unanimously voted to incorporate the UNCRC into Scots law last year, but continued delays mean children are still waiting. We cannot risk stripping away current protections in law in the meantime.

It is vital that the Scottish Parliament, in its role as a human rights guarantor, ensures that children's rights in Scotland are protected, respected and fulfilled. This report is intended to support the Scottish Parliament in that role.

Bruce Adamson

Children and Young People's Commissioner Scotland



INTRODUCTION AND BACKGROUND

In their 2019 manifesto, the UK Government set out a commitment to 'update' the Human Rights Act 1998, which directly incorporates the [European Convention on Human Rights](#) (ECHR) into law.¹ The UK Government then published a consultation setting out their proposals to reform the Human Rights Act, which would significantly and fundamentally undermine how the rights contained in the ECHR are interpreted and given effect.² Following this consultation, the UK Government published the Bill of Rights Bill (the Bill). The former Prime Minister Liz Truss decided to pause progress of the Bill.³ We remain concerned that the UK Government will seek to find new routes to achieve the Bill's objectives and thus undermine the protections in the Human Rights Act.⁴

The Human Rights Act is now over 20 years old and has had a significant impact on the growing culture and understanding of human rights in Scotland. The ECHR that it incorporates is embedded as a key pillar of devolution. ECHR rights are part of the fabric of Scotland's legislation, rich body of case law and crucially, of the legislative competence and the law-making process of the Scottish Parliament. The changing attitudes of the judiciary and the creation of a Scottish legislature which has human rights built into its fabric have created a new attitude toward human rights in policy making and legislative development.⁵

While containing few express references to children, the rights contained in the ECHR have special relevance for children. The way that the European Court of Human Rights has interpreted these rights in cases involving children has demonstrated the potential of the ECHR to protect the rights of children. The Human Rights Act links the interpretation of these rights to national law, by requiring courts and public authorities to interpret and apply legislation in a way that complies with ECHR rights. Together with the duty on public authorities to act compatibly with ECHR rights, the Human Rights Act has helped to integrate human rights into the development of services for children. Where those representing the interests of children have resorted to litigation, the Human Rights Act enables enforcement of rights through the national courts and tribunals, thereby aiding access to justice and increasing the right to an effective remedy.⁶

¹ Page 48, available here: <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>

² Human Rights Act Reform: A Modern Bill of Rights – consultation. Available here: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>

³ The Guardian, 'Liz Truss halts Dominic Raab's bill of rights plan', 7 September 2022. Available here: <https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan>

⁴ The Independent, 'Suella Braverman sparks new government row after calling for UK to quit ECHR', 5 October 2022. Available here: <https://www.independent.co.uk/news/uk/politics/suella-braverman-european-convention-human-rights-b2195809.html>

⁵ B Adamson, 'The Protection of Human Rights in the Legislative Process of Scotland' in M Hunt, H Hooper and P Yowell (eds.) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford, Hart Publishing, 2015).

⁶ See Article 13 ECHR. The UN Committee on the Rights of the Child have stated that the right to an effective remedy also forms an implicit obligation under the UNCRC. See General Comment No. 5 (2003), para. 24. The Committee makes clear that a mechanism for challenging public authorities should include the provision of child-friendly information, advice, (self) advocacy, and access to independent complaints procedures and legal representation.

The ECHR and human rights treaties more generally seek to address the imbalance of power between the individual and the State. This is even more pronounced where children are concerned because they do not have the same political or economic power as adults, and therefore face additional barriers in bringing proceedings to protect their rights.

It is important to recognise at the outset that several of the UK Government's proposals in the Bill of Rights Bill are unlikely to be compatible with the ECHR (for example, by limiting the extent and application of the State's positive obligations). Since the proposals apply equally in Scotland as they do in other parts of the UK,⁷ Scottish courts and public authorities could be put in a position where it is required to adopt an interpretation of ECHR rights in a case involving children which is incompatible with the ECHR. At the same time, if the case concerns an action of the Scottish Government, or a piece of devolved legislation, then there is a risk that this interpretation would also breach children's rights under the UN Convention on the Rights of the Child (UNCRC), which courts and public authorities will have a statutory duty to comply with post-incorporation of the UNCRC into Scots law.

SUMMARY OF CONCERNS

- 1. Under the UK Government's proposals, courts and public authorities would no longer have a duty to interpret and apply legislation in a way which respects ECHR rights.** The 'interpretive obligation' under Section 3, read in conjunction with public authorities' duty to respect ECHR rights under Section 6, is central to ensuring that human rights protection is real and effective for children. It has helped to integrate human rights into the delivery of public services in Scotland.
- 2. The extent and application of the State's positive obligations would be limited.** The Human Rights Act gives effect to positive obligations under the ECHR, meaning it is not enough for public authorities to just not breach children's rights – they must take proactive reasonable steps to protect their rights. Positive obligations have therefore played an instrumental role in expanding rights protections for children. The proposals would limit the extent and application of existing positive obligations and there is a risk that future European Court of Human Rights' case law clarifying or developing positive obligations would not apply in Scotland.
- 3. Courts would no longer need to take into account Strasbourg case law.** The Human Rights Act requires our national courts and tribunals to "take into account" relevant decisions of the European Court of Human Rights when deciding a case concerning an ECHR right. The requirement is essential to ensure that children and those acting on their behalf can enforce the full extent of their ECHR rights

⁷ Some parts of the Bill however do not apply in Scotland, notably provisions which would create a permission stage for bringing a human rights claim through an action for judicial review.

through our national courts. However, the UK Government's proposals would remove this requirement. This means that children would no longer be able to rely on the European Court of Human Rights' evolving case law and new interpretations of existing ECHR rights. This will put Scotland out of sync with the interpretation of children's rights across Europe.

- 4. Balancing of rights would be weighted in favour of the State.** The Human Rights Act contains qualified human rights, like the Right to Private and Family Life (Article 8) and Freedom of Expression (Article 10). Any interference in such rights is only permitted when:
 - o (1) allowed by law;
 - o (2) legitimate (good reason);
 - o and (3) proportionate.

Proportionality, the third part of the test, is a key part of these rights. It requires public body decision-makers to consider the individual's circumstances; choose the least restrictive option; and make a reasoned decision, including why they consider the restriction on human rights to be justifiable. The proposals would set out rules for how courts decide if a restriction on someone's human rights by the Government or a public body is proportionate. Rules would apply in relation to specific scenarios, including where Article 8 is relied on in deportation proceedings, and in a case concerning Article 10 – freedom of expression. This change is not needed, as national courts have already demonstrated that they are able to carry out these often-sensitive balancing exercises without the need for rules. These rules would skew the balancing approach in favour of the State, thereby restricting the scope of protection of rights.

- 5. Scottish courts and tribunals may be required to adopt an interpretation of ECHR rights which will put it out of step with the European Court of Human Rights and potentially in breach of the ECHR.** The proposals would generally apply equally to courts and tribunals in Scotland. In these circumstances, and following incorporation of the UNCRC, Scottish courts may find themselves in a situation where they risk acting incompatibly with the rights of children under the UNCRC.
- 6. The UK Government's proposals would impact on devolved decision-making.** Because the Scotland Act directly references the Human Rights Act, the UK Government's changes to how ECHR rights are interpreted under the Human Rights Act will have a knock-on effect on how courts will approach challenges against the Scottish Government and Scottish legislation based on ECHR rights. The proposals not only make the UK Government less accountable for breaches of the fundamental rights of children under the ECHR; by extension they will weaken accountability of the Scottish Parliament and actions of the Scottish Government.

RECOMMENDATIONS

The Human Rights Act should be retained in its current form.

- ▶ We call on the Scottish Parliament, in its role as a human rights guarantor, to do all it can to ensure that children's rights in Scotland are protected, respected and fulfilled. In particular, we call on the Scottish Parliament to pass a motion refusing legislative consent for any current or future Bill which seeks to weaken or repeal the Human Rights Act; and to reaffirm Scotland's commitment to the ECHR and to the Council of Europe.
- ▶ We repeat our joint call to the Scottish Parliament's Europe, External Affairs and Culture Committee to conduct an Inquiry into the devolution impacts of the UK Government's proposals to reform the Human Rights Act.⁸
- ▶ We call on the Scottish Government to ensure that the consultation for their forthcoming [Human Rights Bill](#) addresses the question of how, in light of the UK Government's proposals, protection for civil and political rights in Scotland can be strengthened within devolved competence. The Scottish Government should explore the option of incorporating the ECHR into Scots law alongside UN treaties.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND CHILDREN'S RIGHTS

The ECHR protects the human rights of people in the 46 member states of the Council of Europe which is an international organisation formed in the aftermath of the Second World War for the purposes of upholding human rights, democracy and the rule of law.

The horrors and atrocities of war, including the treatment of some groups as less than human, led to significant activities, such as the creation of international organisations (including the Council of Europe and the United Nations) and the drafting of human rights treaties, all of which had the aim of preventing any recurrence of such events, both by a system of protection of fundamental human rights and by closer political union between States.⁹

The Council of Europe is separate from the 27 member European Union which was established to make democratic decisions on specific matters of joint interest at the European level. The UK was a member state of the European Union and of its predecessor the European Communities from 1 January 1973 until 31 January 2020.

⁸ Joint Statement: Human Rights Act reform will erode children's rights protections. Available here: <https://www.cypcs.org.uk/news-and-stories/statement-human-rights-act-reform-will-erode-childrens-rights-protections/>

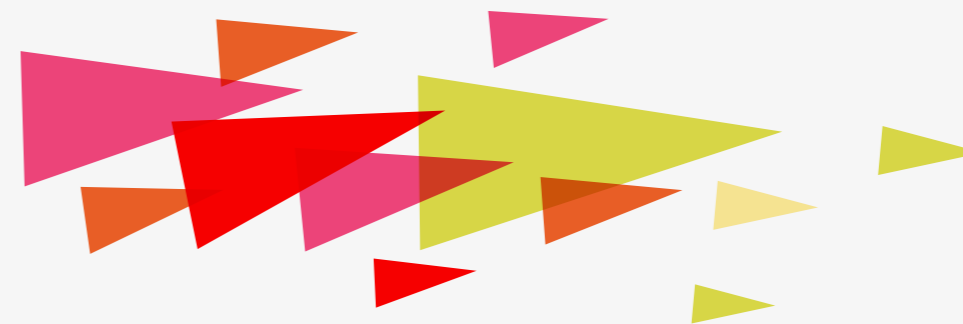
⁹ Council of Europe, The Conscience of Europe, Chapter 1: The Birth of the European Convention on Human Rights. Available here: https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf

The UK leaving the European Union has no impact on its membership of the Council of Europe, of which it was a founding member in 1949.

The UK was one of the States that drafted the ECHR and was one of the first States to ratify it in 1951. It is the first instrument to give binding effect to certain rights set out in the Universal Declaration of Human Rights. It lays down absolute rights which can never be breached by the States, such as the prohibition of torture (Article 3) or freedom of thought, conscience and religion (Article 9), and it protects certain rights and freedoms which can only be restricted by law when necessary in a democratic society, for example the right to respect for private and family life (Article 8) and freedom of expression (Article 10). These are known as 'qualified rights'. A number of rights have been added to the initial text with the adoption of additional protocols.¹⁰

The ECHR's importance lies not only in the scope of the fundamental rights that it protects, but also in the system of protection established in Strasbourg, notably the European Court of Human Rights, to examine alleged violations and ensure that States comply with their obligations under the ECHR.

Unlike the UNCRC, the ECHR contains few express references to children.¹¹ However, several rights protected by the ECHR – most notably the right to private and family life under Article 8 – have special relevance to children. The way that domestic courts, tribunals, and the European Court of Human Rights have interpreted these rights in cases involving children have demonstrated the full potential of the ECHR to protect the rights of children. In particular, the development of positive obligations – being the active steps which public authorities must take to safeguard a child's right under the ECHR – have been instrumental in making rights under the ECHR real and effective for children.¹² In recent times, the European Court of Human Rights has increasingly relied on specialised children's rights instruments, particularly the UNCRC, to ensure that its judgments reflect current standards in children's rights.



¹⁰ The UK has ratified Protocol No. 13 on the abolition of the death penalty in all circumstances, as well Protocol No. 1, which contains three additional rights: Article 1 of Protocol No. 1: the right to free enjoyment of property; Article 2 of Protocol No. 1: the right to education; and Article 3 of Protocol No. 1: the right to free and fair elections

¹¹ For example, Article 5(1)(d) ECHR makes provision for the detention of a "minor for the purpose of educational supervision and to bring a minor before the competent legal authority". Article 6, the right to a fair trial, makes provision for the press and public to be excluded from all or part of a trial "where the interest of juveniles [...] require"

¹² See Dr Ursula Kilkelly, Protecting Children's Rights under the ECHR: the role of positive obligations, NILQ 61(3): 245-61

THE IMPACT OF THE ECHR IN SCOTLAND – EQUAL PROTECTION FROM ASSAULT

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. The European Court of Human Rights' case law on physical punishment illustrates this impact in the context of protecting children from harm.

The European Court of Human Rights first examined the issue of physical punishment in 1978 in *Tyrer v UK* finding that the judicial birching of a teenage boy breached his Article 3 rights under the ECHR.¹³ Article 3 safeguards the child's right to protection against torture, cruel, inhuman and degrading treatment

In 1982, the Court considered a case brought by two Scottish mothers who objected to the use of corporal punishment at the state schools their sons attended in *Campbell and Cosans v. UK*.¹⁴ The Court found that the right to education under 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. *Costello-Roberts v UK* in 1993 then led to corporal punishment being prohibited in independent schools.¹⁵

A v UK in 1998 led to another revision of Scots law in relation to physical punishment. This case related to the repeated beating of a boy by his stepfather with a garden cane.¹⁶ The stepfather had successfully argued a defence of 'reasonable chastisement' as provided for by the law at that time, but the Court overturned that decision and found the boy's treatment violated his Article 3 rights. Whilst the case originated in England, the judgment was against the UK and therefore amendments were necessary to the law in Scotland, resulting in the Criminal Justice (Scotland) Act 2003. Nevertheless, the law still allowed for the defence of "justifiable assault" of children, even where this resulted in actual bodily harm.

Following each of the judgments against the UK highlighted above, the law had been amended only to meet the minimum requirement of the judgment, rather than to properly respect the rights of children.

The United Nations, the Council of Europe, and the European Union had repeatedly called on the UK to honour its international human rights commitments to provide children with total protection from assault.

Following years of campaigning by our office, civil society organisations, and children and young human rights defenders, on 3 October 2019 the [Children \(Equal Protection](#)

¹³ Application no. 5856/72

¹⁴ [1983] ECHR 3, 7743/76

¹⁵ 19 EHRR 112, Application no. 13134/87

¹⁶ *A v United Kingdom*, application no. 25599/94

[from Assault\) \(Scotland\) Act](#) was passed by the Scottish Parliament. It came into force on 7 November 2020, and from that point children in Scotland have had the same protections against assault as adults.

WHAT DOES THE HUMAN RIGHTS ACT DO?

The Human Rights Act 1998, which came into force in 2000,¹⁷ sets out the fundamental rights and freedoms that everyone in the UK is entitled to. Under the promise of 'bringing rights home', the Human Rights Act directly incorporates the rights set out in the ECHR. This means that children whose rights have been violated can rely on rights under the ECHR to obtain a remedy in national courts, rather than having to go to the European Court of Human Rights in Strasbourg. It makes justice cheaper, easier and more accessible.¹⁸

In addition to being able to rely on ECHR rights before national courts, the Human Rights Act also gives effect to ECHR rights in the following ways:

- 1. Under Section 6, all public bodies and other organisations which carry out public functions must respect human rights when exercising their duties.** Our courts can review decisions taken by public authorities and decide whether they have acted compatibly with ECHR rights. Section 6 has helped to integrate human rights into the development of services for children.
- 2. New laws should be compatible with Convention rights.** Under Section 4, our courts can declare that UK legislation is incompatible with ECHR rights. This puts considerable pressure on the UK Parliament to amend or repeal it, although the sovereignty of the UK Parliament means that it can pass laws which are incompatible. Under Section 19, the Minister in charge of a Bill in either House of the UK Parliament is required to make a statement that the provisions of the Bill are compatible with Convention rights. Scottish legislation that is incompatible can be struck down by the courts altogether (see further below).

When reviewing cases under the Human Rights Act, our courts are required to:

- Read and give effect to legislation in a way which is compatible with ECHR rights. Under Section 3, a national court must interpret legislation as being compatible with human rights wherever possible, so as to avoid a breach of ECHR rights.
- "Take into account" relevant decisions of the European Court of Human Rights when deciding a case involving an ECHR right (Section 2).

¹⁷ Relevant sections of the Scotland Act which reference the Human Rights Act came into force in 1999, meaning that the duty on the Scottish Parliament and Scottish Government to respect the ECHR came into force earlier.

¹⁸ Before the passing of the Human Rights Act, an individual would have to take their case directly to the European Court of Human Rights, a process which was subject to long delays and costing an applicant (on average) £30,000. See Joint Committee on Human Rights, Letter to Deputy Prime Minister, 30 June 2022.

THE HUMAN RIGHTS ACT AND DEVOLUTION

Embedding the ECHR into the devolution framework

The Scotland Act 1998 puts the ECHR at the heart of devolution. The powers of both the Scottish Parliament and the Scottish Government are limited by the requirement to act compatibly with ECHR obligations. The Scottish Parliament cannot pass any legislation that would breach ECHR rights, defined by reference to the Human Rights Act.¹⁹ Similarly, the Scottish Government does not have the power to act in a way which would breach ECHR rights.²⁰

The protections built into the Scotland Act, both in terms of the legislative competence of the Scottish Parliament and the checks and balances provided by the Parliament's procedures mean that a high level of legislative scrutiny is possible in terms of human rights standards. However, there remain concerns over how effective these procedures are in practice and how transparent the process is.²¹

By embedding the Human Rights Act within the Scotland Act, rights under the ECHR have become a strong part of the fabric of Scotland's laws and judicial analysis, as well as the legislative competence of the Scottish Parliament. 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, though there is still more that can be done to ensure full compliance both in the spirit and the letter of human rights law.²² The Human Rights Act has also had a significant impact on the use of human rights language and jurisprudence in Scots law.

Important aspects of Scots law have been led and influenced by ECHR rights. Nowhere is this more pronounced than in the Children's Hearings 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 predominantly welfare-based model to one in which children are recognised and respected as rights holders.



Case example: Children's Hearings Rules breached children's right to a fair hearing

- o In a case from 2001 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.²³ 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.

¹⁹ Section 29, Scotland Act 1998

²⁰ Section 57, Scotland Act 1998

²¹ B Adamson, 'The Protection of Human Rights in the Legislative Process of Scotland'

²² 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>

²³ S v Miller 2001 SLT 531. See article by Kenneth Norrie, Hearing and Speaking, 18 January 2010, Available here: <https://www.lawscot.org.uk/members/journal/issues/vol-55-issue-01/hearing-and-speaking/>

- o 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".²⁴ 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.

How would the UK Government's proposals impact on devolution?

Actions of the Scottish Ministers, the Scottish Government and Acts of the Scottish Parliament or Scottish secondary legislation are subject to both the Human Rights Act and the Scotland Act. In practice however, challenges to acts of the Scottish Government and devolved legislation tend to be brought under the Scotland Act.²⁵ Even when this happens, courts must refer to the Human Rights Act. This is because the reference in the Scotland Act to 'Convention rights' are to those ECHR rights which are incorporated by the Human Rights Act. Therefore, in cases against the Scottish Government and Scottish legislation, the Human Rights Act acts as a 'dictionary' for the Scotland Act.²⁶ The following case involving children illustrates the relationship between both pieces of legislation.



Case example: Scottish Government's Named Person scheme incompatible with children's privacy rights

- o In a case brought before the Supreme Court in 2016, a number of charities and parents challenged the information sharing provisions of the Children and Young People (Scotland) Act 2014 relating to the proposed 'named person' scheme.²⁷ They argued that the legislation fell outwith the devolved competence of the Scottish Parliament under the Scotland Act 1998 because the provisions breached the rights of children, young people and their parents under Article 8 ECHR.
- o While the court found that the broad purpose of the "named person" scheme was legitimate and benign, the operation of the scheme, in relation to information sharing (including disclosure and sharing of confidential and sensitive information without the knowledge of the child or parents) and how advice would be given to parents, did not fully meet the requirements of the right to respect for privacy and/or family life under Article 8 ECHR.

Because the Human Rights Act and the Scotland Act 1998 are aligned, any changes to how ECHR rights are interpreted under the Human Rights Act will, unless in some way

²⁴ K v Authority Reporter 2009 SLT 1019

²⁵ See for example, Napier v. the Scottish Ministers, [2005] CSIH16 (conditions of detention); J v. Children's Reporter for Stirling [2010] CSIH 85 (whether provisions in the Children (Scotland) Act 1995 relating to secure accommodation exceeded the legislative competence of the Scottish Parliament); and S v Miller (No.1) 2001 S.L.T. 531 (concerning the alleged failure of the Scottish Ministers to take action to remedy structural deficiencies in the Children's Hearings system).

²⁶ See Somerville and others v Scottish Ministers (HM Advocate General for Scotland intervening), [2007] UKHL 44

²⁷ Christian Institute & Ors v Lord Advocate (Scotland) [2016] UKSC 51

preserved, have a knock-on effect on how courts will approach challenges against the Scottish Government and Scottish legislation based on ECHR rights. By way of example, the UK Government has proposed to limit the scope of positive obligations, which requires public authorities to take active measures to protect the rights of children under the ECHR. In addition to limiting how positive obligations are interpreted under the Human Rights Act, the proposal would also limit the Scottish Government's accountability under the Scotland Act to comply with positive obligations under the ECHR.

The UK Government's proposals would weaken the ability of the Scottish Parliament to act as a human rights guarantor, weaken the human rights protections in the Scottish Parliament, and weaken the accountability on actions of the Scottish Government.

The Human Rights Act is protected from modification by the Scottish Parliament under the Scotland Act 1998.²⁸ While there is no clear consensus as to the extent to which human rights are a devolved matter in Scotland,²⁹ it is widely accepted that the observation and implementation of the ECHR is a specifically devolved matter.³⁰

Because of the relationship between the Human Rights Act and the Scotland Act, any changes to the Human Rights Act will have knock on consequences for the scope of devolved competence. The Sewel convention, which applies when the UK Parliament wants to legislate on a matter within the devolved competence of the Scottish Parliament, is therefore engaged.³¹ Under the terms of the Convention, the UK Parliament will "not normally" legislate in these circumstances without the relevant devolved institution having passed a legislative consent motion.

Finally, it is important to recognise that the UK Government's proposals are at odds with the Scottish Parliament's commitment to human rights. The UNCRC (Incorporation) (Scotland) Bill was unanimously passed by the Scottish Parliament in 2021. It is due to be brought back for reconsideration shortly, with all parties in the current session of Parliament having expressed support. Once brought into force, it will be 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.

The Scottish Government also has an 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 introduce 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'.³²

28 Part 1, Schedule 4 of the Scotland Act 1998

29 Para 7(2) of Schedule 5 to the Scotland Act makes clear that the observation and implementation of human rights are exempted from reservation. JCHR Report, 8 July 2021, para 254. Available at: <https://publications.parliament.uk/pa/ft5802/jtselect/jtrights/89/8913.htm#footnote-029>.

30 JUSTICE, Devolution and Human Rights Report, page 18, available at: <https://justice.org.uk/devolution-human-rights-2/>

31 See Professor Aileen McHarg's evidence to the Joint Committee on Human Rights on Human Rights Act reform, HC 215, Wednesday 11 May 2022. Available at: <https://committees.parliament.uk/oralevidence/10213/pdf/>

32 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://humanrightleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf>

The UK Government's proposals risk creating a two-tier system in Scotland for protection of children's rights, whereby ECHR rights will be subject to weaker enforcement mechanisms than UNCRC rights.

In light of the above, we repeat our joint call to the Scottish Parliament's Europe, External Affairs and Culture Committee to conduct an Inquiry into the devolution impacts of the UK Government's proposals to reform the Human Rights Act.³³

We also call on the Scottish Government to ensure that the consultation for their forthcoming [Human Rights Bill](#) addresses the question of how, in light of the UK Government's proposals, protection for civil and political rights in Scotland can be strengthened within devolved competence. The Scottish Government should explore the option of incorporating the ECHR into Scots law alongside UN treaties.

SECTION 3 HRA - INTERPRETATION OF LAWS AND HUMAN RIGHTS

The Human Rights Act requires that legislation (both primary and subordinate) is interpreted and applied in a way which respects ECHR rights. This is sometimes referred to as the 'interpretive obligation'. This applies to the courts, but also to public authorities who have a legal duty to respect, protect and fulfil human rights in everything they do (Section 6, Human Rights Act).³⁴ Under the UK Government's proposals, Section 3 of the Human Rights Act would be removed altogether.

The interpretative obligation can be used by public officials involved in the delivery of children's services (for example, social workers and teachers) to make rights-respecting decisions, when they create guidance or navigate and apply other laws, such as mental health law or child protection laws. It is used by people acting on behalf of children to challenge public bodies when laws are applied without regard to a person's human rights.³⁵

Section 3 allows courts to adopt statutory interpretations that respect ECHR rights, in circumstances where a statutory provision would otherwise result in a breach of ECHR rights.³⁶ This does not however give the courts power to make new laws, since any statutory interpretation must be consistent with the overall intention of the legislation in question. The following case examples demonstrate how the courts have used the interpretative obligation to address unforeseen drafting issues or factual situations.

33 Joint Statement: Human Rights Act reform will erode children's rights protections. Available here: <https://www.cypcs.org.uk/news-and-stories/statement-human-rights-act-reform-will-erode-childrens-rights-protections/>

34 BIHR, Interpretation of laws and human rights (Sections 3 and 6): What could change and what does this mean? Available here: <https://www.bih.org.uk/Handlers/Download.ashx?IDMF=447d6024-f916-46d6-9d5d-0bb07d312069>

35 BIHR, Why Parliamentarians should stand firm on our Human Rights Act and reject the new Rights Removal Bill, 6 July 2022. Available here: <https://www.bih.org.uk/Handlers/Download.ashx?IDMF=775dedec-8a84-4597-96d4-c772266ab23e>

36 F. Powell and S. Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?', U.K. Const. L. Blog (24th. Mar. 2021) (available at <https://ukconstitutionalaw.org/>)



Case example: Human rights protections for children with additional support needs

- o In 2018, a tribunal in England considered a disability discrimination claim brought by an autistic child who had been excluded from school for behaving aggressively.³⁷ Under Regulations made under the Equality Act 2010 (which also applied in Scotland), disabled children with a “tendency to physical abuse” were not able to rely on the Equality Act’s protection against discrimination. The tribunal relied on Section 3 of the Human Rights Act to interpret the regulation in question so that it did not apply to children in education who have a recognised condition that makes them more likely to be physically abusive. Had the tribunal in England not had the interpretive obligation tool at its disposal, it is unlikely that the same outcome would have been achieved.
- o This significant decision has subsequently been applied by the First-tier Tribunal for Scotland’s Health and Education Chamber (the ‘ASN Tribunal’) in a disability discrimination claim brought by a Scottish child.³⁸
- o These cases demonstrate how the Section 3 interpretive obligation can be used to address gaps in legal protection for disabled children. As a result, schools in Scotland cannot exclude a disabled pupil without first providing reasonable support to try to manage their behaviour. This is another example of how the mechanisms under the Human Rights Act can be used to hold authorities delivering children’s services to account.

The UK Government’s proposals would remove the interpretive obligation, but retain the duty on public authorities to respect, protect and fulfil human rights.³⁹ In practice, this will weaken human rights protection for children in Scotland, as public authorities will no longer have to interpret legislation compatibly with human rights so far as it is possible to do so.

The interpretative obligation, read in conjunction with public authorities’ duty under Section 6, is absolutely central to ensuring that human rights protection is real and effective for children. The current protections afforded by the interpretative obligations have compelled public authorities to develop rights-based policies and practice guidance to underpin delivery of children’s services. The UK Government’s proposal risks us losing the practice-based culture of ensuring rights are being upheld and will weaken accountability.

The UK Government argue that reform of the interpretive obligation is needed to provide a clearer separation of powers between the courts and the UK Parliament. Repealing Section 3, it is argued, would rebalance the approach to solving human rights issues in favour of Parliament.⁴⁰

³⁷ C&C v Governing Body [2018] UKUT 269. For further commentary, see <https://additionalneeds.co.uk/2018/08/>

³⁸ Decision of 9 May 2018, available here: <https://www.healthandeducationchamber.scot/additional-support-needs/decisions/256>

³⁹ Clause 12 of the Bill of Rights Bill (as introduced) replaces Section 6 of the Human Rights Act.

⁴⁰ Paragraph 70, Human Rights Act Reform: A Modern Bill of Rights Consultation Response, June 2022.

This is not borne out by the evidence. The Human Rights Act already strikes a balance between competing interpretations of rights by constructing a framework for ‘dialogue’ between the legislature and the judiciary with the final say resting with the legislature.⁴¹

In any case, under Section 3, an interpretation by the courts cannot change the meaning of the law being looked at and must respect Parliament’s ‘intention’ when making the law.⁴²

Finally, it is important to recognise that by making Parliament the ultimate arbiter and guarantor of rights fails to recognise that many of those most vulnerable to rights violations, including children, are unable to participate in parliamentary democracy and so their rights would be undermined in such a ‘majoritarian’ system.

SECTION 2: TAKING ACCOUNT OF STRASBOURG CASE LAW

Section 2 is an integral part of the Human Rights Act. It requires our national courts and tribunals to “take into account” relevant decisions of the European Court of Human Rights when deciding a case concerning an ECHR right. Former President of the UK Supreme Court, Baroness Hale, described how the requirement works in practice:

“It requires the courts to take account of the Strasbourg jurisprudence, but not necessarily to slavishly follow it. That means that when the UK courts are thinking about whether a public authority has acted compatibly or incompatibly with the convention rights, they have to look at what the Strasbourg organs have said about it. They do not have to follow it, but they have to look at what they have said.”⁴³

The European Court of Human Rights is the authoritative interpreter of ECHR rights.⁴⁴ It is therefore entirely sensible that national courts should be required to ‘take account’ of case law developments at the European Court of Human Rights. The requirement is essential to ensure that children, and those acting on their behalf, are able to enforce the full extent of their ECHR rights through our national courts.

This is all the more important because the ECHR is a “living instrument”. This means that the European Court of Human Rights interprets the rights in the ECHR in the light of present day conditions so as to be practical and effective. Sociological, technological and scientific developments, evolving standards in the field of human rights and changing views on morals and ethics have necessarily to be considered when applying the ECHR. It is essential that national courts apply this evolving case law to allow children to benefit from case law developments.⁴⁵

⁴¹ Greene, Alan, A Floor or a Ceiling? Irish and UK Approaches to Strasbourg Jurisprudence (July 18, 2015). Available at SSRN: <https://ssrn.com/abstract=2632856>

⁴² Powell and Needleman, ‘How radical an instrument is Section 3 of the Human Rights Act 1998?’, cited above

⁴³ Joint Committee on Human Rights, Oral Evidence: The Government’s Independent Human Rights Act Review, HC 1161. Available here: <https://committees.parliament.uk/oralevidence/1661/html/>

⁴⁴ R (Ullah) v Special Adjudicator [2004] UKHL 26 (17 June 2004), para. 20, where Lord Bingham noted that “The Convention is an international instrument, the correct interpretation of which can be positively expounded only by the Strasbourg court”.

⁴⁵ Scottish Human Rights Commission, Submission: Independent Review of the Human Rights Act, Call for Evidence, March 2021, paragraph 44



Case example: Freedom of expression and the internet

- o In 2015, the European Court of Human Rights found that the wholesale blocking of YouTube in Turkey violated the right to freedom of expression.⁴⁶ The case had been brought by law professors at different universities who had, over a long period of time, been unable to access YouTube and who claimed that this violated their right to receive and impart information and ideas, protected by Article 10 ECHR.
- o In reaching their decision, the Court observed that YouTube constituted an important source of information, and that the blocking order restricted access to specific information that could not be accessed by any other means. The Court also noted that YouTube was a platform which fostered the emergence of citizen journalism, imparting political information not conveyed by traditional media.
- o The progress made in technology and science has been unprecedented over the life of the ECHR. Significant advances continue to occur and with increasing frequency.⁴⁷ By interpreting the protection of freedom of expression to cover receiving and imparting information on the internet, the Court has ensured the continued relevance of the ECHR in modern times.

It is important to recognise that the fundamental rights set out in the ECHR offer a minimum standard of protection which States are required to comply with. It is open for States to go further in protecting human rights. For this reason, the ECHR is sometimes referred to as a 'floor' and not a 'ceiling' on protection for human rights.⁴⁸ This is reflected in the text of the ECHR, which states that: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".⁴⁹

Courts in the UK have nonetheless tended to take a restrictive approach by keeping pace with the European Court of Human Rights' jurisprudence rather than engaging with its progressive development.⁵⁰ Courts have classically interpreted the duty under Section 2 as to "keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".⁵¹ This interpretation has created a reluctance to depart from the case law of the ECHR even in cases where the Strasbourg Court allows States some margin of appreciation and domestic courts are free to enforce higher human rights standards.⁵²

⁴⁶ Cengiz and Others v. Turkey, nos. 48226/10 and 14027/11. For a summary of the case, see <https://globalfreedomofexpression.columbia.edu/cases/cengiz-v-turkey/>.

⁴⁷ European Court of Human Rights, Judicial Seminar 2020, The Convention as a Living Instrument at 70. Available here: https://echrcoe.int/Documents/Seminar_background_paper_2020_ENG.pdf.

⁴⁸ Greene, Alan, A Floor or a Ceiling? Irish and UK Approaches to Strasbourg Jurisprudence (July 18, 2015). Available at SSRN: <https://ssrn.com/abstract=2632856>.

⁴⁹ Article 53 ECHR

⁵⁰ 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. Page 6

⁵¹ R (Ullah) v Special Adjudicator [2004] UKHL 26 (17 June 2004)

Notwithstanding, there have been examples when national courts have 'gone beyond' the case law of the European Court of Human Rights to accord greater human rights protection, particularly where the rights of children and families are concerned.⁵³



Case example: Outright ban excluding unmarried couples from applying for an adoption order breaches Article 8 rights

- o 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. Northern Ireland however maintained a rule excluding unmarried couples from applying for an adoption order. The House of Lords (the predecessor of the UK Supreme Court), held that such an outright ban could not be justified in terms of Article 8, read in conjunction with Article 14 (protection from discrimination).⁵⁴ This was in spite of the fact that no Strasbourg decision had clearly established that marital status was a protected ground of discrimination under Article 14.⁵⁵ The court noted that adoption is meant to serve the best interests of the child. While the fact that a couple have not committed themselves to one another in marriage could be relevant to whether allowing them to adopt would be in the child's best interests, it did not follow that it would never be so.
- o Commenting on the case some years later,⁵⁶ Baroness Hale said that 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 stated that "We [the courts] are the guardians of the rights of the minority and also of under-represented groups such as women and children of unmarried parents – whether popular or unpopular – against the decisions of the majority or dominant groups".

Under the UK Government's proposals however, national courts would be prevented from going beyond the human rights protection offered by the case law of the European Court of Human Rights. As has been noted by the Joint Committee on Human Rights, national courts would be able to accord children weaker human rights than those protected by the ECHR, but unable to accord protection that risked going further than the established case law of the European Court of Human Rights.⁵⁷ The ECHR system would therefore act as the maximum level of human rights protection; in other words, the 'ceiling', and not the 'floor'.

⁵² See for example the Supreme Court's judgment in R (on the application of AB) v Secretary of State for Justice [2021] UKSC 28. In this case, the Supreme Court emphasised that Parliament's purpose in enacting the Human Rights Act was to ensure that there is correspondence between the rights enforced domestically and those available before the European Court, not to provide for rights which are more generous than those available before the European Court.

⁵³ Ferreira, Nuno (2015) The Supreme Court in a final push to go beyond Strasbourg. Public Law, 2015 (3), pp. 367-375. ISSN 0033-3565

⁵⁴ In Re G (Adoption: Unmarried Couple) [2008] UKHL 38, [2009] 1 AC 173

⁵⁵ H. Fenwick, 'What's Wrong With S.2 of the Human Rights Act?' UK Const. L. Blog (9th October 2012) (available at <http://ukconstitutionalaw.org>)

⁵⁶ Celebrating 70 years of the Universal Declaration and 20 years of the Human Rights Act British Institute of Human Rights Annual Lecture 2018. Available here: <https://www.supremecourt.uk/docs/speech-181107.pdf>

⁵⁷ See Joint Committee on Human Rights, Letter to Deputy Prime Minister, 30 June 2022. Available here: <https://committees.parliament.uk/publications/22880/documents/167940/default/>

This risks children and those acting on their behalf having to pursue their human rights case in the European Court of Human Rights, thereby creating a barrier to access to justice for children. This would run counter to the objectives of the Human Rights Act to 'bring rights home'. In addition, depending on how courts approach Strasbourg case law, children risk not being able to rely on evolving interpretations of ECHR rights made by the European Court of Human Rights. The scope of human rights protection for children in Scotland would therefore be significantly undermined.

DUTY TO PROTECT HUMAN RIGHTS: POSITIVE OBLIGATIONS

The UK Government has been critical of the doctrine of positive obligations, which requires public authorities to take active measures to protect the rights under the ECHR. The UK Government has argued that the approach to positive obligations taken by both the domestic courts and the European Court of Human Rights can "skew operational priorities", and require public services to allocate scarce resources to "contest and mitigate legal liability".⁵⁸ The UK Government proposes to restrict the scope of positive obligations by limiting the extent and application of existing positive obligations in the UK and by providing that future European Court of Human Rights' case law clarifying or developing positive obligations will not apply in the UK.

Positive obligations have played an instrumental role in securing rights protections for children, by placing an emphasis on ensuring that public authorities (including judicial bodies and the Government) take active steps to promote the effective realisation of rights.

Positive obligations have been applied in a number of cases involving children, for example in a recent case concerning the failure of the UK to protect child victims of trafficking under Article 4 ECHR.⁵⁹ Positive obligations also evolve to respond to sociological, technological and scientific developments, for example in the field of climate justice litigation.⁶⁰

⁵⁸ Consultation Response, Human Rights Act Reform: A Modern Bill of Rights, June 2022, CP 704, paragraph 62

⁵⁹ *VCL v. United Kingdom*, [2021] 2 WLUK 541

⁶⁰ See for example a pending case before the European Court of Human Rights, *Duarte Agostinho et al v. Portugal and 32 other States*, application no. 39371/20. In this case, the applicants are six Portuguese children and young people complain that the respondent States have failed to comply with their positive obligations under Articles 2 and 8 ECHR (right to life and respect for private and family life, respectively), read in the light of the commitments made within the context of the 2015 Paris Agreement to limit the increase of the average temperature of the planet significantly below 2°C in comparison with pre-industrial levels and to seek to limit the temperature rise to 1.5°C by comparison with pre-industrial levels. For further commentary see Judge Tim Eicke, "Human Rights and Climate Change: What role for the European Court of Human Rights", 2 March 2021. Available here: <https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4>

In practice, positive obligations give public authorities a clear framework to understand the steps they need to take to safeguard the fundamental rights of children. However, the UK Government's proposals will prevent the development of new positive obligations, and fundamentally undermine the interpretation of existing obligations by requiring courts to "give great weight" to factors such as how the public authority decides to allocate the resources available to them. This is likely to significantly impair the scope of human rights protection afforded to children under the ECHR.

The following sections of this report demonstrate how the positive obligations doctrine has been used to make ECHR rights real and effective for children.

Protecting the integrity of family life

One area of case law which illustrates the role of positive obligations is in relation to decisions to separate children from their parents. Under the ECHR, decisions to remove children from their parents and decisions on placement and adoption, determination of residence and contact rights constitute serious interference in the exercise of the right to family life under Article 8. Article 8 imposes both negative and positive obligations – not to interfere in family life without justification and to take positive steps to maintain and develop family ties.

In these types of cases, positive obligations have been used to ensure that there are sufficient procedural safeguards in place. The European Court of Human Rights has found violations of Article 8, not because of the substance of the decision taken by the national authorities but because children and their family were not sufficiently involved in the decision-making process.⁶¹ In this regard, positive obligations have meant that parents, guardians, and in some instances, siblings must be involved in procedures of this kind, and must play a sufficiently important part for their interests to be properly taken into account. The degree of involvement required may vary from case to case: it will mainly depend on the seriousness of the measure to be taken. The following cases illustrate this point.



Case example: Children's Hearings system incompatible with the Article 8 rights of an unmarried father

- o In the case of *Principal Reporter v. K* the UK Supreme Court held that the Children's Hearings system, as it was then constituted, violated the Article 8 rights of an unmarried father since it denied him the opportunity to participate in the decision-making process relating to his child.⁶² The Court emphasised that there were positive procedural obligations inherent in the right to respect for family life. Measures therefore had to be put in place to allow parents to play a proper part in the decision-making process before they experienced interference by public authorities.

⁶¹ See for example *McMichael v United Kingdom* (1995) 20 EHRR 205

⁶² *Principal Reporter v K*, 2010 UKSC 6



Case example: Children's Hearings system compatible with the rights of siblings under Article 8

- o In *ABC v. Principal Reporter* the Supreme Court considered a challenge against the compatibility of the Children's Hearings system with the rights of siblings in terms of Article 8 ECHR.⁶³ Following changes made to Children's Hearings system since the case started, the court held that it now complied with the principles of the right to family life under Article 8 ECHR in relation to siblings and other family members.
- o 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".
- o In its judgment, the Court referred directly to the European Court of Human Rights judgment in *Akin*,⁶⁴ and particularly the Court's commentary on the role of positive obligations in cases involving siblings.
- o 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).⁶⁵

Protecting children from harm

Another area of ECHR case law which is underpinned by positive obligations is in relation to a child's right to protection from harm. This right has strong support in the UNCRC (particularly Articles 19, 32, 34, and 36), which requires states to take all necessary measures to protect children from all forms of harm, abuse, neglect, and exploitation, including at the hands of their parents and carers.

By contrast, the ECHR makes no explicit reference to children's right to protection from violence, but this has not prevented children and people acting on their behalf from invoking ECHR provisions in respect of children's treatment both at the hands of the State and of their carers. In this regard, the positive obligations approach which both the European Court of Human Rights and national courts has taken to the interpretation of Article 3 of the ECHR (freedom from torture and inhuman or degrading treatment) and Article 8 (right to privacy) has been critical in articulating its relevance to children. The following case law example will illustrate the point.

⁶³ *ABC (Appellant) v Principal Reporter and another (Respondents)* (Scotland), [2020] UKSC 26

⁶⁴ *Mustafa and Armağan Akin v. Turkey*, application no. 4694/03

⁶⁵ 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).



Case example: Positive obligation to protect children from neglect and abuse

- o In *Z v. United Kingdom*,⁶⁶ four siblings successfully complained to the European Court of Human Rights that their local authority had failed to protect them from inhuman and degrading treatment (prohibited under Article 3) where social services were aware of the neglect and abuse they suffered at home (before they were eventually taken into care). The court held that States were required to take measures designed to ensure that individuals were not subjected to torture, inhuman or degrading treatment, including protecting children and other vulnerable people and taking reasonable steps to prevent ill-treatment which the authorities knew or ought to have known about.

The positive obligations under Articles 3 and 8 ECHR represent an important and practical guide for child protection services, who must be proactive in identifying and responding to signs that children are suffering physical and psychological harm. These positive obligations therefore complement and build on the child's right to protection from harm under Article 19 UNCRC.⁶⁷

BALANCING OF RIGHTS AND PROPORTIONALITY

The ECHR sets out both rights which are 'absolute', for example Article 3 (prohibition of torture), and rights which are 'qualified', for example Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). Qualified rights can be limited, but only if the restriction is:

- 1. Lawful.** Is there a law in place which allows for the restriction on the right?
- 2. Legitimate.** Is there a legitimate reason for the restriction? There is a limited set of reasons which can be relied upon, set out within the text of the ECHR.
- 3. Proportionate.** Is the measure the least restrictive option available to meet the legitimate aim?

The third part of this test, proportionality, underpins decision-making in relation to qualified rights. It requires public body decision-makers to consider the individual's circumstances; choose the least restrictive option; and make a reasoned decision, including why they consider the restriction on human rights to be justified. There must also be a 'fair balance' between the individual's rights and the interests and rights of others (e.g., public safety).⁶⁸

The UK Government proposes to set out rules for how courts decide if a restriction

⁶⁶ Application no. 29392/95

⁶⁷ Dr Ursula Kilkelly, Protecting Children's Rights under the ECHR: the role of positive obligations, NILQ 61(3): 245-61

⁶⁸ BIHR, Proportionality: What could change and what does this mean? Available here: <https://www.bih.org.uk/Handlers/Download.ashx?IDMF=d3aac29a-69bd-4cb4-a1d6-2593f0aa4ea0>

on someone's human rights by the Government or a public body is proportionate.⁶⁹ When deciding whether a law, and its application to an individual, strikes an "appropriate" balance between competing rights (of the same person or different people), or the balance between protecting human rights and other policy aims, courts must "give the greatest possible weight to the principle, that in a parliamentary democracy, decisions about how such a balance should be struck, are properly made by Parliament".

The rationale behind these proposals seems to stem from a perceived 'judicial extension' of the ECHR, particularly where decisions involving 'complex and diverse socio-economic policies' are concerned. This however 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 more pronounced than in cases involving the rights of children.

These proposals are however likely to impact on the way in which decisions impacting children's rights under the ECHR are decided. This is because when carrying out the balancing exercise in cases involving children, the courts apply the internationally recognised standard that the best interests of the child must be a primary consideration (set out in Article 3 of the UNCRC). This does not however mean that the best interests of the child will automatically 'trump' all other considerations. This is perhaps best illustrated in cases concerning social security measures, where the courts have been reluctant to interfere with the Government's judgment on socio-economic policy, even where the measure impacts upon children.



Case example: Challenge to the two-child limit on the individual child tax credit payment dismissed

- o In *SC, CB and 8 children*,⁷⁰ the UK Supreme Court considered a challenge to the two-child limit on the payment of the individual element of child tax credit. The claimants argued amongst other things that the measure discriminated against children living in households with more than two children. Relying on the Human Rights Act, they argued 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.
- o The court found that the two-child limit arguably discriminates against children living in households containing more than two children, compared with children living in households containing one or two children. On the issue of proportionality, the court recognised that assessing proportionality requires a balance between respecting Parliament's assessment of the two-child limit and considering the best interests of children. 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.

⁶⁹ See Clause 7, Bill of Rights Bill 117 2022-23 (as introduced)

⁷⁰ *SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26 (9 July 2021)

- o Ultimately, the court considered that 'the democratic credentials of the measure could not be stronger' and that there was no basis to overturn Parliament's decision.
- o While the outcome in this case is clearly a disappointing one from a children's rights perspective, the case illustrates the degree of respect which the courts accord Parliament's decision-making, particularly where socio-economic considerations are at stake. The courts clearly recognise that there are limits to their powers and that some issues should be left to the elected Parliament (including devolved legislatures) to decide.

The UK Government's proposals risk undermining the proportionality balancing exercise which courts are required to undertake when determining whether a qualified right under the ECHR has been breached. By further weighting the balance in favour of Parliament, there is a risk that courts will be unable to properly consider the full impact that a measure has on a child, and to give full effect to the best interests of the child. This could result in decisions which are at odds with the case law of the European Court of Human Rights, which could in turn drive children and those that represent their interests to apply directly to the Strasbourg court, rather than having their rights determined domestically.

The job of national courts will be made more challenging by the proposal to remove the obligation on Government's ministers to make a statement of compatibility under Section 19 of the Human Rights Act. Such statements not only help to ensure effective Parliamentary scrutiny of legislation, but they also assist courts when determining whether legislation has struck a fair balance between individual rights and the public interest.

Proportionality also gives public authorities a framework for considering the full impact of a measure and less restrictive alternatives. The UK Government's proposals are not only likely to create uncertainty for courts, but also for public authorities, when applying a human rights lens to policy decision-making.

The UK Government also proposes to set out rules on how courts must approach the proportionality balancing exercise decision in certain specific situations, namely when Article 8 (right to private and family life) is relied upon in deportation cases; and in freedom of expression cases (Article 10 ECHR).

Article 8 in deportation cases

The UK Government's proposals would significantly limit the circumstances under which the right to family and private life (Article 8) can be used to challenge deportation decisions for non-British citizens who have committed a criminal offence (however serious). If they want to rely on Article 8, an individual will have to prove that if they were deported, their child or dependent would come to 'exceptional and overwhelming' harm that is incapable of being avoided or is 'irreversible'.⁷¹

⁷¹ Clause 8, Bill of Rights Bill 117 2022-23 (as introduced). See also BIHR, *Our Human Rights Act, The right to respect for private and family life, home and correspondence: What could change and what does this mean?* Available here: <https://www.bih.org.uk/Handlers/Download.ashx?DMF=d4ece1cf-7f3d-4ef0-8964-2610a5e45f02>

Immigration Rules already create a strong presumption in favour of deportation.⁷² Notwithstanding this, courts and tribunals are still required, when assessing whether the Article 8 rights of an individual would be breached by his/her deportation, to conduct a balancing exercise and proportionality assessment in each case.

The UK Government's proposals impose an extremely high threshold, amounting in effect to a complete bar on a category of claimants from relying on their rights. The proposals risk undermining the way that courts and tribunals approach the proportionality balancing exercise, by preventing them from considering and giving weight to all relevant factors in a case. This will have a particular impact on children in cases where the potential deportee is a family member/primary caregiver for an affected child. In these circumstances, the UK Government's proposals may mean that the court or tribunal is not able to fully consider the best interests of the child.



Case example: Deportation of a Nigerian national breached his right to family life

- o In a recent case before the European Court of Human Rights, the Court held that the deportation of a Nigerian national breached his Article 8 rights.⁷³ His deportation had been ordered after he had been convicted of falsifying immigration documents. However, his deportation would have separated him from his wife and children, one of whom had a congenital birth defect and would not be able to travel to Nigeria to visit his father. The Upper Tribunal had refused his appeal against the deportation order.
- o In reaching their 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.

The example of this case demonstrates that even where Immigration Rules apply to a particular deportation, courts and tribunals are still required under Article 8 to carry out a full and proper proportionality assessment. The UK Government's proposed threshold however effectively extinguishes the Article 8 family life rights of children and dependents in deportation cases. It is therefore unlikely that the proposal would be compatible with the ECHR.

Freedom of expression (Article 10)

Under the UK Government's proposals, national courts must give "great weight" to the importance of the right to "freedom of speech". Specific exemptions will apply for certain criminal proceedings, breach of confidence and questions relating to immigration and citizenship.⁷⁴

The protection of freedom of expression (Article 10 ECHR) is essential for the democratic political process and the development of every human being. The European Court of Human Rights has stated that freedom of expression "constitutes one of

⁷² Immigration Rules part 13: deportation. Deportation (paragraphs A362 to 400). See in particular paragraph A398, Deportation and Article

⁷³ *Unuane v. the United Kingdom*, application no. 80343/17

⁷⁴ Clause 4, Bill 117 2022-23 (as introduced)

the essential foundations of a democratic society".⁷⁵ As a matter of principle, the protection given by Article 10 extends to any expression, notwithstanding its content, disseminated by any individual, group or type of media.⁷⁶ Article 10 is a qualified right, meaning interference can be justified, for example, to protect other rights or overriding interests, such as national security. The test for such restrictions, set out in Article 10, paragraph 2, is strict, and is applied rigorously by the European Court of Human Rights. At the same time, the Court has recognised that States enjoy a certain margin of appreciation in deciding how they limit freedom of expression, based on factors such as their culture and history, as well as their legal system.

Freedom of expression can conflict with other rights protected by the ECHR, such as the right to respect for private life (Article 8 ECHR). When this happens, the courts conduct a balancing exercise on a case-by-case basis, taking into account a variety of factors, including the best interests of the child. However the UK Government's proposal would elevate 'freedom of speech' above other rights such as the right to privacy, thereby undermining the philosophy of the ECHR which is premised on the fact that all ECHR rights are fundamental (albeit some are absolute, others qualified). 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.



Case example: Children's privacy rights breached by a newspaper's publication of photographs.

- o In this case⁷⁷, the Court of Appeal found that the three children of a well-known British musician had a reasonable expectation of privacy in relation to paparazzi photographs of them enjoying a family outing in the shops and cafes of Los Angeles, California. The photographs were published as part of an article in the Daily Mail. In balancing the children's Article 8 right to privacy against the newspaper's Article 10 right to freedom of expression, the court applied established criteria set out in case law of the European Court of Human Rights⁷⁸ and concluded that the balance came down in favour of the children's Article 8 rights.
- o Under the UK Government's proposals, the court would have had to give the publisher's Article 10 rights 'great weight' over the children's privacy rights. This may have tipped the balance in favour of the publisher.

⁷⁵ *Lingens v. Austria*, 8 July 1986; *Şener v. Turkey*, 18 July 2000; *Thoma v. Luxembourg*, 29 March 2001; *Marónek v. Slovakia*, 19 April 2001; *Dichand and Others v. Austria*, 26 February 2002.

⁷⁶ The only content-based restriction applied by the European Court of Human Rights has dealt with the dissemination of ideas promoting racism and the Nazi ideology, denying the Holocaust, and incitement to hatred and racial discrimination. The Court relied on Article 17 of the Convention and held that freedom of expression may not be used to lead to the destruction of the rights and freedoms granted by the Convention.

⁷⁷ *Weller v Associated Newspapers Ltd*, [2015] EWCA Civ 1176

⁷⁸ Specifically, the factors set out in *Von Hannover v Germany* (application nos. 40660/08 and 60641/08), including whether publication contributes to a debate of public interest, the prior conduct of the person concerned and the circumstances in which the photos were taken.

CONCLUSION

Children's rights protections are in grave danger of being eroded by the UK Government's proposals. As outlined in this report, 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 Scotland. 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 Act has also protected children by preventing such violations from happening in the first place.

Having rights enshrined in law is the best way to ensure rights are respected, protected and fulfilled. The Scottish Parliament unanimously passed a law in 2021 to protect children's rights by incorporating the UNCRC into Scots law, yet delays have meant that children are still waiting for this to happen. At the time, one of our Young Advisers stated that: "Incorporation is so important because we need to show children and young people in Scotland that their rights are serious, they are meaningful, and they are in law". Proposals from the UK Government to reform the Human Rights Act risk stripping away the protections that children do have in law in Scotland.

As part of the UNCRC 30th anniversary in 2019, we asked children to describe human rights in 7 Word Stories. They said things like:



We call on the Scottish Parliament, in its role as a human rights guarantor, to do all it can to ensure that children's rights in Scotland are protected, respected and fulfilled.



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