

STRENGTHENING CHILDREN'S RIGHTS IN FAMILY LAW: MAKING THE UNCRC WORK HARDER

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TRANSFORMING CHILDREN'S RIGHTS:
DILEMMAS, CHALLENGES AND IMPLEMENTATION
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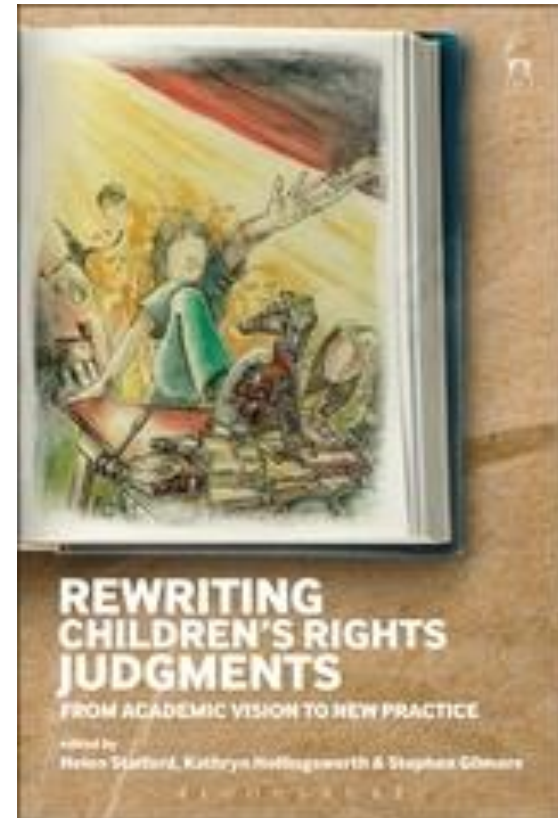
Two projects

Training and Assistance for Legal Experts (TALE)



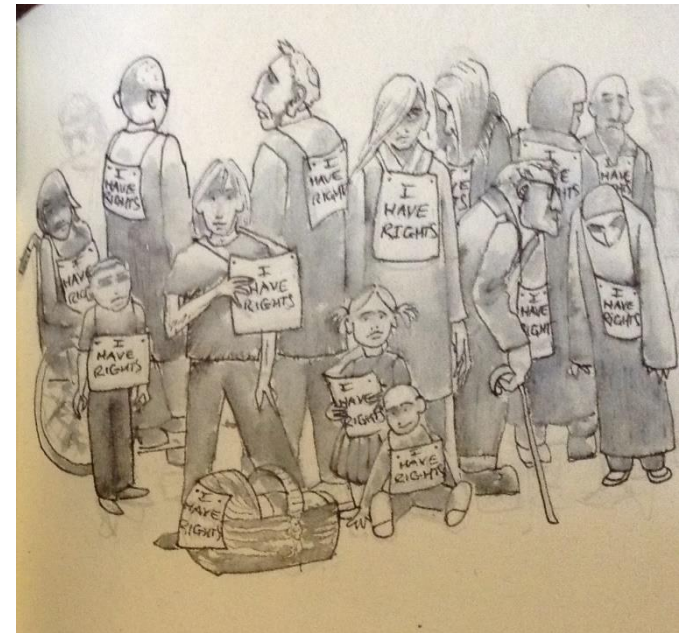
- **Mod 1:** Meeting and taking instruction from children
- **Mod 2:** Giving Advice and Information to children
- **Mod 3:** Drafting statements and reps
- **Mod 4:** Preparing the child to participate in formal proceedings
- **Mod 5:** Acting on Decisions
- **Mod 6:** International Remedies

Children's Rights Judgments: From Academic Vision to New Practice



Legal Practitioners and the UNCRC

- Children's rights have no legal teeth
- Judges are not receptive to children's rights arguments
- Too much at stake for the individual
- Best to stick to familiar strategies, provisions and concepts



Clarifying the legal status of the UNCRC

- Ratified by the UK in 1991. Legally binding but not legally enforceable.
- In the absence of domestic incorporation, legal practitioners cannot seek to protect children's rights through a standalone claim under the UNCRC...BUT
- [Vienna Convention on the Law of Treaties 1969](#), **Art 26**: *“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”*
As such, courts should seek to interpret domestic legislation consistently with the UNCRC
- **Art 31(1)-(2)**: A treaty (such as the UNCRC) must be interpreted in good faith, and in the light of its object and purpose and within the context of the treaty (i.e. all provisions and accompanying guidance) as a whole.

International treaty law can be brought to bear on UK domestic law in at least three ways:

- a) as an aid to interpretation where a provision of domestic law is ambiguous
- b) as a guide to the development of the common law
- c) to the extent that it falls to the domestic courts to interpret the ECHR

[Demir: v. Turkey (2008) 48 EHRR 1272; R. (SG and Others) v. Secretary of State for Work and Pensions [2015] UKSC 16, at [116], [137]].

The UNCRC and family disputes – current application

Article 12	39(13)*	Article 6	3
Article 3	29(3)*	Article 16	2
Article 9	13(2)*	Article 17	2(1)*
Article 8	8	Article 19	2
Article 7	8(1)*	Article 30	2
Article 18	5	Article 2	1
Article 21	4	Article 10	1
Article 24	4	Article 11	1
Article 5	4(1)*	Article 14	1
Article 40	4(1)*	Article 23	1
Article 20	3	Article 28	1
Article 27	3		
Article 35	3		
Article 37	3		

* (The numbers in brackets show the number of citations which were re-citations of earlier dicta rather than original citations).

Source: Gilmore, S. (2017) 'Use of the UNCRC in Family Law Cases in England and Wales' *The International Journal of Children's Rights*, Vol 25(2) 500-518

The UNCRC and family disputes – current application

- UNCRC seen as superfluous in light of welfare paramountcy test
- Limited allusion to general principles to support procedural rights of participation (Art 12) and substantive welfare considerations (Art 3)
- Cut and paste arguments with little real substance

Making The UNCRC Work Harder: four strategies for individual disputes

1. **Connecting:** use the strongest jurisprudence that connects the relevant legislation with children's rights principles
2. **Cross-Fertilising:**
 - i. Between the UNCRC and incorporated human rights instruments
 - ii. Between different legal sub-disciplines
3. **Familiarising:** Present familiar principles (e.g. the welfare principle; parental responsibility) in a way that corresponds with children's rights principles (e.g. best interests; right to know both parents)
4. **Foregrounding:** presenting rights arguments early on in a case

Connecting

- **s.11 Children Act 2004:** places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote **the welfare of children**
- **S.1(3) Children Act 1989:** welfare paramountcy test
- ***ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4 (per Lady Hale):** s.55 welfare duty (Borders, C'ship and Immigration Act 2009) must be interpreted in the light of:
 - The **best interests** principle enshrined in Article 3 UN Convention on the Rights of the Child
 - General Comment No 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin.

Using the welfare/best interests nexus as a 'gateway' provision

“While the best interests principle remains a fluid and flexible concept it is not unfettered or entirely subject to the personal whims of a decision-maker. Rather it remains informed and constrained by the rights and principles provided for under the UNCRC ... Put simply, a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with other provisions of the UNCRC.”

[John Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275, 287].

Cross fertilising

*The UNCRC may be relevant in English law to the extent that it falls to the court **to apply the European Convention on Human Rights** via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multilateral treaties such as the
UNCRC*

(per Lord Hughes in R. (SG and Others) v. Secretary of State for Work and Pensions [2015] UKSC 16, at [137]).

Confirmed in *R (R) v Durham Constabulary* [2005] 1
WLR 1184 [26]:

“The UNCRC is not only binding in international law; it is reflected in the interpretation and application by the European Court of Human Rights of the rights guaranteed by the European Convention”
(Baroness Hale of Richmond).

And in *Neulinger v Switzerland* [\(2010\) 28 BHRC 706](#) (para 131),
ECtHR:

"the [European] Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of any relevant rules of international law applicable in the relations between the parties and in particular the rules concerning the international protection of human rights".

- E.g. ***RD (Deprivation or Restriction of Liberty)*** [2018] EWFC 47
 - 14 year-old girl subject to care order placed in residential accommodation in rural Scotland
 - Right not to be deprived of liberty (Art 5 ECHR) assessed in light of Art 37 UNCRC
- E.g. ***JAL v. LSW*** [2017] EWHC 3699 (Fam)
 - Relocation case concerning contact arrangements for 8 year old child
 - Denial of mother's application to relocate from England to Hong Kong was justified on grounds of Art 8 ECHR read in conjunction with Art 9 UNCRC – namely, that child should be allowed to maintain personal relations/direct and regular contact with both parents.

Familiarising

- Eg. Children Act 2004: imposes an obligation on public authorities to safeguard and promote the welfare of children (s.11). This is defined as:
 - Protecting children from maltreatment (Arts 9, 19, 34, 39 UNCRC)
 - Preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development' (Arts 23, 24, 25, 32, 39 UNCRC)
 - Ensuring that children are growing up in circumstances consistent with the provision of safe and effective care (Arts 3, 7, 18, 19, 20, 21, 23 UNCRC)
 - And undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully (Art 6 UNCRC)

Using the full range

- The right to education (Arts 28, 29 UNCRC):
 - *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [41]–[51]
 - *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin) [75];
 - *LD v Secretary of State for the Home Department* [2010] UKUT 278 (IAC), [30]
- The right to living conditions necessary for child's development (Article 27)
 - *Smith v. Secretary of State for Work and Pensions and Another* [2006] UKHL 35, [2007] 1 FLR 166.

- **Adoption-related rights (Arts 7, 9 and 21 UNCRC)**
 - *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 2 FLR 1075. : the ‘Adoption and Children Act 2002 must be construed and applied bearing in mind the provisions of the United Nations Convention on the Rights of the Child 1989.’
 - *Re R (Inter-Country Adoptions: Practice)*: protection afforded in respect of inter-country adoptions should reach same high standard as domestic adoption, consistent with Art 21(c) UNCRC

- **The right to the highest attainable standard of health, including access to medical care and treatment (Arts 6, 24, 25 UNCRC):**
 - *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin) [31]–[32]
 - *Re C (HIV Test)*, [1999] 2 FLR 1004.

- The right to protection from all forms of physical or mental violence (Arts 19, 34, 35, 36, 37, 38 UNCRC)
 - *AA (unattended children) (Afghanistan) CG [2012] UKUT 00016 (IAC)*, [89]–[93] (risk of indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection)
 - *Re S (Sexual Abuse Allegations: Local Authority Response) [2001] EWHC Admin. 334 [2001] 2 FLR 776.*
- The right to know and maintain relations/contact with both parents (Articles 7, 9 UNCRC);
 - *Re H (Paternity: Blood Test) [1996] 2 FLR 65*: every child has a ‘right to know the truth unless his welfare clearly justifies the cover-up.
 - *Re R (A Minor) (Contact) 53 [1993] 2 FLR 762, at 767.* ’

Using the UNCRC Guidance (General Comments/Periodic Reports) as well as UNCRC provisions

- *R (on the application of Williamson and others) v Secretary of State for Education and Employment and others* [2005] UKHL 15 [84] – Hale refers to conclusions of UN Committee on the Rights of the Child in its UK periodic reports of 1995 and 2002.
- *ZH Tanzania* – Hale refers to General Comment No. 6 as well as Article 3 UNCRC.
- *P-S* [2013] EWCA Civ. 223, [2014] 2 FLR 27: CA considered General Comment No 12 in assessing whether child's right to be heard had been breached.
- *R (on the application of AM) v SSHD* [2017] UKUT 262: one of a number of 'Calais children' family reunification cases – extensive reference to GC14
- *Mathieson v SSWP* [2015] UKSC 47: GC14 held to rank as authoritative guidance in interpreting best interests. Lord Wilson adopted three-fold concept of BI set out in GC14.

Foregrounding

- Early presentation of children's rights arguments is essential
- Supports a children's rights-based approach to the case (procedurally as well as substantively)
- Substantiates arguments and factual presentation
- Supports potential appeals to higher courts
- Embeds rights in jurisprudence

Making the UNCRC Work Harder: Strategic Litigation

- *National Union of Professional Foster Carers v. Certification Officer, UKEAT/285/17/RN*
- Appeal against refusal to officially certify foster carers union pursuant to s.2 Trade Union and Labour Relations (Consolidation) Act 1992.
- Third party intervention by European Children's Rights Unit to challenge Government's position that unionisation of foster carers is contrary to children's 'best interests'
- Challenged by reference to GC14 and CRIA on procedural and substantive grounds

REFERENCES

- **Children's Rights Alliance for England, *Children's Rights in the Courts (2012)***: Using the convention of the rights of the child in legal proceedings affecting children
- **Stalford, Hollingsworth and Gilmore** (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (2017, Oxford: Hart)
- **S Gilmore (2017)** 'Use of the UNCRC in Family Law Cases in England and Wales' *The International Journal of Children's Rights*, Vol 25(2) 500-518
- Improving Decisions through Empowerment and Advocacy (IDEA) project: [Checklist planning ahead for international litigation](#)
- Online training tool: Training and Assistance for Legal Experts (TALE): www.project-tale.org

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