

Human Rights Consortium Scotland Conference
'What Next for Human Rights?'
Glasgow, 25 June 2015

What's Next for Children's Rights?

Introduction

My task is to discuss what is next for children and young people's rights.

I want to do so by first offering some observations as to 3 recent events that I consider relevant to the question, and then offer 3 thoughts as to what ahead next for children's rights, and conclude.

Some Observations

Section 1 (1) duty in force

On Monday of last week, new children's rights duties on Scottish Ministers under s. 1 of the Children and Young People (Scotland) Act 2014 came into force. In case some of you did not feel the earthquake that this caused, I will read out the text of the 'headline' duty in s. 1 (1):

The Scottish Ministers must -

- (a) *keep under consideration* whether there are any steps which they *could* take which *would or might* secure better or further effect in Scotland of the UNCRC requirements, and
- (b) *If they consider it appropriate* to do so, take *any* of the steps identified by that consideration.

In contrast, s. 6 of the Human Rights Act 1998 is a proper, enforceable legal protection of human rights, directed at ensuring compliance with all of our ECHR rights. It is framed in terms of legality and compatibility with the Convention. Just the kind of thing we and our allies were looking for in terms of UNCRC rights when the 2014 Act went through Parliament.

This was one of the rare occasions (some say the first proper occasion) at which the Scottish Parliament debated the benefits or otherwise of fully incorporating the UNCRC. Unfortunately this occurred in the context of a rushed timetable for a large and wide-ranging Bill, and in a Committee that reliably divided along partisan lines - and which based its conclusion that UNCRC incorporation is not desirable at this stage in large part on the views of one academic.

At stage 2, our amendments that would have directly incorporated articles 3 and 12 were duly voted down by majority.

R (ota SG and Others) v Secretary of State for Work and Pensions [2015] HRLR 5

The second development concerns a case decided by the UK Supreme Court in March. The appellants, women who had fled domestic abuse with their children, had challenged the lawfulness of the 'benefit cap', that is the UK Government's policy that the total amount of state benefits received by any one household must not exceed a set amount of money that is broadly equivalent to the median household income [currently around £26k p.a.].

They did so on the ground that the regulations implementing the cap discriminated unlawfully against women, contrary to article 1 of Protocol 1 of the ECHR taken together with art. 14. They also argued before the UKSC that the policy infringed their children's UNCRC rights.

It is a complex case, but what is remarkable for my purposes is this:

- (1) We do not often see cases in which the provisions and effect of the UNCRC are discussed in any great detail [Other examples: *ZH (Tanzania) v SSHD* [2011] 2 AC 166 and *R (ota HC) v SSHD* [2014] 1 WLR 1234].
- (2) In this case, a majority of the Court (3:2, Lady Hale DPSC, Lord Kerr and Lord Carnwath in the majority) held that the benefit cap regulations were in breach of art. 3 of the UNCRC. However, as there was no majority for a finding that they also violated an ECHR right, the court was unable to grant a remedy to the appellants in respect of the UNCRC violation (2:3, Lady Hale and Lord Kerr in the minority).
- (3) There was a discussion about the status and effect of the UNCRC and other non-incorporated international human rights obligations. Lord Kerr - predictably and regrettably in a minority of one - argued that it is time to recognise such obligations as directly enforceable in UK courts.
- (4) On a wider point, the majority judgment also highlights the gaps in our current domestic human rights regime in respect of social and economic rights.

The UK Election

Thirdly, as the results of the UK Parliamentary elections unfolded, the exit poll read alongside the Conservative Party's manifesto suggested that the Human Rights Act was in peril; the same goes for the social and economic rights and wellbeing of those whose lives were centre-stage in *SG*, given the manifesto commitment to lower the benefit cap further (to around £23k).

On human rights, the manifesto commitments include to

- (1) repeal the Human Rights Act 1998 - our existing and in my view highly successful, if imperfect and fairly limited, Bill of Rights for Britain;
- (2) replace it with a 'British Bill of Rights' - the contents of which are currently as unclear as what would make it 'British', or more 'British' than the HRA;
- (3) sever the formal link between UK courts and the ECtHR - that is, trying to isolate domestic law from the largely progressive jurisprudence of the European Court, with little indication as to how this would be done while remaining in the Council of Europe and the EU...

And of course we saw a huge landslide victory for the SNP, taking 56 out of 59 Scottish Westminster seats. Among other things, this adds to the fascinating developing devolution dynamics in the question of a HRA repeal and any 'BBoR', with the SNP having made clear its opposition to the 'appalling' (FM) plans of the UK Government on human rights.

Some Thoughts

(1) Firstly, as a country we should be talking about extending and strengthening human rights protections in the UK and beyond.

There are significant protection gaps in the current legal regime, particularly in terms of children's rights, disabled people's UNCRPD rights, women's rights under CEDAW, and social and economic rights for all. A strong and entrenched human rights framework would help guard against the pernicious and long-term effects of austerity, and the inequalities and indignities it creates.

(2) Instead, we are in a position where we must build the strongest alliances in Scotland and across the UK to defend what we have got: the Human Rights Act 1998 - our Bill of Rights, which anchored in the European Convention framework. This country, and especially the most vulnerable people in it, cannot afford to lose the protections the HRA offers, however limited in scope, however difficult to enforce in practice, however unpopular in the minds of some.

(3) In doing so, we must use the tools that we have, and we must keep our eyes on the 'long game':

- Scrutinise the rhetoric and push for real action: it is all good and very welcome to have the public and strongly-worded support for the Human Rights Act from the SNP and from Labour and the Liberal Democrats - but what are they *doing* or what would they *do* in government? Are law, policy and practice up to scratch, and delivering for people? This includes things like the new children's rights duties I mentioned earlier - we need to critically evaluate what it and the processes put in place to support it, such as the CRWIA, actually deliver in practice. It also includes leadership by example – for which there was an opportunity last week when a LibDem amendment [stage 3, amendment 5, Alison McInnes MSP] would have extended the franchise in future Scottish elections and referenda to 16-17 year-olds in secure accommodation and Young Offenders Institutions in compliance with the ECtHR's jurisprudence in the prisoner voting cases – the majority that rejected that amendment included the SNP, Labour and the Conservatives [86:8:0]...
- Celebrate the successes of our current human rights framework (noisily), and document its shortcomings and gaps;
- Work to build the case not only to retain what we have got now, but to seize the opportunities whenever they might come to extend our human rights framework and make it work better for everyone.

In doing all these things, we must not forget that together we are stronger than any one of us.

