





Free Hybrid Event to mark UK Children's Day

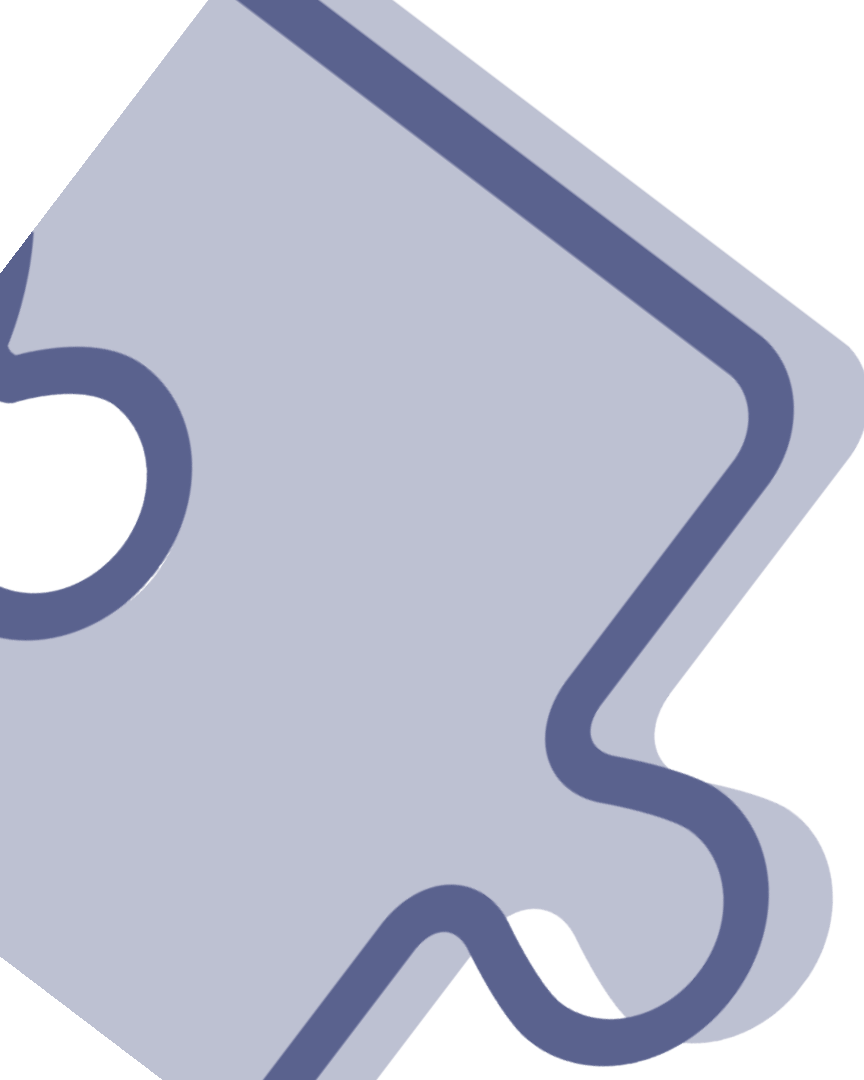
**"Upholding Children's Rights?
Implementation of the UNCRC: A Comparison of
England, Wales, Scotland & Northern Ireland"**



5.30pm-7.30pm

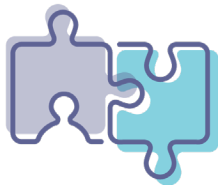


Tuesday 14 May 2024



Domesticating the UNCRC in Wales through the Rights of Children and Young Persons (Wales) Measure 2011

*Dr Rhian Croke, Children's Rights Strategic
Litigation, Information and Policy Advocacy
Lead.*



Canolfan
Gyfreithiol
y Plant
Cymru

Children's
Legal
Centre
Wales

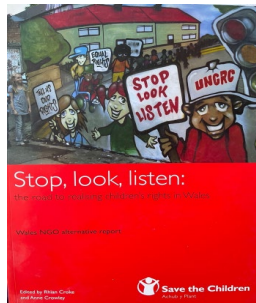
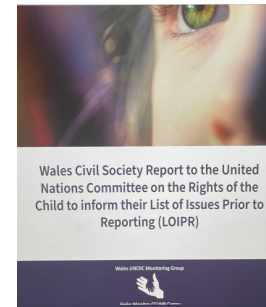
Early political commitment to the UNCRC in Wales

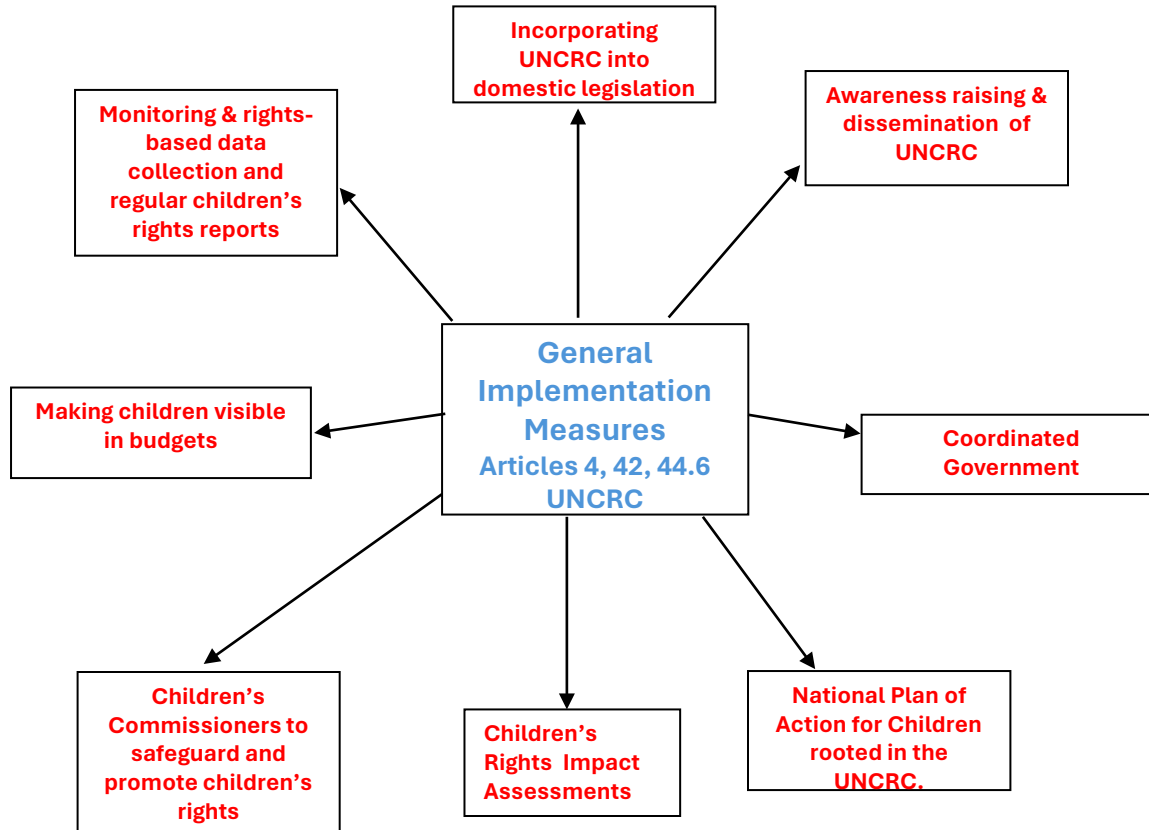
- National Assembly for Wales enacted first legislative reference to the UNCRC in the UK, when the Children's Commissioner for Wales was established in 2001.
- In 2004, the National Assembly for Wales resolved that the UNCRC was its own overarching set of principles for all devolved policies on children.
- Key strategy documents emerged e.g. on partnerships for local child services, child poverty, youth offending, maternity and child health services.
- Mechanisms were established to support children's participation in decision making.

Children and young people should be seen as young citizens with rights and opinions to be taken into account now.'
(Welsh Government, 2004)



Civil society uses dynamic of the UNCRC reporting process as a tool for promoting legislative & policy change on children's rights in Wales





UN Committee on the Rights of the Child, General Comment No.5, 2003.

Legislative change on children's rights in Wales

Rights of Children and Young Persons (Wales) Measure 2011

Sec 1: Welsh Government Ministers must have due regard to Part 1 of the United Nations Convention on the Rights of the Child in the exercise of all their functions.

Sec 2: The Welsh Ministers must make a scheme (“the children's scheme”) setting out the arrangements they have made, or propose to make, for the purpose of securing compliance with the duty under section 1.

Social Services and Well-Being (Wales) Act 2014

Sec 7 (2) A person exercising functions under this Act in relation to a child must have due regard to Part 1 of the United Nations Convention on the Rights of the Child.


Legislation/policy to implementation gap: developing Children's Rights Approach Guidance for Public Authorities

A Children's Rights Approach

Observatory on Human Rights of Children Model

Based on five principles, a Children's Rights Approach helps organisations and institutions to understand and fulfil children's rights.


Embedding Children's Rights <small>Children's rights must be at the core of planning and service delivery.</small>	Equality And Non-Discrimination <small>Every child must have an equal opportunity to make the most of their lives and develop to their fullest potential. No child should have their opportunities limited through adverse discrimination.</small>	Empowering the Child <small>Enhance children's capabilities so they can access their rights, and influence and hold accountable organisations and institutions that affect their lives.</small>	Participation <small>Listen to children and take their views meaningfully into account when decisions or actions are taken that affect their lives.</small>	Accountability <small>Organisations and institutions must be accountable for decisions and actions which affect children's lives, in particular to children themselves.</small>
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Professor David Hartman



Dr. Shanon Coates





Making rights a reality for all children in Wales

THE RIGHT WAY

A Children's Rights Approach in Wales



A Children's Rights Approach is a principled and practical framework for working with children, grounded in the UN Convention on the Rights of the Child

Continued legislative change on children's rights

Learning Needs,
Education and
Tribunal (Wales)
Act 2018, with a
duty to have due
regard to the

16- and 17-year
old's given the
right to vote 2020.

Senedd Elections
(Wales) Act 2020.

Defence of

Assessment
(Wales) Act 2021,
with a duty of due
regard to both the
UNCRC and the

Reasonable
Punishment
abolished.

Children (Abolition of
Defence of
Reasonable

Welsh Government divergent approach to UK Government

Continued
opposition to reform
of Human Rights Act
1998

Continued opposition
to regressive UK
Government
legislation.

‘We have been challenging the ongoing assault on human rights by the UK Government which have directly undermined our human rights goals here in Wales.’

(Minister for Social Justice and Chief Whip, Jane Hutt Ms, Human Rights and Social Justice Annual Lecture, [‘Upholding Human Rights in Wales’](#), Swansea University School of Law, December 2023).

Observing developments across the UK

There should, be no ‘discrimination in the enjoyment of rights by children in different regions’, the Committee focuses on ‘equitability rather than exceptionalism’.

(Prof Ann Skelton, Chair of UN Committee on Rights of Child, Observatory on Human Rights of Children [Annual Lecture](#) 2023).

Lessons learned & Opportunities

- The ‘due regard’ duty, under the ‘Rights Measure’ has demonstrated the potential to expand knowledge and understanding on children’s rights and the embedding of children’s rights in legislative and policy development in Wales.
- Envision direct incorporation as the next stage of our journey, enhancing legal accountability: *all* public authorities in Wales legally accountable for the implementation of and compliance with the UNCRC.
- Welsh Government has accepted the proposal to incorporate international human rights treaties and a Welsh Human Rights Bill.
- Anticipate by next Senedd Term there will be a Green Paper that will launch this into action, and we will see the UNCRC directly incorporated into Welsh law.



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@ChildLegalWales



University
of Glasgow

A WORLD
TOP 100
UNIVERSITY

WORLD
CHANGING
GLASGOW

THE TIMES
THE SUNDAY TIMES
GOOD
UNIVERSITY
GUIDE
2024
SCOTTISH
UNIVERSITY
OF THE YEAR



“Upholding Children’s Rights? Implementation of
the UNCRC: A Comparison of England, Wales,
Scotland & Northern Ireland”

Garden Court Chambers

14 May 2024

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School of Law
University of Glasgow

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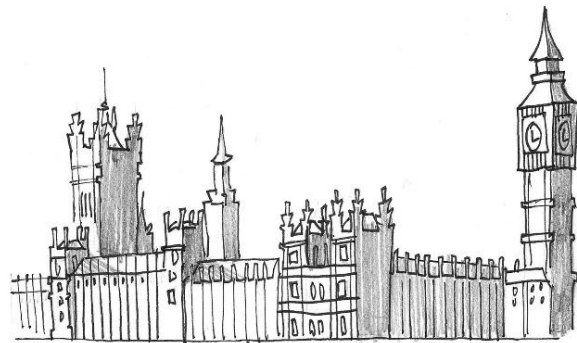
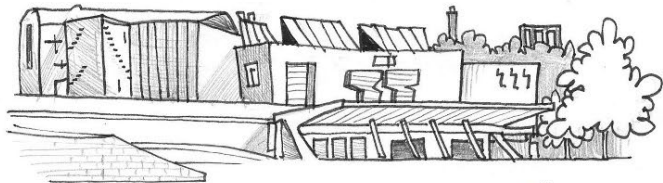
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Scotland – Population 5.5 million (1 million children)





WHEN I BECAME THE COMMISSIONER IN 2017 I TRAVELLED AROUND SCOTLAND AND ASKED CHILDREN AND YOUNG PEOPLE WHAT THEY WANTED ME TO DO.



THEY TOLD ME THEY WANTED...

A CHAMPION FOR OUR RIGHTS!



SOMEONE WHO WOULD WORK CLOSELY WITH US!



RAISE OUR VOICES!



SPEAK TRUTH TO POWER!



I SET UP A GROUP OF YOUNG ADVISERS WHO HELP ME.

THEY'RE FROM ALL OVER SCOTLAND AND FROM DIFFERENT BACKGROUNDS AND ARE INVOLVED IN ALL ASPECTS OF MY WORK.



THEY ARE HUMAN RIGHTS DEFENDERS!

Child Justice



“The UN committee commends states that set minimum ages of 15 or 16 and encourages states to set the minimum age to **at least 14.”**

**Ann Skelton
UN Committee on the Rights of the Child**

#12IsntLeading

Equal Protection

On 3 October 2019 the Children (Equal Protection) (Scotland) Act was passed by the Scottish Parliament, meaning from 7 November 2020 children in Scotland have had the same protections against assault as adults.

Assaulting a child for the purposes of punishment should always be against the law, and our previous law was untenable in international human rights law terms.



Investigation

No Safe Place:

Restraint and Seclusion in Scotland's Schools



Our first investigation:

Restraint means – holding a child or young person to stop them from moving

Seclusion means – shutting a child alone in a room or another place and not allowing them to leave.

- We found that there was serious inconsistency in the governance and monitoring of restraint and seclusion in Scotland
- 22 recommendations to the Scottish Government and local authorities.
- We are now working to make sure they are implemented.

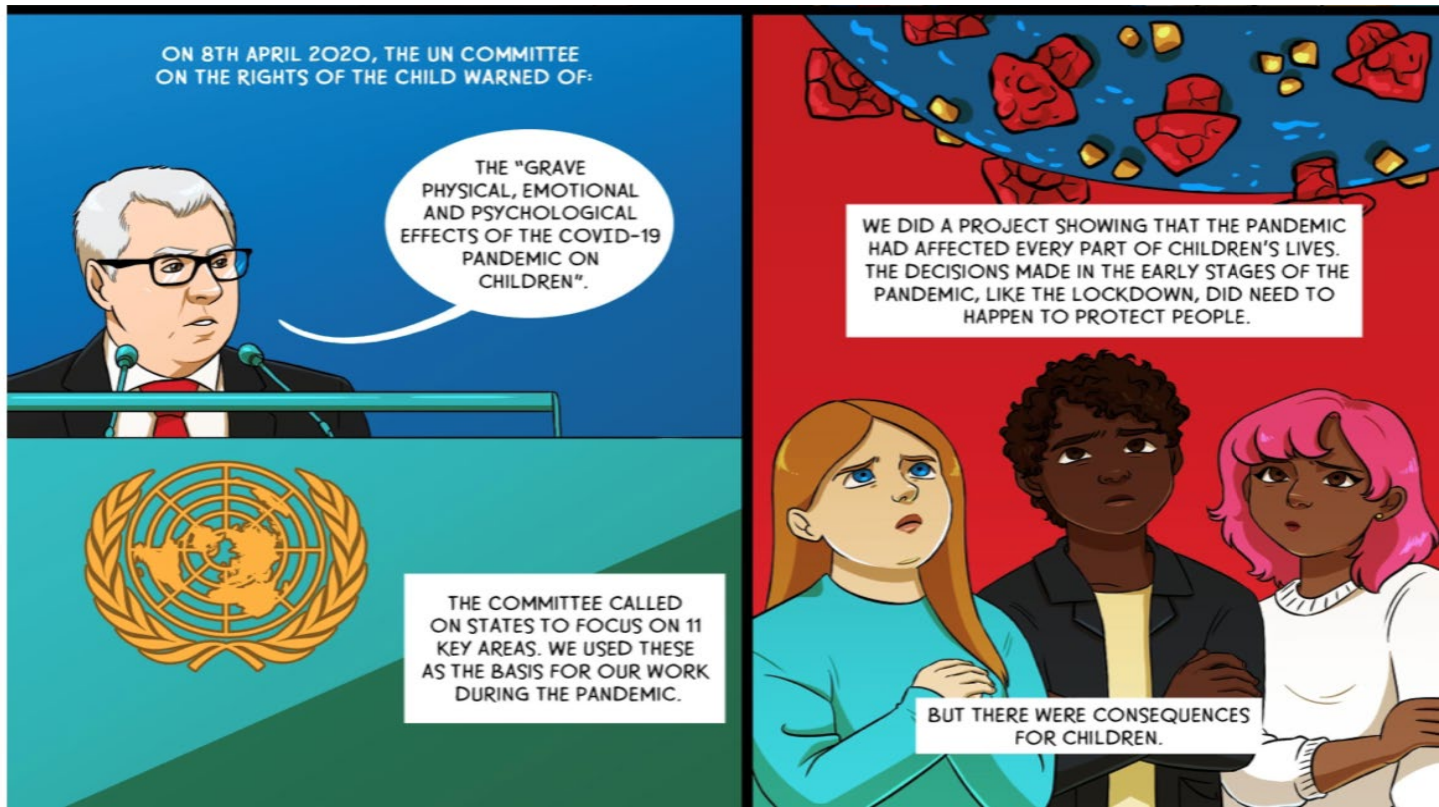
Strategic Litigation



Since 2017, we have become involved in a number of cases involving the rights of children and young people.

- No Recourse to Public Funds
- Deprivation of liberty
- Restraint and Seclusion
- Toolkit

COVID



Incorporation

Prior to 2011 there had been limited discussion about incorporation. The Scottish position matched the UK position that implementation of the UNCRC was best achieved through other measures.

Children and Young People's Scotland Act 2014

2011 Consultation:

UNCRC Incorporation would conflict with parent's rights which are protected in the Human Rights Act 1998, therefore it isn't possible

2013 Bill before Parliaments:

“In Scotland, we are committed to enshrining the principles of the Convention into domestic law and policy wherever possible. However, we also believe that incorporation is best achieved on a case by case basis, and are not of the view that wholesale incorporation of the UNCRC into domestic law represents the best way to progress our approach to children's rights at this time.”

Incorporation Timeline

2014 – 2017 - campaigning

2017 – Scottish Government agrees to consider UNCRC Incorporation

2018 – Scottish Government agrees to incorporate, but sets no timeframe

2018 – CYPCS/Together Expert Advisory Group drafts a Bill

2019 – Scottish Government Consultation

2020 – Bill introduced to Scottish Parliament

2021 – Unanimously passed, challenged in the Supreme Court, ruled *ultra vires* as the scope infringed on Acts of the UK Parliament

2022 – Delay and Prevarication

2023 – Reconsideration with scope narrowed to exclude Acts of UK Parliament

16 February 2024 - Royal Assent, Scottish Government rules out early commencement, so will come into force on last possible date

16 July 2024 - Commencement

1. Today the [@ScotParl](#) considers Stage 3 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. If passed, following Royal Assent, it will come into force later this year! [#UNCRCScotland](#)



Incorporation

Full and direct

Incorporate UNCRC and Optional Protocols into law insofar as possible within the powers of the Scottish Parliament.

Compatibility duty

To enable remedy and redress.

Due regard duty

Encourage a proactive approach to children's rights.

Jurisprudence of UN Committee

Considered in interpreting UNCRC requirements.

High priority in legal system – strike down powers.

Future-proofing

Allowing for change in powers of Scottish Parliament.

Child Rights Impact Assessment – a mandatory duty.

Children's Scheme – including requirements to report on progress, involve children and young people and Children's Commissioner.



**Rights matter.
You matter.
Don't lose**

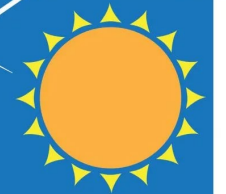
hope.

**We have rights.
Dinosaurs didn't.
They died.**



**Freedom
from
poverty
helps all
children**

flourish



**Rights matter.
You matter.
Don't lose**

hope.

By Kayden aged 7

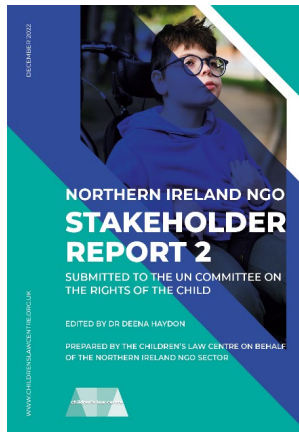
Rights are
help
before you even
ask.



CHILDREN & YOUNG PEOPLES
Commissioner
Richard

UPHOLDING CHILDREN'S RIGHTS IN NORTHERN IRELAND

Dr Deena Haydon



**IMPLEMENTATION OF THE UNCRC:
A COMPARISON OF ENGLAND, WALES, SCOTLAND AND NORTHERN IRELAND**

14 May 2024

Garden Court Chambers, London & Online

NORTHERN IRELAND CONTEXT

Government

- Following the *1998 Belfast/Good Friday Agreement* and Northern Ireland Assembly elections, most social and economic policy matters were devolved from the UK Parliament
- Devolution of policing and criminal justice in 2010
- No Assembly in Northern Ireland for 5 of the last 7 years!
Power sharing finally resumed in February 2024

Promotion and protection of children's rights

- Strong NGO children's sector, including the Children's Law Centre established in 1997
- Northern Ireland Commissioner for Children and Young People [NICCY] established in 2003

UNCRC IMPLEMENTATION IN NORTHERN IRELAND

2011: Key barriers to effective government delivery for children in Northern Ireland

- Commitment to children's rights
- Coordination and joined up government
- Delays
- Training and awareness
- Data, analysis and research
- Participation
- Child impact assessment and evaluation
- Resourcing

Byrne, B. and Lundy, L. (2011) *Barriers to Effective Government Delivery for Children in Northern Ireland*

2013: Options regarding legal implementation of the UNCRC in Northern Ireland

- **The purpose of children's rights legislation**
- **Full, direct incorporation of the UNCRC into domestic law – legislation similar to incorporation of the ECHR via the *1998 Human Rights Act* OR via a *Bill of Rights for Northern Ireland***
- **Measures of indirect incorporation**
 - **Child rights impact assessment**
 - **Training and awareness**
 - **Data collection**
 - **Joined-up working and collaboration**
 - **Child budgeting**
 - **Participation**
 - **National Strategy for Children and Young People**

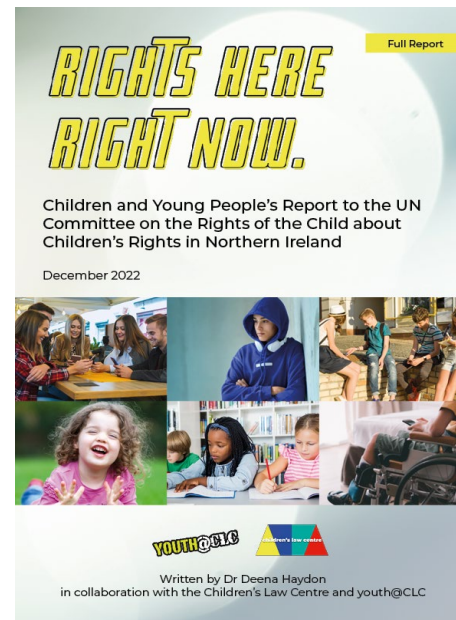
Byrne, B. and Lundy, L. (2013) Legal Measures for Implementing Children's Rights: Options for Northern Ireland

IDENTIFIED FAILURES AND GAPS IN COMPLIANCE

December 2022: Northern Ireland NGO Stakeholder Report 2

Northern Ireland NGO Stakeholder Report 2 Evidence

'Rights Here, Right Now' Children and Young People's Report



Legislation

Implementation of the UNCRC and Optional Protocols in domestic law

- **The UNCRC has not been incorporated into domestic legislation**
- **The ‘best interests’ principle is not reflected in the majority of Northern Ireland legislation**

Child Rights Impact Assessments [CRIA]

- **There is no formal CRIA process**

Post-Brexit legal framework

- **Threat to protection of children’s rights following withdrawal of the UK from the European Union**
- **Concerns about the adverse impacts of withdrawal from the EU human rights framework**

See: Dougan, M. and Stalford, H. (2024) [The Post-Brexit Legal Framework and its Implications for Children’s Rights on the Island of Ireland](#)

Bill of Rights for Northern Ireland

- **A *Bill of Rights for Northern Ireland* was provided for in the 1998 *Belfast/Good Friday Agreement*, to build on the rights contained within the ECHR - including supplementary rights influenced by international standards and reflecting the particular circumstances of Northern Ireland**
- **No progress towards achieving this goal**
- **The Committee on the Rights of the Child's latest Concluding Observations included a recommendation that the State party enact a *Bill of Rights for Northern Ireland***

CRC (2023: para 8d)

Comprehensive policy, strategy and co-ordination

Implementation of the UNCRC across all areas of Northern Ireland government

- **The first Children's Strategy (2006-2016) included the outcome: children and young people live in a society which respects children's rights**
- ***The Children and Young People's Strategy 2020-2030* “aims to support the rights and improve the well-being of all our children and young people”; *Delivery Plan 2021-2024* outlines actions departments will take to improve children's wellbeing and rights**
- **Concerns include lack of: relevant indicators, data, costed budget and involvement of children in the development of the *Delivery Plan***
- **Limited implementation of the *Children's Services Cooperation Act (NI) 2015*, which requires co-operation among certain public bodies (children's authorities) and other children's service providers to contribute to the wellbeing of children and young people**

Monitoring and evaluating implementation and impact of policies and programmes for children's rights

- **A child rights indicator framework covering all areas of the UNCRC, and taking into account the UN High Commissioner for Human Rights publication *Human Rights Indicators*, has not been developed nor implemented**
- **Issues concerning the legislation underpinning the powers and duties of the NI Commissioner for Children and Young People**

Effective co-ordination of UNCRC implementation

- **No Minister has overall responsibility for children**

Allocation of resources

Child rights-based approach in budgeting processes

- **Child rights-based approach not incorporated into the budgeting process**
- **Absence of children's budgetary analysis**

“Withdraw the budget for Northern Ireland for the period 2023-2024 and fully consider the equality and human rights implications for a new budget, taking all possible steps to mitigate any adverse impact on children's rights before issuing a revised budget”

CRC (2023: para 11d)

Data collection

Collection and quality of disaggregated data

- **Essential data is not available in a range of UNCRC areas and the data provided is not *disaggregated***

Dissemination and awareness-raising about the Convention

Awareness-raising programmes for children

- **The UNCRC is not a statutory element of the curriculum**
- **The principles and provisions of the Convention are not integrated into the structures and practices of all schools**

Training of relevant professional groups

- **There is no systematic awareness-raising nor training about the UNCRC, children's and human rights for professionals working with children**

***Suggested Recommendations in the *Northern Ireland NGO Stakeholder Report 2* provide a substantive overview of actions required by the UK Government and the NI Executive**

SUCCESSFUL MECHANISMS FOR COMPLIANCE

Incorporation of the UNCRC

States in which the UNCRC had been incorporated were associated with a greater degree of implementation

*Lundy et al, (2012) **The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries***

“Legal incorporation matters” – “while ratification signals an international commitment to children’s rights, incorporation makes countries accountable at a national level for their implementation”

Incorporation

- **“will bind public authorities to act in a manner that is consistent with children’s rights”**
- **“children and their families will have recourse to the law if their rights ... are breached by public bodies”**

There is value in the *process* of legal incorporation

- **Public and political debate, along with a sustained campaign of advocacy, helps to raise awareness and understanding of children's rights and the UNCRC**

In addition to the legal significance, giving effect to the UNCRC at a national level

- **means that “decision-making by policy makers is better informed by the rights of the child”**
- **“gives leverage to those whose job it is to hold government to account on behalf of children for the promotion and protection of their rights”**
- **has been “shown to generate a greater culture of respect for children as individuals, leading to important reforms and other progressive changes in how children are treated”**

Kilkelly, U. and Lundy, L. (2020) *Does legal incorporation of the UNCRC matter?* Blogpost

Cultural change

Perceiving children (ie under-18s) as rights holders and state agencies as duty bearers is vital for children as individuals as well as for disadvantaged and vulnerable groups

- valuing and respecting children and young people**
- challenging negative stereotypes of, and assumptions about, ‘children’ as a social group**
- highlighting and seeking to address the discrimination, disadvantages and vulnerabilities experienced by specific groups**

Also necessary is political commitment

“Given the antipathy towards human rights being expressed in some political quarters, it is perhaps not surprising that there has not been more progress towards implementation of an enforceable system of children’s rights.”

Mr Justice Humphreys, Children’s Law Centre Annual Lecture Introduction, November 2023

Increased knowledge and understanding about children's rights, the UNCRC and other relevant international standards among:

- **Children**
- **Parents/carers**
- **Policy makers**
- **Professionals working with children**
- **Civil society**

KEY MECHANISMS FOR ENSURING COMPLIANCE

A Bill of Rights for Northern Ireland could

- “provide a framework to guard against the erosion of children’s rights”
- “help inform decisions made by Members [of the Legislative Assembly] about children”
- “remedy a ‘flawed system’ whereby children’s rights need to be protected on a case-by-case basis”

Children’s Law Centre, cited in Ad Hoc Committee on a Bill of Rights (2022) *156/17-22 Report of the Ad Hoc Committee on a Bill of Rights*, p87-88

Resourcing of roles with responsibility for developing guidance about ‘rights respecting’ practice, training, support, advice, etc

Role of independent human right institutions

- **Reviewing the adequacy and effectiveness of law, policy, practice, service provision**
- **Highlighting rights violations and rights respecting practice**
- **Providing advice and recommendations to Government and public bodies about existing and proposed legislation, policy and strategy**
- **Strategic litigation**
- **Conducting investigations**

Role of monitoring and inspection bodies

- **Using rights-based standards to assess policy and practice**
- **Applying effective enforcement mechanisms**

Legal cases

- **Referencing the UNCRC, CRC General Comments and Concluding Observations, other relevant international standards**

“In the absence of incorporation, the attitude of the courts to the UNCRC takes on particular significance...”

“... although the UNCRC may not, at the moment, be directly enforceable in our courts, it may be that the evidence contained in the Concluding Observations and Recommendations could be used to pursue claims in relation to existing rights”

Mr Justice Humphreys, Children’s Law Centre Annual Lecture Introduction, November 2023



Upholding Children's Rights in England

Amanda Weston KC & Kate Aubrey-Johnson, Garden Court Chambers



GARDEN COURT CHAMBERS



 @gardencourtlaw

The English experience – unincorporated child rights

Article 3(1) – “In all actions concerning children... the best interests of the child shall be a primary consideration.”

Public policy, public authorities – where do child rights fit in an established hierarchy of priorities? Resources, commercial interests, competing statutory imperatives?

Public authorities grappling with unfamiliar principles of child law:

“The Children Act is supplemented by detailed guidance – statutory and case based - developed out of the years of specialist experience of those working with the Act. The fundamental principles– the best interests of the child are paramount, decision-making must be prompt, delay is to be avoided: without re-iterating the wealth of knowledge and experience which now informs decision-making for children – this mass of principle and practice has become trite – but not to strangers to the jurisdiction.”



The English experience – unincorporated child rights

- How are the best interests of children to be identified?
- How are they to be factored into decision-making? Policy making?
- How do public authorities ensure they apply the correct principles when considering children's best interests?
- How do they make their inquiries relevant? Ask the right questions? Address the right issues?

In the absence of any statutory duties to conduct a CRIA?



The English experience – unincorporated child rights

- Climbie Inquiry/Every Child Matters green paper
- Children Act 2004 – ”to ensure a voice for children and young people at national level Part 1 of the Act provides for the establishment of a Children’s Commissioner (in these notes referred to as ‘the Commissioner’). Under section 2, the Commissioner’s role will be to promote awareness of the views and interests of children (and certain groups of vulnerable young adults) in England. The Commissioner will also be able to hold inquiries – on direction by the Secretary of State or on his own initiative – into cases of individual children with wider policy relevance in England or, on non-devolved matters, in other parts of the UK.
- Section 11 – arrangements to promote and safeguard welfare
- Section 10 – joined up thinking – co-operation around child welfare



The English experience – unincorporated child rights

- UK withdraws immigration reservation regarding article 3(1) UNCRC – September 2008. S 55 Borders Citizenship & Immigration Act 2009
“Section 55 is intended to achieve the same effect as section 11 of the Children Act 2004 (the 2004 Act) which places a similar duty on other public organisations. As well as providing a driver for improvement within the UK Border Agency, the duty will also help to improve inter-agency working in respect of children. Section 55 applies to the carrying out of the relevant functions anywhere in the UK.”
- *EM (Lebanon) v SSHD* [2008] UKHL 64, [2009] 1 AC 1198 – the obligation on decision-makers to consider a relevant child's best interests separately and individually.
- *MM Lebanon v SSHD* [2017] UKSC 10 - guidance must direct decision-makers to depart from the rules in an appropriate case.
- *ZH (Tanzania) v SSHD* [2011] UKSC “(art 3(1)) is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the 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.”



The English experience – unincorporated child rights

Cautionary experiences – forbidden territory - the limits of international law

SC v DWP [2021] UKSC 26 –issue for the court para 74

“The primary question for the court to decide is therefore supposed to be whether, by introducing the limitation on entitlement to child tax credit, the United Kingdom has breached its obligations under the UNCRC.”

- Unincorporated treaties do not create rights and obligations in domestic law.
- HRA has not given domestic legal effect to unincorporated treaties see Baroness Hale in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, para 53:

“The Human Rights Act 1998 gives effect to the Convention rights in our domestic law. To that extent they are domestic rights for which domestic remedies are prescribed: In re *McKerr* [2004] 1 WLR 807. But the rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg.”
- But see *Neulinger v Switzerland* harmony” as between International treaty obligations



The English experience – unincorporated child rights

- “The “Burnip” approach – specificity in applying HRs to specific protected groups
- Applied in *Mathieson* – 84-day rule ending benefits for children in long-stay in hospital:

“Mr Mathieson invites the court to approach the Secretary of State's need to justify the 84-day rule through the prism of international conventions. They are not part of our law so our courts will not ordinarily reach for them. Courts sometimes find, however, that the law which they are required to apply demands reference to them...”



The English experience – unincorporated child rights

The UN Committee on the Rights of the Child, in its General Comment No 14 (2013) on article 3.1, analysed a child's "best interests" in terms of a three-fold concept. In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at paras 105-106, Lord Carnwath described the committee's analysis as authoritative guidance.

- 1 - child's substantive right to have his best interests assessed as a primary consideration
- 2 - interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted.
- 3 - The third is a "rule of procedure", described as follows:

"Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned ... Furthermore, the justification of a decision must show that the right has been explicitly taken into account ..."



The English experience – unincorporated child rights

Where absence of a statutory CRIA nullifies ‘due regard’ duties:

- See for example *R (PRCBC) & others v SSHD* [2021] EWCA Civ 193
- Jay J at first instance (upheld by CA)
“there is no evidence in the voluminous papers before me that his client has identified where the best interests of children seeking registration lie, has begun to characterise those interests properly, has identified that the level of fee creates practical difficulties for many (with some attempt being made to evaluate the numbers); and has then said that wider public interest considerations, including the fact that the adverse impact is to some extent ameliorated by the grant of leave to remain, tilts the balance.”

Result: amended fees regulations to incorporate fee waiver for children



The English experience – unincorporated child rights

“The UK Government has made a public commitment to give due consideration to the United Nations Convention on the Rights of the Child (UNCRC) when making new policy or legislation.

The Department for Education (DfE) developed a child’s rights impact assessment (CRIA) template for use within government departments, to consider the impacts on children’s rights when developing new policy or legislation... **There is no statutory obligation to conduct this assessment.**” (July 2023)

Child’s Rights Impact Assessment (CRIA)

Stage 1 – screening

Stage 2 – Impact assessment

Stage 3 – summary and monitoring – record overall conclusions of CRIA, set out arrangements for monitoring



The English experience – child rights landscape

- Role of the Children's Commissioner in England was introduced by the Children Act 2004 following a recommendation of Lord Laming in the Victoria Climbié Inquiry.
- Further strengthened by the Children and Families Act 2014 increasing the remit, powers and independence of the Commissioner, and giving special responsibility for the rights of children who are in or leaving care, living away from home or receiving social care services.
- Children's Commissioner also speaks for wider groups of children on non-devolved issues including immigration (for the whole of the UK) and youth justice (for England and Wales).
- Growth in third-sector organisations campaigning on children's rights.



Treating 17-year-olds as children at the police station

- *HC v the Secretary of State for the Home Department* [2013] EWHC 982 (Admin). HC was 17 and treated as an adult when arrested and detained by police because PACE defined a juvenile as under 17 yr olds.

‘The impetus driving the United Kingdom to afford special statutory protection to those under 18 is the United Nations Declaration on the Rights of the Child 1959 and the Convention on the Rights of the Child 1989 ("UNCRC"). One of the key principles of the United Nations Declaration is that a child is to enjoy special protection.

...Article 1 of the UNCRC defines a child as a person aged under 18 unless, under the law applicable to the child, majority is attained earlier. The age of majority in the United Kingdom is 18.’ [38]



Protection against unnecessary arrest of children

- *ST v The Chief Constable of Nottinghamshire Police* [2022] EWHC 1280 (QB)
‘Children and young people are a protected group with specific vulnerabilities. As Gandhi observed the true measure of any society can be found in how it treats its most vulnerable members. In this country the treatment of children in detention is governed not only by domestic legislation but also by the UN Convention on the Rights of the Child (UNCRC) which the UK has signed and ratified.

Article 3 sets out that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37 states

"Parties shall ensure that:...(b) The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort* and for the shortest appropriate period of time." (emphasis added)' [96]



Protection against arresting children at night

‘That requirement that the ‘best interest of the child’ should be integral to the decisions and actions of public bodies is also set out in section 11 of the Children Act 2004 which provides:

Section 11

"Arrangements to safeguard and promote welfare

This section applies to each of the following—

.....

(h) the local policing body and chief officer of police for a police area in England;

(2) Each person and body to whom this section applies must make arrangements for ensuring that—

(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;....’ [97]



Protections for child victims of trafficking and modern slavery

ECHR judgment finds failure to adequately
protect potential victims of child trafficking

TUESDAY 16 FEBRUARY 2021



V.C.L. AND A.N. v. the United Kingdom (applications nos. 77587/12 and 74603/12)

- Submissions relied on UNCRC Articles 3, 32, 33, 35 and Article 3 of the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography (ratified by UK in Feb 2009) and Palermo Protocol affording special and enhanced obligations towards trafficked children
- Two Vietnamese children working in a cannabis factory in the UK were prosecuted and received custodial sentences in a youth offender institute. The ECtHR ruled a breach of ECHR article 4 - prohibition on force labour & 6(1) - right to a fair trial. The CPS had failed to take into consideration credible evidence that the applicants had been trafficked and gave wholly inadequate reasons for disagreeing with the Competent Authority recognition of them as victims of trafficking.
- To read more see: <https://www.gardencourtchambers.co.uk/news/echr-judgment-finds-failure-to-adequately-protect-potential-victims-of-child-trafficking>



Criminal Records

R (P,G,W) v SSHD [2019] UKSC 3

The landmark judgment in the Supreme Court, which heard three linked cases, found that the criminal records disclosure regime was unlawful, and, in the case of G, the disclosure of youth reprimands or cautions in criminal record checks was a breach of his rights under Article 8 ECHR.

G was a young man who had reprimands on his criminal record from when he was 12 years old.

Campaigning work by Just for Kids Law, Liberty and Unlock led to changes in the law in 2019 and 2022.



Children's Rights Case Studies

Rajiv Menon KC & Jennifer Twite, Elena Papamichael & Adrian Berry



GARDEN COURT CHAMBERS



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Covid response exposes impact on children of non-incorporation

- In submissions to the Covid Inquiry, Save the Children, Children's Rights Alliance England (CRAE) and Just for Kids Law made the comparison between the decisions made impacting children in England with the Scottish approach.
- Save the Children's 'What About the Children' report concluded the harm caused to children during the Covid-19 pandemic was preventable. Available at - <https://crae.org.uk/news/harm-caused-children-covid-19-pandemic-was-preventable-new-report-concludes>
- By comparison, in Scotland, a Child Rights and Wellbeing Impact Assessment (CRWIA) examined whether policies and legislation introduced during the pandemic would protect and promote the rights and wellbeing of children and young people.



Report on the United Kingdom of Great Britain and Northern Ireland

June 2023

Key recommendations on the youth justice system where children are being failed, including:

- To raise the minimum age of criminal responsibility to at least 14 years of age;
- the child justice system is applied to all children who were below the age of 18 years when the offence was committed (this should include abolishing life imprisonment for children who committed offences when they were below the age of 18 years);
- To develop early intervention for children and actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial measures for children, such as probation or community service;
- To repeal the practice of remanding children into police custody, ensure that no child is held in police custody overnight and avoid the use and reduce the maximum duration of pretrial detention
- To ensure that detention is used as a measure of last resort;
- To address the overrepresentation of children belonging to minority groups in detention and develop measures, in consultation with affected children and their families, to prevent racial profiling by law enforcement authorities;
- To end the use of solitary confinement and ensure that any separation of the child from others is for the shortest possible time and is used only as a measure of last resort.



Diversion for children in criminal justice

- Article 40(1) of the UNCRC is clear that the over-arching aim of the youth justice system must be focused on treating children in an age-appropriate way consistent with the promotion of their dignity, which reinforces respect for the rights and freedoms of others, and which is focused on reintegration and children's assumption of a positive role in society.
- The Committee on the Rights of the Child has stated clearly that 'a strictly punitive approach is not in accordance with the principles of child justice', and further, that weight should be given in all decisions both to the child's best interests as well as the need to promote their reintegration (General Comment No. 24, para.76).
- Article 40(3) stipulates that measures which divert a child from the formal criminal justice system should be used 'whenever appropriate and desirable', providing that human rights and legal safeguards are fully respected.
- National Police Chiefs Child Gravity Matrix



Avoiding custodial sentences for children

Article 37:

Children should be arrested, detained or imprisoned **only as a last resort** and for the shortest time possible.

R v Ahmed [2023] EWCA Crim 281

- The court acknowledged that children require a different approach to sentencing and are not to be treated as if they were just cut-down versions of adult offenders.
- The court must take as its starting point the sentence which it considers was likely to have been imposed if the child offender had been sentenced shortly after the offence



Avoiding custodial sentences for children

Sentencing Council's Overarching Guideline on Sentencing Children:

- Paragraphs 6.42 to 6.49 contain general principles for courts to bear in mind when arriving at a decision to impose a custodial sentence, including: "If a custodial sentence is imposed, a court must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate and, in particular, why a YRO with intensive supervision and surveillance or fostering could not be justified." (para 6.42)
- Section 157 Police, Crime, Sentencing and Courts Act 2022 amends the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 (sections 91-102) by introducing statutory duties to consider the best interests and welfare of the child in the remand decision and to record the reasons for a custodial remand.



Avoiding custody for defendants with children

Article 9 1.

Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.

R v Boakye [2012] cites UNCRC:

We agree that the interests of affected children may frequently be of relevance to the sentencing process. That will especially be so where the crime is at the lower end of the criminal calendar, and especially where the sentencing decision is for that reason on the cusp of custody or non-custody”

R v Pethertick [2012] Court of Appeal declined to deal with whether article 3 applies when sentencing adults with children but acknowledged at §22 it will be especially where the case stands on the cusp of custody that the balance is likely to be a "ne one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.



Children's rights and British nationality cases

- UNCRC as a legal tool in applications made by children for registration as a British citizen under the British Nationality Act 1981
- UNCRC useful when the Secretary of State must be satisfied as to 'good character' before granting an application for registration
- Section 55 of the Borders, Citizenship and Immigration Act 2009 applies, working similarly to s 11 of the Children Act 2004
- Article 8 ECHR applies too, under the Human Rights Act 1998 and as an interpretive tool in respect of s 55 of the 2009 Act
- The significance of the UNCRC arises in the context of criminal offending and whether a child applicant may nonetheless be considered to be of good character



Children's rights and British nationality cases

Nationality: good character requirement (v 2.0) guidance:

Application of the requirement to young persons

The good character requirement applies to a person *who is aged 10 or over* at the date of application. When assessing whether a child is of good character, you must take account of any mitigation relevant to the child's particular circumstances. Where a child has been convicted of a criminal offence, sentencing guidelines require that any custodial or non-custodial sentence is adjusted to take into account the child's age and particular circumstances and any mitigating factors such as their ability to understand the consequences of their actions.

Therefore, although the criminal sentence thresholds for refusal and non-custodial sentencing guidelines for adults will normally apply to a child who has been convicted of a criminal offence, the lesser sentence handed down to them will mean they are automatically less likely to meet the higher thresholds.



Children's rights and British nationality cases

Nationality: good character requirement (v 2.0) guidance:

Application of the requirement to young persons

- Consideration must also be given to any subsequent mitigation put forward by the applicant that was not taken into account at the time of sentencing.
- You may exercise discretion where a child's criminality would result in a lifetime refusal of any citizenship application (that is over 4 years in prison). In these cases, the amount of time passed since the crime should be weighed up against any evidence of rehabilitation.



Children's rights and British nationality cases

Article 3 of the UNCRC thus provides that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”



Children's rights and British nationality cases

Article 40 of the UNCRC thus provides that:

“(1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others, and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”



Children's rights and British nationality cases

R(SA) v Secretary of State for the Home Department [2015] EWHC 1611 (Admin), per Karon Monaghan QC, at §64

- The Secretary of State may only exercise her discretion to grant citizenship under s. 3 where she is satisfied that the person concerned is of “good character”; s. 41A(1), British Nationality Act 1981)
- In determining whether she is so satisfied, he must make an evaluation of the applicant's character based on all of the material before her.



Children's rights and British nationality cases

R(SA) v Secretary of State for the Home Department [2015] EWHC 1611 (Admin), per Karon Monaghan QC, at §64

- In the case of criminal convictions, she will need to take into account the seriousness of the offence, mitigating factors and the severity of any sentence.
- In assessing the relevance of any convictions for offences committed as a child (that is, under the age of 18), regard will need to be had to the rehabilitative objectives reflected in Article 40 of the UNCRC and the primacy given there to “reintegration.”



Children's rights and British nationality cases

R(SA) v Secretary of State for the Home Department [2015] EWHC 1611 (Admin), per Karon Monaghan QC, at §64

- Article 8 ECHR may be engaged by a decision not to grant citizenship where the necessary threshold for an interference is reached *but in any event* where that decision is arbitrary or discriminatory.
- Further, in assessing whether there is justification for any interference with Article 8 in the case of a child (that is a person under the age of 18), regard will need to be had to the material provisions of the UNCRC.



Children's rights and British nationality cases

R(SA) v Secretary of State for the Home Department [2015] EWHC 1611 (Admin), per Karon Monaghan QC, at §64

- There may be *little room* for justifying an interference with Article 8 where reliance is placed on (at least) non-violent offences committed when a minor, that is under the age of 18, having regard to the terms of Article 40 of the UNCRC.
- Whilst section 55 of the 2009 Act may be material to the exercising of a relevant discretion in the case of an adult where there has been *an historic failure to comply with section 55* which has led to a present injustice, it does not otherwise apply to the exercising of functions at a time when a person has reached the age of majority.



Children's rights and British nationality cases

R v ZA [2023] EWCA Crim 596, § 52:

- Young people's brains are still developing up to the age of 25 with vitally important relevance to any evaluation of a person's character

R(PRCBC, O & A v Secretary OF State [2019] EWHC 3536 (Admin) at § 21:

- There is a need to consider the impact of a continuing refusal of British citizenship upon young people who identify as British: on the basis of a “mass of evidence” young people “feel alienated, excluded, isolated, ‘second-best’, insecure and not fully assimilated into the culture and social fabric of the UK”



Thank you

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Click [here](#) to view our Children's Rights Team webpage

