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Embedding children's rights – why does it matter and what does it mean?

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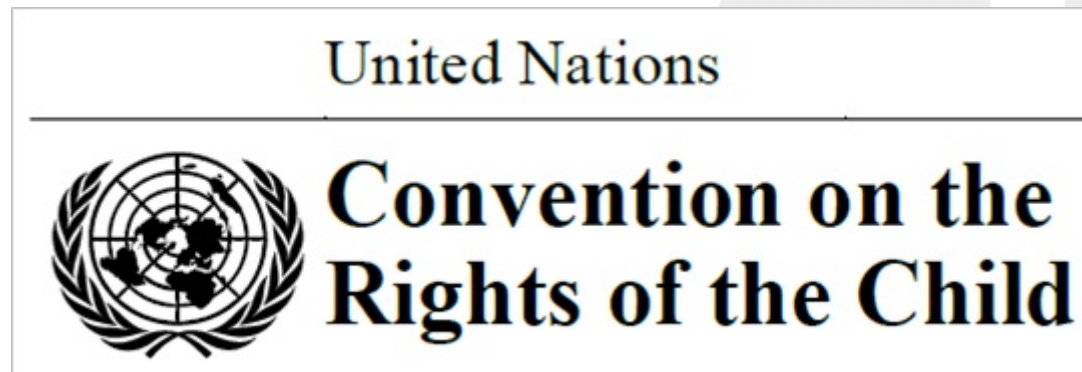


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Which rights are we talking about?

- United Nations Convention on the Rights of the Child (UNCRC)
- Most widely-ratified UN HRs Convention
- 54 Articles containing the civil, political, economic, social and cultural rights that all children everywhere are entitled to





UNCRC

- Article 2: non-discrimination
- Article 3(1): “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 4: must use “maximum extent” of available resources to realise children’s economic, social and cultural rights
- Article 12: right to participation
- Article 24: the right to the “highest attainable standard of health
- Article 26: the right to benefit from social security



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Status of the UNCRC in domestic law

- Unincorporated Convention (in England at least). Compare with the ECHR, incorporated by the HRA 1998
- Therefore no direct effect
- Can be used indirectly – aid to interpretation of ECHR rights and ambiguous domestic legislation





What's the problem?

- *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16
- Challenge to the benefit cap on basis that indirectly discriminated against women (Art 8 and A1P1 read with Art 14)
- Majority found breach of Art 3(1) UNCRC (best interests of child) but no breach of domestic law. Therefore no relief
- Similar reasoning applied by Court of Appeal in subsequent narrower challenge *R (DA) v SSWP* [2018] EWCA Civ 504 (single parents with children under 2)
- Outcome if UNCRC directly incorporated...? What if Welsh legislation applied across the UK?



What's special about Wales?

- Rights of Children and Young Persons (Wales) Measure 2011 and connected Children's Rights Scheme - Welsh Ministers must have "due regard" to requirements of UNCRC when exercising any of their functions
- Social Services and Well-being (Wales) Act 2014 – s.7 imposes obligation on a person exercising functions under the Act in relation to a child to have "due regard" to the UNCRC (ie will apply to children with care and support needs, children with caring responsibilities and looked after children)



What does the duty require?

- Basic principle of public law that all relevant matters must be taken into account (*R v Ealing LBC ex p C* (2000) 3 CCLR 122). But weight attached to those matters is for the decision-maker (subject to *Wednesbury* unreasonableness)
- Requirement to have “due regard” goes beyond mere taking into account. Borrowed from equalities legislation. Currently s.149 Equality Act 2010
- Crucially though it is a procedural requirement. It does not dictate any substantive outcome (subject to *Wednesbury* unreasonableness)



The critical point

“The concept of ‘due regard’ requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making” (Elias LJ in *Hurley v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) at [78])



What does having “due regard” require?

- *Bracking v SSWP* [2013] EWCA Civ 1343 at [25]
- Duty on decision-maker; cannot be delegated
- Must evidence way duty has been discharged (typically EqIA)
- Not a “rearguard action”. Must inform the development of policy
- Duty must be “exercised in substance, with rigour, and with an open mind”. Not a question of “ticking boxes”
- “[G]eneral regard to issues of equality is not the same as having specific regard by way of conscious approach to the statutory criteria”
- Continuing duty



How is the s.149 duty useful in practice?

- Challenge to hospital's new policy to impose car parking charges on blue badge holders. No EqlA done or evidence of "due regard"
- *R (Peters) v LB Haringey* [2018] EWHC 192 (Admin) – challenge to LA's decision to set up a development vehicle. Aim was to transfer £2 billion worth of public land to held 50-50 by LA with private company. In return for 50% share in the land, company would provide money to develop it. High level EqlA done and EqlA for transfer for individual sites, but no EqlA done for concept for chosen development vehicle. On appeal to CA
- Gets harder as decision-makers wise up



How has the UNCRC duty (s.1 of 2011 Measure) in Wales been approached?

- Section 1 2011 Measure
- *Prospective Adopters v FB* [2015] EWHC 297 (Fam). Adoption order sought. No error as law of adoption not a devolved matter. In any event, s.1 imposes duty on Welsh Ministers not the judiciary
- *R (Tilley) v Vale of Glamorgan Council* [2016] EWHC 2272 – Challenge to local authority’s decision to transfer running of library to local community. Confirmed duty in s.1 only applies to Welsh Ministers



How has the UNCRC duty (s.7 SSWBW) in Wales been approached?

- Section 7 SSWBW Act 2014
- *Re A (A Child) Unreported* (Fam Ct). Decision re taking child into care (would become “looked after child”). Judge refers to UNCRC being “partly incorporated” and “binding” on certain decision-makers
- Section 7 should apply to judiciary – “any person exercising functions under this Act”



Concluding thoughts

- Real scope for litigation on procedural aspects of requirement to have “due regard”. Unlike s.149, scope to apply to individual decisions as well as policy challenges and challenges to secondary legislation. Particular potential in respect of social care decisions involving children (eg disabled children, accommodated children)
- Would JS have been decided differently if the duty had applied there? Almost certainly not. Must recognise the limits
- Also part of a mentality change among decision-makers and judges eg tone of *Re A*



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Questions?

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