



SLS SEMINAR

Children's Rights Update

Introduction

The Children's Law Centre is a non governmental organisation based in Belfast which aims to promote, protect and realise children's rights. We do this by providing legal advice and information on children's rights and the law relating to children in Northern Ireland, by training, and by making submissions to government and other bodies on policy and legislation affecting children and young people at both domestic and international levels. We have a youth group called youth@clc which advises for example in relation to materials which we produce for children and young people.

Our staff is comprised of a director, four solicitors, an advice manager, advice worker, legal secretary, receptionist/ administrator, head of finance and administration, policy officer, international human rights adviser, youth worker and volunteers/students. One of our solicitors has just commenced in post and will be specialising in advising and assisting children with mental health difficulties. We also have a solicitor who specialises in education law.

We operate a regional free phone advice service called CHALKY (0808 808 5678) which provides advice and information about children's rights and the law relating to children in Northern Ireland. We now have 113 categories of legal advice and information including for example, suspensions and exclusions from school, special educational needs, bullying, youth justice, policing, employment, human rights and discrimination, social security, housing, the rights of children in care, mental health and family law. Within the family law category we deal with issues on behalf of the child (not the parents) relating to child protection, contact, residence, specific issue orders, parental responsibility, name changes, adoption, domestic violence, separation and divorce, maintenance, separate representation and family support. We also provide a casework service in accordance with our casework policy and casework criteria. The types of cases we normally represent in are test cases mostly at tribunal level or High Court judicial reviews. We do not represent in family proceedings cases or care cases and operate a referral system to the Children Order Panel of solicitors in Northern Ireland in these cases.

We provide a training course called Children's Rights are Human Rights which is a one day training course including case law developments. We have a website at www.childrenslawcentre.org and we produce information materials and submissions. We are a membership organisation and whilst much information on the website is available to anyone, there is a members section which contains more detailed information, including our information pack and training notes. We have a series of leaflets called Do You Know Your Rights which are available free of charge to children and young people. These are on the topics of Suspensions and Exclusions, Admissions, the UNCRC, the Human Rights Act 1998, Policing, Youth Justice, Being in Care/ Leaving Care, Employment, Social Security and our most recent addition is a detailed leaflet for children and young people about Family Law. This new leaflet includes information for children and young people about article 8 orders in family proceedings, counselling and mediation services, non molestation and occupation orders. I have included a copy of this leaflet in your packs and would ask you to encourage children and young people you are working with to contact us on our free phone if they are unsure about their rights.

I have been asked to talk this evening about international and domestic developments with regard to children's rights. This is timely as the United Nations Committee on the Rights of the Child is due to examine the progress which the United Kingdom government has made with regard to implementation of the United Nations Convention on the Rights of the Child (UNCRC) in early 2008 (the last examination was in October 2002).

I intend to provide you with a brief overview of the UNCRC and the recommendations of the United Nations Committee on the Rights of the Child and key legislative and policy developments in Northern Ireland. I will then focus on the following key areas:

- Child and Adolescent Mental Health
- Physical Punishment of Children in the Home
- Positive Duties towards children under Article 3 of the ECHR
- Contact and reunification
- The Child's Right to be Heard/Separate Representation
- Legal Standing of the Child in Judicial Review proceedings

My colleague, Siobhan Keegan QC will then focus specifically on case law developments in the field of family law.

The UNCRC

The UNCRC is an international human rights treaty which was adopted by the General Assembly of the United Nations on 20 November 1989¹ and which was ratified by the United Kingdom (UK) Government in December 1991. A copy of the text of the UNCRC has been included in your packs for today. It has been ratified by 192 countries in the world – only Somalia and the United States of America have not ratified. The UNCRC

¹ UNCRC, (adopted 20 November 1989), entered into force on 2 September 1990, UN Doc. A/44/49.

contains 54 Articles and a broad range of civil, political, economic, cultural, social and educational rights for children.² It has been described as establishing a new vision of the child, one that goes beyond the more traditional approach aimed at providing protection to recognising the child as a holder of participatory rights and freedoms.³

The UNCRC has been gaining prominence in Northern Ireland. The OFMDFM have given a commitment that it will inform and guide the Children and Young People's Strategy⁴ and the UNCRC has been expressly referred to in the legislation establishing the first Commissioner for Children and Young People (hereinafter NICCY) by virtue of which NICCY is bound to consider the provisions of the UNCRC when exercising any of his or her functions.⁵ NICCY has also published a comprehensive analysis of children's rights in Northern Ireland using the UNCRC and the recommendations of the United Nations Committee on the Rights of the Child as the benchmark against which to assess progress.⁶ This research provides an invaluable baseline against which to measure progress on children's rights in Northern Ireland.

The UNCRC has been referred to frequently in judgments in the High Court in Northern Ireland most often as an interpretative aid to arguments advanced under the ECHR as incorporated by the Human Rights Act 1998.⁷ It is our view that any legal argument about the rights of children should be set within the framework of the UNCRC and should also take into consideration any relevant recommendations of the United Nations Committee on the Rights of the Child which examines the ways in which the governments of each signatory country complies with the requirements of the UNCRC every five years. The United Nations Committee on the Rights of the Child produces reports of these examinations and has in addition produced general guidelines for periodic reports.⁸ It has also issued a General Comment in relation to general measures of implementation.⁹ The last recommendations of the United Nations Committee with regard to the United

² Art 1 of the UNCRC states that the UNCRC applies to every human being below the age of 18 years unless, under the law applicable to the child, the majority is attained earlier.

³ Sandra Mason, "Making a Reality of Children's Rights; Bringing Home the Convention on the Rights of the Child", Children's Law Centre launch, 20 October 1998, unpublished.

⁴ OFMDFM, Our Children and Young People- Our Pledge- a Ten Year Strategy for Children and Young People in NI 2006-2016, www.allchildrenni.gov.uk.

⁵ Art 5 of the Commissioner for Children and Young People (NI) Order 2003.

⁶ Children's Rights in Northern Ireland, 2004, (Research commissioned by NICCY, QUB).

⁷ See *Re C (No Contact Order: Representation of Children)*, Family Division (Gillen J), (unreported), 17 May 2002, Fam Div (NI), in which Article 3 UNCRC is considered, *Re C (A Minor) (Custody: Jurisdiction)*, (Gillen J), (unreported), 12 November 2001, Fam Div (NI), in which Art 12 of the UNCRC is considered, *In the Matter of N & L (Care Order; Investigations by GAL Outside NI)* [2003] NI FAM 1, *In the Matter of T (Declaration Not to Inform the Birth Father of Child's Existence)* [2004] NI FAM 2, *Re C: Article 8 Order; Article 10 (2); Grandparents Application for Leave* [2003] NI FAM 13, *S, N & C (Non Hague Convention Abduction: Habitual residence: Child's Views)* [2005] NI FAM 12, *E (Voice of the Child)* [2005] NIFAM 12, *In the Matter of E and M* (Master Wells) 14 December 2006.

⁸ Concluding Observations of the Committee on the Rights of the Child, CRC/C/15.ADD 3 (4 January 1995).

Concluding Observations of the Committee on the Rights of the Child, CRC/C/15 ADD188 (4 October 2002).

General Guidelines for Periodic Reports, CRC/C/58, 20 November 1996.

⁹ General Comment No 5 (2003), CRC/GC/2003/5.

Kingdom government were produced in October 2002. These included the following recommendations:

- government to ensure transparent analysis of budgets to show the proportion spent on children;
- the incorporation of the UNCRC into domestic legislation;
- the establishment of a nation wide system for the collection of disaggregated data ;
- training on and dissemination of the UNCRC;
- the best interests of the child should be included in all legislation and policy affecting children;
- legislation governing procedure in courts and administrative proceedings to ensure that children capable of forming own views have the right to express those views and that they are given due weight;
- Review the use of restraint and solitary confinement of children;
- Removal of the defence of reasonable chastisement and the promotion of positive parenting programmes;
- Introduction of a system of statutory child death inquiries;
- Consistent legislative safeguards for children in alternative care ;
- Effective procedures and mechanisms to receive, monitor and investigate abuse, ill treatment and neglect;
- Reduce inequalities in healthcare;
- Reduce rates of teenage pregnancy;
- Strengthen mental health and counselling services;
- Undertake studies on causes and backgrounds of suicides;
- Provide adequate information to homosexual and transsexual young people;
- Undertake all necessary measures to the maximum extent available of resources to accelerate the elimination of child poverty;
- Better coordinate and reinforce efforts to address the causes of youth homelessness;
- Undertake a study on the scope, causes and background of child prostitution;
- Devise a comprehensive and constructive plan of action to target the obstacles in the enjoyment of rights by Traveller children.

The Committee is due to report again in respect of the United Kingdom government in 2008 and the Children's Law Centre and Save the Children have been in the process of producing an alternative NGO (Non Governmental Organisations) report over the last number of months.

In addition to the text of the UNCRC and the Recommendations of the UN Committee on the Rights of the Child, the Committee issues very detailed General Comments on specific areas of children's rights. To date the General Comments are:¹⁰

¹⁰ These can all be accessed in full on www.ohchr.org.

1. Aims of Education (2001)
2. Role of Independent Human Rights Institutions (2002)
3. HIV/AIDS and the Rights of the Child (2003)
4. Adolescent Health (2003)
5. General Measures of Implementation (2003)
6. Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005)
7. Implementing Child Rights in Early Childhood (2006)
8. The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (2006)
9. The Rights of Children with Disabilities (2006)
10. Children’s Rights in Juvenile Justice (2007)

Policy Framework in Northern Ireland

When dealing with individual children’s cases it is useful to understand not only the international position with regard to children’s rights but also the policy framework in Northern Ireland within which the particular circumstances relating to the child are located. I have set out the current policy framework in Northern Ireland so that you are aware of these documents and where necessary can access them to support the rights of children who you are representing.

The main government strategy currently relating to children’s rights is **“Our Children and Young People – Our Pledge”** which is a ten year strategy for children and young people in Northern Ireland (2006-2016) produced by the Office of the First Minister and Deputy First Minister. The strategy recognises the complexity of children’s lives by adopting a whole child approach and makes the following pledges¹¹:

- To work in a coordinated partnership approach to policy development across government and the coherent delivery of services.
- To offer support to parents, carers and families to ensure that they are able to take primary responsibility for their children and assist with the challenging task of parenting, where this is required.
- In recognizing that Northern Ireland is emerging from a prolonged period of conflict, to ensure that children and young people are supported to grow together in a shared, inclusive society where they respect diversity and difference.
- To promote a move to preventative and early intervention practice without taking attention away from children and young people who are currently most in need of more targeted services.
- In accordance with the UNCRC to be proactive in obtaining the views of children on matters of significance to them.
- To deliver improved outcomes for children and young people and to ensure that all future policies developed and services offered to, and accessed by, children

¹¹ Our Children and Young People– Our Pledge, OFMDFM 2006, www.allchildrenni.gov.uk, p15-19.

and young people, are based on identified need and on evidence about what works.

- To respect and progress the rights of children and young people in Northern Ireland, guided by the UNCRC. The strategy will be the key mechanism by which the government will chart progress on the implementation of the UNCRC.

The first **Children and Young People's Action Plan (2007)** has now been published and this is available on www.allchildrenni.gov.uk. This plan sets out the actions which the government intends to take to implement the Strategy for Children and Young People. These include actions in the areas of education, sport, recreation and play, child health, child and adolescent mental health services, equality, child protection, services for parents and carers, family justice, youth justice and the development of support and treatment services for children and young people under 18 with regard to drug and alcohol abuse. The specific measures in relation to child protection which the government will be addressing are the implementation of a Regional Safeguarding Board, the development of a Child Death Review Protocol, a Review of Sexual Offences legislation and implementation of new enhanced disclosure arrangements with regard to those working with children and young people. With regard to family justice the 2007 Action Plan indicates that the government intends to review the provision in the Children (NI) Order 1995 which prohibits the publication of material from family proceedings, review the reporting restrictions on the family courts and address the gap which currently exists with regard to the separate representation of children in private family law proceedings. A range of proposals to enhance services available to parents are set out in the **Families Matter Strategy**¹² produced by the Department of Health and Social Services and Public Safety (DHSS PS). These include the development of positive parenting and education courses for parents, an information campaign about alternatives to physical punishment and about the implications of Article 2 of the Law Reform Miscellaneous Provisions (NI) Order 2006, the development of mediation services, the expansion of child contact centres and improvement of access to information through a regional database and a regional helpline.

The DHSS PS are currently implementing the new **Regional Assessment Framework for Children in Need (UNOCINI- Understanding the Needs of Children in Northern Ireland)** throughout Northern Ireland and this includes assessment "domains" of health and development, education and learning, identity, self esteem and self care, family and social relationships, basic care and ensuring safety, emotional warmth, guidance, boundaries and stimulation, stability, family history, functioning and well being, extended family, social and community resources, housing, employment and income. This assessment framework should ensure that decision making processes throughout Northern Ireland with regard to services for children in need are more comprehensive and uniform.

The DHSS PS have also recently finished consulting on **A Bridge to a Better Future-Care Matters (2007)** which takes a comprehensive look at the rights of children and young people in care and makes extensive proposals for both legislative and policy

¹² dhsspsni.gov.uk/index/consultations

change. The content of this consultation document will be of interest to any accredited solicitors in the audience who represent looked after children in the care system as you will be familiar with the difficulties which currently exist with regard to accessing appropriate placements and educational provision for children. There are detailed proposals in the consultation document on advocacy services for looked after children, the promotion of educational attainments, the extension of the role of NIGALA into Special Guardianship Orders, the introduction of Independent Reviewing Officers and consistent financial support for Residence Order Allowances and Special Guardianship Order Allowances.

The law relating to adoption in Northern Ireland is also under review and the government has now completed the consultation exercise **Adopting the Future**.¹³ It was announced on 25 January 2007 by the health minister at the time that a radical overhaul of the primary adoption legislation in Northern Ireland would include the following:

- Replacing patchy and inconsistent support services by placing a clear duty on Trusts to ensure the provision of adoption services, including financial support;
- New legal orders called Special Guardianship Orders to be introduced which will enable children and young people to have a permanent family life with a carer but maintain a basic link with their birth family;
- Ensuring that children have at least one person who has parental responsibility for them at all times in the adoption process;
- Allowing civil partners and unmarried couples to jointly adopt;
- Creating a Centre of Excellence in adoption by investing responsibility for many aspects of adoption in one Trust;
- Creating much more consistent arrangements for access to information.

There has been a recent unsuccessful challenge in Northern Ireland in relation to articles 14 and 15 of the Adoption (NI) Order 1987 on the grounds that the ineligibility of unmarried couples to be considered as an adoptive couple is contrary to articles 8 and 14 of the ECHR as incorporated by the Human Rights Act 1998.¹⁴ My colleague Siobhan Keegan QC will be dealing with these cases in detail in her paper. The new adoption legislation is pending. From a children's rights perspective, it will be important to ensure that there is a mechanism for separate representation of the child by a guardian ad litem and where necessary an accredited solicitor in all applications under the legislation including special guardianship applications, that there is a duty placed on courts to consider existing and proposed arrangements for contact when making placement and adoption orders equivalent to sections 27(4) and 46(6) of the Adoption and Children Act 2002 and also that adoption support services are uniform across Northern Ireland and properly resourced.

In the context of child and adolescent mental health in Northern Ireland, the **Independent Review of Mental Health and Learning Disability (the Bamford Review)** has just

¹³ dhsspsni.gov.uk/index/consultations

¹⁴ *In the Matter of P (A child) (Compatibility of the Adoption (NI) Order 1987 with the ECHR)* [2006] NI Fam 5, *In the Matter of P (a Child)* [2007] NICA 20.

closed after two years of work. New legislation will be required to implement the recommendations made. The main reports relating to children and young people are:

- **A Vision of a Comprehensive Child and Adolescent Mental Health Service (2006)**- this report contains 51 child specific recommendations
- **Human Rights and Equality of Opportunity (Oct 2006)**
- **A Comprehensive Legal Framework (2007)**¹⁵

I would now like to highlight several areas in relation to children's rights where there have been significant legal developments:

- **Child and Adolescent Mental Health**
- **Physical Punishment of Children in the Home**
- **Positive Duties towards children under Article 3 of the ECHR**
- **Contact and reunification**
- **The Child's Right to be Heard/Separate Representation**
- **Legal Standing of the Child in Judicial Review proceedings**

Child and Adolescent Mental Health

Recent studies in the United Kingdom have shown that there has been a sharp increase in mental ill health in our child and adolescent population, with the proportion of teenagers with emotional problems such as anxiety and depression increasing by 70% over the past 25 years.¹⁶ The types of mental ill health, which children and young people can experience, are identified in this study as depression, anxiety, behaviour problems and hyperactivity with related difficulties including bullying, fighting, self harm and stealing.¹⁷ The reasons for such an increase are various but this study suggests that the possibility of broader social changes such as high educational and occupational expectations and peer group dynamics as well as family and socio economic factors may all be relevant. Further longitudinal studies will be necessary in this regard. The current UK National Inquiry into deliberate self harm has reported that 1 in 10 teenagers deliberately self harm and more than 24 000 teenagers are admitted to hospital in the UK each year after deliberately self harming.¹⁸ The World Health Organisation, in a recent report has described the global unmet needs of children with regard to child and adolescent mental health as enormous.¹⁹ The lack of early intervention and prevention strategies is particularly marked in the young;

¹⁵ All reports are available online at www.rmhdni.gov.uk

¹⁶ "Time Trends in Adolescent Mental Health", The Nuffield Foundation, (2004 Seminars on Children and Families: Evidence and Implications).

¹⁷ As above, page 3.

¹⁸ www.selfharmuk.org as cited in CAMHS sub group report, page 16.

¹⁹ "Atlas, Child & Adolescent Mental Health Resources, Global Concerns: Implications for the Future", (2005, WHO, World Psychiatric Association and International Association for Child and Adolescent Mental Health).

“Opportunities lost may never be recouped ..the needs of children cannot be deferred while we wait for a more convenient time.”²⁰

In Northern Ireland, factors associated with the “Troubles” and with a society emerging from conflict have impacted severely on child and adolescent mental health²¹. Many children remain undiagnosed and services are patchy and geographically uneven. There are high levels of child poverty in Northern Ireland.²² There are long waiting lists, human resource shortages in relation to child psychiatrists and inadequate inpatient facilities for adolescents.²³ Expenditure on CAMHS in Northern Ireland (CAMHS) in 2004 was less than 5% of the mental health budget.²⁴ The Chief Medical Officer estimated that more than 20% of young people in Northern Ireland are suffering “significant mental health problems” by their 18th birthday.²⁵ High levels of mental health difficulties have been identified in the population of looked after children²⁶ and also in the population of children in custody in Northern Ireland.²⁷ In a submission to the Review written by Dr Angela O Rawe in 2003,²⁸ the Children’s Law Centre made the case that the provision of services in Northern Ireland had not kept pace with demand and concluded that many children and young people did not receive the services they need. Adolescents in Northern Ireland continue to be placed in adult psychiatric wards.²⁹ Harrowing details have emerged in research in relation to the lack of appropriate mental health provision for young people under 18 within the adult prison system.³⁰ The National Deaf Children’s Society has identified significant unmet need in relation to CAMHS services for deaf children.³¹ There is a higher incidence of mental ill health in children with physical disability and learning disability.³² Children and young people with complex and multiple needs sometimes have to be moved out of the jurisdiction to access specialist

²⁰ As above, page 4.

²¹ A Vision for a Comprehensive Child and Adolescent Mental Health Service”, pages 15, 16.

²² Hilyard et al, “Bare Necessities: Poverty and Social Exclusion in Northern Ireland” “Well over a third (37.4%) of all this society’s (NI) children are being brought up in poverty” Belfast: Democratic Dialogue, 2003.

²³ Children and Adolescent Mental Health Services in Northern Ireland, 2003, Dr Angela O Rawe/Children’s Law Centre, 2003.

²⁴ “Children’s Rights in Northern Ireland, 2004”, Research commissioned by NICCY, QUB, page 113.

²⁵ Chief Medical Officer (1999) “Health of the Public in NI”, as cited in CAMHS sub group report of the Review.

²⁶ “Secure Care Report”, (SSI, June 2002), NICCY/QUB research, page 89, “Children Matter”, (SSI, 1998), Teggart, T and Menary, J (2005) “An Investigation of the Mental Health Needs of Children Looked After by Craigavon and Banbridge Trust”, Childcare in Practice, Vol.11 (1) p.39.

²⁷ See note 12, page 91, “In Our Care”, NIHRC, (March 2002), pages 115-117, “Inspection of the Juvenile Justice Centre”, Oct 2004 (Criminal Justice Inspectorate, NI), p.24, “Young People in Regional Care Centres and Youth Justice”, (DHSS PS, Oct 2004), Mc Masters.

²⁸ See note 23.

²⁹ DHSS PS “Number of Admissions of Young People to Adult Wards and Bed Days Occupied Across the Region” 2003 – 2005 – in 2003 – 2004, children in Northern Ireland occupied 2386 bed days in adult psychiatric wards.

³⁰ Scraton, P and Moore, L (2004) “The Hurt Inside: The Imprisonment of Women and Girls in Northern Ireland,” Belfast, NIHRC, chapters 5 and 6.

³¹ “Developing Mental Health Services for Deaf Children and Young People in Northern Ireland”, NDCS, (2005). A cross border facility has now been opened for deaf young people with mental health difficulties.

³² See note 21, page 16.

mental health services. There is currently no forensic inpatient psychiatric provision in Northern Ireland and only limited in patient adolescent facilities (for 14+).³³

The United Nations Committee on the Rights of the Child specifically recommended in October 2002 that mental health and counselling services for children and young people should be strengthened. On 15 May 2007, the Minister for Health announced a new Mental Health and Learning Disability Board and has confirmed:

- In Autumn 2007, work will commence on the new 5 million adolescent specialist unit at Forster Green site.
- An outline business case is being considered to build a replacement of the 15 bed psychiatric unit at Forster Green which should be approved by summer 2007.
- 12 in patient beds (increase of 4) will be open in the interim in patient unit at Knockbracken by summer 2007.
- From June 2007 a number of Crisis Intervention teams will be in operation.

In order to comply with international children's rights standards the new legislation will have to incorporate the following elements:

- best interests principle;
- a proper mechanism for separate legal representation and the appointment of a guardian ad litem for children and young people who are subject to compulsory detention;
- a statutory duty in respect of educational provision for children who are subject to compulsory detention;
- Reciprocity-there must be an explicit legislative commitment to provide age appropriate facilities when detention powers are exercised in respect of children and young people as a last resort and an explicit prohibition against the use of adult psychiatric facilities for this purpose.

Physical Punishment in the Home

The leading case of *A v UK*³⁴ in which a young boy had been beaten repeatedly with a garden cane by his stepfather examined the question of the scope of the State's obligation to protect children from ill treatment under Article 3 of the European Convention on Human Rights (ECHR). It was concluded that as the stepfather was acquitted in the Crown Court in England as a result of raising the defence of reasonable chastisement in relation to a charge of assault occasioning actual bodily harm, that the level of protection that the United Kingdom had provided to the boy was inadequate, that is, that our domestic laws could allow for an acquittal when the European Court was of the view that the treatment of the boy on this occasion amounted to inhuman and degrading treatment under Article 3. The European Court was clear that there was a positive obligation on all

³³ An in patient unit for adolescents in Knockbracken Health Care Park has provision for 9 (shortly 10) young people at the time of writing.

³⁴ *A v UK*, (EurCtHR), App.No. 25599/94, (23 September 1998), also at [1998] 2 FLR 959.

states to ensure that legislative frameworks and court structures protected children. The Council of Ministers is supervising the implementation of this judgment.³⁵

In the case of *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, the House of Lords dismissed an application by head teachers, teachers and parents of children at four independent schools in England. The applicants complained that the statutory ban on the use of corporal punishment in schools interfered with the parent's rights under Article 9 of the ECHR (freedom of religion and freedom to manifest their religion). The House of Lords held that the interference with the parents' rights under Article 9 was necessary in a democratic society for the protection of the rights and freedoms of others. Per Lord Nicholls of Birkenhead at paragraph 49 – 50:

“The statutory ban pursued a legitimate aim; children are vulnerable and the aim of the legislation is to promote their well being. Corporal punishment involves deliberately inflicting physical violence. The legislation is intended to protect children against the distress, pain and other harmful effects this physical violence may cause. That corporal punishment may have these effects is self evident.”

*“Parliament was bound to respect the claimants' beliefs in this regard but was entitled to decide that manifestation of these beliefs in practice was not in the best interests of children.”*³⁶

In Northern Ireland Article 2 of the Law Reform (Miscellaneous Provisions) (NI) Order 2006 was introduced in September 2006. This legislation prevents the use of the defence of reasonable punishment of children in relation to specific offences which are:

- a) an offence under section 18 or 20 of the Offences Against the Person Act 1861 (wounding or causing grievous bodily harm with intent).
- b) an offence under section 20 of that Act (malicious wounding or grievous bodily harm).
- c) an offence under section 43 of that Act (aggravated assault).
- d) an offence under section 47 of that Act (assault occasioning actual bodily harm and common assault).
- e) an offence under section 20 (1) of the Children and Young Persons Act (NI) 1968 (cruelty to persons under 16).

This legislation does not prevent the use of the defence of reasonable punishment in respect of a charge of common assault tried summarily, for which the defence of reasonable punishment is retained. The recommendations made by the United Nations Committee on the Rights of the Child in October 2002 with regard to physical punishment in the home were that the government should:

³⁵ See Article 46 (2) of the ECHR.

³⁶ For a detailed analysis of this case see, *Understanding Children's Rights*, Baroness Hale of Richmond, Childright, 216, page 3.

- a) with urgency adopt legislation throughout the State Party to remove the “reasonable chastisement” defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation.
- b) promote positive, participatory and non violent forms of discipline and respect for children’s equal right to human dignity and physical integrity, engaging with children and parents and all those who work with and for them, and carry out public education programmes on the negative consequences of corporal punishment.³⁷

The Commissioner for Children and Young People has commenced legal proceedings in the High Court in Northern Ireland to challenge the introduction of Article 2 of the Law Reform(Miscellaneous Provisions) (NI) Order 2006 and the Children’s Law Centre, Save the Children and the Parents Advice Centre have been given leave to intervene in these proceedings. The final hearing of this case is due to take place in November 2007.

Positive Duties under Article 3 ECHR

Article 3 of the ECHR has also been argued on behalf of children and young people in the context of the state’s obligation to protect children from child abuse. A leading case in this area is *Z & Others v UK*³⁸ (the so called Bedfordshire cases) in which allegations were made by five siblings who had suffered severe ill treatment and neglect by their parents over a number of years that Bedfordshire County Council had failed to protect them and that they had no access to an effective court or an effective remedy as the House of Lords had effectively bestowed an immunity on social services in relation to being sued in negligence in the United Kingdom in relation to child protection issues. The Commission decided that the treatment the children received amounted to inhuman and degrading treatment under Article 3 and inferred a positive obligation under Article 3 on the State to provide children and young people with adequate protection against inhuman and degrading treatment. The Commission also found that there had been a violation of Article 6 (the right to a fair trial) in that the applicants had been effectively denied the right of access to a court to have the merits of their claim for negligence/ breach of statutory duty examined. It is important, however, to say that it has been recognised that the decision -making process in child protection cases is an extremely difficult task for social workers. These cases were heard by the European Court and judgment was given on 10 May 2001. The European Court found that there had been a breach of all the children’s Article 3 rights in respect of the State’s failure to protect them from inhuman and degrading treatment. There was no finding by the court under Article 6 of the ECHR. The European Court did not make a finding under article 6 (right to a fair hearing) but did make a finding under article 13 (no remedy) and awarded the sum of £320 000 in total damages plus costs.

³⁷ Concluding Observations of the Committee on the Rights of the Child, CRC/C/15 ADD188 (4 October 2002), paragraph 36.

³⁸ *Z & Others v UK*, (EurCtHR), App.No. 29392/95, (10 May 2001).

In the case of *E and Others v UK*³⁹ the European Court found a breach of Article 3 and Article 13 of the ECHR in respect of the failure by the state to protect four applicants from sexual and physical abuse, which amounted to inhuman and degrading treatment. The European Court stated in this case that a failure to take reasonably available measures, which could have had a real prospect of altering the outcome or mitigating the harm, is sufficient to engage the responsibility of the State.

The duty of care on social services is owed to the children and not to the parents.⁴⁰

Article 3 ECHR has also been argued successfully recently in relation to the ill treatment of a child in police custody⁴¹ and the detention and subsequent deportation to the Congo of a five year old child by immigration authorities in Belgium for nearly two months in a closed centre initially intended for adults.⁴²

In Northern Ireland, the rights of the child under Articles 3 and the positive obligations on the state to protect the rights of the child to freedom from torture, inhuman and degrading treatment or punishment under Article 3 have been argued in the High Court and the Court of Appeal in the case of “*In the Matter of an Application by E for Judicial Review*” in the context of the protest affecting the children attending the Holy Cross Girls Primary School in 2001.⁴³

The nature of the State’s positive obligation towards children under Article 3 has been stated by the European Court of Human Rights in the case of *A v UK*⁴⁴ as being as follows:

“The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, included such ill treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity.”

This position was then reiterated in *Z and Others v UK*⁴⁵:

“The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure everyone within their jurisdiction the rights and freedoms

³⁹ *E and Others v UK*, EurCtHR, App. No. 33218/96, (26 November 2002).

⁴⁰ *L v Reading Borough Council* [2006]EWHC 2449

⁴¹ *Okkali v Turkey* judgement of the EurCtHR, 17/10/2006

⁴² *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, Eur Ct HR, 12/10/2006

⁴³ [2003]NIQB 39, [2004] NIQB 35, [2006] NICA, 37.

⁴⁴ See note 34, para 22.

⁴⁵ See note 38, para 73.

defined in the Convention taken together with Article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill treatment of which the authorities had or ought to have had knowledge.”

The European Court of Human Rights has also stated in the case of *E v UK*⁴⁶ that a failure to take reasonably foreseeable measures which could have had a prospect of altering the outcome or mitigating harm is sufficient to engage the responsibility of the State and that in this case the Court was satisfied that the pattern of lack of investigation, communication and co operation by the relevant authorities disclosed must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid or at least minimise the risk or the damage suffered. In assessing whether treatment of a child falls within the scope of Article 3 the European Court of Human Rights has confirmed that regard must be had to the fact that the Convention is a living instrument which must be interpreted in light of present day conditions:⁴⁷

“In order to fall within the scope of article 3, the ill treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. In order to carry out this assessment, regard must be had to the fact that the Convention is a living instrument which must be interpreted in light of present day conditions and that the increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. “53 It [the Court] reiterates that the obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill treatment administered by private individuals. Steps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society, and should include reasonable measures to prevent ill treatment of which the authorities have or ought to have knowledge. 54. In this connection, the Court must examine whether or not the impugned regulations and practices and in particular the manner in which they were implemented in the instant case, were defective to the point of constituting a violation of the State’s positive obligations under Article 3 of the Convention.”

⁴⁶ See note 39, paras 99-101.

⁴⁷ See note 42, paras 48 and 50 -55.

Contact and reunification

The European Court has been very clear in its judgments about the importance of contact for children who have been separated from their parents and has also stated that in implementing care orders the ultimate aim should be reunification if possible with parents.⁴⁸ In the case of *Kutzner v Germany*⁴⁹ the applicants lived with their parents and unmarried brother on an old farm with their two daughters aged 5 and 4. In February 1997 an order was made withdrawing the parents' rights to decide where their daughters should live on the grounds that the parents "lacked the intellectual capacity" to bring up their children properly. In May 1997, the court withdrew all parental rights and in July 1997 the two children were placed in two separate unidentified foster homes. The parents did not see their children for 6 months. Thereafter the parents saw the children for one hour monthly in the presence of 8 representatives from social services later extended to two hours monthly. The European Court found that not enough consideration had been given by the German authorities to additional measures of family support as an alternative to separation from parents. The European Court reiterated that a care order should in principle be regarded as a temporary measure and that any measures implementing temporary care should be consistent with reunification with parents. A violation of Article 8 was found with regard to the parents' rights and damages were awarded.

More recent judgments of the European Court of Human Rights have re-emphasised these principles. A violation of Article 8 of the ECHR was found in the case of the restriction of contact by the authorities of between a five year old boy and his father over a six year period. The child had been placed in a residential children's home and subsequently a foster placement. The European Court of Human Rights reiterated the principles that a care order should be regarded as a temporary measure and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parent and child and also that there was a positive duty on the state to take measure to facilitate family reunification as soon as reasonably feasible.⁵⁰ The European Court of Human Rights has also found a breach of Article 8 of the ECHR in circumstances where the applicants' five children had been taken into care due to the fact that the applicants were unable to find suitable housing. In this case the Court was of the view that the underlying problem was a lack of resources and that the Czech authorities could have assisted the family with improving their living conditions rather than interfering in such a serious way with their Article 8 rights.⁵¹

The Child's Right to be Heard/Separate Representation of the Child

Procedural fairness is of particular importance in the context of family proceedings and administrative decisions which impact upon the Article 8 rights of children and young

⁴⁸ *Johansen v Norway*, (EurCtHR), App. No. 17383/90, (17 August 1996).

⁴⁹ EurCtHR, App No 46544/99 (26 Feb 2002).

⁵⁰ *R v Finland*, App No 34141/96, Eur Ct HR, 30/08/2006.

⁵¹ *Wallova and Walla v the Czech Republic*, Eur Ct HR, 26/10/2006.

people. I dealt extensively with this topic in my last paper in 2006 which can be obtained from the Children's Law Centre. I however wish to re emphasise some case law and a number of points with regard to the child's right to be heard and the separate representation of children and young people.

The High Court in Northern Ireland has considered the wishes and views of children in the context of non Hague Convention abduction and ultimately refused to order return of the children in this case to Bahrain.⁵² The judge in this case stated that one important yardstick against which the family justice system in Northern Ireland must be evaluated is article 12 of the UNCRC. He went on to say:

*"It must be remembered that a child is a person with human dignity and not merely the object of a parental dispute. A child's fundamental rights including the right to be heard, must be respected in all forums including the confounds of the Hague Convention and non- Convention cases. A child therefore possesses the right to self – expression. Equally a court must be wary not to give undue weight to the views of children particularly when they are very young. Only in those cases where there is some evidence before the court that the child is capable of giving his or her own view is such an investigation warranted in the particular circumstances of each case."*⁵³

Further consideration was given to the importance of the voice of the child in *E (Voice of the Child) [2005]*.⁵⁴ In the context of the wishes and feelings of a 12 year old child in wardship and residence proceedings, the judge referred to the "gathering momentum of the importance of listening to children" and taking into account their perspectives when decisions are being made about them;

"One important yardstick against which the family justice system in Northern Ireland must be evaluated is Article 12 of the UNCRC to which the United Kingdom is signatory ...As stated in Re S, N and C, I do not believe it is helpful or appropriate for me to set in stone the age at which a child is likely to be of sufficient maturity to give informed views. This will undoubtedly vary according to the individual intelligence and maturity of the individual child and the circumstances of the case. Nor do I believe there is any fixed method for obtaining those views."

In *Mabon & Mabon*⁵⁵ the Court of Appeal allowed an appeal on behalf of three children seeking separate legal representation under Rule 9.5 of the Family Proceedings Rules 9.5.1 in England emphasized the importance of courts complying with article 12 of the UNCRC and stated as follows:

"the Rule is sufficiently widely framed to meet our obligations to comply with both article 12 of the UNCRC and Article 8 of the ECHR, providing that judges correctly focus on the

⁵² *Re S, N & C*, (Non –Hague Convention Abduction: Habitual Residence: Child's Views) [2005] NI Fam

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⁵³ See above, paragraph 12.

⁵⁴ [2005]NI Fam 12.

⁵⁵ [2005] EWCA Civ 634

sufficiency of the child's understanding and, in measuring that sufficiency, reflect the extent to which, in the 21st century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life... unless we in this jurisdiction are to fall out of step with similar societies as they safeguard article 12 rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare."

Section 122 of the Adoption and Children Act 2002 has introduced a mechanism for the introduction of separate representation of children in private family law cases in England and Wales. In Northern Ireland there has been no amendment to the Children (NI) Order 1995 to allow for the separate representation of children and young people in the family proceedings courts. Furthermore, Article 36 of the Family Homes and Domestic Violence (NI) Order 1998 which would allow for separate representation of children in domestic violence cases has never been commenced. The Children Order Advisory Committee produced a detailed report on this matter in 2005⁵⁶ and there is a commitment as outlined above in the 2007 Action Plan for the Strategy for Children and Young People to address this gap in provision and we await the outcome.

In the context of international abduction of children, by virtue of Article 11.2 of the Revised Brussels II Regulation⁵⁷ children must be given the opportunity to be heard (when applying articles 12 and 13 of the Hague Convention and in cases to which the Regulation applies) unless this is inappropriate having regard to age or maturity. Thus, in the House of Lords case of *Re D (A Child) (Abduction: Foreign Custody Rights)* 2006⁵⁸ the House of Lords permitted an 8 year old to intervene in the child's mother's appeal against a Hague Convention return and Baroness Hale stated that as a result of Article 11 (2) "children should be heard far more frequently in Hague Convention cases than has been the practice hitherto" and that these views should be obtained at the outset of proceedings. She suggests three possible ways of hearing the child ranging from full scale legal representation of the child or a report from an independent CAFCASS officer or other professional to a face to face interview with the judge.⁵⁹

Legal Standing of the Child in Judicial Review Proceedings

The child must show that he or she has sufficient interest in the case in order to have locus standi in judicial review proceedings. It has long been established that in the case of school admissions cases concerning the parental preference with regard to secondary schools it is only in exceptional circumstances where the children will be the proper applicants.⁶⁰ However, as stated in Larkin and Scoffield's recent text on judicial review⁶¹ this appears to be narrowly confined to these admissions cases. Thus in the case of *Re M*

⁵⁶ COAC, *The Separate Representation of Children in Private Law Proceedings*, 2005, www.courtsni.gov.uk

⁵⁷ EC No. 2201/2203

⁵⁸ [2006] UKHL 51

⁵⁹ Above, paragraph 60.

⁶⁰ *Anderson & O Doherty* [2001] NIQB 48.

⁶¹ *Judicial Review in Northern Ireland A Practitioners Guide*, Larkin and Scoffield, SLS, 2007

(*Good Shepherd Primary School*)⁶² where a child applicant challenged by way of judicial review a suspension against him, at first instance the judge stated:

“the school’s admissions criteria cases arise out of parental grievances because of parental choice is being affected. In the present case the grievance is that of M [the child] who has suffered the suspension.”

The issue of standing has also been adjudicated upon in the context of a challenge to a planning decision allowing the erection of mobile phone masts in which the judge referred to the decision in *Anderson and O Doherty* as follows:

*“In the above instance the rights in question are generally those of the parents. However, in a case where the rights in question are those of a minor and the minor is affected by the outcome of the decision then that minor has sufficient interest and will have standing for the purposes of the Judicial Review proceedings...it is not an abuse of process for the proceedings to be undertaken in the name of the applicant selected on the basis of entitlement to legal aid provided that the applicant has sufficient interest.”*⁶³

This principle has been reaffirmed in the case of *JN A Minor v SEELB* [2005] NIQB 46 which was an application for judicial review in which the applicant was a child with autistic spectrum disorder in which it is stated as follows:

*“The determination made in the Statement accordingly establishes the content of the educational provision which the State considers it appropriate to supply for the child. It must follow in my view that any unlawful conduct by a public authority in the determination of that provision is capable of giving rise to a breach of the right to education in article 2 of the First Protocol. In those circumstances I consider that the minor has established a sufficient interest in this case”.*⁶⁴

The matter was addressed again most recently in the case of *An Application by NBE (a minor) for Judicial Review*, *In the Matter of an Application by DK (A Minor) for Judicial Review* [2006] NIQB 91 where the judge states at para 34:

“The Court of Appeal decision in Anderson & O Doherty [2000] was a case concerning schools admission and the applications were made in the names of the children. While the Court of Appeal considered that in relation to schools the parent was probably the proper

⁶² [2004] NIQB 6, [2004] NICA 32. the child’s application was upheld by the Court of Appeal who allowed this section of the judgment to stand.

⁶³ *In the Matter of an application by Heather Murphy A minor by Peter Murphy* [2004] NIQB 85.

⁶⁴ See also, *JS (A Minor)* [2006] NIQB 40, The distinction that emerges in the education cases is between on the one hand those cases where the issue concerns parental rights.....On the other hand, there are education cases where the issue does concern an aspect of the right to education under article 2 of the First Protocol, such as Nolan’s application and the present case, where the issue engages directly with the rights of the child. The issue in the present case is whether or not the required minimum standards are being provided for this applicant’s educational needs. The issue engages Article 2 of the First Protocol and it is an issue in respect of which the applicant child has sufficient interest and it is appropriate that the child should be the applicant.

person to bring the application, the application was not dismissed on that ground. The issue arose in *Conor Green's Application [unreported, 2005]* where [the judge] questioned whether the child was the proper applicant. In *JN's Application [2005] NIQB 46* [the judge] decided that the child was an appropriate applicant in a case concerned with the educational provision that would be made for the child. I reviewed the authorities in *Theresa Murphy's Application [2004] NIQB 85* where a child of the family made an application in relation to a telecommunications mast near the family home where the parent might equally have made the application. I took the view that where a child has sufficient interest then that child can be the applicant even though the parent might also have been an appropriate applicant. This is that type of case where both the parent and the child have interest in the subject matter of the application, and although in some cases those interests may be different, in a case such as this the child has sufficient interest.”

Tara Caul, Head of Legal Unit, Children's Law Centre, November 2007.