

Lady Hale at the Welsh Observatory on the Human Rights of Children and Young People

Who's Afraid of Children's Rights?

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The idea of children's rights goes back a long way, at least as far as Eglantyne Jebb, one of the remarkable Jebb sisters, who founded the Save the Children Fund and drafted the first Declaration of the Rights of the Child in 1923. It was a simple and direct document:

1. The child must be given the means for its normal development, both materially and spiritually.
2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of stress.
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

What is there to quarrel with in that, apart perhaps from item 5: that is a value judgment about the good life with which those who believe that life should also be about the pursuit of pleasure and profit might disagree. But the rest is surely what we owe to every child. And the following year it was adopted by the League of Nations

as the Geneva Declaration of the Rights of the Child. The UN Convention on the Rights of the Child of 1989 simply spells out those rights in a great deal more detail and extends most of the rights granted to all people in later human rights instruments to children as well as adults.

But do children really have rights, rights which other people are bound to respect whether or not they think it in the child's best interests? Or do they only have interests, the right to have other people do what they or the authorities think best for the child? The Universal Declaration of Human Rights of 1948, which is the inspiration for all our modern western human rights instruments, boldly declares that 'all human beings are born free and equal in dignity and rights' but then goes on to say that 'They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. In other words, the foundation for human rights is the universal human capacity to reason and make moral judgments. But babies and young children cannot do this. So philosophers and academic lawyers have argued for ages about whether children really can have rights, mainly because they do not agree about whether people who have limited capacity to make choices for themselves can be said to have rights at all. They may agree that children have the right to grow up, but that is all.

The point can also crop up in real cases. Take, for example, the Irish case of *Lobe v Minister for Justice, Equality and Law Reform* [2003] IESC 3. This was about the right of an Irish-born child of non-Irish parents to live in Ireland with her parents. The Lord Chief Justice thought that the right to live in Ireland depended upon the capacity to make choices about where to live. As the child did not have that capacity, then she

could be deprived of the right to live in her own country by effectively having to leave with her parents. But if the right to live in Ireland depended upon the importance of the child's interest which was at stake, then an Irish child should always be enabled to live in her own country, whether or not she has the capacity to make the choice or indeed to live there without someone to look after her.

Children's rights campaigners could even take issue with the reasoning of the Supreme Court of the United Kingdom when the same issue came before us in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. This was about two children who had been born and lived all their lives in England, where they were well-established in their schools and local community. They were British citizens because their father was a British citizen. But their mother had an 'appalling' immigration history. She had over-stayed her leave to enter by many years, made two unsuccessful applications for asylum under false names, and been refused the benefit of an amnesty because of her bad behaviour. The children had of course been conceived when both their parents knew that she had no right to be here.

The Supreme Court held that it would be a disproportionate interference with the children's right to respect for their private and family lives to deport their mother to Tanzania, because their father (who was an alcoholic with HIV) was unable to look after them and so deporting her would mean that they would have to go too. The European Court of Human Rights in Strasbourg would expect us to interpret and apply article 8 of the European Convention consistently with article 3 of the United Nations Convention on the Rights of the Child. Article 3.1, of course, requires that in any decision affecting a child, the best interests of the child shall be 'a primary

consideration'. Strasbourg is not as careful about distinguishing between 'a primary', 'the primary, and 'the paramount' as we are. But the message is plain – the best interests of the child have to be given great weight when making decisions which affect her future – although they might be outweighed by other factors. But the children were not to be blamed for the bad behaviour of their parents, so in reality, as the Canadians recognised long ago, the welfare of the children can be a trump card.

That is certainly better than treating it as a matter of adults' rights or utilitarian public concerns – although I still meet people who cannot see what the fuss was all about and why the children should not be obliged to leave with their mother. But why should it be a matter of welfare at all? Why is it not a matter of the children's rights? The principal right of citizenship is to live in the country of which you are a citizen. You may not have the right to live anywhere else. That is why statelessness is such a disability that there is no power to deprive a UK citizen of his citizenship if he will be made stateless as a result. The right to live here brings with it many other rights, to education, health services and welfare benefits, so it is a very valuable right. The Supreme Court had no option but to treat it as a matter of 'best interests' because article 8 was the only route to a solution. And you could say that the children did have a right to stay here: it was just that their right was useless without their primary carer, their mother, so that it was their welfare rather than their rights which dictated the decision.

The Court of Justice of the European Union has also wrestled with this problem. In *Ruiz Zambrano (European Citizenship)* [2011] EUECJ C-34/09 they held that refusing a residence and work permit to the non-EU parents upon whom their EU

citizen children were dependent deprived the children of the enjoyment of the substance of their rights as a citizens. Later cases (*McCarthy v Secretary of State for the Home Department* [2011] All ER (EC) 729; and *Dereci v Bundesministerium fur Innere* [2012] All ER (EC) 373) have emphasised that this is an exceptional situation, where the citizen would otherwise be denied the genuine enjoyment of the substance of the rights conferred by being a citizen of the EU.

I dwell on this issue because I think it such a good example of the difference between children's rights and children's welfare. It also illustrates a gap in the coverage of the UN Convention. Article 7 comes next after the right to life in article 6, so it is obviously thought fundamental. It requires that 'the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'. It is worth remembering how important the right to an identity is – the right to be recognised and counted as a human being. It is the sine qua non of all the other rights. We tend to take it for granted in this country, where we think that birth registration has been efficient and more-or-less comprehensive since at least 1836. But there are millions of children elsewhere in the world whose existence is not officially recognised and counted and who may be denied their basic status as human beings as a result. This is known to be a problem in much of sub-Saharan Africa, so perhaps it is no coincidence that the Constitution of the Republic of South Africa, one of the most advanced Constitutions in the western world, has its own section on Children. (Other African states have followed their lead, and some Latin American Constitutions also make special provision for children.) Section 28(1)(a) says that every child has the right to a name and nationality from birth.

Another and perhaps even more striking example of the difference between children's rights and children's welfare is in the context of medical treatment. We are pretty confused about this in this country. On the one hand, we have section 8(1) of the Family Law Reform Act 1969, which states quite clearly that the consent of a child of 16 or 17 to any surgical, medical or dental treatment shall be as effective as if he were eighteen; and if he has given an effective consent, it is not necessary to obtain the consent of his parent or guardian. We also have the well-known decision in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, in which the House of Lords held that a child under 16 could give a valid consent to contraceptive advice and treatment. Lord Scarman stated the principle in general terms: '... as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed' (pp 188-9). So competent children can consent to medical treatment whatever their parents want.

But did Lord Scarman really mean 'whether or not'? Section 8(3) of the 1969 Act says that nothing in the section renders ineffective any consent which would have been effective had it not been passed. So if the parents could have given an effective consent at common law, even if a competent child refused it, this would have been enough. I think the logic of what Lord Scarman was saying is clearly to the effect that parents lose their right to decide upon medical treatment once the child gains it. But in two cases decided in the 1990s, doctors faced with adolescents refusing life-saving treatment made their patients wards of court in order to seek authority to treat. Both

applications involved adolescents with serious psychological problems. The Court of Appeal held that under its inherent jurisdiction the court could override a young patient's wishes and authorize life-saving treatment in his or her best interests.

In *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, the court authorised the compulsory use of anti-psychotic drugs to treat a 15 year-old suffering from increasingly paranoid and disturbed behaviour. In *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, it authorised the compulsory treatment of a 16 year-old in a dangerously anorexic state. The same principle has been followed in later cases. In *Re M (Medical Treatment: Consent)* [1999] 2 FLR 1097, for example the court overrode a 15 year-old's objections to a heart transplant, without assessing whether she was *Gillick* competent or not, on the basis that it was in her best interests. In *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, the court overrode a 16 year-old anorexic girl's refusal to accept treatment, irrespective of her capacity to consent on her own behalf. And in *South Glamorganshire County Council v W and B* [1993] 1 FLR 574, the court authorised a local authority forcibly to remove a disturbed 15-year-old from home to a specialised psychiatric unit for assessment and treatment, despite having held that she was *Gillick* competent.

Although not necessary for the decision in *Re W* and *Re R*, it was also said that *anyone* with parental responsibility for a minor patient could authorise doctors to carry out much needed treatment despite the patient's own clear opposition. This could be granted whatever the patient's age (over or under the age of 16) and whether or not he or she was *Gillick* competent. However, it is one thing to allow a *court* to override the child's decision after a fair hearing in which all sides of the argument

have been properly ventilated. It is another thing to allow a parent – or worse still a local authority with parental responsibility – the right to force unwanted treatment upon a competent child. This does look inconsistent with the *Gillick* principle as stated by Lord Scarman.

But might not the cases accepting that the courts have power to do so also be inconsistent with that principle? If the courts are acting in the place of parents, why should they have any more powers than parents have? The point has not yet come before the Supreme Court of the United Kingdom, but it did come before the Supreme Court of Canada. In *AC v Manitoba (Director of Child and Family Services)* [2009] SCC 30, AC, a 14 year-old Jehovah's Witness, had been forced to undergo blood transfusion treatment for a life-threatening condition. Federal legislation gave the courts a discretionary power to authorise medical treatment for adolescents under the age of 16, even against their wishes. The court's survey of international approaches to this problem showed that other jurisdictions were finding it equally difficult to allow adolescents to reject life-saving treatment: '. . . courts . . . have generally not seen the "mature minor" doctrine as dictating guaranteed outcomes, particularly where the consequences for the young person are catastrophic' (para 69). The majority considered that the legislation did not unduly infringe AC's right, under the Canadian Charter of Rights and Freedoms 1982, to freedom from forced medical treatment. The legislation reflected the state's legitimate concern to protect younger adolescents as a vulnerable group from making decisions before attaining capacity for truly mature and independent thought. Binnie J dissented, on the ground that a finding of competence should negate the court's discretion to override the young patient's

refusal: at that point, as with an adult patient, the patient gains a *right* to determine his or her own medical treatment.

The dilemma illustrates, better than anything else, the conflict between the child's best interests and the competent child's right to self-determination. Of course, it could be said that no child has the competence to refuse treatment which will save his life or prevent serious harm to his health or development. The New South Wales Law Reform Commission (2008: 2.29-2.34) has argued that the brain of an adolescent may, in cognitive terms, be far more developed than that of a toddler, but his capacity to make wise health care decisions may be greatly hampered by emotional and social immaturity, combined with a predilection for risk-taking behaviour and a concern only for the short-term consequences of decisions. Adolescents commonly experience mood swings ranging from intense exhilaration to extreme depression - probably at least in part attributable to the fact that their brains are still undergoing profound physical changes, combined with hormonal development. Furthermore, adolescence sometimes marks the onset of psychological ill-health which hampers the ability to consider treatment options with any detachment.

On the other hand, in developmental terms, an adolescent's brain is more like that of an adult than that of a young child – and an adolescent patient may be just as intelligent as many adult patients. The fact that serious risks or consequences may result from an *adult's* refusal of medical treatment does not undermine his or her right to self-determination - a choice not to allow treatment must be respected, whether or not the professionals agree with the patient's decision. Why should an adolescent

patient be treated any differently, particularly now that society perceives young people as individuals with rights and points of view of their own?

Somehow I think that the UN Convention would be on the side of the English and Canadian courts. Not only does the child have the right to life, but the Convention does not spell out the child's right to self-determination, only her right to be consulted. Article 12.1 requires that States Parties 'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. Article 12.2 requires in particular that the child be given the opportunity to be heard in any judicial and administrative proceedings affecting him, either directly or through a representative or an appropriate body . . .'

The right to be heard is of course a great advance on the duty 'to be seen and not heard' (as my father used jokingly to say of and to his children). But it is emphatically not the same as the right to decide. The UN Committee on the Rights of the Child (General Comment No 12) explains that it is a way of securing that decisions are made in the best interests of the child, so it is clear that the duty in article 3 to make the best interests of the child a primary consideration in all decisions affecting him can override the duty to consider the child's views. By article 3.2, states parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her . . .'

It has been something of a struggle even to get the voice of the child heard in judicial and administrative decisions which closely affect him. For a long time the only reference to ascertaining the wishes and feelings of the child was in adoption law. But the Children Act 1989 placed a new duty on the court hearing legal proceedings about the future of the child to take account of the wishes and feelings of the child, considered in the light of his age and understanding, when deciding what would best serve the paramount consideration of his welfare. Hence there is some concern that the proposed new presumption in favour of shared parenting will conflict both with the paramountcy of the child's welfare and with the duty to take account of the child's views (NSPCC 2012, British Academy, 2012, CRAE, 2013,).

The 1989 Act also placed a duty on local children's services authorities to do the same in relation to decisions about a child whom they are looking after, and in 2004 this was extended to decisions about services to be provided for a child in need in the community and about whether or not to bring care proceedings to protect a child from harm. Local authorities seem to be reasonably good at doing this. A survey of looked after children (Ofsted, 2012) found that over half said they were usually or always asked their opinions on things that mattered to them and 85% said that their views always, usually or sometimes made a difference.

But things are different in families. Most separating parents do not go to court to sort out the arrangements for their children. On the whole we are glad about that, because court processes are slow, expensive and adversarial, generally conducive to less rather than more co-operation in the child's best interests. But how can we work out satisfactory ways of taking account of the child's views when their parents are making

their own arrangements? We can urge the parents to think carefully about what will best suit their children, but we have to be careful about advising them to ask their children what they want. Many children, especially older children, do not want to be asked to choose between their parents. Family mediators will urge the parents to take a child-centred view and some may even try to involve the children in the mediation, either directly or indirectly. But this is not a professional requirement, any more than it is a professional requirement of the lawyers brokering a deal to do so.

Even when the adults disagree and the case goes to court, the courts are reluctant to hear from the children direct. They want to hear their views through the professionals, either Cafcass or the expert witnesses. It would be understandable if they feared that if they began to hear directly from children, the services of the professionals upon whom the family courts depend so much would be further reduced or even taken away. But in fact, their reluctance to engage directly with children goes deeper than that.

Not surprisingly, we do not like the idea of children being treated as witnesses in our adversarial system of court hearings. But sometimes there is no option. The Supreme Court held in *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12 that where a child was making allegations against a parent, it was wrong to have a presumption against that child giving evidence. The rights of all the parties, to a fair trial and to respect for their family lives, had to be balanced against one another.

Some may see this as a bad thing – requiring a child to give evidence about the abuse she has suffered could turn the proceedings which are designed to protect her into a further abuse. Others may see it as respecting the child as a real person with her own

account to give of what has happened to her. Hearing the authentic voice of the child must on occasions include finding a sensible way of assessing the reliability of what she has to say. This need not mean giving the parties a free hand to cross-examine the child in whatever way they think will most effectively destroy her. Child psychiatrists cannot understand why they, and police or social workers conducting video'd Achieving Best Evidence interviews, are not allowed to ask leading questions, while cross-examining advocates ask nothing else. But devising new ways of getting at the truth is easier said than done.

Nor do the family judges like the half way house of seeing the child privately, partly because they cannot give the child a guarantee of confidentiality and will have to report anything which might affect the result to the parents. This is not a comfortable experience if the parents cannot question the child about it. But I suspect that for some it is not a comfortable experience anyway. Talking to children about difficult things is not an easy thing to do, and is even less easy if you do not have much experience of talking to children about easy things.

The upshot is that the family judiciary, and the family justice council, have taken the view that, even though children may be encouraged to come to court and see where their futures will be decided, this is more in the nature of a public relations exercise – reassuring the child that she is seen as a real person and enabling her to learn more about what goes on in court – rather than an exercise in helping the judge to make the right decision. But we all love meeting the child with her new parents *after* an adoption – often these days a bitterly contested one - has gone through.

And if it is hard to find reliable mechanisms for consulting children in the proceedings which concern their future care and upbringing, it is even harder in other kinds of decision. It used to be thought that there was little point in consulting them about child abduction proceedings under the Hague Convention, because the court had so little discretion to refuse to return a child who had been wrongfully taken or kept away from her home country. But the Brussels II revised regulation does require this in European Union cases and the House of Lords held that it should apply to all. It is even more difficult to work out how to consult the children involved in immigration and asylum decisions about their parents. But clearly this ought to happen.

It ought to be easier to consult the child in cases which directly concern him, such as school exclusions, admissions, and provision for special educational needs and disability. But the recent changes to legal aid will make it more difficult for children to get legal advice and representation in respect of these issues. And the Department for Education seems inconsistent about whether children should have their own right to participate in such proceedings separately from their parents. Recent proposals for reforming provision for children with special educational needs (Department for Education, May and September 2012) contain little detail about how children will be able to express their views on matters that affect them, and the only ones which do deal with participation apply only to parents and children of 16 and over; but the Department is piloting schemes which will give children the right to bring their own appeals in special education and disability discrimination cases. On the other hand, new guidance and regulations on school exclusions, while stressing that children should be given an opportunity to present their views, does not give them the right to appeal their own exclusion (Department for Education, June 2012).

So the legal system is frightened of letting children take their own decisions and make their own mistakes; it is frightened of listening to what children have to say; but it is not so frightened of holding children responsible for the crimes which they commit. As is well known, we have one of the lowest ages of criminal responsibility in Europe. Not only that, in 1998 the (rebuttable) presumption that a child under 14 was incapable of having the guilty mind which is an essential element of most criminal offences was abolished. This means that the criminal justice system operates on a model of responsibility which is completely different from the approach of the civil law in *Gillick*, which looks to the capacity of the individual child to understand the implications of what she is doing.

Bodies as diverse as the UN Committee on the Rights of the Child (2008), the Royal Society (2011), and the Centre for Social Justice (2012) have called for it to be raised, but the Government has rejected this, arguing that setting the age at 10 ‘allows frontline services to intervene early and robustly, preventing further offending and helping young people develop a sense of personal responsibility for their behaviour’ (2012).

Not only that. We went through a phase of bringing more and more children into the clutches of the criminal justice system. When the Children Act 1989 was being developed, we were very keen to separate the issue of whether parents were looking after their children properly from the issue of what the state should do about delinquent children. At that stage, diversion was all the rage. Very few children were placed in custodial settings within the penal as opposed to the child care system. But

in 1998 the government decided that diversion had gone too far. It restricted police discretion to issue reprimands and cautions and gave them targets for offenders brought to justice, all of which pushed more and more children into the youth justice system, with its escalating scale of responses. The invention of ASBOs, ostensibly a civil measure, but breach being punished as a criminal offence, also contributed. Not surprisingly there was an explosion in the numbers of children in secure institutions, but fewer and fewer of these were sent to secure children's homes (which are much better suited to their educational and developmental needs) and more and more to secure training centres and young offender institutions in the penal system (where the quality of education provided has been found wanting).

These institutions raise many children's rights issues. Children die in them. There have been around 33 child deaths in custody since 1990 (Inquest, 2012). These have of course been investigated individually, but there has been no overall inquiry into the underlying systemic and policy issues, which makes it hard for lessons to be learned and improvements made. The Equality and Human Rights Commission (2012) has suggested that this may put the UK in breach of its obligation under article 2 of the European Convention on Human Rights, which requires that deaths for which the state may be responsible (presumably including all deaths in state-mandated custody, even if the institution is privately run) be independently investigated so that lessons may be learned and individuals may be brought to justice.

Then of course there is the use of restraint – the methods which may be employed and the reasons for using it. These are not limited to holding the child in order to prevent his doing harm to himself or others or running away. Thus the techniques which are

authorised for use in penal institutions include those which deliberately cause pain to the child – ostensibly ‘distraction’ techniques but obviously capable of being perceived as physical punishment; and until the courts put them right, it was believed that these could be used for ‘good order and discipline’ – again capable of being perceived as punishment rather than the prevention of harm. It is also alarming that some institutions find it necessary to use these techniques far more often than others do. The government introduced a new system for ‘Minimising and Managing Physical Restraint’ last year, and Ofsted now requires its STC inspectors to look closely at whether restraint is being used as a last resort and ‘legitimately, proportionately and safely by trained staff’ (HMIP, Care Quality Commission and Ofsted, 2012). So it does look as if the problem is being taken seriously. But there is a good deal of evidence that children in custody do not have much confidence in the complaints mechanisms available to them (Office of the Children’s Commissioner, 2012; CRAE, 2012).

However, there has recently been a significant fall in the number of children in custody - in October last year it was just under 1600, compared with a high of around 3000 in 2002-3 – and in the numbers of children entering the system and receiving out of court or community penalties, perhaps because police targets for numbers of offenders brought to justice have now been abandoned (Ministry of Justice, 2013). So perhaps things are on the move. But the Children’s Rights Alliance for England has suggested that there is still no real distinction in law, policy and practice between how the state responds to adults and children who are in conflict with the law. The law still includes punishment, as well as reform and rehabilitation, among the aims of sentencing for children; it does not provide that custody is a last resort and that if

resorted to it should be in a secure children's home rather than a penal service establishment; it continues to allow children to be tried in adult courts; and (until a recent High Court decision) it allowed 17 year olds in police custody to be treated as if they were adults. All of this is contrary to recommendations made by the UN Committee on the Rights of the Child at their last periodic review in 2008.

The Committee was 'concerned at the general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State Party, including in the media, and may often be the underlying cause of further infringement of their rights' (2008, para 24). They recommended that the government take 'urgent measures to address the intolerance and inappropriate characterisation of children, especially adolescents, with the society, including in the media'. The National Council of Voluntary Organisations, for example, felt that the tendency of the media to misreport the numbers of children involved in the 2011 riots was typical of the negative stereotyping of young people (NCVO, 2012).

But might things be better for children in Wales? In England, there is no general duty on public authorities to subject their policies and practices to a children's rights audit, to consider whether they comply with the UN Convention on the Rights of the Child, and to see whether they could be made to do so. The highest it gets is section 11 of the Children Act 2004. This imposes a duty on a wide range of public bodies, including local authorities, health service bodies, the police, probation and prison services, to ' . . . make arrangements for ensuring that . . . their functions are discharged having regard to the need to safeguard and promote the welfare of children'. In *Castle v Commissioner of Police for the Metropolis* [2011] EWHC 2317, it was held that this

did not only mean that the police must have institutional arrangements aimed at carrying its duties into effect, but that they must actually perform their functions in individual cases in a way which takes into account the need to safeguard and promote the welfare of the individual child concerned. The duty was extended to the UK Borders Agency by section 55 of the Borders, Citizenship and Immigration Act 2009, following the UK's withdrawal of its reservation from the UNCRC on immigration matters. In *ZH (Tanzania)*, the Secretary of State accepted that the duty applied, not only to how the Agency looks after the children for whom it is responsible, but also to how it makes its decisions on whether to grant asylum or leave to enter or remain in the United Kingdom.

That duty is clearly an attempt to translate article 3.1 of the UN Convention into law. But it goes nowhere near as far as the Welsh have gone. From very early on, the National Assembly for Wales has taken an interest in children's issues. In 2001 it established the Children's Rights Commissioner for Wales with a broader remit than his English counterpart was (later) given when set up by the Children Act 2004, being able to undertake individual case work from the start, whereas the English Commissioner is only just being given a limited power to do this. In 2002, the National Assembly adopted seven core aims for children in 2002, which look remarkably like the five principles in Eglantyne Jebb's Declaration. Children and young people should (1) have a flying start in life; (2) have a comprehensive range of education and learning opportunities; (3) enjoy the best possible health and [be] free from abuse, victimisation and exploitation; (4) have access to play, leisure, sporting and cultural opportunities; (5) [be] listened to, treated with respect, and have their race and cultural identity recognised; (6) have a safe home and a community which

supports physical and emotional wellbeing; and (7) [be] not disadvantaged by poverty. And in 2011, the Assembly passed the Rights of Children and Young People (Wales) Measure.

You do not need me to tell you that section 1 requires the Welsh Ministers to have ‘due regard’ to the Convention on the Rights of the Child (and the two optional protocols to which the UK is party), from 2012 to 2014 in making any decision about proposed legislation, the formulation of a new policy, or the review of or change to an existing one (s 1(2), (3)), and from 2014 in exercising any of their functions (s 1(1)). Sections 2 and 3 require Ministers to make and publish a scheme setting out their arrangements for doing this, which they have done. Most importantly, this sets out a six step process for having ‘due regard’ (what’s the piece of work; which UNCRC rights does it help to realise or affect; does it breach those rights or could it give further effect to them; how might we prevent breaches or give the rights further effect; what options and advice to provide to Ministers; and keeping records of how the duty was complied with). Section 4 requires them to report to the Assembly and the public every five years (following their first report by 31 January 2013) on how they have complied with the section 1 duty. Section 5 requires them to promote knowledge of the Convention amongst the public, including children. And section 6 gives them power to amend legislation or a prerogative instrument if a section 4 report concludes that this would be desirable in order to give further or better effect to the rights and obligations set out in the Convention.

This goes much further than the English duty, because it covers the whole range of government activity and the broad sweep of the Convention rights. There is a certain

amount of case law on what having ‘due regard’ means, where it is required in race and disability discrimination law. While it is not fatal to make no reference to the duty in the actual decision taken, it may sometimes be fatal if officials do not draw the duty to Ministers’ attention when giving their advice: but the Supreme Court gave this argument short shrift in *R (McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, para 24, because it was obvious that the council had the needs of disabled people in mind when deciding what provision to make for a disabled person. So the Welsh scheme, which clearly requires this to be done, should be an improvement. Nevertheless, a ‘tick box’ approach is not enough. ‘What is required is that the duty is exercised in substance, with rigour and an open mind’ (HHJ Jarman QC in *R (Boyejo) v Barnet London Borough Council* [2009] EWHC 3261, para 55; but derived from Rix LJ in *R (Domb) v Hammersmith and Fulham London Borough Council* [2009] EWCA Civ 941, para 53).

The great test will come, not with policies and decisions which obviously have an impact upon children’s rights, but with those where the impact is less obvious but nonetheless serious. The examples of changes to civil legal aid and to the benefits system come to mind. But of course all of this will only apply to measures and decisions which are within the competence of the Welsh Assembly and Ministers. I would hate it if the Supreme Court of the United Kingdom had to adjudicate upon a challenge that a measure designed to enhance respect for children’s rights in the Principality was not within its competence.