

The legislative competence of Stormont to incorporate the UNCRC into Northern Ireland law and the relationship between the UNCRC and the HRA in Northern Ireland

Introduction

The UNCRC was ratified by the United Kingdom government on 16 December 1991. Responsibility for compliance with the reporting obligations under the UNCRC lies with the government in Westminster. However, some of the rights under the UNCRC relate to devolved matters pursuant to the Northern Ireland Act 1998 (“NIA”). As a result Northern Ireland ministers have devolved responsibility for implementation of aspects of the UNCRC.

The last oral hearing held by the UN Committee in relation to the implementation of the UNCRC in the United Kingdom was in September 2008, with the Concluding Observations of the UN Committee being published on 20th October 2008:

Committee remains concerned that the principles of the Convention are not duly taken into account in all pieces of legislation throughout the country and that the State party has not incorporated the Convention into domestic law nor has ensured the compliance of all legislation affecting children with it. (para. 10)

The UNCRC has yet to be incorporated into the domestic law of Northern Ireland, albeit that some UNCRC rights do already form part of Northern Ireland law through other legislation.

It is appropriate to now take stock of the position as the UN Committee’s pre-sessional working group is scheduled to consider the List of Issues for the United Kingdom in October 2015, with the UN Committee meeting in May 2016 to consider the United Kingdom State Report.

Requirement for incorporation

The UNCRC is an international human rights treaty with the status of legally binding international instrument. That it has not been incorporated into domestic law has real significance for the ability of the courts in the United Kingdom courts to rule on any rights that it confers on children.

However, that does not mean that the UNCRC is without significance in the domestic setting. The courts will look to the UNCRC as an aid in interpreting legislation and in the interests of achieving a consist approach. See Weatherup J in *McMillen and Board of Governors of Ballyclare High School* [2008] NIQB 21, para.16:

I refer to the United Nations Convention on the Rights of the Child. Article 3 provides that in all actions concerning children, public authorities, including schools, will ensure that the child's best interests shall be a primary consideration. Article 12 provides the right of a child to have their views heard on all decision affecting them and for those views to be given due weight. Articles 28 and 29 provide the right to education that develops each child's personality and talents to the full ... School discipline should be administered in a manner consistent with human dignity and conformity with European Convention rights. The effect of these provisions ... is that the courts, where possible, will interpret domestic and Convention law consistently with the provisions of the United Nations Convention and will act in accordance with Treaty obligations unless domestic legislation requires otherwise ...

*The provisions of the Convention are relevant to the interpretation of the European Convention and as Lord Bingham stated in *Dyer v. Watson* [2004] 1 UKPC at [23] "colour the courts approach".*

See also Carswell LJ in *Re E* [2008] UKHL 66 (Holy Cross primary school case):

A further argument was ... that the police had failed to have regard to the best interests of the children in carrying out the operation. This is based on the requirement in article 3(1) of the United Nations Convention on the Rights of the Child 1989, that in all actions concerning children 'the best interests of the child shall be a primary consideration.' The Convention was ratified by the United Kingdom in 1991, but has not been incorporated into domestic law. The requirement is nevertheless a consideration which should properly be

taken into account by the state and its emanations in determining upon their actions. It is accordingly a matter which may be relevant in determining whether the actions of the police satisfied the obligations placed upon them by article 3 of the Convention.

See more recently, Stephens J in *JR 70's Application* [2014] NIQB 5, on the interpretation of article 3 of the UNCRC in the context of article 12, article 8 of the European Convention on Human Rights (“ECHR”) and decisions made under Rule 65 of the Prison and Young Offenders’ Centre Rules (NI) 1995:

There are many ways in which the voice of the child can be heard but in relation to administrative decisions of this nature there is a treaty obligation for the voice of the child to be heard. At its most elemental overlooking or ignoring the interests of a child does not comply with Rule 65 as construed in accordance with the treaty obligation. The voice of the child will not have been heard and no consideration will have been given to the child’s interests as opposed to giving those interests primacy.

However, whilst there is an increasing tendency to refer to UNCRC rights and a willingness of the courts to apply the UNCRC as an aid to interpreting existing rights, the approach is not always consistent and therefore the extent of the influence of the UNCRC not always apparent. Nor the use of UNCRC in that way be said to be a substitute for children being able to enforce in Northern Ireland their rights under the UNCRC.

Power of the Northern Ireland Assembly to Incorporate the UNCRC

The starting point is the legislative competence of the Northern Ireland Assembly (“Assembly”). Unlike the Westminster parliament, which has the unfettered power to legislate in relation to any matter, the Assembly is a creature of statute and can only legislate in accordance within the authority devolved to it. The ambit of its legislative competence is determined by sections 6(1) and (2) of the NIA. Section 6 of the NIA defines competence at (2)(a)-(f) by identifying those areas where the Assembly does not have competence, rather than where it does.

The most significant of those provisions is (2)(b) concerning “*deals with an excepted matter*”. Section 98(2) of the NIA defines “*deals with an excepted matter*” restrictively: “*For the purposes of this Act, a provision of any enactment, Bill or subordinate legislation deals with the matter, or each of the matters, which it affects otherwise than incidentally.*” This

can be interpreted to mean that a provision which has only a minor effect on an excepted area can nonetheless lie outside the competence of the Northern Ireland Assembly.

Excepted reserved matters are defined in section 4 of the NIA and are set out in Schedule 2. Clearly, there are aspects of the UNCRC that ‘overlap’ with excepted matters. See for example para.8 of Schedule 2 on nationality, immigration and asylum and articles 7, 10 and 22 of the UNCRC on rights in respect of nationality, family reunification and refugee children respectively. The Assembly, therefore, has no competence to incorporate UNCRC in its totality.

The real issue is therefore the extent to which the Assembly has competence to incorporate the rights in the UNCRC that are **not** excepted matters. The most relevant for those concerns “*International relations*” as provided for in para.3(c) of Schedule 2, which are defined in section 98(1) of the NIA as: *any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights*. That obviously includes the UNCRC.

The issue then becomes the extent to which the incorporation of the UNCRC can be construed as “*observing and implementing international obligations*” in the manner referred to in para.3(c) of Schedule 2. The UNCRC obligations provide at article 4 that: “*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*”. However, the UNCRC does not impose a requirement on State Parties to incorporate the UNCRC itself. It is focused on the implementation of rights without prescribing how State Parties should achieve that. The approach taken the United Kingdom has been to meet its obligations under the UNCRC through a mixture of legislative and policy initiatives as opposed to the incorporation of the UNCRC itself.

If such an approach is adequate to meet the requirement at article 4, does that mean incorporation of the UNCRC is not required by the UNCRC and therefore is not to be construed as an international obligation? Does that mean the Assembly therefore lacks legislative competence? I do not think so. It is a distinction between ‘means’ and ‘effect’. The combined force of section 6, schedule 2 and section 98(1) is that the Assembly is not precluded from giving effect, by incorporation where necessary, to those UNCRC rights that are neither excepted nor reserved matters. Furthermore, section 83(2) of the NIA provides for an approach that errs on the side of competence: “*The provision shall be read*

in the way which makes it within that competence or, as the case may be, does not make it invalid by reason of that section, and shall have effect accordingly”.

Relationship between the UNCRC and the Human Rights Act 1998 in Northern Ireland law

Section 2 of the Human Rights Act 1998 (“HRA”) requires courts to take account of the jurisprudence of the European Court of Human Rights (“ECtHR”). In the *ZH (Tanzania)* case the Supreme Court interpreted the jurisprudence of the ECtHR as requiring the UNCRC to be considered when a child’s article 8 rights were engaged. Hence, in this indirect manner the UNCRC finds itself as an aid to courts considering the extent of the rights a child has under article 8 of the ECHR.

That approach had already been adopted in Northern Ireland. See Weatherup J in *Re TP (a minor by his father and next friend)’s Application for Judicial Review* [2005] NIQB 64, para.29:

In interpreting art 8 rights the Court will take into account relevant international obligations. R (on the application of P and Q) v. Secretary of State for the Home Department [2001] EWHC Admin 357, [2001] 2 FLR 383 ... At para 33 Lord Woolf CJ accepted that while the United Nations Convention on the Rights of the Child (UNCRC) was not part of domestic law, the obligations under the UNCRC were relevant because (a) they could inform the Court’s decision, and (b) they are taken into account by the European Court of Human Rights when applying art 8 and therefore in accordance with s 2(1) of the Human Rights Act 1998 have a place in the interpretation of Convention rights.

Nevertheless the Centre [JJC] and the Court should in any event address the applicant’s Convention rights in the light of the international obligations that include the best interests of the applicant as being a primary consideration. All of the aspects of the international obligations may be described for shorthand purposes as the welfare principle ... Accordingly all of the above matters inform the approach to Article 8, and that includes what has been labeled as the welfare principle arising from the international obligations.

There has been subsequent Northern Ireland jurisprudence since the *TP* and *ZH (Tanzania)* cases recognizing the relationship between the UNCRC and the HRA. See *Re JR 38* [2013] NIQB 44 concerning the judicial review by a child of the PSNI’s decision to

release to local newspapers for publication images of those suspected of being involved in sectarian rioting and violent offending at an interface area in 2010. It was argued that the publication of the photographs constituted a breach of the child's rights under article 8 of the ECHR and that in interpreting those rights it was necessary to have regard to the protections for children contained in the UNCRC. Morgan LCJ accepted that proposition, para.25:

Neither the UNCRC nor the Beijing Rules are justiciable as a matter of domestic law but it is common case that both inform the rights and values protected by Article 8 ECHR. Article 3 UNCRC provides that in all actions concerning children the best interests of the child shall be the primary consideration. Article 40 UNCRC recognises the desirability of reintegrating into society every child alleged to have infringed the criminal law and specifically guarantees the right to have the child's privacy fully respected at all stages of the proceedings.

That use of the UNCRC as a guide to interpret rights under HRA has been extended to other domestic provisions affecting children. In *JR 70's Application for Judicial Review* [2014] NIQB 5 Stephens J cited article 3(1) of the UNCRC which requires that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Conclusion

The incorporation of UNCRC rights into the domestic law of Northern Ireland will enable those rights to be enforced as entitlements rather than simply used as aids to the interpretation of existing rights.

However, the Assembly does not have the legislative competence to incorporate the entirety of the UNCRC into Northern Ireland law but neither does the Westminster parliament. The Assembly could though incorporate those aspects that are within its devolved powers.

Should it do so it is unclear what impact that would have on the interpretation and development of rights under the ECHR and the relationship between UNCRC and the HRA.

It would certainly focus greater attention on the whole issue of children as holders of their own rights.

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6 March 2015