



THE UNIVERSITY *of* EDINBURGH
Edinburgh Law School



together
Scottish Alliance for
Children's Rights

HUMAN RIGHTS ACT 1998 :

**A STUDY ON HOW THE HUMAN RIGHTS ACT 1998 HAS IMPACTED CHILDREN'S RIGHTS IN
THE UNITED KINGDOM IN ANTICIPATION OF SCOTLAND'S IMPLEMENTATION OF THE UNCRC
(INCORPORATION) (SCOTLAND) BILL AND FUTURE INCORPORATION OF INTERNATIONAL
HUMAN RIGHTS TREATIES**

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ABOUT TOGETHER (SCOTTISH ALLIANCE FOR CHILDREN'S RIGHTS)

Together (Scottish Alliance for Children's Rights) is an alliance of 497 children's organisations, academics and interested professionals. Our vision is that all children and young people growing up in Scotland have their human rights respected, protected and fulfilled, as enshrined in the UNCRC and other human rights conventions. To achieve this, we work with our membership, stakeholders and duty bearers to progress and achieve the realisation of children's rights in all areas of society.

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- Louise King (Just for Kids Law)
- Maria Galli (Children and Young People's Commissioner Scotland) (in her personal capacity)
- Mhairi Snowden (Human Rights Consortium Scotland)
- Professor Simon Hoffman (Observatory on Human Rights of Children (Wales))

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
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EXECUTIVE SUMMARY

Introduction

On 7 December 2020, as promised in the Conservative Party's manifesto, the UK Government [launched](#) the Independent Human Rights Act Review aimed to update the Human Rights Act 1998. However, the Scottish Government has made its position clear that [the HRA functions efficiently](#) in protecting and enhancing human rights in Scotland. This was evident when the Scottish Government [introduced](#) the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill on 1 September 2020. The Bill [intentionally replicates the HRA model, key features and approach](#) while at the same time, builds upon the HRA with the aim of ensuring the strongest protection for children's rights in Scotland. On 16 March 2021, [the Bill was passed unanimously by the Scottish Parliament](#) demonstrating the Scottish Government's, Parliament's, public services' and civil society's [commitment towards championing children's rights and making their rights real](#). Together has worked with Siti Zaleha Binti Mohd Ali, an LLM in Human Rights student from the University of Edinburgh to explore how the HRA has impacted children's rights in the United Kingdom in anticipation of Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and future incorporation of international human rights treaties.

The research began with analysis on the legal protections for children's rights in the UK prior to the HRA. Next, the research explored the progression and gaps in children's rights protection in the UK after the HRA. Finally, the research drew out the learning to inform Scotland's implementation of the UNCRC Bill and plans to incorporate international human rights treaties in the future.

What Were the Legal Protections for Children's Rights in the United Kingdom prior to the Human Rights Act 1998?

The dualist nature of the UK meant courts were [unable to fully utilise](#) the European Convention on Human Rights prior to the HRA. This is reflected in a series of earlier cases, for example, in *Re C (Interim Care Order : Residential Assessment)* [1996] UKHL 4. and *Kaur v Lord Advocate* [1980] ScotCS CSOH 5 wherein the courts tended to refer only to domestic legislations. In some cases like *X (A Minor) v Bedfordshire County Council and Others* [1995] 2 AC 633 and *M v. Newham London Borough Council* [1995] AC 633, the courts upheld the local authority's interests over children's rights.

However, shortly before the HRA came into the picture, the courts started to embrace a limited role of the ECHR. Scottish courts began to adopt the English courts' approach when faced with ambiguity in legislation. These are reflected in several cases such as *Anderson v HM Advocate [1995] ScotHC HCJAC 3* and *Re D and Another (Minors) [1995] UKHL 17*.

Throughout the years, the UK courts continued to evolve in terms of children's rights. Nevertheless, the ECHR remained unincorporated so it was not binding on the courts or other public authorities before the HRA.

How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom?

The HRA marked the ECHR's incorporation into UK domestic law. The ECHR guarantees, irrespective of age, the [human rights of all people in the Council of Europe's Member States](#). The HRA [did not incorporate all of the ECHR](#) but rather those rights set out in Articles 2-14, 16, 18, Articles 1, 2 and 3 of the First Protocol and Article 1 of Protocol 13. The HRA also bolstered the protection and furtherance of the Convention rights in Scotland wherein the Scotland Act 1998 elevates the HRA's function in Scotland. The HRA and the Scotland Act can be said to encourage the development of a human rights' culture in Scotland, in particular, the Scottish courts started to adopt a [rights-based approach](#) in their decisions.

a) Legislative Impacts

Through the in-depth case study, three fundamental effects flow from the HRA, each of which have implications for children's rights protection. Firstly, the UK courts have the [jurisdiction](#) to hear cases of human rights' breaches, secondly, public bodies and those exercising public functions have an [obligation to respect](#) human rights while carrying out their duties and thirdly, new laws that are enacted by the Parliament must be [compatible](#) with the Convention rights.

However, the case study brought to light the existing gaps within the HRA, namely, it is [not fully protecting](#) the broad range of positive economic, social and cultural obligations, [not child-focused](#), has [ambiguity and inconsistencies](#) in defining public authority, there is [hesitancy by the courts](#) to issue DOIs and [lack or absence of effective responses](#) from the governments towards courts' judgments. To place

children's rights on a par with those of adults, a holistic reform to address these gaps is crucial and inevitable.

b) Administrative Impacts

The HRA has contributed to [a growing human rights culture](#) in Scotland. In turn, this has led to a greater awareness of children's rights and the development of various administrative tools which seek to further embed them. The HRA also plays an important role in the context of public policies and administrative decisions. It can be seen that the HRA (including the Scotland Act) encourages early consideration of children's rights in policy development through Human Rights Impact Assessments ('HRIA'), Child Rights and Wellbeing Impact Assessments ('CRWIA') and compatibility statement.

Sadly, it is arguable that the governments, ministers and public authorities are [not giving sufficient consideration](#) to the HRA and children's rights when developing policies and coming to decisions. The lack of human rights' knowledge, awareness and culture remains a recurring challenge within the whole community including the administrative bodies.

c) Procedural Impacts

Apart from legislative and administrative impacts, the HRA has impacted children's rights procedurally. This can be seen in two different areas; standing and time limits.

The HRA acknowledges [children's standing](#) to bring proceedings to the courts and/or tribunals. However, the victim test under Section 7(1) of the HRA may place impassable barriers in upholding children's rights in the UK. On the ground, organisations that possess knowledge and expertise on children's rights may recognise the violation of rights, wish to bring proceedings to the courts, can effectively present cases in the courts, stand a higher success rate and contribute to a robust furtherment of children's rights in the UK. These organisations, if provided with [a more relaxed standing rule](#), can represent children to seek redress efficiently and aid to ground-breaking judgments that will impact children's rights in the UK.

The HRA prescribed [a longer time](#) to bring legal proceedings to the courts. The research highlighted that the courts' approaches and judgments are inconsistent on the factors that warrant an extension of time under Section 7(5) of the HRA. The [lack of jurisprudence](#) on the limitation's principles applicable to

human rights' cases, [absence of a predetermined list on exceptions](#) and [inconsistency of courts' decisions](#) together with the existing time limitation under the HRA present difficulties for children to access and uphold their human rights in the current legal system. Feasibly, the expansion of the time limit specifically to children may restore the gap under the HRA.

A New Dawn for Scotland?

In summary, regardless of the progression of rights experienced by children as a result of the HRA, the in-depth analysis suggested that the HRA contains a plethora of gaps that prevent children's rights from being fully realised. The research stressed the fact that incorporation of the UNCRC is the [initial step](#) to guarantee a broad range of children's rights. In publishing this research, Together (Scottish Alliance for Children's Rights) hopes to demonstrate the value of the HRA but also to bring attention to the urgent need to incorporate the UNCRC into Scotland's domestic law to address these gaps. Also, it must be borne in mind that direct incorporation of the UNCRC serves as a floor and not a ceiling. Going forward, Together (Scottish Alliance for Children's Rights) hopes the recommendations may serve as a point of reference on how the Scottish Government, Scottish Parliament, judiciary, Together (Scottish Alliance for Children's Rights) and other civil society organisations may support the implementation of the Bill and future incorporation of international human rights treaties in Scotland.

TABLE OF CONTENTS

Executive Summary	3 - 6
Table of Contents	7 - 9
List of Abbreviations	10 - 11
 Chapter 1 : Rights Brought Home	
Introduction.....	12 - 13
Scope of Project	14
Methodology.....	14
 Chapter 2 : Children’s Rights in the UK prior to HRA 1998	
	15- 17
 Chapter 3 : Legislative and Administrative Impacts of HRA 1998 on Children’s Rights in the United Kingdom	
Introduction.....	18 - 19
Legislative Impact.....	19 - 29
Administrative Impact.....	30 - 38
 Chapter 4 : Procedural Impact of HRA 1998 on Children’s Rights in the United Kingdom	
Introduction.....	39
Standing.....	39 – 45
Time	45 - 49
 Chapter 5 : A New Dawn for Children in Scotland	
Introduction.....	50
Incorporation of the UNCRC in Scotland.....	50 - 55
Recommendations.....	56 – 57

Annex A : Compilation of Questions from Information-Gathering Discussions with Child Rights’ Practitioners, Academics And Civil Society Representatives

Information-Gathering Discussion with Janet Cormack from Clan Childlaw

(21/06/2021)..... 58 - 60

Information-Gathering Discussion with Mhairi Snowden from Human Rights Consortium Scotland

(22/06/2021)..... 61

Information-Gathering Discussion with Louise King and Jennifer Twite from Just for Kids Law (28/06/2021)

..... 62 - 66

Information-Gathering Discussion with Andrew Sirel from JustRight Scotland (28/06/2021) 67 - 68

Information-Gathering Discussion with Dr Tracy Kirk (29/06/2021) 69 - 70

Information-Gathering Discussion with Maria Galli from Children and Young People’s Commissioner

Scotland (in her personal capacity) (08/07/2021) 71 - 73

Information-Gathering Discussion with Professor Simon Hoffman from Observatory on Human Rights of

Children (Wales) (09/07/2021) 74 - 75

Information-Gathering Discussion with Laura Pasternak as Trustee of Together (Scottish Alliance for

Children’s Rights) (10/07/2021)..... 76 - 78

Annex B : General Opinion from Information-Gathering Discussions on HRA 1998 and its Relationship with Children’s Rights in the UK 79

Annex C : Barriers/Limitations Experienced by Children to Access their Human Rights and/or Justice System..... 80 - 82

Annex D : Learning Drawn from Implementation of HRA 1998 in the UK 83 - 85

Annex E : Table of Cases.....	86 - 104
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Bibliography	105 - 117
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LIST OF ABBREVIATIONS

No.	Abbreviations	Explanation
1.	A1P1	Article 1 of the First Protocol
2.	A2P1	Article 2 of the First Protocol
3.	Bill	United Nation Convention on the Rights of the Child (Incorporation) (Scotland) Bill
4.	Child(ren)	In this project, child(ren) refers to individual(s) under the age of 18 years old
5.	Children's Commissioner	Children and Young People's Commissioner Scotland
6.	CRC Committee	Committee on the Rights of the Child
7.	CRIA	Children Rights Impact Assessment
8.	CRWIA	Child Rights and Wellbeing Impact Assessment
9.	Convention rights	Articles 2-14, 16, 18 ECHR, Articles 1, 2 and 3 of the First Protocol and Article 1 of Protocol 13
10.	COVID-19	Coronavirus
11.	CYP Act	Children and Young People (Scotland) Act 2014
12.	DLA	Disability Living Allowance
13.	DOI	Declaration of incompatibility
14.	ECHR	European Convention on Human Rights
15.	ECtHR	European Court of Human Rights
16.	Equality Act	Equality Act 2010
17.	Experts	Child rights' practitioners, academics and civil society representatives
18.	HRA	Human Rights Act 1998
19.	HRIA	Human Rights Impact Assessment
20.	IHRAR	Independent Human Rights Act Review
21.	NIHRC	Northern Ireland Human Rights Commission
22.	Scotland Act	Scotland Act 1998
23.	SHRC	Scottish Human Rights Commission

24.	SQA	Scottish Qualifications Authority
25.	UK	United Kingdom
26.	UNCRC	United Nation Convention on the Rights of the Child

CHAPTER 1

RIGHTS BROUGHT HOME

1.0 Introduction

In 1998, the Labour Government introduced the Human Rights Act 1998 ('HRA') which incorporated the European Convention on Human Rights ('ECHR') into the United Kingdom's ('UK') domestic law.¹ Since its enactment, the HRA has been in the crosshairs of some politicians,² received relentless attacks from the media,³ yet, most people continue to stand by it.⁴ On 7 December 2020, as promised in the Conservative Party's manifesto, the UK Government launched the Independent Human Rights Act Review ('IHRAR') aimed to update the HRA.⁵ Early this year, the review gained the Committee on the

¹ The Secretary of State for the Home Department, 'Rights Brought Home : The Human Rights Bill' (UK Government, October 1997) para 1.18 – 1.19
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights_brought_home_bill.pdf> (accessed 7 May 2021).

² Kate Allen, 'The Government is Hell-Bent on Diluting the Human Rights Act. We Must Protect It' (The Guardian, 3 March 2021) <<https://www.theguardian.com/commentisfree/2021/mar/03/government-hell-bent-diluting-human-rights-act>> (accessed 5 July 2021).

³ Human Rights Watch, 'Why The UK Needs Human Rights' (13 September 2017)
<<https://www.hrw.org/news/2017/09/13/why-uk-needs-human-rights>> (accessed 5 July 2021).

⁴ Savanta ComRes, 'Human Rights Poll' (Amnesty International UK, 1 March 2021)
<https://2sjjwunnql41ia7ki31qqub1-wpengine.netdna-ssl.com/wp-content/uploads/2021/03/Amnesty_Savanta-ComRes_Human-Rights-Poll-Tables_010321.pdf> (accessed July 2021); Amnesty International UK, 'Strong Public Support for Human Rights Act after Covid Crisis' (London, 3 March 2021) <<https://www.amnesty.org.uk/press-releases/strong-public-support-human-rights-act-after-covid-crisis>> (accessed 5 July 2021).

⁵ Ministry of Justice, 'Press Release : Government Launches Independent Review of the Human Rights Act' (UK Government, 7 December 2020) <<https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act>> (accessed 19 August 2021).

Rights of the Child's ('CRC Committee') attention on the measures taken by the UK Government to assess the review from a child rights perspective.⁶

Meanwhile, the Scottish Government has made its position clear that the HRA functions efficiently in protecting and enhancing human rights in Scotland.⁷ This was evident when the Scottish Government introduced the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ('the Bill') on 1 September 2020.⁸ The Bill intentionally replicates the HRA model, key features and approach while at the same time, builds upon the HRA with the aim of ensuring the strongest protection for children's rights in Scotland.⁹ On 16 March 2021, the Bill was passed unanimously by the Scottish Parliament¹⁰ demonstrating the Scottish Government's, Parliament's, public services' and civil society's commitment towards championing children's rights and making their rights real.¹¹

⁶ Committee on the Rights of the Child, 'List of Issues prior to Submission of the Combined Sixth and Seventh Reports of United Kingdom of Great Britain and Northern Ireland', CRC/C/GBR/QPR/6-7 (United Nations, 4 March 2021) para 5(d) <<https://undocs.org/pdf?symbol=en/CRC/C/GBR/QPR/6-7>> (accessed 11 August 2021).

⁷ Scottish Government, 'UK Independent Human Rights Act Review (IHRAR) Call for Evidence : Response by the Scottish Government' (March 2021) para 35
<<https://www.gov.scot/binaries/content/documents/govscot/publications/speech-statement/2021/03/scottish-government-response-uk-independent-human-rights-act-review/documents/uk-independent-human-rights-act-review-ihrar-call-evidence-response-scottish-government/uk-independent-human-rights-act-review-ihrar-call-evidence-response-scottish-government/govscot%3Adocument/uk-independent-human-rights-act-review-ihrar-call-evidence-response-scottish-government.pdf>> (accessed 11 August 2021).

⁸ The Scottish Parliament, 'United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill' (2021) <<https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>> (accessed 5 July 2021).

⁹ Scottish Government, 'UK Independent Human Rights Act Review : Our Response' (2 March 2021)
<<https://www.gov.scot/publications/scottish-government-response-uk-independent-human-rights-act-review/pages/2/>> (accessed 5 July 2021).

¹⁰ The Scottish Parliament (n 8).

¹¹ Together (Scottish Alliance for Children's Rights), 'Incorporation of the UN Convention of the Rights of the Child' (undated) <<https://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/incorporation-of-the-un-convention-on-the-rights-of-the-child/>> (accessed 5 July 2021).

1.1 Scope of Project

In light of the aforementioned development, this project seeks to (i) analyse legal protections for children's rights in the UK prior to the HRA, (ii) determine the progression and gaps in children's rights protection in the UK after the HRA and (iii) draw out learning to inform Scotland's implementation of the Bill and plans to incorporate international human rights treaties in the future.

1.2 Methodology

Chapters 2 analyses case law on children's rights in the UK prior to the HRA. Chapters 3 and 4 specifically explore the progression and gaps of the HRA by analysing case law, legislation and policies in the UK and conducting eight (8) semi-structured information-gathering discussions with child rights practitioners, academics and civil society representatives ('the experts').¹² The semi-structured questions are annexed at pages 58 - 78, a summary of the discussions is annexed at pages 79 - 85 and the table of cases is annexed at page 86 – 104.

In the following section, the author will analyse legal protections for children's rights in the UK prior to the HRA.

¹² Many thanks to Mhairi Snowden from Human Rights Consortium Scotland, Janet Cormack from Clan Childlaw, Jennifer Twite and Louise King from Just for Kids Law, Andrew Sirel from JustRight Scotland, Laura Pasternak as Trustee of Together (Scottish Alliance for Children's Rights), Dr. Tracy Kirk, Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) and Maria Galli from Children and Young People's Commissioner Scotland (participated in her personal capacity).

CHAPTER 2

LEGAL PROTECTIONS FOR CHILDREN'S RIGHTS IN THE UNITED KINGDOM PRIOR TO HRA 1998

The dualist nature of the UK meant courts were unable to fully utilise the ECHR prior to the HRA.¹³ This is reflected in a series of earlier cases wherein the courts tended to refer only to domestic legislations. On the right to family life, for example, the courts referred to domestic legislation instead of Article 8 ECHR. This is reflected in *Re C (Interim Care Order : Residential Assessment)*¹⁴ which involved a dispute between the local authority's power to conduct a residential assessment on the child and the court's parallel power to do so. The Court highlighted the child's right to participation, mental capacity and relationship with his parents – all of which are enshrined in the United Nations Convention on the Rights of the Child ('UNCRC') - but confined its unanimous decision to domestic law alone.

This sentiment was also reflected in the Scottish courts. For instance, in *Kaur v Lord Advocate*,¹⁵ Lord Ross expressed that a Convention was irrelevant unless it had been incorporated into the domestic legal system. Accordingly, the Scottish courts were not compelled to consider the ECHR as an interpretative tool or otherwise.¹⁶

In some cases, the courts upheld the local authority's interests over children's rights. For example, in *X (A Minor) v Bedfordshire County Council and Others*,¹⁷ the House of Lords considered a local authority's child protection duties. It held that the local authority and social workers would be adversely affected by

¹³ Constitutional Reform and Governance Act 2010.

¹⁴ [1996] UKHL 4.

¹⁵ [1980] ScotCS CSOH 5.

¹⁶ *ibid* <https://www.bailii.org/scot/cases/ScotCS/1980/1980_SC_319.html> (accessed 21 August 2021).

¹⁷ [1995] 2 AC 633.

a vicarious liability action on behalf of a child.¹⁸ Meanwhile in *M v. Newham London Borough Council*,¹⁹ the House of Lords decided that;

*social workers did not assume any general professional duty of care towards the children.*²⁰

However, shortly before the HRA came into the picture, the courts started to embrace a limited role of the ECHR. Scottish courts began to adopt the English courts' approach when faced with ambiguity in legislation. For instance, in *Anderson v. HM Advocate*,²¹ the High Court of Justiciary referred to Article 6 ECHR and stated that;

*[...] it is well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to, or conflicts with, the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.*²²

The same sentiment was adopted by the House of Lords in *Re D and Another (Minors)*²³ on the adoption of a child. The Court referred to several European Court of Human Rights ('ECtHR') decisions and the ECHR's language before allowing the appeal.²⁴

¹⁸ Raymond Arthur, 'Children's Rights to Sue for Social Workers Negligence : The Impact of the Human Rights Act 1998' (2006) 14(3) Tort Law Review 5 <<https://research.tees.ac.uk/ws/portalfiles/portal/6409003/112198.pdf>> (accessed 5 July 2021).

¹⁹ [1995] AC 633.

²⁰ Arthur (n 18) 6.

²¹ [1995] ScotHC HCJAC 3.

²² *ibid* <https://www.bailii.org/scot/cases/ScotHC/1995/1996_JC_29.html> (accessed on 21 August 2021).

²³ [1995] UKHL 17.

²⁴ *ibid* [35], [46], [47] and [48].

Throughout the years, the UK courts continued to evolve in terms of children's rights. From not paying much attention to their human rights, the courts partially advanced to recognise the ECHR and its jurisprudence as interpretative tools and reflect this in their decisions. Nevertheless, the ECHR remained unincorporated so it was not binding on the courts or other public authorities before the HRA.

In the following chapter, the author will demonstrate the impacts of the HRA on children's rights in the UK.

CHAPTER 3

LEGISLATIVE AND ADMINISTRATIVE IMPACTS OF HRA 1998 ON CHILDREN'S RIGHTS IN THE UNITED KINGDOM

3.0 Introduction

The HRA marked the ECHR's incorporation into UK domestic law. Notwithstanding this positive development, the ECHR was not drafted with children's rights in mind.²⁵ Rather it guarantees, irrespective of age, the human rights of all people in the Council of Europe's Member States.²⁶ As the HRA incorporates the ECHR, it can be said that by extension, the HRA itself is not child-focused.²⁷ The HRA also did not incorporate all of the ECHR but rather those rights set out in Articles 2-14, 16, 18, Articles 1, 2 and 3 of the First Protocol and Article 1 of Protocol 13 ('Convention rights').²⁸ Despite such limitation, the Convention rights continue to protect and further human rights including children's rights in the UK.²⁹

²⁵ Allen Levy Q.C., 'The Human Rights Act 1998 : The Implications for Children' (2000) 6(3) Child Care in Practice 288 <<https://www.tandfonline.com/doi/pdf/10.1080/13575270008413216?needAccess=true>> (accessed 3 July 2021).

²⁶ Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009) 57.

²⁷ Gillian Cleave, 'The Human Rights Act 1998 – How will it Affect Child Law in England and Wales?', (2000) 9 Child Abuse Review 396 <[https://onlinelibrary.wiley.com/doi/pdf/10.1002/1099-0852\(200011/12\)9:6%3C394::AID-CAR656%3E3.0.CO;2-9?casa_token=OcNB0qsNUiAAAAA:Tkcieo0NaHRtSwuwIsc40O9CIVU4mhkRh79kuAd_31PCzUNOFwQPrzEay1-XLBUJelDY-pcagWOfg](https://onlinelibrary.wiley.com/doi/pdf/10.1002/1099-0852(200011/12)9:6%3C394::AID-CAR656%3E3.0.CO;2-9?casa_token=OcNB0qsNUiAAAAA:Tkcieo0NaHRtSwuwIsc40O9CIVU4mhkRh79kuAd_31PCzUNOFwQPrzEay1-XLBUJelDY-pcagWOfg)> (accessed 4 July 2021).

²⁸ The British Institute of Human Rights, 'The Law : The Human Rights Act' (undated) <<https://www.bihhr.org.uk/thehumanrightsact>> (accessed 3 July 2021).

²⁹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law relating to the Rights of the Child* (European Union Agency for Fundamental Rights and Council of Europe, 2015) 19 <https://www.echr.coe.int/documents/handbook_rights_child_eng.pdf> (accessed 16 August 2021).

The HRA also bolstered the protection and furtherance of the Convention rights in Scotland. The Scotland Act 1998³⁰ ('Scotland Act') elevates the HRA's function in Scotland. As an example, Section 29 prevents the Scottish Government and Parliament from acting incompatibly with the ECHR. Any such attempts can be struck down as "not law".³¹ The HRA and the Scotland Act can be said to encourage the development of a human rights' culture in Scotland, in particular, the Scottish courts started to adopt a rights-based approach in their decisions.³²

Looking at the positive development of bringing rights home for the whole community, one may ask : what impact has the HRA, an Act that is not child-centred, had for children?

To answer this question, the author will analyse the legislative and administrative impacts of the HRA on children's rights in the UK.

3.1 Legislative Impact

One of the main effects of the HRA is that it makes the Convention rights justiciable in the UK courts.³³ This means that a person (including a child) can take a human rights case to the UK courts rather than seeking justice from the ECtHR in Strasbourg. This progression is given effect through several provisions. Section 2 requires courts to take ECtHR jurisprudence into account when determining questions relating to Convention rights³⁴ while Section 3 requires courts to read and give effect to legislations in a way that is compatible with the ECHR.³⁵ Additionally, Section 4 empowers courts with declaration of

³⁰ Scotland Act 1998 defined the areas in which Scotland is competent to develop law and policy.

³¹ Scotland Act 1998, s 29.

³² Scottish Human Rights Commission, 'Inquiry: 20 years of the Human Rights Act 1998 : Written evidence to the Joint Committee on Human Rights' (September 2018) para 11

<<https://www.scottishhumanrights.com/media/1796/shrc-submission-to-the-jchr-on-hra-1998-13-september-2018.pdf>> (accessed 15 July 2021).

³³ Human Rights Act 1998, s 7.

³⁴ *ibid*, s 2.

³⁵ *ibid*, s 3.

incompatibility³⁶ ('DOI') while Section 6 compels public authorities (including courts) to act compatibly with Convention rights.³⁷

The effects of these provisions are visible in numerous cases concerning children's rights (see Annex E at pages 86 - 104). For example, in *Mathieson v Secretary of State for Work and Pensions*³⁸ the Supreme Court considered the rule by which under-16s would cease to receive Disability Living Allowance ('DLA') if hospitalised for more than 84 days. Following Section 2, the Supreme Court took account of numerous ECtHR decisions to determine whether there was a breach of the child's rights to non-discrimination (Article 14 ECHR) and to property (Article 1 of the First Protocol – 'A1P1').³⁹ Judges considered *Sidabras v Lithuania*,⁴⁰ *Stec v UK*,⁴¹ *Carson v UK*,⁴² *Clift v UK*,⁴³ *Neulinger v Switzerland*,⁴⁴ *Hode v UK*⁴⁵ and *X v Austria*⁴⁶ before allowing the child's appeal. The Court found the Secretary of State had breached Section 6 by suspending the child's DLA payment when not obliged to do so.⁴⁷ Regarding Section 3, the Court declined to interpret the relevant provisions as inapplicable to children on the grounds that the 84-day rule would not necessarily violate children's rights in every case.⁴⁸ However, the Court invited the Secretary of State to vary the strict 84-day rule so as not to violate the rights of disabled children.⁴⁹ The Court refrained from issuing a DOI under Section 4, instead deferring to Parliamentary intention.⁵⁰

³⁶ Human Rights Act 1998, s 4.

³⁷ *ibid*, s 6.

³⁸ [2015] UKSC 47.

³⁹ *ibid* [48].

⁴⁰ [2004] ECHR 55480/00.

⁴¹ (2006) BHRC 348.

⁴² (2010) 29 BHRC 22.

⁴³ [2010] ECHR 7205/07.

⁴⁴ (2010) BHRC 706.

⁴⁵ [2012] ECHR 22341/09.

⁴⁶ (2013) 35 BHRC 85.

⁴⁷ *Mathieson* (n 38) [48].

⁴⁸ *ibid* [49].

⁴⁹ *ibid*.

⁵⁰ *Mathieson* (n 38) [61].

This demonstrates deference to Parliamentary sovereignty and acknowledgement of the separation of powers between the Parliament and judiciary.⁵¹

The HRA has played a vital role in other cases involving children such as *The Queen on the Application of HC v The Secretary of State for the Home Department and Another*.⁵² The main issue was the treatment of 17-year-old detainees who were treated as adults. The Court concluded that the Secretary of State's failure to revise the Code of Practice that treated 17-year-olds as adults was incompatible with Article 8 ECHR.⁵³ The landmark judgment has positively impacted 75,000 17-year-olds who were brought into custody every year.⁵⁴ It secured a change of law as the Home Secretary was ordered to amend the Code of Practice⁵⁵ which resulted in (i) all 17-year-olds have the right to appropriate adults in police station and (ii) they are no longer treated as adults.⁵⁶

Notwithstanding the HRA's legislative impact, it is arguable that discourses on the ground repeatedly point to recurring barriers and/or limitations that hamper children's access to their human rights and justice. Firstly, the ECHR is designed narrowly to address civil and political rights only.⁵⁷ Further, the ECHR also fails to detail the positive steps expected of governments to promote these rights or to enable children to take full advantage of these rights.⁵⁸ In contrast to the UNCRC, the ECHR does not address

⁵¹ *Mathieson* (n 38) [51] – [53].

⁵² *The Queen on the Application of HC (a child, by his Claimant litigation friend CC) v The Secretary of State for the Home Department and The Commissioner of Police of the Metropolis* [2013] EWHC 982

⁵³ *ibid* [98] – [99].

⁵⁴ BBC News, 'Teenager Wins Ruling on Detention of 17-year-olds' (25 April 2013)

<<https://www.bbc.co.uk/news/uk-22294098>> (accessed 9 August 2021).

⁵⁵ Owen Bowcott, 'Police Must Treat 17-year-olds in Custody as Children, Court Rules' (The Guardian, 25 April 2013) <<https://www.theguardian.com/uk/2013/apr/25/police-17-custody-children-court>> (accessed 9 August 2021).

⁵⁶ Information-Sharing Discussion with Jennifer Twite and Louise King from Just for Kids Law (21/06/2021).

⁵⁷ *Jane Fortin* (n 26) 354.

⁵⁸ *ibid*.

the holistic concept of children's rights that includes welfare, protection and social justice rights within a framework that is appropriate to children and their childhood process.⁵⁹

Secondly, it is settled that the ECHR and by extension, the HRA do not cater to children's needs specifically⁶⁰ and have limited references on children.⁶¹ The ECHR and HRA do not recognise children as a distinct group who require protection due to their vulnerability. Consequently, children are expected to conform to an adult-focused standard or "child-neutral" system.⁶² This is problematic, for instance, in cases that involve interplay between children's and parents' rights or children's rights and State's interests.⁶³ There is a tendency to assume that children and their parents' interests are alike or to deduce that the State always acts in the best interests of children.⁶⁴ This is dangerous as it fails to recognise children (i) as rights-holders with views and experiences that are distinct from their parents and (ii) have the right to their own agency in decisions that affect them.⁶⁵ This is readily apparent in *The Christian Institute and Others v The Lord Advocate (Scotland)*.⁶⁶ The central question was the legislative competence of the Scottish Parliament to enact the provisions in Part 4 of the Children and Young People (Scotland) Act 2014 ('CYP Act'). The Scottish Government identified key failings such as (i) failure to act promptly and (ii) lack of coordinated communication between agencies which led to the heart-

⁵⁹ Jane Fortin (n 26) 354.

⁶⁰ Kasey McCall-Smith, 'On the Cusp of Maximalist Incorporation of Children's Rights in Scotland' in n Ursula Kil Kelly, Laura Lundy and Bronagh Byrne (eds), *Incorporating the United Nations Convention on the Rights of the Child into National Law*, (Intersentia, 2021) 5 <<https://www.law.ed.ac.uk/sites/default/files/2020-10/On%20the%20Cusp%20of%20Maximalist%20Incorporation%20-%20McCall-Smith.pdf>> (accessed 10 July 2021).

⁶¹ Levy (n 25) 288.

⁶² *ibid.*

⁶³ Information-Sharing Discussions with Mhairi Snowden from Human Rights Consortium Scotland, Janet Cormack from Clan Childlaw, Jennifer Twite and Louise King from Just for Kids Law, Andrew Sirel from JustRight Scotland, Laura Pasternak as Trustee of Together (Scottish Alliance for Children's Rights), Dr Tracy Kirk, Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) and Maria Galli from Children and Young People's Commissioner Scotland (participated in her personal capacity).

⁶⁴ Jane Fortin (n 26) 354.

⁶⁵ *ibid* 51 – 56.

⁶⁶ [2016] UKSC 51.

breaking death of children.⁶⁷ To overcome these failings, the Government intended to appoint a Named Person to every child in Scotland; an adult who will be a point of contact and helps to support children and their parents.⁶⁸ The challenge on Article 8 ECHR in the Supreme Court was premised on two categories; (i) broad category that challenged violation of the parents' right to family life due to the blanket provisions on the Named Person and (ii) narrow category that challenged violation of children's right to privacy due to a low threshold level on information sharing.⁶⁹ As a matter of concern, prior to the intervention by Clan Childlaw at the Supreme Court, the competing concerns were the parents' rights and the obligation on the Named Person to protect and safeguard the wellbeing of children.⁷⁰ The challenge echoed by the parents and organisations that supported them was "children as possessions" rather than recognising children as rights-holders.⁷¹ In actual fact, children are right-holders and not possessions.⁷² For this reason, children's right to privacy was argued by Clan Childlaw during the Supreme Court proceedings.⁷³ This was also acknowledged by the Court when it mentioned that

⁶⁷ Elaine E. Sutherland, 'Proactive Child Protection: A Step Too Far?' (2017) 2017 International Survey of Family Law 295 – 296

<<https://heinonline.org/HOL/Page?handle=hein.journals/intsfal2017&id=303&collection=journals&index=>> (accessed 6 August 2021).

⁶⁸ Gillian Black, 'Scotland's Named Person Scheme : A Case Study of Article 5 of the United Nations Convention on the Rights of the Child in Practice' (2020) 28 International Journal of Children's Rights 572
<https://brill.com/view/journals/chil/28/3/article-p571_571.xml?language=en> (accessed 20 July 2021).

⁶⁹ *The Christian Institute* (n 66) [69].

⁷⁰ Black (n 68) 576.

⁷¹ Elaine E. Sutherland, 'Beyond the Named Person Service : The UK Supreme Court Ruling in *Christian Institute v Scottish Ministers* Arguably has Wider Implications for Reform of Scots Law in General, and Child and Family Law in Particular' (Law Society of Scotland, 19 September 2016) <<https://www.lawscot.org.uk/members/journal/issues/vol-61-issue-09/beyond-the-named-person-service/>> (accessed 23 August 2021).

⁷² Committee on the Rights of the Children, 'General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests taken as a Primary Consideration (Art. 3, Para. 1)', CRC/C/GC/14 (United Nations, 29 May 2013) para 16(b) <https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf> (accessed on 20 May 2021).

⁷³ Information-Sharing Discussion with Janet Cormack from Clan Childlaw (21/06/2021).

children's rights to family and privacy are similar to their parents'.⁷⁴ The Court did not find the Named Person Scheme violated Article 8 on the broad basis. However, the narrow challenge on children's right to privacy argued by the intervener was found to be in breach of Article 8.⁷⁵ The decision highlighted three key issues; (i) in absence of the significant intervention, the Named Person Scheme may be regarded as compatible with Article 8 ECHR, although it may have detrimental effects on children's rights, (ii) the impactful intervention is an excellent reminder that third party interventions in public interest cases may contribute to sound jurisprudence on children's rights⁷⁶ and (iii) it serves as a good reminder to the governments and public authorities that, in supporting children's safety and wellbeing, they must tread carefully so as not to trump other rights of children.⁷⁷

Thirdly, notwithstanding the public authorities' duty to act compatibly with the Convention rights,⁷⁸ the definition of public authority under Section 6(3) HRA that includes "*any person certain of whose functions are functions of a public nature*"⁷⁹ remains contentious. To complicate the issue, Section 6(5); "*a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private*"⁸⁰ gives birth to a new term; hybrid or functional public authority; a body that is categorised as a public authority by virtue of performing a public function.⁸¹ Parliament never intended to define "*functions of a*

⁷⁴ *The Christian Institute* (n 66) [71].

⁷⁵ *ibid* [106].

⁷⁶ Sangeeta Shah, Thomas Poole, Michael Blackwell, 'Rights, Interveners and the Law Lords' (2014) 34(2) *Oxford Journal of Legal Studies* 323 – 324

<<https://www.jstor.org/stable/pdf/24562820.pdf?refreqid=excelsior%3A168b00cba7c78062a84a45aca94d2bc5>> (accessed 25 July 2021).

⁷⁷ Eric Stoddart, 'The Named Person: Surveillance and the Wellbeing of Children and Young People in Scotland' (2015) 13(1) *Surveillance & Society* 115 <<https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/name/named>> (accessed 23 July 2021).

⁷⁸ Human Rights Act 1998, s 6.

⁷⁹ *ibid*, s 6(3)(b).

⁸⁰ Human Rights Act 1998, s 6(5).

⁸¹ Justice, 'Public Authorities under the Human Rights Act 1998' (undated) <<https://justice.org.uk/public-authorities-human-rights-act-1998/>> (accessed 10 August 2021).

public nature”⁸² as it placed the interpretation obligation on the courts considering the evolution of law and practice over time.⁸³ However, interpreting the words; ‘public’ and ‘function’ that are not defined in the ECHR or HRA is very complicated and invites contrasting interpretations. As a result, there are inconsistencies in the courts’ judgments concerning the definition of hybrid public authority such as (i) Section 6(3) *is applicable* to a private organisation that is established and supported by a local authority to carry out a public service⁸⁴ and (ii) Section 6(3) *is not applicable* to a private organisation that delivers contracted-out public services or privatised services on behalf of a central or local government.⁸⁵ The inconsistencies can be seen in the recent case; *Ali (Iraq) v Serco Ltd*⁸⁶ that dealt with eviction of asylum seekers by Serco, a private company that provided temporary accommodation on behalf of the Secretary of State for the Home Department. The Outer House adopted a ‘factor-based approach’ as iterated in *Aston Cantlow v Wallbank*⁸⁷ and *YL v Birmingham City Council*⁸⁸ and concluded that Serco was exercising functions of a public nature and fell within the definition of public authority under the HRA.⁸⁹ Contrastingly, the Inner House relied solely on the ‘fundamental distinction’ in *YL*⁹⁰ and concluded that the Home Secretary did not absolve its public law responsibility just because it contracted out the service to Serco.⁹¹ The inconsistencies in the decided cases are not surprising as even the Outer House

⁸² Justice (n 81).

⁸³ “As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality”. HC Deb 17 June 1998, Volume 314, Column 433 <<https://api.parliament.uk/historic-hansard/commons/1998/jun/17/acts-of-public-authorities>> (accessed 10 August 2021).

⁸⁴ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ. 595; *R (Beer) v Hampshire Farmer’s Markets Ltd* [2003] EWCA Civ. 1056.

⁸⁵ *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB); *James v London Electricity Plc* [2004] EWHC 3226 (QB).

⁸⁶ [2019] CSIH 54.

⁸⁷ [2003] UKHL 37.

⁸⁸ [2007] UKHL 27.

⁸⁹ *Serco Ltd* (n 86) [32].

⁹⁰ *YL* (n 88) [54].

⁹¹ *Serco Ltd* (n 86) [56].

recognised the absence of a “*single test of universal application*”⁹² to determine functions of a public nature. Nevertheless, it is apparent that contracting out public services has become the norm.⁹³ Bearing in mind the vital role of private and voluntary bodies in delivering public services, this calls into question the ability of the HRA to protect children’s human rights to the full extent as expected from the Act. This is because the inconsistencies may negatively impact different services concerning children, for instance, housing or social services.⁹⁴ The inconsistencies make it (i) difficult for the public - especially children - to seek redress under the HRA if their Convention rights are violated and (ii) ambiguous for service providers to understand their obligations under the HRA.⁹⁵

Fourthly, effectivity of DOIs under the HRA remains questionable. This is because (i) the HRA demands the courts to read and give effect to all legislation “*as far as it is possible*” in a way that is compatible with the ECHR⁹⁶ and (ii) DOIs are considered the last resort to be exhausted by the courts.⁹⁷ For these reasons, the courts tend to be cautious in issuing DOIs which could positively impact children in some instances. For example, in *Mathieson*, the Supreme Court refrained from issuing a DOI, instead deferring to Parliamentary intention.⁹⁸ It is arguable that if the Court had granted a DOI, the judgment could have benefitted approximately 500 families with disabled children who were affected by the 84-day rule (see discussion at page 20 above).⁹⁹ Without the DOI, Parliament has been slower to amend the rule,

⁹² *Serco Ltd* (n 86) [53].

⁹³ Alexander Williams, ‘Public Authorities : What is a Hybrid Public Authority under the HRA?’ in *The Impact of the UK Human Rights Act on Private Law* (Cambridge : Cambridge University Press, 2011) 50
<<https://dro.dur.ac.uk/10650/1/10650.pdf?DDC71+DDD19+DDC108+dla3arw+cqjd36>> (accessed 18 July 2021).

⁹⁴ Information-Gathering Discussion with Andrew Sirel from JustRight Scotland (28/06/2021).

⁹⁵ Joint Committee on Human Rights, ‘The Meaning of Public Authority under the Human Rights Act : Seventh Report of Session 2003 – 2004’ (House of Lords and House of Commons, 3 March 2004)
<<https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>> (accessed 10 August 2021).

⁹⁶ Human Rights Act 1998, s 3.

⁹⁷ *Ghaidan v Godin-Mendoza (FC)* [2004] UKHL 30 [39] and [46].

⁹⁸ *Mathieson* (n 38) [61].

⁹⁹ Disability Rights UK, ‘Supreme Court Rules that Suspending Child’s DLA after 84 Days in Hospital Breached His Human Rights’ (undated) <<https://www.disabilityrightsuk.org/mathieson>> (accessed 7 August 2021).

meaning these children must individually appeal the suspension of their DLA by citing this judgment as precedent. Eventually, the 84-day rule was disappplied under SI 2016/556.¹⁰⁰

Fifthly, lack or absence of prompt response from the UK and devolved governments towards courts' judgments continues to pose a challenge to children's rights. This is illuminated in *R (on the application of P, G and W) v Secretary of State for the Home Department and Another*.¹⁰¹ The appeal concerned statutory requirements in England, Wales and Northern Ireland to disclose criminal convictions irrespective of age or subject matter to potential employers under the Rehabilitation of Offenders Act 1974 and Police Act 1997. On the footing that the statutory requirements were disproportionate and violated Article 8 ECHR, in G's case, a declaration was imminent as the disclosure included cautions given to young offenders which were intended to be rehabilitative and not penal.¹⁰² It can be said that the judgment was a welcome step forward as (i) disclosure of criminal records has impacted more than one million young people,¹⁰³ (ii) approximately 25,000 youth cautions were disclosed annually in criminal record checks¹⁰⁴ and (iii) it may remove the existing barriers in employment and most importantly, social stigma against young people.¹⁰⁵ To ensure the Disclosure and Barring Service could

¹⁰⁰ The Social Security (Disability Living Allowance and Personal Independence Payment) (Amendment) Regulations 2016, s 2.

¹⁰¹ *In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) v Secretary of State for the Home Department and Another, and R (on the application of P) v Secretary of State for the Home Department and Others* [2019] UKSC 3.

¹⁰² *ibid* [64] and [68].

¹⁰³ Unlock, 'Unlock Response to Supreme Court Judgment on Criminal Records Disclosure Regime' (30 January 2019) <<https://www.unlock.org.uk/judgment-supreme-court/>> (accessed 9 August 2021).

¹⁰⁴ Unlock, 'Government Responds to Supreme Court Ruling with Plans to Change Criminal Records Disclosure Regime' (9 July 2020) <<https://www.unlock.org.uk/government-response-supreme-court/>> (accessed 9 August 2021).

¹⁰⁵ Matthew Flinn, 'A Criminal Record, or a Clean Slate?' (UK Human Rights Blog, 4 February 2019) <<https://ukhumanrightsblog.com/2019/02/04/a-criminal-record-or-a-clean-slate/>> (accessed 9 August 2021).

comply with the Court's judgment, Westminster was called on to implement a remedial order swiftly.¹⁰⁶ It was reasonable to anticipate a prompt response from the UK Government as a DOI can only be remedied by amending legislation,¹⁰⁷ however, it took more than a year for the Government to comply with the Court's ruling.¹⁰⁸ Much to the organisations' disappointment, the response was bare minimum¹⁰⁹ in Northern Ireland, for example, the Department for Justice did not consider wider reforms and settled with narrow changes.¹¹⁰ Notwithstanding that the significant judgment may ensure a fresh start for young people, the Government's lukewarm response continues to prevent young people from moving on from their past.

On a similar note, in *AB v Her Majesty's Advocate (Scotland)*,¹¹¹ the Supreme Court concluded that Section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 was incompatible with Article 8 ECHR and not law due to the provision's lack of proportionality. Manifestly, the judgment was a significant step forward as (i) it was indicated by the Lord Advocate that there was an absence of guidelines on charging children,¹¹² (ii) the provision contradicted the children's welfare principles, (iii) it did not strike a fair balance between child offenders' rights and community's interests, (iv) it did not distinguish features around child offending, (v) it did not consider different levels of mental capacity among children and (vi)

¹⁰⁶ Unlock, 'Northern Ireland Makes Changes to the Disclosure of Convictions and Cautions in response to Supreme Court Ruling' (17 March 2020) <<https://www.unlock.org.uk/northern-ireland-supreme-court/>> (accessed 9 August 2021).

¹⁰⁷ Edward Jones, 'P, G & W – A Significant Step Forward, but Still a Significant Way to Go' (31 January 2019) <<https://www.hja.net/expert-comments/opinion/criminal-defence/p-g-w-a-significant-step-forward-but-still-a-significant-way-to-go/>> (accessed 9 August 2021).

¹⁰⁸ Unlock (n 104).

¹⁰⁹ Information-Sharing Discussion with Janet Cormack from Clan Childlaw (21/06/2021).

¹¹⁰ According to Unlock (n 106), the changes did not take into account the inability to remove length of prison sentence or consider the inability to remove specified offences from standard or enhanced checks.

¹¹¹ [2017] UKSC 25.

¹¹² Becky Steels, 'Case Comment : AB v Her Majesty's Advocate (Scotland) [2017] UKSC 25' (UKSC Blog, 10 May 2017) <<http://uksblog.com/case-comment-ab-v-her-majestys-advocate-scotland-2017-uksc-25/>> (accessed 10 August 2021).

it was unsafe to assume the likelihood of child offenders to commit sexual offences in adulthood.¹¹³ Despite its fundamental impacts on children, the Government has not responded to the judgment even though the provision is no longer applicable.¹¹⁴ One can argue that this case did not receive as much coverage as *The Christian Institute's* case as it concerned a very niche and not a well-known provision which posed a challenge for the people to understand it. Without public attention and pressure, the judgment did not impact the political landscape as much as the politicians wanted it to and made it difficult to pave the way for a prompt change in the law.¹¹⁵

It can be said that three fundamental effects flow from the HRA, each of which have implications for children's rights protection; firstly, the UK courts have the jurisdiction to hear cases of human rights' breaches, secondly, public bodies and those exercising public functions have an obligation to respect human rights while carrying out their duties and thirdly, new laws that are enacted by the Parliament must be compatible with the Convention rights.¹¹⁶ However, there are existing gaps within the HRA, for instance, it is not fully protecting the broad range of positive economic, social and cultural obligations, not child-focused, has ambiguity and inconsistencies in defining public authority, there is hesitancy by the courts to issue DOIs and lack or absence of effective responses from the governments towards courts' judgments. To place children's rights on a par with those of adults, a holistic reform to address these gaps is crucial and inevitable.

The next section will examine the administrative impact of the HRA on children's rights in the UK.

¹¹³ Morag Ross and Daniel Byrne, 'Revised Submissions for Intervener' paras 34, 36, 38, 39, 43 and 46 <<https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=cf74c79d-c28f-4fa1-b8f9-458be83803de>> (accessed 10 August 2021).

¹¹⁴ Information-Sharing Discussion with Janet Cormack from Clan Childlaw (21/06/2021).

¹¹⁵ Information-Sharing Discussion with Janet Cormack from Clan Childlaw (21/06/2021).

¹¹⁶ Nicole Busby, 'Human Rights and Devolution : The Independent Review of the Human Rights Act : Implications for Scotland' (Human Rights Consortium Scotland, 2021) 3 <<https://hrcscotland.org/wp-content/uploads/2021/02/Final-IRHRA-Nicole-Busby-January-2021.pdf>> (accessed 11 May 2021).

3.2 Administrative Impact

The HRA has contributed to a growing human rights culture in Scotland.¹¹⁷ In turn, this has led to a greater awareness of children's rights and the development of various administrative tools which seek to further embed them.

There are no "child-neutral" policies, legislations or budgetary decisions. Every policy, law and decision, whether intentionally or not, impact children's lives positively or negatively.¹¹⁸ For this reason, Human Rights Impact Assessment ('HRIA') works as a tool to systematically evaluate policies' compliance with human rights standards.¹¹⁹ When done properly, HRIA may enhance human rights' protection and prevent human rights' violation.¹²⁰ Specifically, Children Rights Impact Assessment ('CRIA') focuses on children's rights¹²¹ wherein it (i) analyses policy, legislation and budgetary decision's impact on children,

¹¹⁷ Together (Scottish Alliance for Children's Rights), 'Independent Human Rights Act Review' (March 2021) <https://www.togetherscotland.org.uk/media/1907/hra_020321_final.pdf> (accessed 20 August 2021); Scottish Human Rights Commission (n 33).

¹¹⁸ UNICEF and European Commission, 'Child Rights Toolkit Module 5: Child Impact Assessments' (UNICEF, 2014) 3 <<https://www.childrightstoolkit.com/wp-content/uploads/toolkit/English/Child-Rights-Toolkit-Module5-Web-Links.pdf>> (accessed 5 August 2021).

¹¹⁹ James Harrison and Mary-Ann Stephenson, 'Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments' (Edinburgh: Scottish Human Rights Commission, 2010) 16 – 19 <<https://fian-ch.org/content/uploads/HRIA-Review-of-Practice-and-Guidance-for-Future-Assessments.pdf>> (accessed 5 August 2021).

¹²⁰ Christopher McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Oregon: Hart Publishing, 2005) 9–12 (available in DiscoverEd).

¹²¹ Simon Hoffman, 'Ex Ante Children's Rights Impact Assessment of Economic Policy' (2020) 24(9) *The International Journal of Human Rights* 1334 <<https://www.tandfonline.com/doi/epub/10.1080/13642987.2020.1819798?needAccess=true>> (accessed 1 July 2021).

(ii) provides evidence for policymaking and (iii) generates recommendations to reduce or remove potential negative impact on children's rights.¹²²

In the UK, the HRA seeks to ensure that law, public policies and decisions are consistent with human rights' objectives.¹²³ Hence, the HRIA concentrates on the ECHR¹²⁴ and adopts a minimalist approach by publication of a compatibility statement.¹²⁵ Under Section 19 HRA, a Minister is required to make a statement, whether a Bill is compatible with the ECHR, to the Parliament.¹²⁶ It can be said that the HRA provides a framework within which the Ministers should operate.¹²⁷ However, there are big differences in the way that law and policies especially towards children are conducted in Scotland in comparison with the rest of the UK.¹²⁸ In Scotland, consideration of children's rights is partially embedded into legislation, for instance, in the CYP Act. As part of the Scottish Government's implementation strategy to carry out its duties under the CYP Act, in June 2015, the Government introduced a non-compulsory Child Rights and Wellbeing Impact Assessment ('CRWIA').¹²⁹ Over the years, the Scottish Government has

¹²² Lisa Payne, 'Child Rights Impact Assessment (CRIA): A Review of Comparative Practice Across the UK' (London: UNICEF-UK, 2017) 10 – 41 <https://www.unicef.org.uk/wp-content/uploads/2017/09/Unicef-UK-CRIA-comparative-review_FOR-PUBLICATION.pdf> (accessed 10 August 2021).

¹²³ Information-Gathering Discussion with Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) (9 July 2021).

¹²⁴ Lisa Payne, 'Child Rights Impact Assessment as a Policy Improvement Tool' (2019) 23(3) The International Journal of Human Rights 410 <<https://www.tandfonline.com/doi/pdf/10.1080/13642987.2018.1558989>> (accessed 3 July 2021).

¹²⁵ United Kingdom Cabinet Office, 'Guide to Making Legislation' (London, 2017) 12.29 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf> (accessed 13 August 2021).

¹²⁶ Human Rights Act 1998, s 19.

¹²⁷ Information-Gathering Discussion with Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) (9 July 2021).

¹²⁸ *ibid.*

¹²⁹ Lisa Payne (n 124) 413.

continuously produced CRWIAs¹³⁰ in connection with “*Bills, draft Regulations, guidance, government strategies and delivery plans.*”¹³¹ The administrative impact of the HRA can be seen in the recent CRWIA; The Looked After Children (Scotland) Amendment Regulations 2021¹³² that relates to the amendment of The Looked After Children (Scotland) Regulations 2009 (‘Regulations’). The intended amendment concerned the right to sibling contact of care experienced children.¹³³ By way of incorporation, the CRWIA engaged Article 8 ECHR on the right to family life between siblings. Article 8 imposes a duty on public authorities, courts and Children’s Hearings (i) to take into account the close ties between siblings in care and (ii) if the close ties are present, any interference must be lawful and proportionate.¹³⁴ Based on the evidence, the CRWIA concluded that the Regulations would impact children positively, at the same time, it did not foresee any negative impacts on any rights or group of children.¹³⁵ As a result, a new law has been passed to assist care experienced children to maintain their sibling relationships.¹³⁶ Similarly, in Wales, the HRA contributes to a framework that engages children in policy development. It minimizes the need for children to bring actions to enforce their rights as there are opportunities within

¹³⁰ Scottish Government, ‘Child Rights and Wellbeing Impact Assessments : List’ (2 July 2021) <<https://www.gov.scot/publications/child-rights-and-wellbeing-impact-assessments-list/>> (accessed 5 August 2021).

¹³¹ Lisa Payne (n 124) 414.

¹³² Scottish Government, ‘The Looked After Children (Scotland) Amendment Regulations 2021 : Children’s Rights and Wellbeing Impact Assessment’ (February 2021) <<https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2021/02/looked-children-scotland-amendment-regulations-2021-childrens-rights-wellbeing-impact-assessment/documents/looked-children-scotland-amendment-regulations-2021-childrens-rights-wellbeing-impact-assessment/looked-children-scotland-amendment-regulations-2021-childrens-rights-wellbeing-impact-assessment/govscot%3Adocument/looked-children-scotland-amendment-regulations-2021-childrens-rights-wellbeing-impact-assessment.pdf>> (accessed 5 August 2021).

¹³³ Scottish Government (n 132) 1.

¹³⁴ *ibid* 8 – 9.

¹³⁵ *ibid* 3, 4 5, 8 and 9.

¹³⁶ Janet Cormack, ‘New Rights for Brothers and Sisters in Children’s Hearings from 26 July’ (14 July 2021) <<https://www.chscotland.gov.uk/about-us/latest-news/new-rights-for-brothers-and-sisters-in-children-s-hearings-from-26-july/>> (accessed 5 August 2021).

the legislation that allow those who represent children to include children's rights into policy development at the earlier stage.¹³⁷

In some cases, the UK courts have considered the impact assessments conducted by the Minister in coming to their decisions. For example, *R (on the application of SG and Others) v Secretary of State for Work and Pensions*¹³⁸ concerned a Welfare Reform Bill by the Secretary of State to impose a cap on welfare benefits' amount in non-working households.¹³⁹ The Department for Work and Pensions laid a series of impact assessments about the household benefit cap before the Parliament wherein the policy was vigorously scrutinised by House of Lords and House of Commons.¹⁴⁰ The Court considered a 2011 Impact Assessment that demonstrated the UK Government's awareness of the potential impact on children,¹⁴¹ an Equality Impact Assessment that highlighted the UK Government's objective to reverse the impact of beneficial dependency on families and children¹⁴² and an updated 2012 Impact Assessment¹⁴³ that revised the assessment on the amount of children who may be affected by the policy. The Court also highlighted the opportunity given to the interested children's organisations and commissions to submit evidence and reports expressing their concerns about the predicted impact on children's rights.¹⁴⁴ Taking into account the Secretary of State's effort, the fullest debate participated by

¹³⁷ Information-Gathering Discussion with Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) (9 July 2021).

¹³⁸ [2015] UKSC 16.

¹³⁹ *ibid* [1].

¹⁴⁰ *ibid* [27].

¹⁴¹ Department for Work and Pensions, 'Impact Assessment for the Household Benefit Cap' (UK Government, 2012) <<https://www.parliament.uk/globalassets/documents/impact-assessments/IA12-003.pdf>> (accessed 5 August 2021).

¹⁴² Department for Work and Pensions, 'Benefit Cap : Equality Impact Assessment' (UK Government, July 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/220153/eia-benefit-cap-wr2011.pdf> (accessed 5 August 2021).

¹⁴³ Department for Work and Pensions (n 141).

¹⁴⁴ *R (on the application of SG and Others) (n 138) [26] – [27]*.

relevant parties, the impact assessments conducted by the Government, the Court was not persuaded that the regulations were incompatible with Article 14 ECHR.¹⁴⁵

Equally, in Scotland, *Opinion of Lord Burns in the Petition MA*¹⁴⁶ concerned a petition by a woman who was refused criminal injuries compensation for injuries sustained as a child which were inflicted by her mother as these (i) took place before 1 October 1979 and (ii) in the same household.¹⁴⁷ The Court considered a 1979 review and a 2012 Equality Impact Assessment by the Ministry of Justice regarding the eligibility criteria.¹⁴⁸ The impact assessment justified the retention of the criteria for injuries sustained prior to 1 October 1979 as it will (i) reduce the taxpayer's burden and (ii) ensure the Scheme's sustainability in the long term.¹⁴⁹ This is because the bright line rule¹⁵⁰ makes the Scheme sustainable considering the inability to estimate the Scheme's abolition cost.¹⁵¹ For these reasons, Lord Burns dismissed the petition despite acknowledging the fact that the claim fell within the ambit of Article 14 and A1P1 ECHR.¹⁵²

While efforts are continuing, the administrative impact of the HRA remains intangible. Firstly, from 2010 to May 2017, only five out of 15 to 25 UK Government Bills were considered in light of their effects on children's rights. Instead of examinations, these Bills were minimally analysed with a lack of reference towards children's views.¹⁵³ This development highlighted a chicken and egg situation; does the Government think about children's rights, then as a result, it introduces legislation which upholds

¹⁴⁵ *R (on the application of SG and Others)* (n 138) [96].

¹⁴⁶ [2016] CSOH 115.

¹⁴⁷ *ibid* [2].

¹⁴⁸ The eligibility criteria are prescribed under Paragraph 7(b) of the Criminal Injuries Compensation Scheme 2008.

¹⁴⁹ Ministry of Justice, 'Reform of the Criminal Injuries Compensation Scheme : Equality Impact Assessment' (UK Government, July 2012) 167 <<https://consult.justice.gov.uk/digital-communications/victims-witnesses/results/eia-criminal-injuries-comp-scheme.pdf>> (accessed 5 August 2021).

¹⁵⁰ According to Merriam-Webster, bright line rule can be defined as unambiguous criteria or rule that set a basic standard. <<https://www.merriam-webster.com/dictionary/bright-line>> (accessed 19 August 2021).

¹⁵¹ *MA* (n 146) [36] – [37].

¹⁵² *MA* (n 146) [36].

¹⁵³ *Lisa Payne* (n 124) 412.

children's rights or does the Government introduce legislation that upholds children's rights, subsequently, the politicians start to think about children's rights?

Secondly, it is not mandatory for a compatibility statement to be accompanied by an HRIA or CRWIA to prove such statement.¹⁵⁴ It begs the question; does Section 19 HRA require only a statement of opinion by a Minister? This question is addressed in *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and Others*¹⁵⁵ regarding limitation introduced on child tax credit. The Bill was introduced in the House of Commons in 2015 wherein the Minister made a compatibility statement to the Parliament.¹⁵⁶ The Bill was politically contentious, therefore, it was subjected to numerous debates, impact assessments, written evidence, briefing papers and notes by the UK Parliament, UK Government and wider stakeholders.¹⁵⁷ It can be argued that the Supreme Court threaded along a traditional line on the Parliamentary privilege issue. The Court followed *Wilson v First County Trust Ltd (No. 2)*¹⁵⁸ that reliance on Parliamentary material by the courts must be in rare circumstances only; that is to check the legislation's purpose.¹⁵⁹ To assess a Bill's compatibility with the Convention rights, it is sufficient for the courts to assess whether the Parliament takes into account the compatibility issue. They must not go further to analyse the arguments raised or look through the debate records.¹⁶⁰ It can be seen that Parliamentary sovereignty has been built into the HRA¹⁶¹ and it is reflected in the Court's decision to affirm the separation of powers principle. The Court highlighted that the Government is separated from the Parliament, therefore, a Minister's statement of compatibility under Section 19 HRA cannot be attributed to the Parliament.¹⁶² The Court followed *Anderson v Scottish Ministers*¹⁶³ that a

¹⁵⁴ Information-Gathering Discussion with Andrew Sirel from JustRight Scotland (28/06/2021).

¹⁵⁵ [2021] UKSC 26.

¹⁵⁶ *ibid* [13].

¹⁵⁷ *R (on the application of SC, CB and 8 children)* (n 155) [16].

¹⁵⁸ [2003] UKHL 40.

¹⁵⁹ *R (on the application of SC, CB and 8 children)* (n 155) [178].

¹⁶⁰ *ibid* [182] – [183].

¹⁶¹ Information-Gathering Discussion with Andrew Sirel from JustRight Scotland (28/06/2021).

¹⁶² *R (on the application of SC, CB and 8 children)* (n 155) [166] – [167].

¹⁶³ [2003] 2 AC 602.

compatibility statement *“is no more than a statement of opinion by the relevant minister.”*¹⁶⁴ Crucially, this decision strengthens the argument that a compatibility statement is merely narration and not examination of policy with the true intention of complying with the HRA.¹⁶⁵ There is lack or absence of evidence to demonstrate that the courts have overstepped the line drawn by the HRA while at the same time, there is a populist conception that what the Parliament says should happen, should happen.¹⁶⁶

Thirdly, lack or absence of human rights’ awareness and culture within the public authority and society remains a persistent challenge in terms of administrative policies and decisions. The governments and public authorities tend to focus more on Equality Act 2010 (‘Equality Act’), the UNCRC or other international human rights’ treaties when discussing about children’s rights. Ironically, the HRA comes into the picture at a very basic level.¹⁶⁷ This is demonstrated in the cancellation of examinations in 2020 by the Scottish Government due to the coronavirus (‘COVID-19’) crisis. Across Scotland, children who were key stakeholders were vocal about their concerns and the impact of the alternative assessment introduced by the Government.¹⁶⁸ Young Advisers and the Children and Young People’s Commissioner (‘Children’s Commissioner’) appeared before the Parliament’s Education and Skills Committee and discussed issues including children’s right to education and right to be heard.¹⁶⁹ Crucially, Dr. Tracy Kirk has put forward several issues which were not addressed by the Scottish Qualifications Authority (‘SQA’) or the Scottish Government such as fundamental flaws in the CRWIA.¹⁷⁰ Dr. Kirk argued that the CRWIA

¹⁶⁴ Anderson (n 163) [7].

¹⁶⁵ Lisa Payne (n 124) 412.

¹⁶⁶ Information-Gathering Discussion with Andrew Sirel from JustRight Scotland (28/06/2021).

¹⁶⁷ Information-Gathering Discussion with Dr. Tracy Kirk (29/06/2021).

¹⁶⁸ Children and Young People’s Commissioner Scotland, ‘Exams and Assessments’ (undated) <<https://cypcs.org.uk/coronavirus/exams-and-assessments/>> (accessed 8 August 2021).

¹⁶⁹ Children and Young People’s Commissioner Scotland, ‘Young Voices at the Scottish Parliament : Our Young Advisers’ Session with the Education and Skills Committee’ (12 March 2021) <<https://cypcs.org.uk/news-and-stories/young-voices-at-the-scottish-parliament-our-young-advisers-session-with-the-education-and-skills-committee/>> (accessed 8 August 2021).

¹⁷⁰ Tracy Kirk, ‘Children’s Rights, Education and COVID 19 : Submission to the Scottish Parliament Education and Skills Committee’, (January 2021) 5 – 6

conducted by the SQA¹⁷¹ did not follow the CRWIA guidelines put in place by the Scottish Government.¹⁷² Ironically, the CRWIA, submissions and discussions by the Scottish Government, SQA and children were premised on the Equality Act and the UNCRC. The parties seemed not to engage with the HRA which incorporated Article 2 of the First Protocol ('A2P1') on right to education. The ECHR places an obligation on the public authorities to ensure that policies or decisions taken by them do not interfere with A2P1. If their policies or decisions interfere with the right to education, they have an obligation to provide justifications for their actions.¹⁷³ Despite such protection provided by the HRA, the parties have yet to utilise it. This highlights the protection gap which can arise when rights-holders and duty bearers do not have sufficient knowledge of domestic human rights law.

The HRA plays an important role in the context of public policies and administrative decisions. It can be seen that the HRA (including the Scotland Act) encourages early consideration of children's rights in policy development through the HRIA, CRWIA and compatibility statement. However, it is arguable that the governments, ministers and public authorities are not giving sufficient consideration to the HRA and children's rights when developing policies and coming to decisions. The lack of human rights'

<https://archive2021.parliament.scot/S5_Education/General%20Documents/20210108Dr_Tracy_Kirk.pdf> accessed 8 August 2021).

¹⁷¹ Dr. Kirk has identified several fundamental flaws in the CRWIA such as non-compliance with Section 96 of the Equality Act 2010 in the grading process, failure to engage with affected candidates individually and children who were protected under the Equality Act, lack of transparent and direct appeal process as well as absence of right to redress for the affected candidates. As a result, the algorithm and ranking system used by the SQA were discriminatory and contradictory to children's human rights.

¹⁷² Tracy Kirk, 'The Best Place in the World to Grow up: How can Scotland Uphold its Legal Obligations to Children and Young People in these Unprecedented Times?' (7 August 2020)

<<https://childrensrightsadvocate.com/2020/08/07/the-best-place-in-the-world-to-grow-up-how-can-scotland-uphold-its-legal-obligations-to-children-and-young-people-in-these-unprecedented-times/>> (accessed 8 August 2021).

¹⁷³ Equality and Human Rights Commission, 'Human Rights, Human Lives : A Guide to the Human Rights Act for Public Authorities' (April 2014) 60 <<https://www.equalityhumanrights.com/en/human-rights-act/article-2-first-protocol-right-education>> (accessed 8 August 2021).

knowledge, awareness and culture remains a recurring challenge within the whole community including the administrative bodies.

In the next chapter, the author will analyse the procedural impacts of the HRA on children's rights in the UK.

CHAPTER 4

PROCEDURAL IMPACT OF HRA 1998 ON CHILDREN'S RIGHTS IN THE UK

4.0 Introduction

Chapter 3 illustrated the legislative and administrative progression and existing gaps of the HRA on children's rights. Apart from those areas, the HRA has impacted children's rights procedurally. This can be seen in two different areas; standing and time limits. This chapter will analyse how standing and time limits prescribed under the HRA have impacted children's rights in the UK.

4.1 Standing

Along with guaranteeing the human rights of all people in the UK, the HRA also accords standing; "*capacity of a party to bring suit*".¹⁷⁴ To determine who can bring legal proceedings in courts, Section 7(1) HRA prescribed that an individual who is or would be a victim¹⁷⁵ of a public authority's unlawful act under Section 6(1) HRA can bring a legal proceeding against the authority.¹⁷⁶ It must be emphasised that the HRA recognises children's standing and capacity to bring proceedings equally as adults, provided that, both groups must demonstrate that they are victims of public authority's unlawful act. This progression is reflected in a series of cases in the UK, for instance, in *Opinion of Lady Paton in the Appeal by CF against MF, GF and Scottish Reporter*,¹⁷⁷ a 14-year-old girl filed an appeal against the Sheriff's decision according to Article 8 ECHR that deemed her grandparents as relevant persons in relation to Children's Hearings. In *Opinion of the Court in the Reclaiming Motion by L v The Principal Reporter of the*

¹⁷⁴ Cornell Law School. <<https://www.law.cornell.edu/wex/standing>> (accessed 28 July 2021).

¹⁷⁵ Section 7(7) of the Human Rights Act 1998 stated that a person is a victim of an unlawful act if he would be recognised as a victim under Article 34 of the ECHR if proceedings are brought in the ECtHR in respect of that act. Article 34 of the ECHR stated that the court may receive applications from any person; non-governmental organisation or group of individuals claiming to be the victim of a violation of their Convention rights by the Contracting States. Both the HRA and the ECHR limit standing to victim test; a person must be directly affected by an unlawful act [*Klass v Germany* 1988 2 EHRR].

¹⁷⁶ Human Rights Act 1998, s 7(1).

¹⁷⁷ [2017] CSIH 44.

Scottish Children's Reporter Administration & Another,¹⁷⁸ a 17-year-old girl sought a declaration and damages under Section 8 HRA against her unlawful deprivation of liberty according to Article 5(5) ECHR and in *R (on the application of AB) v Secretary of State for Justice*,¹⁷⁹ a 15-year-old child filed a judicial review proceeding before the High Court, thereafter, appealed to the Court of Appeal and Supreme Court on the issue of Article 3 ECHR.

Throughout the years, the victim test under Section 7(1) which modelled Article 34 ECHR comes with a price; it is narrower compared to the 'sufficient interest' test under judicial review.¹⁸⁰ One could argue that the restrictive test poses challenges to the enhancement of children's rights in the UK. This is because, for the HRA to effectively protect children's rights, victims themselves must bring actions to the courts and/or tribunals. As acknowledged by the experts, this is problematic especially when dealing with children as they (i) may not possess the knowledge and/or awareness about their human rights, consequently, they may be unaware of human rights' violation; (ii) may not wish to report human rights' violation or; (iii) may refuse to engage in litigation.¹⁸¹ There could be numerous reasons for children's refusal to report or to engage in litigation such as a not-child-friendly justice system, language barrier, financial and emotional costs¹⁸² or dependency on adults to access and utilise the justice system.¹⁸³

Throughout the discussions with the experts, it is apparent that most children do not possess sufficient knowledge and/or awareness about their human rights.¹⁸⁴ For example, the experts highlighted that most children failed to identify the human rights' breach encountered by them as they were unfamiliar with human rights' language. To complicate the matter, most children were unaware of who they should

¹⁷⁸ [2021] CSIH 4.

¹⁷⁹ [2021] UKSC 28.

¹⁸⁰ Section 27B of the Court of Session Act 1988 as amended by the Courts Reform (Scotland) Act 2014 and *AXA General Insurance Limited and Others v The Lord Advocate* [2011] UKSC 46.

¹⁸¹ Information-Gathering Discussions (n 63).

¹⁸² *ibid.*

¹⁸³ Children's Parliament, 'A Consultation on Incorporating the UNCRC into Domestic Law in Scotland' (September 2019) 19 <<https://www.childrengovernment.org.uk/wp-content/uploads/Incorporation-Online.pdf>> (accessed 9 August 2021).

¹⁸⁴ Information-Gathering Discussions (n 63).

seek advice from or how to access their right to redress in such situations. In most situations, children felt a sense of unfairness or injustice imposed against them, therefore, they must seek advice or assistance to resolve the issue.¹⁸⁵ Such finding is alarming as knowledge and awareness about human rights are prerequisite to lay people as much as to the government. Crucially, precise understanding of human rights is influential in the effective implementation of the HRA in the domestic legal system, public services and society as a whole.¹⁸⁶

This is echoed by a Member of the Children's Parliament;

*It shouldn't be just about following the law, but also about everyone knowing about their rights.*¹⁸⁷

Further, litigation is often daunting and nerve-racking, especially for children who are vulnerable, have communication difficulties or are socially excluded.¹⁸⁸ However, as Lord Bingham has indicated, judges are not legislators, therefore, they cannot judge on claims that do not appear before them.¹⁸⁹ Without children bringing legal proceedings, the narrow definition of victims inevitably limits the capacity of other people such as organisations to bring proceedings to the courts.¹⁹⁰ In most circumstances,

¹⁸⁵ Information-Gathering Discussions (n 63).

¹⁸⁶ Paul Stenner, 'Subjective Dimensions of Human Rights : What Do Ordinary People Understand by 'Human Rights'?' (2011) 15(8) The International Journal of Human Rights 1215 – 1216
<<https://www.tandfonline.com/doi/pdf/10.1080/13642987.2010.511997?needAccess=true>> (accessed 20 July 2021).

¹⁸⁷ Children's Parliament (n 183) 11.

¹⁸⁸ Frances Butler, *Human Rights : Who Needs Them? : Using Human Rights in the Voluntary Sector*, (Institute for Public Policy Research, 2004) 60.

¹⁸⁹ Thomas Bingham, 'Judges Possess the Weapon to Challenge Surveillance' (The Guardian, 17 February 2009)
<<https://www.theguardian.com/commentisfree/2009/feb/17/surveillance-civil-liberties>> (accessed 28 July 2021).

¹⁹⁰ Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them : Is a Bill of Rights the Answer?' (November 2009) 72(6) The Modern Law Review 893
<<https://www.jstor.org/stable/pdf/27755216.pdf?refreqid=excelsior%3Ad39747f400d9f0901700dfa3957d0c4b>> (accessed 20 July 2021).

organisations are not victims, yet, they want to bring proceedings on behalf of children under the HRA but they cannot do so.¹⁹¹ This glaring limitation is reflected in *Re an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)*.¹⁹² In this case, the Northern Ireland Human Rights Commission ('NIHRC') highlighted the Northern Ireland legislation's compatibility with Articles 3, 8 and 14 ECHR that did not allow abortions in the context of pregnancy due to rape, incest or serious foetal abnormality.¹⁹³ The majority of 4-3 held that the NIHRC did not have standing to take the proceeding to the court because there was an absence of actual or potential victims as required by Sections 6 and 7 HRA.¹⁹⁴ Despite this, the minority applied purposive interpretation which upheld the NIHRC's right to initiate actions in its own name "*to prevent any woman or girl from having to face the burden of doing so*".¹⁹⁵ Fundamentally, the majority was fixated on the victim test under Section 7 which restricts the NIHRC's ability to take actions under the HRA.¹⁹⁶

Similarly, in Scotland, the Children's Commissioner's¹⁹⁷ powers are limited. Most importantly, he does not currently have the power to bring proceedings to the courts.¹⁹⁸ Due to this limitation, the Children's Commissioner had intervened in two cases regarding children's rights in 2018 and 2019. One of the cases is an ongoing group of cases of similar situations wherein children were being deprived of their

¹⁹¹ Mhairi Snowden and Janet Cormack, 'Discussion Paper : Overcoming Barriers to Public Interest Litigation in Scotland' (The Baring Foundation, October 2018) 8 <<https://cdn.baringfoundation.org.uk/wp-content/uploads/Final-Overcoming-Barriers-to-PIL-in-Scotland-web-version.pdf>> (accessed 28 July 2021).

¹⁹² [2018] UKSC 27.

¹⁹³ *ibid* [197].

¹⁹⁴ *NIHRC for Judicial Review* (n 192) [3], [60], [135], [333], [334] and [365].

¹⁹⁵ Northern Ireland Human Rights Commission, 'Northern Ireland Termination Law Breaches Women and Girls' Human Rights' (7 June 2018) <<https://nihrc.org/news/detail/northern-ireland-termination-law-breaches-women-and-girls-human-rights>> (accessed 28 July 2021).

¹⁹⁶ Northern Ireland Act 1998, s 69(5).

¹⁹⁷ Children and Young People's Commissioner promotes and protects children's rights in Scotland. Children and Young People's Commissioner Scotland, 'Who is the Commissioner?' <<https://cypcs.org.uk/about/commissioner/>> (accessed 21 August 2021).

¹⁹⁸ Commissioner for Children and Young People (Scotland) Act 2003 as modified by Children and Young People (Scotland) Act 2014.

liberty in residential houses.¹⁹⁹ The Children's Commissioner was notified about T, a case on the issue of unregistered and unregulated children's house whereby leave to appeal had been granted. At the same time, the Children's Commissioner started to receive calls informing him that there was a sharp rise in the number of children being transported in the middle of the night from England into these places in Scotland. The Children's Commissioner intervened in this case wherein the court's judgment is due in October 2021. On the same note, more children are now applying to the Scottish court to invoke its inherent jurisdiction and sanction these places, however, these cases are suspended pending judgment in the Supreme Court.²⁰⁰ The Children's Commissioner does not have standing to bring actions but was granted leave to intervene on a very narrow basis with a very limited involvement.²⁰¹ This narrow construction of standing is problematic as (i) it contributes to a floodgate of isolated applications with similar issues; (ii) children will incur financial and emotional costs; (iii) it is a less efficient use of courts' time to address individual applications and (iv) in the worst case scenario, it may prevent some trailblazing claims from being heard in the courts.²⁰²

The recent development in *R (on the application of SC, CB and 8 children)*²⁰³ is worrisome towards the children's organisations. The appeal was brought with the support of Child Poverty Action Group and concerned the restriction of benefit payments to two children in a family under Articles 8, 12 and 14 ECHR.²⁰⁴ Apart from dismissing the appeal unanimously,²⁰⁵ the victim test was applied very restrictively by the Supreme Court with some judges showing active opposition to civil society organisations raising

¹⁹⁹ Children and Young People's Commissioner Scotland, 'Strategic Litigation' <<https://cypcs.org.uk/get-help/i-work-to-change-things/strategic-litigation/>> (accessed 29 July 2021).

²⁰⁰ Information-Gathering Discussion with Maria Galli from Children and Young People's Commissioner Scotland (participated in her personal capacity) (8 July 2021).

²⁰¹ *ibid.*

²⁰² Amos (n 190) 894.

²⁰³ *R (on the application of SC, CB and 8 children)* (n 155).

²⁰⁴ *ibid* [1] and [11].

²⁰⁵ *ibid* [2].

strategic litigation.²⁰⁶ For these reasons, why the victim test was imported into the HRA? In Bringing Rights Home's consultation paper, the standing to bring proceedings was recommended to extend to;

*[...] pressure groups who believe their cause may be prejudiced, [and] representative group interests who consider their collective interests are disadvantaged.*²⁰⁷

However, the victim test was adopted in the Human Rights Bill to reflect similar terms in the ECHR.²⁰⁸ It can be argued that it was unnecessary to import the ECHR's victim test into the HRA because (i) the ECHR is a living instrument that set a basic level of protection of human rights,²⁰⁹ (ii) the ECHR does not mandate the States to adopt the victim test domestically²¹⁰ and (iii) it is the States' obligations to ensure effective remedies are available before national authorities²¹¹ and to secure the people's rights and freedoms as prescribed in Section 1 ECHR.²¹²

It can be seen that despite the HRA acknowledges children's standing to bring proceedings to the courts and/or tribunals, the victim test under Section 7(1) may place impassable barriers in upholding children's rights in the UK. On the ground, organisations that possess knowledge and expertise on children's rights may recognise the violation of rights, wish to bring proceedings to the courts, can

²⁰⁶ *"They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign"* at Paragraph 162 and *"Typically, the organisations which bring cases of the present kind will themselves have campaigned against the legislation during its passage through Parliament, as Lord Bingham noted. They will have made sure that their concerns were drawn to the attention of Parliamentarians, as the Child Poverty Action Group did in the present case: para 19 above."* *R (on the application of SC, CB and 8 children)* (n 155) [185].

²⁰⁷ Ronagh J.A. McQuigg, 'The Victim Test under the Human Rights Act 1998 and its Implications for Domestic Violence' (2011) 3 European Human Rights Law Review 296.

²⁰⁸ McQuigg (n 207).

²⁰⁹ Helen Fenwick *et al*, *The Human Rights in Contemporary Context*, (Cambridge University Press, 2009) 6.

²¹⁰ McQuigg (n 207) 297.

²¹¹ European Convention on Human Rights, Article 13.

²¹² *ibid*, Article 1.

effectively present cases in the courts, stand a higher success rate and contribute to a robust furtherment of children's rights in the UK. These organisations, if provided with a more relaxed standing rule, can represent children to seek redress efficiently and aid to ground-breaking judgments that will impact children's rights in the UK.²¹³

The following section will examine how the HRA's provision on time has impacted children's rights in the UK.

4.2 Time Limits

The HRA was enacted as an instrument to boost human rights' legal protection in the UK. Hence, during the Human Rights Bill's debate, the Lord Chancellor emphasised that;

*We want to provide as much protection as possible for the rights of individuals against the misuse of power by the state within the framework of a Bill which preserves Parliamentary sovereignty.*²¹⁴

While a judicial review is subjected to a three-month time limit²¹⁵ and a discrimination claim is subjected to a six-month time limit,²¹⁶ the HRA prescribed a longer time to bring legal proceedings to the courts. According to Section 7(5)(a), a claim against a public authority under Section 7(1) HRA must commence within one year of the challenged acts or omissions.²¹⁷ It is settled law that the expression "*the date on*

²¹³ Joanna Miles, 'Standing under the Human Rights Act 1998 : Theories of Rights Enforcement & (and) the Nature of Public Law Adjudication' (2000) 59(1) The Cambridge Law Journal 145-146
<<https://doi.org/10.1017/S0008197300000052>> (accessed 20 July 2021).

²¹⁴ HL Deb 24 November 1997, Volume 583, Columns 771-817 para 808 <https://api.parliament.uk/historic-hansard/lords/1997/nov/24/human-rights-bill-hl-1#S5LV0583P0_19971124_HOL_215> (accessed 31 July 2021).

²¹⁵ Courts Reform (Scotland) Act 2014, s 89.

²¹⁶ Equality Act 2010, s 188.

²¹⁷ Human Rights Act 1998, s 7(5)(a).

which the act complained of took place”²¹⁸ covers a single event and a course of conduct.²¹⁹ Most importantly, the time runs not when the continuing act begins but when it ceases.²²⁰ Further, paragraph (b) extends the time limitation if it is equitable having regard to all the circumstances.²²¹

However, it is possible to pinpoint obstacles with Section 7(5) HRA which inhibit its effectiveness concerning children’s rights. The Parliament did not adopt any exception in terms of Section 7(5)(b), hence, there is no predetermined list that the courts may take into consideration to grant time extension.²²² On the contrary, Sections 28 and 33 of the Limitation Act 1980 identify the factors to assist the courts in doing so. For instance, Section 28(1) considers disability as a rebuttable presumption to grant extension²²³ while Section 33 sets out factors to exclude time limitation in relation to personal injuries or death.²²⁴ The absence of a predetermined list under Section 7(5) has negatively impacted children, for instance, in *M (A Minor by His Litigation Friend LT) v Ministry of Justice*.²²⁵ In this case, the appellant aged 6 brought a claim by means of his mother as his litigation friend against the Ministry of Justice pertaining to his father’s suicide in Liverpool’s prison under Articles 2 and/or 8 ECHR and Section 7(1) HRA.²²⁶ The issue before the Court was; whether the Appellant’s claim was within the time limit as

²¹⁸ Human Rights Act 1998, s 7(5)(a).

²¹⁹ *O’Connor v Bar Standards Board* [2017] UKSC 78 [23].

²²⁰ *Somerville v Scottish Ministers* [2007] UKHL 44 [51].

²²¹ Human Rights Act 1998, s 7(5)(b).

²²² *AP (by His Litigation Friend, BA) v Tameside Metropolitan Borough Council* [2017] EWHC 65 (QB) [69].

²²³ Section 28(1) of the Limitation Act 1980 stated that “*subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.*”

²²⁴ Limitation Act 1980, s 33.

²²⁵ [2009] EWCA Civ 419.

²²⁶ *ibid* [2].

the claim was issued approximately four years after his father's suicide.²²⁷ The Court upheld the Liverpool County Court's decision that Section 7(5) HRA did not provide any exception, including to children.²²⁸

The absence of a predetermined list may work in contrary to the HRA's initial objective of guaranteeing human rights' protection in the UK. In most cases, such absence poses challenges to children as they encounter environmental and legal barriers in accessing the justice system, for example, lack of knowledge and/or awareness about their human rights,²²⁹ inability to instruct lawyers on their own, inability to secure legal representation in time, financial and emotional costs.²³⁰ Consequently, children often have to depend on others to protect and uphold their rights. Those who deal with children such as parents and/or guardians, organisations, Children's Commissioner, lawyers or experts require time to (i) determine human rights' violations, (ii) draft court documents, (iii) secure funding, (iv) secure legal representation and (v) prepare children for hearings. To overcome these barriers and work effectively, it may go beyond one-year time limitation under Section 7(5)(a).²³¹

One may question, how did the courts respond to these barriers? In *AP (by His Litigation Friend, BA) v Tameside Metropolitan Borough Council*,²³² the claimant, a protected party due to his disability, sought a declaratory relief and damages due to unlawful deprivation of liberty under Articles 5 and 8 ECHR.²³³ The claim was brought outside the time limitation of Section 7(5)(a)²³⁴ due to (i) delay in granting legal aid and (ii) time taken in drafting pleadings.²³⁵ It is significant to point out that the Court did not consider

²²⁷ "...it is a striking feature of Section 7 that it provides a limitation period of only one year, to be strongly contrasted with the much longer period allowed under the Limitation Act, and indeed makes no allowance in the case of a minor." *M* (n 225) [1].

²²⁸ *ibid* [30].

²²⁹ *Amos* (n 190) 886 – 888.

²³⁰ *Snowden and Cormack* (n 191) 11.

²³¹ *Information-Gathering Discussions* (n 63).

²³² [2017] EWHC 65 (QB).

²³³ *ibid* [2] and [6].

²³⁴ *ibid* [36].

²³⁵ *ibid* [89].

those reasons as equitable and refused to grant an extension of time. The Court also highlighted that in principle, legal aid issue must be coordinated within the time limitation.²³⁶

In a different manner, *A v Essex County Council*²³⁷ concerned the right to education of a disabled child under Article 2 ECHR and statutory responsibility of the local authority under Section 6(1) HRA. On the issue of delay over nine months to bring the proceeding,²³⁸ Lady Hale acknowledged the (i) difficulty to secure funding, (ii) lack of knowledge or (iii) lack of resources to initiate proceedings in the courts may serve as good reasons to grant an extension of time under the HRA. Crucially, her Ladyship emphasised the expression 'equitable' under Section 7(5)(b) as "*fair to each side*".²³⁹

On the other hand, in *M (A Minor by His Litigation Friend LT)*, public funding issue was mentioned in Paragraph 6 as one of the reasons for the delay, however, the Court did not elaborate on it further.²⁴⁰

It can be seen that the courts' approaches and judgments are inconsistent on the factors that warrant an extension of time under Section 7(5) HRA. The lack of jurisprudence on the limitation's principles applicable to human rights' cases,²⁴¹ absence of a predetermined list on exceptions and inconsistency of courts' decisions together with the existing time limitation under the HRA present difficulties for children to access and uphold their human rights in the current legal system. Feasibly, the expansion of the time limit specifically to children may restore the gap under the HRA.

²³⁶ *"The matters relating to the obtaining of legal aid or the time taken to draft pleadings cannot in themselves make it equitable to extend time to the length required in this case. Legal aid matters are ones which in principle should be accommodated within the primary limitation period."* *AP (by His Litigation Friend, BA)* (n 232) [89].

²³⁷ [2010] UKSC 33.

²³⁸ *ibid* [113].

²³⁹ *ibid* [114] – [118].

²⁴⁰ *"...on 15 February 2006 the mother's solicitors wrote again to the Treasury Solicitor pointing out that they were now in receipt of public funding to bring a claim against the Home Office and would therefore be grateful for a decision within the next 21 days."* *M* (n 225) [6].

²⁴¹ *A* (n 237) [112].

In the final chapter, the author will draw the learning from the implementation of the HRA to inform Scotland's implementation of the Bill and incorporation of other international human rights treaties.

CHAPTER 5

A NEW DAWN FOR CHILDREN IN SCOTLAND

5.0 Introduction

The previous chapters have demonstrated the HRA's impacts on children's rights in the legislative, administrative and procedural areas. Regardless of the progression of rights experienced by children, the aforementioned analysis suggests that the HRA contains a plethora of gaps that prevent children's rights from being fully realised.

This chapter will analyse the measures taken and which should be taken by Scotland to inform the implementation of the Bill and incorporation of other international human rights treaties taking into account the learning drawn from the implementation of the HRA in the UK, especially in Scotland.

5.1 Incorporation of the UNCRC in Scotland

One may question, how can Scotland respect, protect and fulfil children's rights who make up almost 21% of its population?²⁴² According to international children's rights practice, incorporation²⁴³ of the UNCRC is the initial step to guarantee a broad range of children's rights.²⁴⁴ This is because the UNCRC consists of 54 articles that (i) safeguard civil, political, economic, social and cultural rights of children, (ii)

²⁴² National Records of Scotland, 'Data Tables : Population' (8 October 2020)

<<https://www.nrscotland.gov.uk/statistics-and-data/statistics/stats-at-a-glance/registrar-generals-annual-review/2019/data-tables>> (accessed 16 August 2021).

²⁴³ According to Paragraph 22 of the General Comment No. 5 by the United Nations Committee on the Rights of the Child, incorporation means "*the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice.*"

²⁴⁴ Kasey McCall-Smith, 'Incorporation of the UNCRC into Scots Law : What, How and Why?' (29 August 2019),

Global Justice Academy and Global Development Academy, University of Edinburgh.

<<https://www.globaljusticeblog.ed.ac.uk/2019/08/29/incorporation-of-the-uncrc-into-scots-law-what-how-and-why/>> (accessed 16 August 2021).

provide a comprehensive approach to tackle issues affecting children and (iii) balance children's rights with others' rights.²⁴⁵ Having regard to these benefits, the CRC Committee continuously advocates for direct incorporation²⁴⁶ to ensure effective implementation and realisation of children's rights domestically.²⁴⁷ Notwithstanding the UK's lacklustre response to the CRC Committee's repeated calls for incorporation,²⁴⁸ Scotland successfully passed legislation on 16th March 2021 that, once in force, will incorporate the UNCRC into Scots law.²⁴⁹ The Bill builds on the HRA model wherein the HRA is significantly reflected in the Bill due to its tried and tested nature in the UK and Scotland. However, the Bill strengthens children's rights in comparison to the HRA in the following manner:-²⁵⁰

5.1.1 Approach

The Bill adopts a maximalist approach as it incorporates the UNCRC "*fully and directly*" into Scots law to the extent possible under the Scottish Parliament's powers.²⁵¹ The Bill includes relevant articles²⁵² within Scotland's devolved competency and the two optional protocols on

²⁴⁵ McCall-Smith (n 244).

²⁴⁶ Direct incorporation can be understood as incorporation of a Convention, either in full or in part, directly into the domestic legal system.

²⁴⁷ Committee on the Rights of the Child, 'General Comment No. 5 (2003) : General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)', CRC/GC/2003/5 (United Nations, 27 November 2003) paras 20 - 23 <<https://undocs.org/CRC/GC/2003/5>> (accessed 18 August 2021).

²⁴⁸ Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', CRC/C/GBR/CO/5 (United Nations, 12 July 2016) para 7 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En> (accessed 21 August 2021).

²⁴⁹ Scottish Government, 'Landmark for Children's Rights' (16 March 2021) <<https://www.gov.scot/news/landmark-for-childrens-rights/>> (accessed 4 July 2021).

²⁵⁰ Information-Gathering Discussions (n 63).

²⁵¹ Nicola Sturgeon, 'Programme for Government 2020-2021: First Minister's Speech 1 September 2020' (1 September 2020) <<https://www.gov.scot/publications/first-minister-programme-government-1/>> (accessed 21 August 2021).

²⁵² The redacted version of the Bill which shows the parts that have been removed as considered outwith Scotland's competence is available at

Children in Armed Conflict and Sale of Children, Child Prostitution and Child Pornography.²⁵³ The Bill also opens the possibility to add further articles and optional protocols in the future which will make the Bill relevant at all times for children.²⁵⁴ Crucially, the Bill takes into account different jurisprudence which are relevant to the UNCRC's interpretation such as preambles, optional protocols, general comments, concluding observations and recommendations which broaden the domestic courts' point of reference.²⁵⁵

5.1.2 Legislative and Administrative Impacts

Apart from its maximalist approach, Part II forms the reactive part of the Bill.²⁵⁶ Similar to the HRA, it places an obligation on public authorities to act compatibly with the UNCRC and optional protocols. Learning from the ambiguity of Section 6 HRA and the inconsistencies in courts' judgments that have negatively impacted children, the Bill clarifies the definition of public authority, including that private or third sector bodies may fall within its scope if they deliver services under contract, payment or other agreement with a public authority.²⁵⁷ The broad definition of a public authority remains constitutionally contentious as it was challenged by the

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2020/08/united-nations-convention-on-the-rights-of-the-child-bill-rights-and-requirements/documents/united-nations-convention-on-the-rights-of-the-child-bill-rights-and-requirements/united-nations-convention-on-the-rights-of-the-child-bill-rights-and-requirements/govscot%3Adocument/UNCRC%2BBill%2B-%2BThe%2Brights%2Band%2Brequirements%2Bto%2Bbe%2Bincluded%2Bin%2Bthe%2BBill%2B-%2Bstrike%2Bthrough%2Bversion%2B%2528002%2529.pdf> (accessed 19 August 2021).

²⁵³ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, Parts 1, 2 and 3.

²⁵⁴ *ibid*, s 5.

²⁵⁵ *ibid*, s 4.

²⁵⁶ McCall-Smith (n 244).

²⁵⁷ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, s 6(3A) and s 6(3B).

UK Government and pending Supreme Court's judgment.²⁵⁸ The UK Government, however, has confirmed that it has no objection to the policy intention behind the Bill.²⁵⁹

Part III forms the proactive part of the Bill.²⁶⁰ Through this part, the Bill places a duty on the Scottish Government to prepare a Children's Rights Scheme,²⁶¹ requires the Scottish Government to publish a report on steps taken and planned to progress children's rights which must be laid before the Parliament,²⁶² makes preparation and publication of CRWIA mandatory for new Bills and strategic decisions,²⁶³ and requires periodic reports from other listed authorities.²⁶⁴ These measures recognise children's participation and involvement of the Children's Commissioner and Scottish Human Rights Commission ('SHRC') in a wider context. Part III also helps to ensure children's rights are upheld in the development of law and policies as they shape early thoughts about decision making among the government, Parliament, politicians and public authorities.²⁶⁵ Without the transparent reflection and children's participation prescribed by Part III, Scotland may face similar challenges that have taken place through the implementation of the HRA.

²⁵⁸ Together (Scottish Alliance for Children's Rights), 'Children's Rights Bill Reaches UK Supreme Court: Here's What You Need to Know' (25 June 2021) <<https://togetherscotland.blog/2021/06/25/childrens-rights-bill-reaches-uk-supreme-court-heres-what-you-need-to-know/>> (accessed 17 August 2021).

²⁵⁹ Office of the Secretary of State for Scotland, 'United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill' (UK Government, 24 March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973000/Letter.pdf> (accessed 21 August 2021).

²⁶⁰ McCall-Smith (n 244).

²⁶¹ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, s 11 and s 12.

²⁶² *ibid*, s 13.

²⁶³ *ibid*, s 14.

²⁶⁴ *ibid*, s 15.

²⁶⁵ Information-Gathering Discussion with Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) (9 July 2021).

Part IV covers three essential elements; statements of compatibility, strike down declarators and incompatibility declarators.²⁶⁶ While statements of compatibility are non-mandatory under the HRA, the Bill makes it compulsory for all Government Bills to be accompanied by statements of compatibility to ensure their compliance with the UNCRC.²⁶⁷ The Bill also empowers the courts with strike down declarators²⁶⁸ against existing laws that contradict the UNCRC and incompatibility declarators²⁶⁹ against post-incorporation legislation that runs contrary with the UNCRC. These judicial capacities will strengthen the protection and enforcement of children's rights in Scotland considering the lukewarm responses by the governments towards courts' judgements.²⁷⁰

5.1.3 Procedural Impact

According to the Bill, there are two areas analogous to the HRA namely standing and time. Firstly, the Bill disregards the victim test and adopts a broader standing under the sufficient interest test.²⁷¹ This means the Bill acknowledges children's standing as well as other stakeholders' standing to bring actions on behalf of children. Further, the Bill amends Section 4 of the CYP Act and empowers the Children's Commissioner and SHRC with power to bring proceedings in courts and/or tribunals if a public authority acts or proposes to act incompatibly with the UNCRC,²⁷² contrary to the HRA. Secondly, the Bill reiterates the default rule of one year under the HRA. However, when it comes to those below 18 years old, the Bill suspends the time

²⁶⁶ This aspect also was challenged by the UK Government and at the time of submission, the Supreme Court case is pending judgement.

²⁶⁷ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, s 18.

²⁶⁸ *ibid*, s 20.

²⁶⁹ *ibid*, s 21.

²⁷⁰ As discussed in Chapter 3.

²⁷¹ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, s 7.

²⁷² *ibid*, s 10.

limitation to one year after children reach the age of 18 years old.²⁷³ This is essential considering the issues which continue to limit children's access to their human rights and justice system.²⁷⁴

There are numerous overarching impacts that can be drawn from direct incorporation of the UNCRC such as (i) children are recognised as rights-holders, (ii) it advances knowledge, understanding and awareness of children's rights among stakeholders (iii) it creates a culture of respect for children's rights, (iv) it cultivates thoughts, discussions and consultations about children's human rights from the birth of law and policy, (v) children's rights are justiciable in domestic legal system and (vi) it places duties on government and public authorities which must be complied with domestically.²⁷⁵ Moreover, two recent Supreme Court's judgments demonstrated the need for direct incorporation.²⁷⁶ In these cases, the Court concluded that (i) treaties are not contracts that domestic courts can enforce,²⁷⁷ (ii) due to the UK's dualist nature, unincorporated treaties are not part of the domestic law,²⁷⁸ (iii) the HRA only gives domestic legal effect to the ECHR but not to the unincorporated treaties including the UNCRC²⁷⁹ and (iv) the CRC Committee does not have the power to make binding decisions in matters relating to the UNCRC or ECHR's interpretation.²⁸⁰

However, it must be borne in mind that direct incorporation of the UNCRC serves as a floor and not a ceiling. One may question, going forward, what more can Scotland do to inform its implementation of the Bill and future plans to incorporate other international human rights treaties?

²⁷³ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, s 7.

²⁷⁴ As discussed in Chapter 4.

²⁷⁵ Ursula Kilkelly, Laura Lundy and Bronagh Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' (2013) 21(3) International Journal of Children's Rights 449 – 450
<https://pureadmin.gub.ac.uk/ws/portalfiles/portal/18188714/Incorporation_of_the_United_Nations_Convention_on_the_Rights_of_the_Child_in_Law.pdf> (accessed 16 August 2021).

²⁷⁶ *R (on the application of SC, CB and 8 children)* (n 155); *R (on the application of AB)* (n 179).

²⁷⁷ *R (on the application of SC, CB and 8 children)* (n 155) [76].

²⁷⁸ *ibid* [77].

²⁷⁹ *ibid* [79].

²⁸⁰ *R (on the application of AB)* (n 179) [64].

5.2 Recommendations

Scottish Government

Building on learning from implementation of the HRA, Scottish Government should:

- (i) ensure the Bill is implemented fully and effectively, so that it delivers on its ambition of making rights real for children through incorporation;
- (ii) conduct a comprehensive review of law and policies to ensure compatibility with the UNCRC. Where law and policies are found to be incompatible, the Scottish Government should amend them as a matter of urgency;
- (iii) produce clear guidance and resource effective training for officials, public authorities, legal professionals and others working with and for children to ensure understanding of the UNCRC and the effects of the Bill. This should include building their capacity to understand differences between the HRA and the Bill;
- (iv) produce transparent and evidence-based CRWIA and HRIA to mitigate future breaches and monitor implementation of the Bill; and
- (v) proactively address barriers in access to justice, drawing from learning from HRA implementation. This includes learning around child-friendly approaches towards standing, access to justice, remedy and redress, and allocating sufficient resources to ensure access to legal representation and independent advocacy.

Scottish Parliament

- (vi) Scottish Parliament should hold the Scottish Government to account for its implementation of the Bill, including by scrutinising the Children's Rights Scheme and scrutinising legislation brought forward to remedy deficiencies identified by the courts.

Judiciary

- (vii) Scottish Courts should ensure that the judiciary and all staff have the knowledge, skills and understanding to implement children's rights under the UNCRC, including the range of litigation needed to support children to uphold their rights.

Together (Scottish Alliance for Children's Rights)

Together should build the capacity of its members in relation to the HRA and the Bill, including to:

- (viii) understand how to implement a child rights-based approach in practice, including the tools they can use to progress and enforce children's rights; and
- (ix) understand the duties they may be subject to, including the differences between the HRA and the Bill.

Civil Society Organisations

- (x) Organisations should support their staff, volunteers and members to build their knowledge and understanding of children's rights and the implications of incorporation;
- (xi) Organisations with legal expertise should support other organisations to build their knowledge and understanding of strategic litigation so they are empowered to advocate for children's rights through the courts; and
- (xii) Organisations should hold the government and public authorities accountable for their implementation of HRA and the Bill.

ANNEX A

COMPILATION OF QUESTIONS FROM

INFORMATION-GATHERING DISCUSSIONS WITH CHILD RIGHTS' PRACTITIONERS,

ACADEMICS AND CIVIL SOCIETY REPRESENTATIVES

Information-Gathering Discussion with Janet Cormack from Clan Childlaw (21/06/2021)

This discussion involves two parts; the first part will discuss about general questions and the second part will expound on specific questions in relation to the organisation's work.

General Questions	
No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, what is your/your organisation's view about the HRA 1998 (in general) and its relationship with children's rights (in specific)?
2.	What are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
3.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
4.	Based on your experience/information, what are the barriers/limitations experienced by children to access their human rights and/or justice?
5.	Going forward, what should we do to improve/resolve the issues mentioned in Question 4? Are there any opportunities you see?
6.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your/your organisation's view about this?
7.	In your/your organisation's opinion, how do you think the UNCRC (Incorporation) (Scotland) Bill builds on or strengthens human rights for children compared to the HRA 1998?

Specific Questions

Clan Childlaw has intervened in three cases at the Supreme Court :-

- i) The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51
- ii) AB (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2017] UKSC 25
- iii) In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) v Secretary of State for the Home Department and another, and R (on the application of P) v Secretary of State for the Home Department and others [2019] UKSC 3

The following section will focus on the abovementioned cases.

No.	Questions
8.	In the case of The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, the Court ruled that the information-sharing provisions under the Act were incompatible with the rights of children, young persons and parents under Article 8 of ECHR, therefore, not within the legislative competence of the Scottish Parliament.
9.	In the case of AB (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2017] UKSC 25, Section 39(2)(a)(i) was held to be incompatible with Article 8 and therefore not law.
10.	In the case of, In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) v Secretary of State for the Home Department and another, and R (on the application of P) v Secretary of State for the Home Department and others [2019] UKSC 3, the Court ruled that the requirement for spent minor criminal convictions to be disclosed to potential employers under the multiple convictions rules is incompatible with Article 8 of ECHR. Clan Childlaw intervened in this case to explain the Scottish system.
11.	Apart from the positive impacts and barriers/limitations already mentioned, are there any others you have identified?
12.	What is/are the learning(s) that we can draw out from these strategic litigations to improve children's rights in relation to the HRA 1998 in the future?

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
www.togetherscotland.org.uk

13.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
14.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?

Information-Gathering Discussion with Mhairi Snowden from Human Rights Consortium Scotland
(22/06/2021)

No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, would you share your views about the HRA 1998 and its implementation in the UK and/or Scotland?
2.	Based on your experience/information, what are the available mechanisms in and around the HRA 1998 through which people access their human rights and/or justice?
3.	Based on your experience/information, what are the strengths and positive impacts of the implementation of the HRA 1998 in the UK and/or Scotland?
4.	Based on your experience/information, what are the barriers/limitations experienced by people to access their human rights and/or justice under the HRA 1998?
5.	Going forward, what can we do to improve/resolve the issues mentioned in Question 4? Are there any opportunities you see?
6.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your/your organisation's view about this?
7.	How do you think the UNCRC (Incorporation) Scotland Bill builds on or strengthens human rights for children compared to the HRA 1998?
8.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
9.	In relation to the Independent Review of the HRA 1998, what is your/your organisation's opinion about it? When would we be able to see the Report?
10.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?

Information-Gathering Discussion with Louise King and Jennifer Twite from Just for Kids Law (28/06/2021)

This discussion involves two parts; the first part will discuss about general questions and the second part will expound on specific questions in relation to the organisation's work.

General Questions	
No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, what is your/your organisation's view about the HRA 1998 (in general) and its relationship with children's rights (in specific)?
2.	What are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
3.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
4.	Based on your experience/information, what are the barriers/limitations experienced by children in accessing their human rights and/or justice under the HRA 1998?
5.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your/your organisation's view about this?
6.	In your/your organisation's opinion, how do you think the UNCRC (Incorporation) (Scotland) Bill builds on or strengthens human rights for children compared to the HRA 1998?
Specific Questions Just for Kids Law has intervened/secured judgment in numerous cases, among others are; <ul style="list-style-type: none"> iv) In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) v Secretary of State for the Home Department and another, and R (on the application of P) v Secretary of State for the Home Department and others [2019] UKSC 3 (https://www.justforkidslaw.org/what-we-do/fighting-change/strategic-litigation/past-cases/criminal-records) 	

v)	R v Jogee (Appellant) Ruddock (Appellant) v The Queen (Respondent) (Jamaica) [2016] UKSC 8 (https://www.justforkidslaw.org/what-we-do/fighting-change/strategic-litigation/past-cases/joint-enterprise)
vi)	#stillachildat17 (https://www.justforkidslaw.org/what-we-do/fighting-change/strategic-litigation/past-cases/still-child-17)
vii)	R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 57 (https://www.justforkidslaw.org/what-we-do/fighting-change/strategic-litigation/past-cases/young-gifted-and-blocked)

The following section will focus on the abovementioned cases.

No.	Questions
7.	<p>In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) v Secretary of State for the Home Department and another, and R (on the application of P) v Secretary of State for the Home Department and others [2019] UKSC 3, the Court ruled that the requirement for spent minor criminal convictions to be disclosed to potential employers under the multiple convictions rules is incompatible with Article 8 ECHR.</p> <p>Just for Kids Law secured the landmark judgment in this case.</p> <ul style="list-style-type: none"> i) In this case, how did the children know about their rights under Article 8 of ECHR and such rights have been breached? ii) How did the HRA 1998 play a role to secure the judgment? iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice? iv) How does this judgment impact children's rights now? v) Has the government responded to the judgment? If yes, how? If no, why? vi) Based on this case, how does the role of courts and Parliament being translated into practice?
8.	In the case of R v Jogee (Appellant) Ruddock (Appellant) v The Queen (Respondent) (Jamaica) [2016] UKSC 8, Just for Kids Law intervened and argued that children and adolescents do not

	<p>have the same ability to predict events or understand the consequences of theirs and other people's actions in the way that an adult would. The Court has ruled in Jogee's favour, resetting the law of joint enterprise.</p> <ul style="list-style-type: none"> i) Would you elaborate about this decision? ii) In your opinion, did the HRA 1998 play a role in this case? If yes, how? iii) Based on your knowledge/experience in this case, did the children experience any barriers/limitations in accessing their rights and/or justice? iv) How does this judgment impact children's rights now? v) Has the government responded to the judgment? If yes, how? If no, why? vi) Based on this case, how does the role of courts and Parliament being translated into practice?
9.	<p>In the case of Hughes Cousins-Chang, he was arrested aboard a bus in south London, few weeks after his 17th birthday. He was held in a police cell for hours without being able to contact his mum, who only found out about his arrest when police arrived to search the house. The Court engaged with Article 8 of ECHR in its judgment and 17-year-olds now have the right to appropriate adults when questioned in the police station.</p> <ul style="list-style-type: none"> i) To what extent did the HRA 1998 contributes to the judgment? ii) Based on your knowledge/experience in this case, did the children experience any barriers/limitations in accessing their rights and/or justice? iii) How does this judgment impact children's rights, in particular, in the criminal justice system? iv) Has the government responded to the judgment? If yes, how? If no, why?
10.	<p>In the case of R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 57, the Court ruled in Beaurish's favour, forcing the government to reverse its position and opening up eligibility for student finance to those with limited leave to remain. A research report by Dr Lisa Vanhala was published in October 2017 on Case Study of Just for Kids Law's Strategic Intervention in the UK Supreme Court.</p>

	<p>i) In this case, how did the children know about the rights they possessed and such rights have been breached?</p> <p>ii) In your opinion, did the HRA 1998 play a role in this case?</p> <p>iii) Based on your knowledge/experience in this case, did the children experience any barriers/limitations in accessing their rights and/or justice?</p> <p>iv) How does this judgment impact children's rights now?</p> <p>v) Has the government responded to the judgment? If yes, how? If no, why?</p> <p>vi) The appellant raised Section 3 of the HRA 1998; the Court should read down the eligibility rule so as to require individual consideration in every case not plainly within the stated categories. Would you share your view on this?</p>
11.	Apart from the positive impacts and barriers/limitations already mentioned, are there any others you have identified?
12.	What is/are the learning(s) that we can draw out from these strategic litigations to improve children's rights in relation to the HRA 1998 in the future?
13.	If the UNCRC had been incorporated into the domestic system, in your opinion, would this have made any difference to these cases?
14.	Just for Kids Law also deals with other issues in relation to children such as children as spies, unlawful detention of children in police cells, campaigning for issues like youth justice, school exclusions, housing and social care as well as immigration. Based on your experience/information, does the HRA 1998 helps the children affected by these issues? What are the barriers/limitations affecting children's access to their rights and/or justice in these issues?
15.	Going forward, what should we do to improve/resolve the barriers/limitations mentioned in Questions 4 and 13 as well as from these cases?
16.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
17.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?

18.	Are you happy to be listed as one of the bodies that contributed to the project?
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Information-Gathering Discussion with Andrew Sirel from JustRight Scotland (28/06/2021)

No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, what is your/your organisation's view about the HRA 1998 and its implementation and/or enforcement in the UK and/or Scotland?
2.	Based on your experience/information, what are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
3.	JustRight Scotland works with different groups of people such as migrants, refugees, asylum seekers and victims of trafficking. Based on your experience/information, does the HRA 1998 helps the children within these groups of people? (you may refer to the cases that JustRight Scotland have work on)
4.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
5.	Based on your experience/information, what are the barriers/limitations experienced by children in accessing their human rights and/or justice under the HRA 1998?
6.	Going forward, what can we do to improve/resolve the issues mentioned in Question 5? Are there any opportunities you see?
7.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your/your organisation's view about this?
8.	How do you think the UNCRC (Incorporation) (Scotland) Bill builds on or strengthens human rights for children compared to the HRA 1998?
9.	When discussing about UNCRC (Incorporation) (Scotland) Bill in relation to the migrants', refugees', asylum seekers' and victims of trafficking's children, do you think immigration as reserved power will become an issue in the implementation of the Bill in Scotland? If yes, how? If no, why?
10.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?

11.	In relation to the Independent Review of the HRA 1998, what is your/your organisation's opinion about it?
12.	How proactive does the Government responds to the court judgment under the HRA 1998?
12.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?
13.	Are you happy to be listed as one of the bodies that contributed to the project?

Information-Gathering Discussion with Dr. Tracy Kirk (29/06/2021)

This discussion involves two parts; the first part will discuss about general questions and the second part will expound on specific questions in relation to the participant's work.

General Questions	
No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, would you share your views about the HRA 1998 (in general) and its relationship with children's rights (in specific)?
2.	Based on your experience/information, what are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
3.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
4.	Based on your experience/information, what are the barriers/limitations experienced by children in accessing their human rights and/or justice under the HRA 1998?
5.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your view about this?
6.	How do you think the UNCRC (Incorporation) Scotland Bill builds on or strengthens human rights for children compared to the HRA 1998?
Specific Questions	
7.	I come across several opinions/articles/materials by you on the issue of SQA in Scotland. Would you elaborate on this issue?
8.	UNCRC has been cited/referred to in the issue of SQA. Based on your knowledge, does the HRA 1998 contributes in assisting/supporting the children in this issue? If yes, how? If no, why?
9.	Going forward, what can we do to improve/resolve the issues/barriers/limitations mentioned in this discussion? Are there any opportunities you see?

10.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
11.	In relation to the Independent Review of the HRA 1998, what is your opinion about it?
12.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?
13.	Are you happy to be listed as one of the bodies that contributed to the project?

Information-Gathering Discussion with Maria Galli from Children and Young People's Commissioner Scotland (in her personal capacity) (08/07/2021)

This discussion involves two parts; the first part will discuss about general questions and the second part will expound on specific questions in relation to the participant's work.

General Questions	
No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, would you share your views about the HRA 1998 (in general) and its relationship with children's rights (in specific)?
2.	Based on your experience/information, what are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
3.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
4.	Based on your experience/information, what are the barriers/limitations experienced by children in accessing their human rights and/or justice under the HRA 1998?
5.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your view about this?
6.	How do you think the UNCRC (Incorporation) Scotland Bill builds on or strengthens human rights for children compared to the HRA 1998?
Specific Questions	
7.	<p>CYPCS were given leave to intervene in strategic litigation. The first case involved children whose parents were not allowed to receive benefits because of their immigration status. After CYPCS became involved, the case was resolved, out of court.</p> <p>i) Would you elaborate on this case?</p> <p>ii) Did the HRA 1998 play a role to resolve the case?</p>

	iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice?
8.	<p>The second case involved a child who was being deprived of his/her liberty in a residential children's house.</p> <p>i) Would you elaborate on this case?</p> <p>ii) In your opinion, did the HRA 1998 play a role in this case?</p> <p>iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice?</p> <p>iv) How did this case impact children's rights now?</p>
9.	<p>In the third case, CYPCS worked with the Equality and Human Rights Commission Scotland who supported a judicial review against the Scottish Government on the topic of restraint and seclusion in Scotland's schools.</p> <p>i) Would you elaborate on this case?</p> <p>ii) To what extent did the HRA 1998 contribute to the judgment?</p> <p>iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice?</p>
10.	<p>If the UNCRC had been incorporated into the domestic system, in your opinion, would this have made any difference to these cases?</p> <p>Do you see any gap in terms of the law and how things work on the ground and how the UNCRC Bill would fit that gap?</p>
11.	What is/are the learning(s) that we can draw out from these strategic litigations to improve children's rights in relation to the HRA 1998 in the future?
12.	Does CYPCS utilise the HRA 1998 in its affairs other than strategic litigation? Would you elaborate on this?
13.	Going forward, what can we do to improve/resolve the issues/barriers/limitations mentioned in this discussion? Are there any opportunities you see?

14.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
15.	In relation to the Independent Review of the HRA 1998, what is your opinion about it?
16.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?
17.	Are you happy to be listed as one of the bodies that contributed to the project?

Information-Gathering Discussion with Professor Simon Hoffman from Observatory on Human Rights of Children (Wales) (09/07/2021)

This discussion involves two parts; the first part will discuss about general questions and the second part will expound on specific questions in relation to the participant's work.

General Questions	
No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, would you share your views about the HRA 1998 and how it operates in Wales?
2.	Based on your experience/information, how does devolution of power affect children's rights in Wales? What are the differences with Scotland?
3.	Based on your experience/information, what are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
4.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
5.	Based on your experience/information, what are the barriers/limitations experienced by children in accessing their human rights and/or justice under the HRA 1998?
6.	Wales has indirectly incorporated UNCRC into Welsh law. Would you elaborate on this?
7.	To what extent do the implementation of the HRA 1998 together with the incorporation of UNCRC change the children's rights' landscape in Wales?
8.	To what extent do you think the incorporation of UNCRC in Wales builds on or strengthens human rights for children compared to the HRA 1998 alone?
9.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your view about this?
10.	How do you think the UNCRC (Incorporation) Scotland Bill builds on or strengthens human rights for children compared to the HRA 1998?

Specific Questions	
11.	Based on your experience/information, are there any cases particularly Supreme Court's cases on children's rights from Wales that you think would be significant to analyse as part of the project? If so, why?
12.	During my research, I come across your research materials on economic on social rights in Wales, for example, the right to adequate housing. Based on your experience/information, did the HRA 1998 contribute in assisting the children's social rights? If yes, how? If no, why?
13.	There are few materials by you on children's rights impact assessment. Would you share about this? What is/are the learning(s) that may inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill in relation to children's rights impact assessment in the future?
14.	I come across another work that you were involved, Legislative Gap Analysis, published in October 2020. Would you elaborate on this?
15.	Going forward, what can we do to improve/resolve the issues/barriers/limitations mentioned in this discussion? Are there any opportunities you see?
16.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
17.	In relation to the Independent Review of the HRA 1998, what is your opinion about it?
18.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?
19.	Are you happy to be listed as one of the persons who contribute to this project?

Information-Gathering Discussion with Laura Pasternak as Trustee of Together (Scottish Alliance for Children's Rights) (10/07/2021)

This discussion involves two parts; the first part will discuss about general questions and the second part will expound on specific questions in relation to the participant's work.

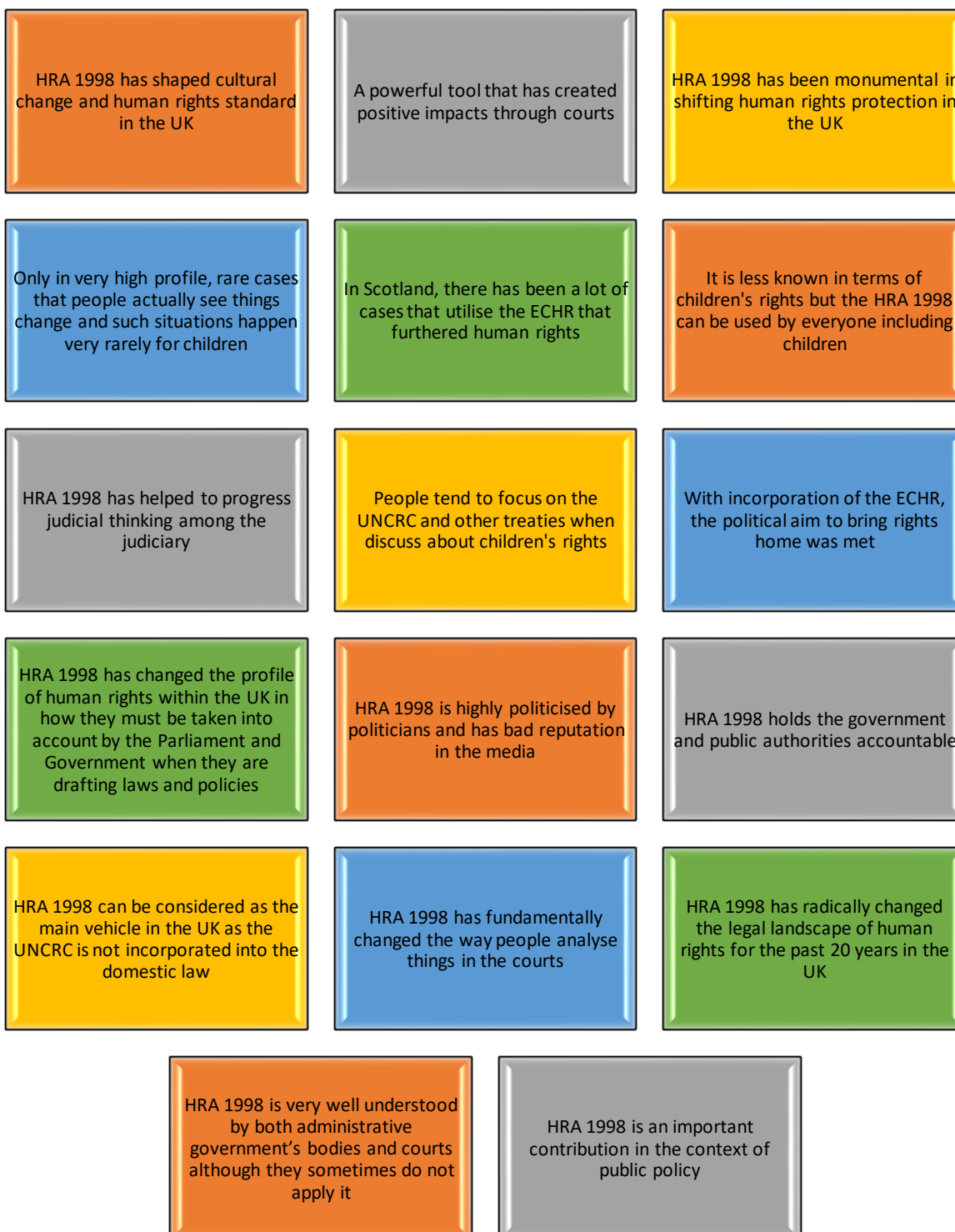
General Questions	
No.	Questions
1.	This project focuses on Human Rights Act 1998 (HRA 1998) in relation to children's rights. As an introduction, would you share your views about the HRA 1998 (in general) and its relationship with children's rights (in specific)?
2.	Based on your experience/information, what are the available mechanisms in and around the HRA 1998 through which children access their human rights and/or justice?
3.	Based on your experience/information, what are the strengths of the HRA 1998 that impact children's access to their human rights and/or justice?
4.	Based on your experience/information, what are the barriers/limitations experienced by children in accessing their human rights and/or justice under the HRA 1998?
5.	The HRA 1998 is reflected significantly in the UNCRC (Incorporation) (Scotland) Bill. What is your view about this?
6.	How do you think the UNCRC (Incorporation) Scotland Bill builds on or strengthens human rights for children compared to the HRA 1998?
Specific Questions	
7.	The Equality and Human Rights Commission gets involved in strategic litigation. Has the Equality and Human Rights Commission utilised the HRA 1998 before Scotland's courts?
	In the case of R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions (Respondents) [2021] UKSC 26 (the judgment will be pronounced on 09/07/2021) on revised benefit cap which restricted child tax credits and universal credit to the first two children, Equality and Human Rights Commission intervened in the Administrative

	<p>Court and Court of Appeal (https://legal.equalityhumanrights.com/en/case/challenging-two-child-limit-basis-discrimination)</p> <p>i) Would you elaborate on this case?</p> <p>ii) Did the HRA 1998 play a role to resolve the case?</p> <p>iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice?</p> <p>iv) How would this case impact children's rights now?</p> <p>v) How do you foresee the government's response to the upcoming judgment?</p>
8.	<p>Equality and Human Rights Commission also intervened in the case of R (on the application of AB) (Appellant) v Secretary of State for Justice (Respondent) [2021] UKSC 28 (the judgment will be pronounced on 09/07/2021) at the High Court and Court of Appeal. This case involved a child who was placed in solitary confinement for prolonged periods of a time in a Youth Offenders Institute and engaged with Article 3 of the ECHR (https://legal.equalityhumanrights.com/en/case/protecting-rights-children-solitary-confinement)</p> <p>i) Would you elaborate on this case?</p> <p>ii) In your opinion, did the HRA 1998 play a role in this case?</p> <p>iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice?</p> <p>iv) How would this case impact children's rights now?</p> <p>v) How do you foresee the government's response to the upcoming judgment?</p>
9.	<p>In the case KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53, Equality and Human Rights Commission intervened to provide court with expert advice or evidence. Under the Home Office policy, where the parent has been convicted of a crime or it is otherwise considered in the public interest to deport them, the child must either be deported with their parent or stay in the UK without them. The Court concluded that the Home Office's policy was not unlawful and two of the six cases were remitted to the Upper Tribunal for further</p>

	<p>consideration (https://legal.equalityhumanrights.com/en/case/immigration-children-who-are-eligible-leave-remain-whose-parents-have-been-convicted-crime)</p> <p>i) Would you elaborate on this case?</p> <p>ii) To what extent did the HRA 1998 contribute to the judgment?</p> <p>iii) Did the children experience any barriers/limitations in accessing their human rights and/or justice?</p> <p>iv) How did this case impact children's rights now?</p> <p>v) How did the government respond to the judgment?</p>
10.	If the UNCRC had been incorporated into the domestic system, in your opinion, would this have made any difference to these cases?
11.	What is/are the learning(s) that we can draw out from these strategic litigations to improve children's rights in relation to the HRA 1998 in the future?
12.	Does Equality and Human Rights Commission utilise the HRA 1998 in other affairs apart from the strategic litigation, for example, on reserved matters? Would you elaborate on this?
13.	Going forward, what can we do to improve/resolve the issues/barriers/limitations mentioned in this discussion? Are there any opportunities you see?
14.	Based on your experience/information, what is/are the learning(s) that we can draw out from the implementation of the HRA 1998 to inform Scotland's implementation of the UNCRC (Incorporation) (Scotland) Bill and to inform plans to incorporate other international human rights treaties in the future?
15.	In relation to the Independent Review of the HRA 1998, what is your opinion about it?
16.	Are there any additional reports, resources or cases you think it would be useful for me to study as part of the project? If so, are you able to share links to these?
17.	Are you happy to be listed as one of the bodies that contributed to the project?

ANNEX B

**GENERAL OPINION FROM INFORMATION-GATHERING DISCUSSIONS ON HRA 1998
AND ITS RELATIONSHIP WITH CHILDREN'S RIGHTS IN THE UK**



Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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ANNEX C

BARRIERS AND/OR LIMITATIONS EXPERIENCED BY CHILDREN

TO ACCESS THEIR HUMAN RIGHTS AND/OR JUSTICE SYSTEM

Theme 1 : Knowledge and Awareness of Human Rights	
1.	Most children do not have knowledge and/or awareness about their human rights
2.	Most children are not aware when their human rights have been breached or about to be breached
3.	Most children do not have knowledge on how to enforce their human rights or how to navigate the existing system
4.	In some situations, children cannot differentiate between not being treated fairly, in breach of their rights, and not getting what they want
5.	Lack of knowledge and/or awareness about human rights among stakeholders such as public authorities, parents/guardians and public
6.	Some people erroneously assume the ECHR is no longer applicable as the UK has left European Union
Theme 2 : Legal System	
7.	Narrow interpretation of standing under the HRA; ‘victim test’ resulted in systemic breaches/issues remain in the society and opportunity to create a strategic impact is lost
8.	Children and Young People’s Commissioner Scotland does not have power to bring legal proceedings in courts and/or tribunals on behalf of children
9.	Lack of child rights-based approach in the justice system such as measures to ensure children understand courts procedures and cautions, measures to ensure children do not have to travel for police interviews or courts cases
10.	Court system is not child-friendly, difficult to navigate and intimidating
11.	Gaps in knowledge and understanding of children’s human rights amongst lay members of the Children’s Hearings System.
12.	Right to appeal in Children’s Hearings System is rarely used
13.	Human rights arguments are not often put forward in courts and Children’s Hearings System
14.	Some children are still being tried in adult court system

15.	Definition of public authorities remains contentious and creates accountability gap in the age where most things go to public procurement or are outsourced to private services
16.	Lack of human rights culture in judiciary
Theme 3 : Legal Representation/Aid	
17.	Children face difficulty to get access to legal representation or to instruct lawyers on their own without intermediary such as parents/guardians/independent advocacy/organisations
18.	Children sometimes hesitant to take legal actions against people whom they are relying on or have a relationship with or taking care of them like family, local authority, carers
19.	Lack of legal representation in human rights cases due to lack of solicitors with specialist knowledge and expertise of human rights' issues
20.	Children are represented by lawyers who do not understand added special protections that are accorded to children
21.	Means-tested methods that take into account parents' income precludes many children from legal aid and does not uphold children's right to privacy
22.	Means-tested methods that set a very low threshold level of incoming capital precludes many children who work full time and obtain more than £246 per week from accessing legal aid
Theme 4 : Administrative System	
23.	Decision-makers and policymakers tend to rely on welfare-based system rather than rights-based system
24.	More focus on children's right to participation while other rights and/or issues such as evolving capacities are being looked over
25.	Challenges in translating certain rights into reality such as right to protest, right to play or right to healthy environment
26.	Public authorities tend to focus on Equality Act 2010 or other international treaties when carrying out their duties while the HRA 1998 comes off as a box-ticking exercise
27.	Transparency continues to be an issue in terms of impact assessments
28.	Tokenistic approach in engagement with children to inform law and/or policy
29.	Lack of training for professionals working with or for children such as teachers and policymakers

Theme 5 : Environment	
30.	Lack of resources to create a child-friendly system
31.	Long periods of time to seek redress and no quick solution to obtain remedy act as barriers to children pursuing their rights.
32.	Children such as refugees, victims of trafficking and other groups come from countries that treated them differently than the UK and Scotland, therefore, they may not want to take human rights cases against the people who are looking after them
33.	Bad media publicity about the HRA and human rights as discourses tend to focus on terrorism or prisoners rather than improvement of people's lives
34.	Disconnectedness between the systems and public authorities
35.	Lack or absence of disaggregated data on children poses a challenge in determining impacts of measures taken by public authorities for children
36.	Different aspects of cost such as financial, resources, emotional, time and reputational costs
37.	Language barrier
38.	Disability barrier
39.	Age barrier

ANNEX D

LEARNING DRAWN FROM IMPLEMENTATION OF HRA 1998 IN THE UK

Theme 1 : Knowledge, Awareness on Human Rights	
1.	Public education on human rights and the HRA 1998 to ensure people feel ownership of their rights
2.	Inclusion of children's human rights in school curriculum
3.	Mandatory children's human rights' training to those who work with or for children
4.	Human rights' training across Scottish society to improve knowledge and awareness of children's human rights, and to deliver the widespread culture change anticipated by the UNCRC Bill.
Theme 2 : Legal System	
5.	Incorporation of the UNCRC and other international human rights treaties into domestic law
6.	Broader interpretation of Section 6 of the HRA
7.	Amendment of Section 7 of the HRA to adopt a broader standing; sufficient test
8.	Awareness on Section 4 of the HRA, how it functions and how the government must act on courts' judgments efficiently
9.	Strike down declarators must be utilised effectively by the Scottish courts
10.	Expansion of Children's Hearings System so that it is applicable to all children
11.	Child-friendly complaint mechanism is fundamental to improve children's access to their human rights
12.	Judiciary must understand how to deal with the HRA 1998, how to deal with cases and jurisprudence from Strasbourg, how to interpret them and how to enhance children's human rights with them
13.	Designation of system wherein children may obtain remedy through different means and not only through courts
14.	Systematic review of devolved legislations to ensure their compliance with human rights
15.	Implementation and respect of good law is as important as passing good law
Theme 3 : Legal Representation/Aid	
16.	Increment of strategic litigation in relation to children's rights similar to England

Human Rights Act 1998 :

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17.	Mandatory children's human rights' training to lawyers and experts who work with or for children
18.	Introduction of specific regulation to regulate lawyers who deal with children's rights
19.	Mainstreaming children's rights through lawyers' education and training to ensure they come thinking with human rights' mindset and arguments
Theme 4 : Administrative System	
20.	Policy development upstream to ensure the Ministers and others such as local government are properly focused on children's rights from the very outset of the policy development process to mitigate the risk of future breaches and avoid the need for children having to engage with a very difficult process of enforcing their rights
21.	Children must be given a seat at the decision-making table
22.	Absolute engagement and empowerment of children which enables them to offer their views and inform the development of law/policy
23.	Different sectors must not work in silos and should be able to connect with each other
24.	Ensure public authorities embrace the letters of the law and the culture of human rights based in decision-making or policymaking
25.	Transparent and evidence-based impact assessments to advance quality of children's human rights protection and progression
26.	Implementation of law and policies must work hand in hand
Theme 5 : Environment	
27.	Independent advocacy for children that is not one-size-fits-all approach as, for example, the advocacy needs of asylum seekers are different to the needs of other children
28.	Children, organisations and people must always be on their toes, quickly recognise the Parliament's intention to curb human rights proliferation and nip such intention from the bud
29.	Reinforce and encourage a continued positive narrative on the HRA 1998 through the media
30.	Continuously conduct survey on people's understanding about their human rights, how to access their rights and how to hold people accountable of their decisions
31.	Increase resources in advocacy
32.	Systemic collection of disaggregated data on children and make it publicly available and accessible

33.	Encourage and support positive narratives on the Bill and other international human rights treaties in the media to instil positive thoughts on human rights
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ANNEX E

TABLE OF CASES

Theme: Prohibition of Torture, and Inhuman, Cruel and Degrading Treatment

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
R (on the application of AB) v Secretary of State for Justice [2021] UKSC 28	UK Supreme Court	England	3	37 and 43	Section 2(1) of the HRA	The Appellant alleged that the solitary confinement of a person below 18 years old automatically amounted to violation of Article 3 of the ECHR. In the alternative, such treatment can only be considered as compatible with Article 3 of the ECHR if there are strictly exceptional circumstances to do so.	The Supreme Court unanimously rejected the appeal.	As required by Section 2(1) of the HRA, the Court took into account relevant judgments of the ECtHR. The Court held that there was no bright line rule adopted by the ECtHR to conclude that solitary confinement of a person below 18 years old automatically amounted to violation of Article 3 of the ECHR. The Court further elaborated that the ECtHR did not adopt any rule that solitary confinement can only be considered as compatible with Article 3 of the ECHR if there are strictly exceptional circumstances to do so. As such, the Court should follow the ECtHR's judgments and it was not the Court's function to anticipate such development by the ECtHR. The Court went on to reject the applicability of General Comments issued by the CRC Committee on the basis that the CRC Committee did not have power to make binding decisions in matters relating to the UNCRC and ECHR's interpretation.		General Comment No. 10, General Comment No. 24

Opinion of the Court in the Reclaiming Motions by Natasha Tariro Nyamayaro and Olayinka Oluremi Okolo [2019] CSIH 29	First Division, Inner House, Court of Session	Scotland	1, 3, 8 and 14	3, 26, 28 and 31	Articles 1, 18, 21 and 24 of Charter of Fundamental Rights of the European Union	The Petitioners challenged changes on the rates payable to them on the grounds that the Secretary of State acted in breach of: (i) the Reception Directive, which laid down minimum standards for asylum seekers; (ii) Articles 21 and 24 of the CFR; (iii) Article 14, when read with Article 8 of the ECHR; and (iv) Section 55 of the Borders, Citizenship and Immigration Act 2009.	The reclaiming motions was refused.	The provision of free accommodation, heat, light, health care and education, together with cash to meet essential living needs fulfilled the best interests of the child. The Court agreed that the Secretary of State was entitled to reduce the rates payable to children. The Court also did not consider exclusion of certain items such as computers, toys and entertainment as deprivation of children's rights. The reduction in the level of support and the exclusion of certain items were done after an in-depth review of what was required to meet the statutory test. As such, there was no breach of Articles 3 and 8 of the ECHR.	General Comment No. 14 General Comment No. 17 Arts. 1, 13, 17, 18 of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers Every Child Matters : Change for Children (November 2009)
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Theme: Family and Private Life

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department [2011] UKSC 4	UK Supreme Court	England	8	3(1), 7 and 12	N/A	A Tanzanian mother was issued a notice of deportation. She has two children, both British citizens and have lived in England all their lives. The Court of Appeal decided that the children could reasonably be expected to follow their mother to Tanzania.	The Supreme Court allowed the appeal.	In reference to Article 3(1), Strasbourg Court is more sensitive to the innocent children's welfare who are victims of their parents' choices. To assess proportionality under Article 8(2) of the ECHR, the Court held that the children were not responsible for the mother's immigration history and precariousness of her position when she decided to start a family. Further, the children were expected to move to a country which they were not familiar with and will be separated from their father who visited them regularly. The tribunal's finding may affect their citizenship/nationality rights under Article 7 of the UNCRC which was not in their best interests. The immigration authority also failed to consider the children's views when they were old enough to do so.		UNHCR Guidelines on Determining the Best Interests of the Child General Comment No. 14 General Comment No. 6 General Comment No. 12
E (Children) (FC) [2011] UKSC 27	UK Supreme Court	England	8	3(1)	N/A	Livi and Milly were born and lived all their lives in Norway. They were brought to the UK by their mother on the basis that they were all very frightened of the father because of his temper and his violent behaviour, which the father denied. Further, the mother was ill and her condition may deteriorate if she had to return to Norway unless certain protective measures were in place.	The Supreme Court dismissed the appeal.	In this case, the children's best interests had two aspects; (i) to be reunited with their parents and (ii) to be brought up in a sound environment without any risk of harm. There was a tension between the inability of the court to resolve the factual disputes between the parties and there were disputed allegations which can neither be tried nor objectively verified. As such, taking into account Article 8 of the ECHR and Hague Convention, the Court focused on the sufficiency of any protective measures which can be put in place to reduce the risk while the children remained in Norway.		
AB (Appellant) v Principal Reporter and another (Respondents)	UK Supreme Court	Scotland	8	N/A	N/A	The question before the Supreme Court was; whether the children's hearing system operated in a way that protect the legitimate interests of	The Supreme Court dismissed the appeal.	Article 8 of the ECHR did not require the public authorities to give a sibling who had no significant involvement in the child's upbringing the status of a		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
www.togetherscotland.org.uk

(Scotland) & In the matter of XY (Appellant) (Scotland) [2020] UKSC 28						siblings and other family members who did not have a significant involvement in the child's upbringing. The Respondents did not acknowledge that it was necessary to afford the relevant person's status in order to respect the family members.		relevant person. The Court acknowledged the importance of a sibling's role in the well-being and development of a child. However, the Court differentiated a sibling's role than a parent's role in the upbringing of a child.		
The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51	UK Supreme Court	Scotland	8	3(1) and (2), 16, 5, 18(2), 27(3) and 19(1)	Section 101 of the Scotland Act 1998	The question before the Court was; whether the provisions of Part 4 of the Children and Young People (Scotland) Act 2014 were within the legislative competence of the Scottish Parliament.	The information-sharing provisions of Part 4 of the Act were not within the legislative competence of the Scottish Parliament	The provisions did not violate parents' right to family life, however, they contradicted children's right to privacy under Article 8 of the ECHR as it may have detrimental effects on children's rights.		
In the matter of an application by JR38 for Judicial Review (Northern Ireland) [2015] UKSC 42	UK Supreme Court	Northern Ireland	8	3(1) and 40(2)(vii)	N/A	The Appellant aged 18 had been involved in a public disorder in Londonderry when he was barely 14. In 2010, two newspapers published an image of him at the request of the police as part of a campaign known as "Operation Exposure" to counteract sectarian rioting in parts of Derry. The Appellant argued that publication of his photographs violated Article 8 of the ECHR.	The Supreme Court dismissed the appeal.	The Court acknowledged that there had been an interference with the Appellant's right to privacy under Article 8 of the ECHR. However, the interference was justified as Section 29 of the Data Protection Act allowed publication of photograph, including children's photograph, for prevention and detection of crime. The publication was truly a measure of last resort to benefit the Appellant and the community.		
In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland) R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants) R (on the application of P) (Appellant) v	UK Supreme Court	Northern Ireland, England and Wales	8	N/A	N/A	The Respondents challenged the statutory rules that required disclosure of their records as being incompatible with the ECHR.	In the case of G who was a child, the Supreme Court declared that Part V of the Police Act 1997 (as amended) was incompatible with Article 8 of the ECHR.	The Court concluded that the scheme of disclosure under the Rehabilitation of Offenders Act 1974 (as amended), the Police Act 1997 (as amended) and the corresponding legislation in Northern Ireland was in accordance with law as required by Article 8 of the ECHR. However, in terms of proportionality, a warning or reprimand given to a young offender was intended to be instructive, an alternative to prosecution and not punitive. The inclusion of warnings and reprimands as offences to be disclosed was an error of principle.		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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Secretary of State for the Home Department and others (Respondents) [2019] UKSC 3										
Opinion of Lady Wise in the Petition MB v The Principal Reporter [2021] CSOH 19	Outer House, Court of Session	Scotland	8	N/A	N/A	The Petitioner challenged four ICSSOs which had been granted on 2 July, 13 August, 17 September and 4 November 2020 respectively on the basis that there was an interference with the right to family life under Article 8 of the ECHR.	The Court granted a declarator on a single occasion, 4 November 2020 due to the deficiency in the Sheriff Court's procedure.	The pandemic had significant impact on the operation of court proceedings. The reporter's decision not to include the Petitioner in the Form 65D was unlawful. This is because the reporter had knowledge that the Petitioner had applied to be involved in the grounds for referral proceedings as a relevant person. Further, after all parties had agreed that he should be given the opportunity to make relevant submissions on the issue of contact, his agents tendered a submission to the reporter, however, the Sheriff stated that there were no such submissions. The Court concluded that there was a deprivation of the right to participate and amounted to a breach of the procedural requirements of Article 8 of the ECHR.		
Opinion of the Court in the Appeal from the Sheriff Principal of Grampian, Highlands and Islands [2017] CSIH 14	Court of Session	Scotland	8	N/A	Section 6 of the HRA 1998	The Appellant was the mother of E. Due to behavioural problems, offences and alcohol abuse by the Appellant, E was placed with the Respondents who then, were approved as kinship carers. In 2015, the Respondents sought adoption of E. The Sheriff made an Adoption Order under Section 29 of the Adoption and Children (Scotland) Act 2007 and included conditions of contact in respect of the Appellant. The Sheriff also terminated the Compulsory Supervision Order as she was unable to discharge her parental responsibilities or exercise her parental rights and was likely unable to do so.	The appeal was granted.	In this case, the Court considered how the 2007 Act was intended to operate in the context of the ECHR within the HRA. The Court pointed out that drastic intervention by granting adoption was unnecessary as the Appellant did not seek to disturb E's stable home. Further, less drastic intervention could be achieved by a Residence Order under Section 11 of the 1995 Act. The Court were unpersuaded that the Sheriff made any reasoned assessment about other alternatives that may be available which would secure the welfare of E in all the circumstances. The Sheriff also failed to address the issue of contact which seemed to be the main potential area of dispute. The Sheriff also failed to address why an Adoption Order instead of other		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
www.togetherscotland.org.uk

								legal solution was required for E. In terms of Article 8 of the ECHR, the Court was satisfied that, if the domestic legislation was applied correctly, it would not result in a decision that was incompatible with Article 8 of the ECHR.		
Appeal by CF against MF, GF and Scottish Reporter [2017] CSIH 44	Court of Session	Scotland	8	N/A	N/A	Pursuant to a Child Protection Order, CF aged 14 and her sibling was removed from her mother's care to a place of safety. Since then, CF remained in foster care and was subjected to a Compulsory Supervision Order in 2012. In 2013, prior to the CSO's annual review, CF's maternal grandparents requested to be considered as relevant persons. In 2014, the hearing decided that her grandparents should no longer be deemed as relevant persons. An appeal against the 2014 decision was upheld. In 2015, the hearing decided that her grandparents no longer met the test to be considered relevant persons. They appealed against the decision and it was upheld by a Sheriff. In 2016, CF instructed her own solicitor and requested a review to consider whether to "undeem" her grandparents as relevant persons. A pre-hearing panel decided that her grandparents should no longer be deemed as relevant persons. However, the Sheriff upheld the appeal by her grandparents. He made an order deeming the grandparents to be relevant persons as prescribed under Section 160(4) of the Act. CF has appealed against the Sheriff's decision.	The Court of Session answered in affirmative that (i) CF did not wish to see her grandparents and they should not have involvement with her life, (ii) her evidence demonstrated that she had not seen her grandparents for more than a year and there was no bond between them, (iii) her grandparents no longer met the legal test prescribed under Section 81A(3) of the Act and (iv) CF did not want her grandparents to exercise significant involvement in her life with or without a CSO.	The Court decided that CF's grandparents had not enjoyed significant direct contact with her or involved in her upbringing since 2012. In these circumstances, it was difficult to consider the child's views as a wholly irrelevant factor in the overall assessment under Section 81A(3). In a borderline case, the panel might be influenced by benefits and disbenefits as well as looked to the child's best interests in the long term.		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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Theme: Private and Family Life and Non-Discrimination

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
R (on the application of Johnson) v Secretary of State for the Home Department [2016] UKSC 56	UK Supreme Court	England	8 and 14	N/A	Section 4 of the HRA 1998	The Appellant moved from Jamaica to the UK with his father. However, his father never applied for him to be registered as a British citizen. After several criminal convictions, the Appellant was convicted of manslaughter and sentenced to nine years' imprisonment. As such, he was liable to automatic deportation wherein he appealed against the order.	Paragraph 70 of Schedule 9 to the Immigration Act 2014 which inserted the requirement of good character into Section 41A of the 1981 Act was incompatible with the ECHR.	In this case, the applicable law did not provide for automatic citizenship at birth unless people registered as citizens and passed the 'good character' test. The Court held that it was unreasonable to impose additional test of a good character on a person who would have acquired automatic citizenship at birth if not for their parents' marital status. It was highlighted that denial of citizenship was not a one-off event that happened during birth, but it had a continuing effect that could violate other Convention rights. In this case, the Appellant became liable to State's action in the manner of deportation as a result of not being a British citizen. The Court decided that denial of citizenship fell within the ambit of Article 8 of the ECHR which also triggered the application of Article 14 of the ECHR.		
In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland) [2018] UKSC 48	UK Supreme Court	Northern Ireland	14, 8 and A1P1		Section 4(2) of the HRA 1998	The Appellant challenged the requirement to claim widowed parent's allowance as discriminatory against the survivor and/or the children according to Article 14 when read with either Article 8 or Article 1 of the First Protocol of the ECHR ("A1P1").	section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 was incompatible with Article 14 read with Article 8 of the ECHR insofar as it precluded a surviving unmarried partner of any entitlement to widowed parent's allowance. The Supreme Court granted a declaration of incompatibility under section 4(2) of the HRA.	The Court held that the widowed parent's allowance was a positive measure that secured the life of children within their families. Whether the survivor was married to the deceased made no difference to the children. The allowance existed taking into account the responsibilities of both parents towards their children. Those responsibilities did not change whether they were married or in a civil partnership or not. Therefore, the children should not suffer this disadvantage only because their parents were not married to one another.	The widowed parents' allowance was compatible with Article 14 when taken with either Article 8 or A1P1 of the ECHR. The allowance was a benefit which intended to replace the loss of income experienced by the widow/widower or civil partner after the deceased passed away. The allowance may cease to be payable in several circumstances while the responsibilities towards the children remained. Further, the allowance was a contributory benefit and were the product of the	

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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									deceased's contributions. As such, the sums payable was not related to the children's needs, instead it was similar to pension. If the children were in need of assistance, there were different child benefits to support them.	
R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and Others [2021] UKSC 26	UK Supreme Court	England	8, 12, 14 and A1P1	UNCRC	N/A	The Appellants; two adults and their children challenged the two-child limit imposed by the Government on child tax credit that came into force in April 2017 as violation of Articles 8 and 14 of the ECHR.	The Supreme Court unanimously rejected the appeal.	The Court acknowledged that the case was within the ambit of Article 8 of the ECHR or, in the alternative, A1P1 of the ECHR. However, the Court rejected the Appellants' argument that the two-child limit would cause a damaging effect on the integration of children into family life on the basis that there was no evidence to suggest so. In relation to Article 14 of the ECHR, the Court accepted the Appellant's argument that the two-child limit could be indirectly discriminatory, in particular against children who live with more than two children in a household. However, the Court concluded that the two-child limit was justified as the measure did not discriminate against "sibling" in a household, but the distinction made was between households that have less or more than two children. Thus, the measure did not violate the "status" criteria under Article 14 of the ECHR. The Court went on to criticise the Appellants' argument on the application of unincorporated UNCRC in the domestic law. The Court decided that (i) treaties are not contracts that domestic courts can enforce, (ii) due to the UK's dualist nature, unincorporated treaties are not part of the domestic law and (iii) the HRA only gives domestic legal effect to the ECHR but not to the unincorporated treaties including the UNCRC.		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
www.togetherscotland.org.uk

Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47	UK Supreme Court	England	8, 14	3(1)	Section 6 of the HRA 1998 and Article 7(2) of the UNCRPD	C had part of his bowel removed, diagnosed with cystic fibrosis and Duchenne muscular dystrophy. In 2010, C was admitted to the NHS hospital for more than 13 months due to his condition. His parents had to relinquish their business, spent their savings and fell back on State benefits. However, the Secretary of State decided to suspend the payment of Disability Living Allowance on the basis that by then, C had been a hospital in-patient for more than 84 days.	Secretary of State for Work and Pensions violated C's human rights under Article 14 when taken with A1P1 of the ECHR.	As a severely disabled child in need of lengthy in-patient treatment, C fell within the grounds of discrimination prohibited by Article 14 of the ECHR. Under Article 14, difference of treatment is discriminatory if it has no objective and reasonable justification. The Court concluded that there was nothing before the Court to indicate that the Secretary of State has considered the justification to suspend a child's DLA following his 84th day in hospital. Therefore, the Secretary of State was in breach of international law and procedural rule. These have generated a violation of the substantive right of disabled children to have their best interests taken into account as primary consideration.	General Comment No. 14
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Theme: Fair Trial and Private and Family Life

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
AB (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2017] UKSC 25	UK Supreme Court	Scotland	6(2) and 8	N/A	Section of the 102 Scotland Act 1998	When the Appellant was 14, he was charged with two charges of lewd and libidinous practices and one contravention of Section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. When he was 19, he was charged with engaging in sexual intercourse with a girl below 16 years old. He did not deny the sexual intercourse, however, his defence was he reasonably believed that the girl was more than 16 years old. He pleaded reasonable belief defence under Section 39(2)(a)(i), however, that defence was not available to him. He challenged the legality of the provision.	Section 39(2)(a)(i) of the 2009 Act was incompatible with the ECHR.	The use of prior charges to exclude the reasonable belief defence was considered a disproportionate interference with Article 8 of the ECHR. This is because the Appellant's prior charges did not give official warning that subsequent sexual activity amounted to an offence could form a basis for exclusion of the reasonable belief defence.		
The Queen on the Application of HC (a child, by his Claimant litigation friend CC) v The Secretary of State for the Home Department and The Commissioner of Police of the Metropolis [2013] EWHC 982	High Court of Justice	England	8	1, 3(1), 5, 9, 12, 37(c) and 40	Section 6 of the HRA 1998	The main issue was treatment of 17-year-old detainees who were treated as adults.	The High Court of Justice concluded that the Secretary of State's failure to revise the Code of Practice under the Police and Crime Evidence Act 1984 that treated 17-year-olds as adults was incompatible with Article 8 ECHR.	The Code of Practice did not allow 17-year-old detainees to be treated like those aged 16 or under. As a result, the 17-year-olds were frequently denied contact with their parents or the right to an appropriate adult. The Court elaborated that Article 8 of the ECHR protected the rights of the child and his parent against the power imbalance with the authority. Article 8 of the ECHR also did not function in silo as it must be read in harmony with general principles of international law such as Article 3 of the UNCRC that required their treatment in detention must take into		General Comment No. 10

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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								account their best interests as a primary consideration.		
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Theme: Admissibility of Evidence at Children's Hearings

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
Opinion of Lord Matthews in causa NH v Her Majesty's Advocate [2019] HCJ 46	High Court of Justiciary	Scotland	6 and 7	N/A	N/A	The Minuter has been indicted in relation to charges of sexual offences in respect of his child, MN under Sections 18 and 20 of the Sexual Offences (Scotland) Act 2009 (charge 1) and Sections 28 and 30 of the 2009 Act (charge 2). He also faced charges of assault in respect of two other children under Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. MN was placed in a residential unit, had no contact with the Minuter but had contact with her mother. Some issues relating to his charges arose and the Minuter, upon advice by his counsel and solicitor, accepted the amended grounds of referral and the supporting facts. The Sheriff proceeded without warning the Minuter that his acceptance might render him liable to criminal proceedings and might be used as evidence against him in criminal proceedings. The Sheriff also was unaware of such consequences and did not specifically consider that matter. The Minuter objected the admissibility of evidence in accordance with 2 Section 79(2)(b)(iv) of the Criminal Procedure (Scotland) Act 1995 and raised a compatibility issue on the same ground.	The High Court of Justiciary was not satisfied that a case was made out under Article 7 of the ECHR or any issue arose under Article 6 of the ECHR which was not covered by the common law. The Court also dismissed the compatibility issue.	The case was an exceptional one as such material had never been used in a prosecution before. First, Section 179 of the 2011 Act allowed material relating to referrals to be given to the Crown on request and to be used in criminal proceedings. Whether Section 179 of the 2011 Act violated Article 7 of the ECHR, the Court concluded that Section 179 and its purpose were clear, therefore, it did not constitute a breach of Article 7. Second, the crux of the case was the advice given to the Minuter. The Court categorised the Minuter's acceptance as voluntary, however, his voluntariness was quashed since it was based on the advice given to him. A court's officer gave clear advice, however, the Court found it to be wrong. Crucially, the Minuter had acted upon that advice and an attempt was made to indicate when to use the information from children's hearings in the criminal proceedings.		
JS and CS v Children's Reporter [2017] S.C.L.R 539	Court of Session	Scotland	6 and 8	N/A	N/A	The case concerned Section 163 of the Children's Hearings (Scotland) Act 2011 and raised two issues: (i) the extent of a Sheriff's power in management of a hearing to find grounds of referral established to restrict the leading of evidence and (ii)	The appeal was allowed.	The Sheriff excluded the evidence of A, J2 and R at the end of the hearing in 2015 as he was concerned about the children's welfare of being brought to the court when their evidence was available in the form of		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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						whether the Sheriff's act was an appropriate exercise of powers.		extensive J11s. To compel children to give evidence was likely to be distressing and may be damaging. However, there were other rights and interests in question such as the parents' rights and interests to a fair trial on the disputed issues. The Court highlighted that the issue was the conduct of proceedings by a public authority which may interfere with Article 8 of the ECHR significantly. The Court pointed out that the children's reporter and the court were public authorities, as such, under Section 6 of the HRA, they must act compatibly with the ECHR. However, the Appellants were not given an adequate and proper opportunity to challenge and question a witness against them. The Sheriff also failed to explore other appropriate means or special measures to assist the Appellants at the same time, would protect the children. Therefore, the Court held that Article 8 as well as Article 6 of the ECHR were engaged.	
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Theme: Deprivation of Liberty

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
In the matter of D (A Child) [2019] UKSC 42	UK Supreme Court	England	5 and 8	2(1), 37(b) and 37(d)	Article 7(1) of the UNCRPD	This case concerned the interplay between the child's liberty and the parents' responsibilities under Article 5 and Article 8 of the ECHR.	The appeal was allowed.	The Court agreed that adults who exercised parental responsibility may impose restrictions on a child's liberty or authorise others to do so. However, the restrictions imposed must not amount to a total deprivation of liberty. In this case, the accommodation of D in Placement B and Placement C amounted to a total deprivation of liberty which violated Article 5 of the ECHR. Also, it was not within his parents' responsibility to consent to such deprivation of liberty. The Court's decision was also consistent with the principle of non-discrimination under Article 2(1) read together with Article 37(b) and Article 37(d) of the UNCRC as well as Article 7(1) of the UNCRPD.	The Court decided that the parents' decision was made in the best interests of D. That decision, however, involved a degree of confinement that was necessary as part of the treatment. D's parents were exercising their parental responsibility and not authorising a violation of his rights.	

Theme: Non-Discrimination and Education

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 57	UK Supreme Court	England	2 and 14	N/A	Section 3 of the HRA 1998	The Appellant decided to further her tertiary education in International Business Management. She was requested to provide further information about her immigration status when she applied for a student loan. However, she was not eligible for a student loan and she was informed that her mother had taken no steps to regularise their immigration status after their visa had expired. Both of them applied for indefinite leave to remain but their applications were rejected and only granted discretionary leave to remain.	The Appellant entitled to a declaration that the settlement criterion imposed on her was a breach of her rights under Article 14 read together with A2P1 of the ECHR. However, the "lawful ordinary residence" criterion was declared to be compatible with the ECHR.	The Court concluded that the denial of access to a student loan when such loans are made available to other university students constituted a breach of the Appellant's right to education. This is because the right to education is important to furtherance of human rights in a democratic society. The Secretary of State's decision failed to satisfy all the tests for justification of discrimination as; (i) the measure had a legitimate aim which was sufficient to justify the right's limitation, however, the bright-line rule did not rationally connect to that aim, (ii) there could be a less intrusive measure taken and (iii) the decision has impacted the Appellant and others in her position very severe that fair balance was not struck between the individuals' rights against the community's interests.		Education (Student Support) Regulations 2011 Immigration Act 1971

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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Theme: Prohibition of Slavery and Forced Labour

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
MS (Pakistan) (Appellant) v Secretary of State for the Home Department (Respondent) [2020] UKSC 9	UK Supreme Court	England	4	N/A	Section 6 of the HRA 1998	MS entered the UK on a visitor's visa when he was 16 on the pretext of furthering his education. Before he came to the UK, he had been subjected to forced labour and physical abuse by his families. When he arrived in the UK, he was made to perform labour and did not receive pay, thereafter, he moved from job to job. The police referred him to the local authority services department when he came to their attention, thereafter, he was referred to the NRM. His application for asylum was rejected by the NRM as there was no reasonable ground to believe that he was a victim of trafficking. The Secretary of State decided to remove him from the UK and he appealed to the decision.	Removal of the Appellant from the UK would be unlawful under Section 6 of the HRA 1998.	Article 4 of the ECHR, Palermo Protocol and ECAT required the authorities to prevent, protect and punish those responsible for slavery and forced labour. As such, they must act on their own motion to investigate independently, identify and punish the individuals responsible for such acts. In this case, there was absence of effective investigation and the police took no further action after referring him to the social services department. Therefore, the Court found a breach of Article 4 of the ECHR.		

Human Rights Act 1998 :

A Study on How the Human Rights Act 1998 has Impacted Children's Rights in the United Kingdom
in Anticipation of Scotland's Implementation of the UNCRC (Incorporation) (Scotland) Bill
and Future Incorporation of International Human Rights Treaties
Together (Scottish Alliance for Children's Rights)
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Theme: Access to Damages

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
Opinion of the Court in the Reclaiming Motion by L v The Principal Reporter of the Scottish Children's Reporter Administration & The Chief Social Work Officer of Renfrewshire Council [2021] CSIH 4	Court of Session	Scotland	5(5)	N/A	Section 8 of the HRA 1998	The Petitioner sought a declarator that she had been unlawfully deprived of her liberty under Article 5(5) of the ECHR and damages under Section 8 of the HRA in the sum of 20,000 pounds with interest. The issues before the Court were; (i) whether a 17-year-old who was being accommodated by a local authority and has not been involved with the children's hearings system may be placed in secure accommodation and (ii) whether the children's hearings system had any jurisdiction in respect of that person.	The Court of Session dismissed the claim.	The Petitioner argued that she was not a child in terms of Section 199 of the 2011 Act, therefore, she could not be referred to the children's hearings system which operated under the 2011 Act. Consequently, the hearing had no power to impose compulsory measures that deprived her liberty. However, the Court held that the 2011 Act amended Section 93(2)(b) of the 1995 Act so that regulations could be made under Section 75 of the 1995 Act and such regulations can be applicable to someone like the Petitioner who was (i) under 18 years old, (ii) not the subject of a CSO or similar measure, and (iii) who was being looked after by a local authority. The Court concluded that Section 75 of the 1995 Act was the enabling provision. Therefore, the Petitioner was considered a child and could lawfully be placed in secure accommodation, thereafter, brought before a children's hearing for consideration of a CSO.		

Human Rights Act 1998 :

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and Future Incorporation of International Human Rights Treaties
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Theme: Protection of Property (A1P1) and Non-Discrimination

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
Opinion of Lord Burns in the Petition MA [2016] CSOH 115	Court of Session	Scotland	14 and A1P1	N/A	N/A	The case concerned a judicial review petition by a woman who was refused criminal injuries compensation for injuries sustained as a child which were inflicted by her mother as these (i) took place before 1 October 1979 and (ii) in the same household.	The Court of Session dismissed the petition despite acknowledging the fact that the claim fell within the ambit of Articles 14 and A1P1 of the ECHR.	The Court took note of the review conducted in 1979 and Equality Impact Assessment in 2012 by the Ministry of Justice regarding the eligibility criteria under Paragraph 7(b) of the Criminal Injuries Compensation Scheme 2008. The impact assessment justified the retention of the criteria in light of injuries sustained prior to 1 October 1979 as it will (i) reduce the taxpayer's burden and (ii) ensure the Scheme's sustainability in the long term. This is because the bright line rule helped to make the Scheme sustainable taking into account the impossibility to estimate the Scheme's abolition cost.		

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Theme: Standing

Case Name and Citation	Court	Jurisdiction	ECHR Article (s)	Related UNCRC Article(s) Referred to by the Court	Other Treaties/Acts	Brief Summary	Outcome/Decision	Significance	Dissenting	Other Relevant Sources
In the matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27	UK Supreme Court	Northern Ireland	3, 8 and 14	N/A	Sections 3, 4, 6 and 7 of the HRA 1998	The appeal challenged the compatibility of Sections 58 and 59 of the Offences Against the Person Act 1861 and Section 25 of the Criminal Justice Act (Northern Ireland) with Articles 3, 8 and 14 of the ECHR. The appeal also considered whether the Appellant entitles to bring proceedings under the HRA and seeks a declaration of incompatibility in relation to unlawful act or acts.	The majority held that (i) the current law that prohibited abortions in the context of pregnancy due to rape or incest or serious foetal abnormality violated the right to private and family life under Article 8 of the ECHR and (ii) the Northern Ireland Human Rights Commission (NIHRC) did not have standing to bring proceedings to the courts.	In terms of standing, the Court held that the Parliament did not provide NIHRC with standing to bring abstract proceedings. The Court elaborated that it was not necessary for NIHRC to be a victim of an unlawful, however, NIHRC must demonstrate that there were actual or potential victims of an unlawful act in the proceedings, which they failed to do so. As such, the Court concluded that NIHRC did not have standing to bring the proceeding wherein the complaint only related to incompatibility of primary legislation with the ECHR. In relation to substantive challenge, the majority held that there was an interference with the right to private and family life of women and girls. The Court also did not find such interference justified in accordance with the law and necessary in a democratic society. The Court also called out the need for radical reconsideration of the law to ensure its compatibility with the ECHR.		

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