

Making sure the child is heard:

Part I – human rights

by The Honourable Mr Justice Munby

This two part article is taken from a lecture for NYAS (the National Youth Advocacy Service) given at The Law Society in February 2004.

First, in the spirit of the age, I must start with some disclaimers. I write as a mere lawyer, and I am very conscious that the matter under consideration is one that has to engage the assistance of many disciplines. Moreover, I have spent the whole of my professional life in the courtroom, first as a barrister and now as a judge. So that my perspective inevitably reflects my forensic experience, though the subject extends far beyond that rather narrow context. Finally, and I know this will be disappointing to you, I have no solutions or even suggestions as to *how* the interests of our children can be better represented. My more modest task is to explain *why* it is so important that we make sure that our children are properly represented and to identify a few areas where our present arrangements are perhaps not always as satisfactory as they should be. My survey is partial and slanted, reflecting in major part the problems that the happenstance of litigation has brought my way.

I must start with the Human Rights Act 1998 and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Act is of fundamental, indeed almost revolutionary, importance. For the first time it confers upon the citizen and the denizen legally enforceable constitutional and human rights. You may be surprised to hear me say it, but at common law there is no such thing as a constitutional right, using the term in what the legal philosophers would consider its only proper meaning. What we traditionally refer to as our constitutional rights are more correctly described as liberties, privileges or freedoms. Those of a jurisprudential turn of mind will recognise the reference here to Hohfeld's *Fundamental Legal Conceptions* at p 47.

Now this is not some arid piece of legal pedantry. It is a point of great importance. Traditionally our constitutional and human rights fell into two broad categories. First, there were "rights" – in truth, liberties, privileges or freedoms – such as freedom of speech and freedom of

association. At common law, freedom of speech was founded on nothing more than the principle that, absent some specific prohibition imposed, for example, by the law of libel or the law of obscenity, a man is free to write and say what he wants. So with freedom of religion and freedom of association. These were not rights enforceable by action in the courts – which indeed is why they were not rights at all in strict legal theory. Secondly, there were rights properly so called, where infringements of the right, because it involved a correlative breach by someone else of a legal duty, gave rise to an action, typically an action in tort. So if a man's house was unlawfully searched or he was assaulted by agents of the state an action in trespass lay, just as it would against any other tortfeasor.

Please do not misunderstand me. Our old constitutional settlement served us remarkably well. Generations of our ancestors were blessed that they did not have to apply to some government office to seek permission to publish a newspaper or to set up some association of like-minded people. As the great legal historian Maitland once remarked, speaking of the religious liberty granted to barely tolerated sects (*Selected Essays* at p 183): "All that they had to ask from the state was that the open preaching of their doctrines should not be unlawful." And generations have cause to be grateful that every Minister of the King, however powerful, could always be brought to account in a court of law if he broke, or caused his minions to break, the law.

But the fact is that the old constitutional settlement had its limitations.

In the first place, whilst it may have obliged the state not to interfere in certain activities – at least not unless the state could obtain Parliamentary authority to do so – it imposed no positive obligations on the state. Secondly, it tended to protect the citizen from official wrongdoing only if that wrongdoing could be brought within the ambit of either the criminal law or the law of tort. Thus the law

protected the citizen from false imprisonment – a man unlawfully held in a prison could obtain a writ of habeas corpus and sue for damages for false imprisonment – but gave him little remedy against being detained lawfully but in degrading conditions. And the Secretary of State could only be held liable for those for whose acts he was vicariously liable. So a prisoner who was assaulted by a prison officer could sue the Home Secretary; a prisoner who was assaulted by another prisoner could not. To an extent these difficulties could be overcome by extensions of the law of negligence or by that surprisingly recent development, the public law administered by the Administrative Court. But these were in many ways inadequate.

Our public law in particular was crippled by its identification of rationality as the benchmark of the legality of decision-making by public authorities. Whilst European jurisprudence was developing proportionality as the test of legality, so long as the so-called *Wednesbury* test of rationality held sway in our domestic courts, the decision of a public authority could be struck down by our courts only if it was “so outrageous in [its] defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” (Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p 410).

The importance of the Human Rights Act is not merely that it makes the Convention directly enforceable in our domestic courts. It confers rights in the strict sense of the word: rights matched by the correlative obligation, imposed on every public authority by section 6 of the Act and backed up by the remedies granted by sections 7 and 8 of the Act, not to act, or fail to act, in a way which is incompatible with Convention rights. It confers rights which in many cases oblige the state – public authorities – to take positive action. And it introduces proportionality as the benchmark of legality when the state is proposing to act in a manner which engages a Convention right.

For present purposes the most important provision in the Convention is Article 8 which, as you all know, protects “the right to respect for ... private and family life”. Article 8(2) provides that:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 8(2) requires the judicial or other decision-maker to carry out what is conventionally called a balancing exercise. The key to this is the Convention concept of proportionality. To meet the test of proportionality it has to be shown that what the state is proposing to do is in pursuit of one of the legitimate aims

provided for in the Convention and that it is “necessary in a democratic society”. That is to say, the reasons given must be “relevant and sufficient”, they must correspond to a “pressing social need” and must be “proportionate” to the legitimate aim being pursued (Hale LJ in *Re W and B, Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, at para [54]). It can readily be seen what a far cry this is from the old common-law test of rationality.

I should also refer to Article 3 which, without qualification or exception, prohibits “torture or ... inhuman or degrading treatment or punishment”.

STATE INTERFERENCE WITH FAMILY LIFE

It may be convenient at this point to consider two different types of reason why the state may seek to interfere with family life. Let me give three examples. The state seeks to send the mother of a baby to prison. Or the state seeks to deport a convicted drug smuggler or failed asylum seeker who has a wife and child in this country, in circumstances where it may be difficult or even impossible for his wife and child to follow him abroad. Or the state, in the form of a local authority, seeks an interim care order placing a child in foster-care. Now in each case the consequence to the child of the state’s threatened activity may be the same – separation from his or her parent – but what the state is actually doing is not at all the same in all three cases.

In the first and second cases the analysis is simple and obvious: the state is seeking to do something which involves an interference in family life but is doing so in pursuit of its own ends – in pursuit of the public interest; specifically, the interest of the state – the public interest – to use the language of Article 8(2) in “public safety” or “the prevention of disorder or crime”. In cases of this kind both the Strasbourg jurisprudence and the decisions of our domestic courts are at one: the interests of the child, although they plainly have to be taken into account, are neither paramount nor primary. There is a balancing exercise in which the scales start even (see the authorities discussed in *Re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921, at paras [49]–[53]).

But in the third case – the care proceedings – something different is going on. Because, subject only to meeting what family lawyers call ‘threshold’, both our domestic law – section 1(1)(a) of the Children Act 1989 – and the Strasbourg jurisprudence give priority to the child’s best interests (see sections 31(2) and 38(2) of the Children Act 1989; note that there is no threshold requirement when the proceedings relate to a mentally incompetent adult: *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, at para [45], *Re S (Adult’s Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, at para [13]). If the rights of a parent and her child conflict then domestic law

requires the conflict to be resolved by reference to the child's best interests. In domestic law the governing consideration is the child's welfare. So it is under the Convention. Strasbourg jurisprudence has long recognised that, in the final analysis, parental rights have to give way to the child's. (I might add that the answer is no different where the child, although now an adult, remains unemancipated because mentally incapacitated: see *Re S (Adult Patient)* at para [42]). As the European Court of Human Rights at Strasbourg has very recently said (*Yousef v The Netherlands* [2003] 1 FLR 210 at para [73]):

"In judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."

Why is this so?

When we think of Article 8 we tend to think of it as a protection against the serious interference in a parent's right to respect for family life which occurs when the state – often in the guise of a local authority – seeks compulsorily to separate parent and child. Such an interference by the state in the internal life of a family is a very serious matter. After all, the family, whatever form it takes, is the bedrock of our society and the foundation of our way of life.

But the parents' rights to respect for their family life are only a part, even if a very important part, of the picture. Parent and child both have rights protected by Article 8, and Article 8 protects the right to respect for both "private" and "family" life. Private life is not the same as family life and the two may sometimes come into conflict. In particular, the parent's right to respect for his or her family life may come into conflict with the child's rights to respect both for his or her family life and for his or her private life. Let me explain why and then move on to explain the significance of the point.

CONCEPT OF PRIVATE LIFE

I need not further elaborate what is meant by family life, but it is important for present purposes to understand what is embraced within the concept of private life. In *Niemietz v Germany* (1993) 16 EHRR 97 the Strasbourg Court indicated at para [29] that private life includes at least two elements. The first is the notion of "an "inner circle" in which the individual may live his own personal life as he chooses"; the second is "the right to establish and develop relationships with other human beings". The court developed this in *Botta v Italy* (1998) 26 EHRR 241, a case which I venture to suggest is of fundamental importance to every family lawyer. What the court said (at para [32]) was this:

"Private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the

development, without outside interference, of the personality of each individual in his relations with other human beings."

This has been elaborated by the court in further cases (*Bensaid v United Kingdom* (2001) 33 EHRR 205 at para [47], *Pretty v United Kingdom* (2002) 35 EHRR 1, [2002] 2 FLR 45, at para [61]) where it was pointed out that:

"Article 8 ... protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."

In *Pretty v United Kingdom* the court stressed at para [65] that:

"The very essence of the Convention is respect for human dignity and human freedom."

It follows from this that, included in the private life respect for which is guaranteed by Article 8, and embraced in the "physical and psychological integrity" protected by Article 8, is the right to participate in the life of the community and to have access to an appropriate range of social, recreational and cultural activities (*Re S (Adult Patient)* at paras [114]–[123], *R (A, B, X and Y) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194, at paras [99] and [114], *Re Roddy (a child) (identification: restriction on publication)*, *Torbay Borough Council v News Group Newspapers* [2003] EWHC 2927 (Fam), [2004] FCR 481 and *Claire F v Secretary of State for the Home Department* [2004] EWHC 111 (Fam) at paras [44]–[45], [107]). The Strasbourg jurisprudence recognises that the ability to lead one's own personal life as one chooses, the ability to develop one's personality, indeed one's very psychological and moral integrity, are dependant upon being able to interact and develop relationships with other human beings and with the world at large. Similarly, the private life protected by Article 8 extends to the emotional and developmental environment in which a child is brought up. A child's Article 8 rights may be engaged if he is being brought up in surroundings that isolate him socially or confine or stultify him emotionally. The ability to establish and develop relationships with the outside world – the ability to participate in the life of the community – is an important aspect of the "psychological integrity" protected by Article 8.

DUTIES IMPOSED ON THE STATE BY ARTICLE 8

So much for family and private life. What of the duties imposed on the state by Article 8? The Strasbourg Court has long recognised – the principle goes back at least as far as *Marckx v Belgium* (1979–80) 2 EHRR 330 – that the respect for private and family life which Article 8 guarantees imposes on the state not merely the duty to abstain from inappropriate interference but also, in some cases, certain positive duties. The state may be obliged to take positive action to prevent or stop another individual from interfering with private life. As the court put it in *Botta v Italy* at para [33]:

“While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”

Now this has very important implications. The first is this. As *Botta v Italy* shows, the state, even in the sphere of relations between purely private individuals, may have positive obligations to adopt measures which will ensure effective respect for the child’s private life. Thus the state, in the form of the local authority, may have a positive obligation to intervene, even at the risk of detriment to the parent’s family life, if such intervention is necessary to ensure respect for the child’s Article 8 rights. And the state, in the form of the High Court, has a positive obligation to act in such a way as to ensure respect for those rights. There is perhaps nothing very surprising in this. The Crown as *parens patriae* has the duty and obligation to protect those unable to look after themselves. If I can be forgiven for quoting what I once said (*Re F, F v Lambeth London Borough Council* [2002] 1 FLR 217 at para [41]):

*“Modern reference to the ‘rights’ of the citizen can sometimes lead one to overlook the equal importance of what was once very clearly understood as the “duty” of the Crown to its subjects. Today the rights of the citizen are mirrored by the duty of the state. Expressed in the language of the new constitutional settlement, the parents and the boys are guaranteed by Article 8 of the Convention their rights to respect for private and family life. By acceding to the Convention the state bound itself to secure these rights to the parents and to the boys. Moreover, since 2 October 2000 it has been the duty of every public authority (and for this purpose both [the local authority] and this court are public authorities . . .) not to act in a way which is incompatible with the citizen’s Convention rights. In more traditional language it is the duty of the Crown as *parens patriae* to protect children against injury of whatever kind from whatever source.”*

So what the state – the local authority – is actually doing when it seeks to take a child into care can usefully be analysed in terms of the state fulfilling the duties cast upon it by Article 8. *Botta v Italy* shows that the state in the form of a local authority does not merely have the power to commence care proceedings under section 31 of the Children Act; it may in certain circumstances be under a duty to do so.

Now you may not think the analysis is useful, and in terms of day to day practice it probably is not. After all, we simply apply sections 31 and 38 of the Children Act without asking – without needing to ask – what precisely it is that we are doing. But when the case involves not a child

but a mentally incapacitated adult, the analysis is more useful. As you will know, the consequence of historical anomaly and a historical mistake is that the only jurisdiction available in the case of a mentally incapacitated adult is the court’s inherent declaratory jurisdiction (see *A v A Health Authority, In re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, at paras [35]-[40]). First discovered by the House of Lords in 1989 in a case involving medical treatment (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1), this jurisdiction has, by a remarkable process of judicial pragmatism and inventiveness, evolved into something which is now sufficiently broad as to encompass what is, in all but name, a non-statutory care jurisdiction in relation to mentally incapacitated adults, enabling a local authority in an appropriate case to be invested, as it were, with all the powers it would have if a care order in respect of a child had been made in its favour. This development started as recently as 1992 (see *Re C (Mental Patient: Contact)* [1993] 1 FLR 940). Its most recent manifestations are to be seen in *Re S (Adult Patient)* and *Re S (Adult’s Lack of Capacity)* (see in particular *Re S (Adult Patient)* at para [11]). I venture to suggest that it is Article 8 as expounded in cases such as *Botta v Italy* that explains what it is that the court is actually doing in such a case and also why it is that the court must continue to develop this novel jurisdiction if it is to comply with its duty under section 6 of the Human Rights Act.

So much for the process by which a child enters the care system. But what of the child who has been taken into care? Here the state’s – the local authority’s – positive obligations are even more compelling. As *Botta v Italy* itself shows, the positive obligations which arise under Article 8 may be fairly limited if the complaint is that the state has simply failed to act altogether. As the court explained at para [33]:

“In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual.”

But it is much more difficult for the state to justify inaction once it has chosen to intervene and has, by its intervention, actually interfered with family life, for example, by taking a child into care.

Children are to be taken away from their parents by the state if, and only if, the conditions set out in section 31 of the Children Act are satisfied, that is, if the local authority can establish that the children have suffered or are likely to suffer significant harm as a result of parental default. The state assumes a heavy burden when it takes a child into care. If the state is to justify removing children from their parents it can only be on the basis that the state is going to provide a better quality of care than that from which the child in care has been rescued (*Re F, F v Lambeth London Borough Council* at paras [40]-[43]).

If the state – the local authority – unjustifiably fails in that endeavour it will find itself liable under the Human

Rights Act. Any child who complains that a local authority has failed to meet its obligations under Article 8 can bring a free-standing action in the High Court under sections 7 and 8 of the Human Rights Act. So, for example, a child in care can in principle bring such proceedings against the local authority if his placement fails to meet the standards mandated by *Botta v Italy*.

The same point can be illustrated by another group of children who find themselves in a very different setting. Children in the care of local authorities are not the only children in the care of the state. There are many children in prisons, who are the responsibility of the Secretary of State for the Home Department. They fall into two categories: those children who are themselves serving sentences, usually in Young Offender Institutions (“YOIs”), the subject of my judgment in *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484; and those children who are in prison mother and baby units (“MBUs”) because their mother are serving sentences, the subject of the judgment I gave very recently in *Claire F v Secretary of State for the Home Department* [2004] EWHC 111 (Fam).

Let me deal first with the children – they are in fact babies, because Prison Service policy usually requires them to be separated from their mothers no later than when they are 18 months old – who find themselves in MBUs.

There is a significant body of evidence identifying the various disadvantages to babies – particularly older babies – of living in MBUs. The fact is that even the best MBU cannot alone offer the variety that is available in the world outside prison. In the light of this material, and having regard to the principle in *Botta v Italy*, what I said was this (*Claire F v Secretary of State* at para [109]):

“It seems to me that, when deciding whether and at what stage to separate a mother and her baby, the Secretary of State is entitled to have regard to the potential disadvantages to the baby of living in the abnormal environment of a MBU. Indeed, he must have regard to it if he is properly to balance, as he must, the child’s rights under Article 8 (including the child’s right to respect for that part of its private life referred to in Botta v Italy) against the mother’s rights under Article 8 to respect for her family life. I am not saying that this factor alone will be decisive, but it will often, I suspect, carry considerable weight, particularly as the child gets older.”

I refused to interfere on the merits with the Secretary of State’s decision to separate nine-month old Lia-Jade and her mother Claire. Explaining why, I said (para [199]) that the Secretary of State was fully entitled to pay particular attention to the views expressed by a number of professionals as to the desirability of Lia-Jade being able to live in a “normal” environment. In the light of *Botta v Italy*, I said, this was clearly a most important factor.

The other group of children in prisons – those in young offenders’ institutions – are, on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse or neglect. The statistics paint a deeply disturbing picture of the YOI population. They plainly need much support. In relation to some there are child protection issues. In the *Howard League* case at para [11] I described these children as follows:

“Over half of the children in YOIs have been in care. Significant percentages report having suffered or experienced abuse of a violent, sexual or emotional nature. A very large percentage have run away from home at some time or another. Very significant percentages were not living with either parent prior to coming into custody and were either homeless or living in insecure accommodation. Over half were not attending school, either because they had been permanently excluded or because of long-term non-attendance. Over three-quarters had no educational qualifications. Two-thirds of those who could be employed were in fact unemployed. Many reported problems relating to drug or alcohol use. Many had a history of treatment for mental health problems. Disturbingly high percentages had considered or even attempted suicide.”

But the *Howard League* case also illustrates another important implication of the principles I have been talking about. You will recall my earlier comments about the inadequate protection afforded by the common law to a prisoner detained lawfully but in degrading conditions and to a prisoner assaulted by another prisoner. The position has been revolutionised by the Human Rights Act. In the *Howard League* case at paras [65]-[66] I said that Articles 3 and 8 of the Convention:

“protect children in YOIs from those actions by members of the Prison Service which constitute inhuman or degrading treatment or punishment or which impact adversely and disproportionately on the child’s physical or psychological integrity [and] impose on the Prison Service positive obligations to take reasonable and appropriate measures designed to ensure that:

- (i) *children in YOIs are treated, both by members of the Prison Service and by fellow inmates, with humanity, with respect for their inherent dignity and personal integrity as human beings, and not in such a way as to humiliate or debase them;*
- (ii) *children in YOIs are not subjected to torture or to inhuman or degrading treatment or punishment by fellow inmates or to other behaviour by fellow inmates which impacts adversely and disproportionately on their physical or psychological integrity.”*

I added that, quite apart from any other remedies which there may be arising out of the state’s – the Prison Service’s – failure to meet its human rights obligations, sections 7 and 8 of the Human Rights Act enable a victim

to bring a free-standing action in the High Court and that in the case of a claimant who is a child such a claim can appropriately be brought in the Family Division.

And the implications of that were recently spelt out by Moses J in a case involving a child in a YOI who alleged breaches of Articles 3 and 8 of the Convention (*R (BP) v Secretary of State for the Home Department* [2003] EWHC 1963 (Admin) at para [42]):

“I would like to stress . . . the right of a claimant such as this to bring an action under section 7 of the Human Rights Act 1998 . . . Such an action would give rise to the possibility of live evidence in relation to past events, such live evidence might lend force to the contentions of someone in the position of the claimant and afford an opportunity to cross-examine witnesses on behalf of the Home Department. This will provide a powerful incentive, whatever the result, that that Department should comply with its obligations in relation to young detainees under the 1998 Act.”

Thus far I have been considering the *substantive* rights accorded to a child by Article 8. And thus far, you may be thinking to complain, I have had precious little to say that is relevant to the subject about which I am supposed to be speaking. But bear with me. I must now turn to another aspect of Article 8 which is perhaps more directly relevant, namely the *procedural* rights that are guaranteed to parents and children by Article 8.

Let me start with parents, for much of the Strasbourg and domestic case-law has focussed on their rights. Article 8 affords parents who are involved in care proceedings not merely substantive protection against any inappropriate interference with their private and family life by public authorities but also significant procedural safeguards. As the Strasbourg Court has said (*McMichael v United Kingdom* (1995) 20 EHRR 205 at para [87]):

“Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.”

The fundamental rule was articulated by the court as long ago as 1988 (*W v United Kingdom* (1988) 10 EHRR 29 at paras [63]–[64]):

“The decision-making process must therefore . . . be such as to secure that [the parents’] views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them . . . what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as “necessary” within the meaning of Article 8.”

What does this mean in practical terms? In one case, which involved allegations of unfairness in the process leading up to the hearing of an application for a care order, I said this (*Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), [2002] 2 FLR 730, at para [151]):

“The state, in the form of the local authority, assumes a heavy burden when it seeks to take a child into care. Part of that burden is the need, in the interests not merely of the parent but also of the child, for a transparent and transparently fair procedure at all stages of the process – by which I mean the process both in and out of court. If the watchword of the Family Division is indeed openness – and it is and must be – then documents must be made openly available and crucial meetings at which a family’s future is being decided must be conducted openly and with the parents, if they wish, either present or represented. Otherwise there is unacceptable scope for unfairness and injustice, not just to the parents but also to the children.”

You will note my reference to the parents being represented if that is what they wish. Referring to professionals’ meetings (as opposed to a meeting of experts) I added at para [154] that “a parent or other party who wishes to should have the right to attend and/or be represented at the professionals’ meeting”.

In another case a local authority which held a care order was proposing to remove the children from the parents with whom they had been placed in accordance with the care plan approved by the court. The local authority was alleged to have acted unfairly. I said this (*Re G (Care: Challenge to Local Authority’s Decision)* [2003] EWHC 551 (Fam), [2003] 2 FLR 42, at para [45]):

“In a case such as this, a local authority, before it can properly arrive at a decision to remove children from their parents, must tell the parents (preferably in writing) precisely what it is proposing to do. It must spell out (again in writing) the reasons why it is proposing to do so. It must spell out precisely (in writing) the factual matters it is relying on. It must give the parents a proper opportunity to answer (either orally and/or in writing as the parents wish) the allegations being made against them. And it must give the parents a proper opportunity (orally and/or in writing as they wish) to make representations as to why the local authority should not take the threatened steps. In short, the local authority must involve the parents properly in the decision-making process. In particular, the parents (together with their representatives if they wish to be assisted) should normally be given the opportunity to attend at, and address, any critical meeting at which crucial decisions are to be made.”

Again, you will have noted the reference to the parents’ representatives.

Now although it may be that most of the cases on the point relate to parental involvement in care proceedings brought by local authorities, these important principles are, of course, of general application. As I commented in

the first of the two cases to which I have just referred (*Re L* at para [90]):

“I see no reason in principle why the requirements of fairness mandated by Article 8 should not also apply to the other persons and agencies involved in child protection work as they apply to the local authority – after all, many of the decisions which most directly impact upon parents are properly taken at multi-disciplinary meetings. Collective decision making surely carries with it collective responsibility and a collective duty to act fairly.”

Article 8 guarantees fairness in the decision-making process at all stages of child protection (*Re L* at para [88]). But Article 8 is not confined only to child protection. It applies also, for example, to decision-making by the Prison Service when the question for decision is whether or not to separate an imprisoned mother from her baby (*R (P) v Secretary of State for the Home Department*, *R (Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, *R (D) v Secretary of State for the Home Department* [2003] EWHC 155 (Admin), [2003] 1 FLR 979, and *Claire F v Secretary of State*). As Maurice Kay J has recently said (*R (D) v Secretary of State* at para [24]):

“The decision to separate mother and baby is plainly one of great importance and it is axiomatic that it can only lawfully be taken within the bounds of procedural fairness.”

Indeed in that case he quashed the decision to separate mother and baby on the ground (amongst others) that the procedure adopted “fell well short of what fairness required”. One of the matters to which he drew attention at paras [28]-[29] was that “no opportunity was provided for representations to be made by [the mother] or her solicitors.” I emphasise those last words.

Moreover, and this is a matter of some importance, the procedural guarantees afforded by Article 8 apply as much to the child as to his or her parents. Children are not the largely passive objects of more or less paternalistic parental, judicial, local authority or Prison Service decision-making. A child is as much entitled to the protection of the Convention – and specifically of Article 8 – as anyone else. The fairness which Article 8 guarantees to every parent is, of course, equally guaranteed to every child (*Re L* at para [150], *Claire F v Secretary of State* at para [158]).

Thus far I have concentrated on the implications of Article 8 for local authorities and the Prison Service. But in

principle the procedural safeguards mandated by Article 8 apply to all public authorities whose actions may engage someone’s Article 8 rights. However, such issues can arise in many different contexts and different contexts may call for different procedures. It may be that the demanding requirements imposed on a local authority or the Prison Service do not apply in all their full rigour to the very different context of deportation and removal. And no-one has yet suggested that a mother’s children require to be represented in the Crown Court before she is sentenced to a term of imprisonment. And there may, of course, be cases of emergency or extreme urgency where it is not possible to involve parents as fully in the decision-making process as would normally be appropriate (*Re G* at para [58]). The guiding principles are clear enough. How they apply in particular contexts can only be determined on a case by case basis.

These principles are not mere rhetoric. The books already contain reports of at least three cases (*Re M (Care: Challenging Decisions by Local Authority)* [2001] 2 FLR 1300, *Re L* and *Re G*) in which the procedures adopted by local authorities, and two cases (*R (D) v Secretary of State* and *Claire F v Secretary of State*) in which the procedures adopted by the Prison Service in relation to the separation of mothers and babies in MBUs, were found to have breached Article 8.

(Note: Many of the matters I have touched on here are considered at greater length in a number of cases where the authorities are considered in some detail: see *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017, *Re F, F v Lambeth London Borough Council* [2002] 1 FLR 217, *Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), [2002] 2 FLR 730, *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484, *R (A, B, X and Y) v East Sussex County Council No 2* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194, *Re G (Care: Challenge to Local Authority’s Decision)* [2003] EWHC 551 (Fam), [2003] 2 FLR 42, *Re Angela Roddy (A Minor)* [2003] EWHC 2927 (Fam) and *Claire F v Secretary of State for the Home Department* [2004] EWHC 111 (Fam)).⁸

The Honourable Mr Justice Munby