



## Human Rights Act claims and care proceedings

09.02.17  
Asha Pearce-Groves  
St John's Chambers

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## Legislation



European Convention on Human Rights 1950



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Article 6:  
*'1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'*

Article 8:  
*'1. Everyone has the right to respect for his ... family life ... 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 ... for the protection of health ... or for the protection of the rights and freedoms of others.'*

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Human Rights Act 1998



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Section 6 unlawful act:

It is 'unlawful for a public authority to act in a way which is incompatible with a convention right.'

Sections 6(1) and 6(6): an unlawful act is an act or failure to act which is incompatible with a Convention right.

Section 7(1)- victims of the unlawful act may bring a claim as a freestanding application or within proceedings:

*'A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by s6(1) may-*  
*(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*  
*(b) rely on the Convention right or rights concerned in any legal proceedings,*  
*but only if he is (or would be) a victim of the unlawful act.'*

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Section 8: Remedies available for a breach of Convention rights

- s8(1)- Discretion, upon a finding that any unlawful acts have been committed, to 'grant such relief or remedy within its powers as it considers just and appropriate'

- s8(3)- Power to award damages

No award of damages unless the Court is 'satisfied that the award is necessary to afford just satisfaction to the person in whose favour the order is made ... taking account of all the circumstances of the case, including:

*(a) Any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court) and,*  
*(b) the consequences of any decision (of that or any other court) in respect of that act.'*

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- Section 8 (4):

*'In determining - (a) whether to award damages, or (b) the amount of the award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.'*

- Article 41 ECHR defines 'just satisfaction':

*'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party.'*

If the court considers that a declaration does not provide just satisfaction it may consider awarding damages

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## Case law- Section 20



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### Section 20 – Children Act 1989

*'(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of— (a) there being no person who has parental responsibility for him; (b) his being lost or having been abandoned; or (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.*

*...(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.*

*... (7) A local authority may not provide accommodation under this section for any child if any person who— (a) has parental responsibility for him; and (b) is willing and able to— (i) provide accommodation for him; or (ii) arrange for accommodation to be provided for him, objects.*

*(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.*

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## Section 20 and consent / objection



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S20(7) 'A local authority may not provide accommodation under this section for any child if any person who— (a) has parental responsibility for him; and (b) is willing and able to— (i) provide accommodation for him; or (ii) arrange for accommodation to be provided for him, objects.'

### **Developed into a requirement of active consent:**

R (G) v Nottingham City Council and Nottingham University Hospitals NHS Trust [2008] EWHC 400 (Admin) per Munby J  
'Submission in the face of asserted State authority is not the same as consent. In this context ... nothing short of consent will suffice' [55]

Coventry City Council v C [2013] EWHC 2190 (Fam) per Hedley J  
- Need for informed consent and the involvement of a solicitor ([43-44])  
'Willingness to consent cannot be inferred from silence, submission or even acquiescence'; it was 'a positive stance' [44]

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Consent reaffirmed in:  
Re W (Children) [2014] EWCA Civ 1065 at [34]

Re N (Adoption: Jurisdiction) [2015] EWCA 1112 at [163]

### **BACK TO OBJECTION:**

London Borough of Hackney v Williams & Anor [2017] EWCA Civ 26 (26 January 2017)

'Although obviously highly relevant to any consideration of the exercise of power under this section, it is important to underline the circumstances in which these principles came to be enunciated and the critical importance of identifying the guidance as good practice which does not, in fact, have the force of law.' [48]

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'...I recognise that, in the context of the cases that he was then considering, it may well have been appropriate for Sir James to equate the obligation on a local authority not to use its powers under section 20 if a parent 'objects' as meaning, effectively, that when the parent is known and in contact with the authority, consent is required but, **in my judgment, it would be wrong to elevate the requirement of consent into a rule of law that operates in all circumstances.**' [74]

'...nothing that is said in this judgment is intended to, or should be read as, altering the content and effect of that guidance in family cases. The focus of the court in the present appeal is on the bottom-line legal requirements that are established by s 20 and within which a local authority must act. ... For reasons of good administration, the practice guidance should continue to be followed, notwithstanding the limits of the underlying legal requirements in s 20 that I have identified but **a failure to follow it does not, of itself, give rise to an actionable wrong, or found a claim for judicial review.**' [77]

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## Section 20 and delay



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*Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112

'Section 20 may, in an appropriate case have a proper role to play as a short term measure pending the commencement of care proceedings, but **the use of section 20 as a prelude to care proceedings for a period as long as here [in that case 8 months] is wholly unacceptable.** It is in my judgment, and I use the word advisedly and deliberately, a misuse by the Local Authority of its statutory powers.' [157] per Munby P

*Northampton CC v AS and others* [2015] EWHC 199 (Fam)

[Delay in issuing] 'deprived [the child] of the benefit of having an independent children's guardian to represent and safeguard his interests' and... 'deprived the court of the ability to control the planning for the child and to prevent or reduce unnecessary and avoidable delay in securing a permanent placement for the child at the earliest possible time.' [37] per Keehan J

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*Medway Council v M and T* [2015] EWFC B 164 at [53], HHJ Lazarus raised the concern that local authorities' current misuse of section 20, enables them effectively to avoid and subvert the stringent tests and limitations applicable to all other modes of removal of a child from a parent's care under the Children Act 1989.

Was this the intention of Parliament given that these tests and limitations were put in place to safeguard families from unregulated unilateral actions of local authorities that interfere with their family life?

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## A brief look at damages and quantum



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Wilson LJ at [64] in *Re C (A Child)* [2007] 1 FLR 1957. :

'In general the "principles" applied by the European Court, which we are thus enjoined to "take into account" are not clear or coherent...What is clear, however, is that the European Court generally favours an award of damages in cases in which local authorities have infringed the right of parents under Article 8 to respect for their family life by shortcomings in the procedures by which they have taken children into care or kept them in care, whether temporarily or permanently.'

*Medway* - agreed relevant factors to be taken into account:

- the length of the proceedings;
- the length of the breach;
- the severity of the breach;
- distress caused;
- insufficient involvement of parent or child in the decision-making process;
- other procedural failures.

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## The statutory charge



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Human rights issues within care proceedings must be determined within those proceedings, not by way of freestanding application - Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam) and in H (A Child – Breach of Convention Rights: Damages) [2014] EWFC38.

Civil Legal Aid (Statutory Charge) Regulations 2013 ("the regulations")

In a claim under the HRA 1998 'arising out of a family relationship', the whole of the costs of the case are recoverable, unless 'the Director has made an exceptional case determination under section 10 of the Act (exceptional cases)'

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*Ways to attempt to avoid statutory charge-*

Medway- don't order payment just yet

P v a Local Authority [2016] EWHC 2779 – statutory charge does not apply

Pro Bono

Payments or provision of services under s17 Children Act instead of damages

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# Questions

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