

Disabled young people and families: The law through a human rights lens

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Key human rights instruments

- European Convention on Human Rights (ECHR)
 - Incorporated into English law through Human Rights Act 1998 – see section 6
- UN Convention on the Rights of the Child (CRC) – applies up to 18
- UN Convention on the Rights of Persons with Disabilities (CRPD)
 - Not part of English law, but relevant in three ways

Key human rights instruments

- Article 1 CRPD
 - ‘The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’
- Progressive realisation of Econ/Soc rights
 - ‘each State Party undertakes to take measures to the maximum of its available resources ...ith a view to achieving progressively the full realization of these rights...’ (Art 4 CRPD / CRC)

Relevance of CRC / CRPD

From *SG v SSWP* ('Benefit Cap' case)

1. Inform decisions on whether ECHR rights have been infringed – e.g. *Mathieson* in relation to children's best interests
2. Help resolve any ambiguity in domestic legislation
3. Inform development of common law

Article 23 CRC – disabled children

- Right to ‘full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.’
- Right to ‘special care’
 - subject to ‘available resources’
 - education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities
 - fullest possible social integration / development

Article 7 CRPD – disabled children

- ‘States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.’
- ‘Best interests’ obligation
- Participation obligation

(1) Participation

- Article 8 ECHR
 - Right to be heard on decisions which impact on your private life (inc ‘physical and psychological integrity’), family life and home
- Article 12 CRC / Article 7 CRPD
 - Children’s right to participate – views given ‘due weight in accordance with the age and maturity of the child’
- Article 3(c) CRPD – general principle of participation

Views, Wishes and Feelings

- Central to any ‘best interests’ decision making under section 4 Mental Capacity Act 2005
 - See Baroness Hale in *Aintree v James*
- Sections 17(4A) and 20(6) Children Act 1989
 - Requirement to ascertain and give ‘due consideration’ to child’s wishes and feelings before providing services
- Section 19 Children and Families Act 2014
 - Due regard to need to support effective participation by children, YP and families

(2) Non-discrimination

- Article 14 ECHR
 - Requires another ECHR right (e.g. Article 8)
- Article 2 CRC
 - Discrimination against children
- Article 4 CRPD
 - ‘Without discrimination of any kind on basis of disability’

Duties not to discriminate

Equality Act 2010

1. Direct discrimination
2. Indirect discrimination – ‘blanket’ policy having a disproportionate adverse affect on a particular group
3. Discrimination arising from disability – less favourable treatment because of something arising in consequence of disability
4. Failure to make reasonable adjustments – positive obligation to take all reasonable steps to address substantial disadvantages

PSED

Section 149 of the Equality Act 2010

Requires public bodies to have 'due regard' to a series of specified needs when carrying out their functions.

Includes needs to eliminate discrimination and advance equality of opportunity

Bracking – two key issues:

1. Proper understanding of impact of the decision on disabled children and families
2. Specific regard to the needs specified in section 149

PSED

Recent case example – *R (DAT and BNM) v West Berkshire*

- West Berkshire Council decided to cut funding for short breaks provided by voluntary sector by 52%
- Challenged through judicial review (two children, legal aid).
- Court held decision unlawful because
 - No consideration of relevant legal duties
 - Misdirection as to the requirements of the PSED
- Decision quashed, council required to reconsider

(3) Best Interests

- Article 3 CRC
 - All children
- Article 7 CRPD
 - Disabled children

‘In all actions concerning children...the best interests of the child shall be a primary consideration.’

Domestic legislation

Section 11 of the Children Act 2004 (social care and other local authority functions)

Section 175 of the Education Act 2002 (local authority education functions and schools)

Duty to ‘have regard to the need to safeguard and promote the welfare of children’

- Requires ‘active promotion’ of children’s welfare
(Baroness Hale in *HC*, see also *R (J and L) v Hillingdon*)

CFA - Importance of s 19 principles

Section 19 CFA provides that:

In exercising a function under this Part in the case of a child or young person, a local authority... must have regard to...

the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

Applies to everything done under CFA

(4) Capacity

- Article 12 CRPD
 - States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
 - States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
 - States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse...

Transition - Mental Capacity

- *Gillick* competence – children in principle able to make own decisions at any age
- General rule – once YP turns 16 parents can no longer make decisions for them
- BUT – section 80 CFA:
 - YP aged 16 and other with capacity can decide for themselves
 - Parents or ‘representatives’ (eg Deputies) can make decisions for YP who lack capacity up to age 25
 - Only applies to decisions under CFA

Transition - Mental Capacity (2)

The principles

- Section 1 MCA
 - Presumption of capacity
 - ‘All practicable steps’ to help make decision
 - Right to make unwise decisions
 - All acts and decisions for person who lacks capacity must be in their best interests
 - Requirement for ‘least restrictive’ option

Transition - Mental Capacity (3)

General approach to mental capacity

- Section 2 MCA:
 - ‘a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’
- Section 3 MCA
 - ‘unable’ includes inability to understand or ‘use or weigh’ information

Mental Capacity (4)

- Section 4 MCA
 - Detail in relation to ‘best interests’ decision making
 - Requirement to involve P and family
- Section 5 MCA
 - ‘general defence’ for those who (i) reasonably believe a person lacks capacity and (ii) reasonably believes the act is in that person’s best interests
- Complex issues in relation to deprivation of liberty
 - Deprivation of Liberty Safeguards – hospital / care home 18+, Court of Protection otherwise

(5) Deprivation of Liberty

- Article 5 ECHR
 - ‘acid test’ from *Cheshire West* (not free to leave / continuous supervision and control)
- Article 14 CRPD
 - ‘States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and thatany deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.’

DoL and disabled young people

- Parents can give consent to what would otherwise be a deprivation of liberty for a child under 16 (Re D, High Court)
- Parents can give consent to what would otherwise be a deprivation of liberty for a 16 or 17 year old (Re D, Court of Appeal)
- A local authority cannot consent to what would otherwise be a deprivation of liberty for a child in its care (Re AB)
- Process guidance – Re A-F (Children)

(6) Socio-economic rights

Right to education

- Article 2 of the First Protocol ('A2P1') ECHR
 - 'No person shall be denied the right to education'
- Article 28 CRC
 - 'on the basis of equal opportunity'
- Article 24 CRPD
 - 'States Parties shall ensure an inclusive education system at all levels and lifelong learning...'

Socio-economic rights

Right to health

- Article 24 CRC
 - ‘States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health...’
- Article 25 CRPD
 - ‘States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’

Socio-economic rights (?)

Right to leisure and play

- Article 31 CRC
 - ‘States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

States Parties shall...encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity’

Socio-economic rights (?)

Right to independent living/community inclusion

- Article 19 CRPD
 - ‘States Parties...recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community’
 - See specific obligations in Art 19(a), (b) and (c)

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