KEEPING CHILDREN'S RIGHTS ALIVE

Some observations about current problems in public authority decision-making affecting children

This paper aims to stimulate discussion about current problems in promoting and preserving a child-centred methodology where public authority decision-making affects children. We have heard how this has been attempted with some success through a combination of implementation of the UN Convention on the Rights of the Child through policy, domestic legislation and statutory and non-statutory guidance and some current threats to that project. This paper raises a question on whether a lack of clarity in identifying the fundamental status of children's rights where competing principles are to be applied by public authorities means that child rights are at the bottom of the pile. How can public lawyers make sure they're not part of the problem?

We have heard from other speakers about the international and domestic mechanisms which have sought to generate a culture of reflecting children's welfare needs and providing for better outcomes for children at risk from migration, poverty, violence, homelessness, crime and the consequences of their parents' problems. But when a hierarchy of relevant factors in public authority decision-making is already established, how are attempts to shift that culture through legislation received? How can that culture be protected from new threats in a climate dominated by the twin spectres of austerity and national security?

A useful example of a successful culture change in a highly contentious domestic context is section 55 Borders Citizenship & Immigration Act 2009 which provides that the Secretary of State must make arrangements for ensuring that—
immigration, asylum and nationality functions, and any function conferred by the Immigration Acts or on an immigration officer are discharged *"having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom…"*.

This duty was implemented in the Home Office by statutory guidance "Every child Matters" and the appointment of a 'Children's Champion' within the Home Office. Every Child Matters stated that:

"*Section 55 is intended to achieve the same effect as section 11 of the Children Act 2004 (the 2004 Act) which places a similar duty on other public organisations. As well as providing a driver for improvement within the UK Border Agency, the duty will also help to improve inter-agency working in respect of children. Section 55 applies to the carrying out of the relevant functions anywhere in the UK.*"

Section 55 is designed to ensure that the Children Act principles and practice extend to and inform all strands of immigration authorities' decision-making which impacts on children's lives.

Initial enthusiasm led some practitioners to attempt to deploy the provision as a 'trump card' in appeals leading to the inevitable judicial backlash – particularly in cases of breaches of immigration laws or offending – demonstrating resistance to the idea that a migrant who has committed criminal offences may nevertheless be a good and caring father. There is after all also a public interest in ensuring that childen have stable and secure relationships with the important adults in their lives. But to treat section 55 - or any provision like it – as dictating particular outcomes is to misunderstand its function. Section 55 – like the Human Rights Act – is a set of tools for ensuring that in decisions which affect them the needs and interests of children are firstly identified and secondly given the weight that a civilised society requires. Even where – especially where – there is clear political tension dominating decision-making in which the risk of harm to children can easily be overlooked.

In this way section 55 shows how it is possible – with some help from the Supreme Court[1] – for Parliament to ensure at least that the direction of travel in a highly contentious area of public-law making is one in which decision-makers understand how decision-making involving children must be undertaken differently.

[1] *ZH (Tanzania) v SSHD* [2011] HRLR 15

Since the change in administration after the introduction of s 55, there is some institutional backtracking for example, the recent extension of adult threshold for good character requirements in children's registration cases to 10 year olds and the ongoing failure to amend some outstanding policies. But in general terms the specialist Immigration & Asylum Chamber has developed significant expertise in asking the right questions in children's cases.

The experience with section 55 shows how the culture of s 11 Children Act 2004 – of extending out beyond children's social services to other public authorities exercising non-Children Act functions the culture of child-centred decision–making - can bring positive change. Section 11 seeks to achieve this culture shift in a wide range of public authorities – from the police to probation services – through the concept of safeguarding. But this concept is not without its problems and – as in the vulnerable adult context – can result in outcomes which are harmful.

For example it is not unusual in the immigration detention context for the Home Office to contact social services prior to a bail hearing and inform them that children in their area have a parent in immigration detention facing deportation and asking whether the family home has been assessed as safe for the return of an 'immigration offender' with the consequence that an immigration judge – as part of her safeguarding obligation - is asked not to authorise release until the home has been assessed by social services. Unless there is an alternative release address, the delay which ensues is one which has the result of prolonging detention - and separation from children – even though invariably social services have no issues concerning a child's welfare.

Safeguarding and the Prevent Duty

Section 11 safeguarding obligations are now subject to the 'Prevent' duty since the coming into force of s 26 Counter Terrorism & Security Act 2015 which is also reflected in amendments to statutory guidance 'Working together to safeguard children' which replaced the previous 'Framework for the Assessment of Children in Need'.

The Prevent duty requires that 'specified authorities' 'must, in the exercise of their functions, have due regard to the need to prevent people from being drawn into terrorism.' That duty includes a reporting or referral duty[2]. Specified authorities are set out in schedule 6 to the Act and include: private education providers, schools, nursery schools, governors of prisons, Young Offender institutions and secure colleges, local government, care providers, health providers.[3]

The Prevent agenda has been widely criticized[4] as being counter-productive, opaque, potentially harmful and without any evidence base for its strategy or effectiveness. Egregious examples of the impact of the Prevent duty on children – particularly in the education context have been reported in the press and have more recently been featured in studies on the chilling effect of Prevent in schools, colleges and universities[5].

Parliament, by the Children Act 1989, has provided a statutory scheme which governs public authority duties in respect of children's welfare, private law decision-making concerning children and in particular circumstances in which a child may may lawfully be separated from a parent by a public authority on protection grounds. Those circumstances are strictly circumscribed and depend – in general terms - on establishing evidence of a threshold of risk of harm *before* separation of a child and parent can be lawful. This is fundamentally at odds with the 'pre-emptive' approach increasingly adopted by public authorities in Prevent cases where a risk of radicalization is suspected.

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2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf

3 The duty does not apply to judicial functions – whether or not exercised by a court or tribunal: s 26

4 See eg. UN Special Rapporteur report A/HRC/31/65, cautioning against requiring educators to act as watchdogs or intelligence officers or steps which could discourage from discussing controversial topics; or David Anderson QC's submission to the Home Affairs Committee http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/countering-extremism/written/27920.pdf

5 See the recent Rights Watch report "Preventing Education". http://rwuk.org/wp-content/uploads/2016/07/preventing-education-final-to-print-3.compressed-1.pdf

The Children Act is supplemented by detailed guidance – statutory and case based - developed out of the years of specialist experience of those working with the Act. The fundamental principles are now entrenched – the best interests of the child are paramount, decision-making must be prompt, delay is to be avoided: without re-iterating the wealth of knowledge and experience which now informs decision-making for children – this mass of principle and practice has become trite – but not to strangers to the jurisdiction. To an untrained eye what a child law practitioner need not express because it is a 'given' is lost. Thus outside that framework there is a serious risk that decision-makers do not act in the best interests of children because in a very real sense there is a lack of understanding about what that means on the part of the many authorities under a Prevent or a safeguarding duty and on the part courts and tribunals including – regrettably – some constitutions of the Administrative Court.

That is an important problem – because both the Prevent duty and the s 11 CA 2004 safeguarding duty are imposed on non-specialist public authorities. Conversely, a second problem also arises – that is that those who are charged with the tasks of taking action in a child's best interests under the Children Act (for example in the provision of social services) may be prevented from so acting by the Prevent duty. An example of the former might be – an Offender Manager concerned about the risk of radicalization that a Terrorism Act offender may pose to his children. An example of the latter may be a teacher, doctor or social worker providing vital pastoral support to a teenager.

The term 'national security' however loosely defined, and opaquely deployed has assumed a status at the top of the hierarchy of competing interests which silences public authorities and the courts, provoking guidance from the President of the Family Division that in the Family Courts at least, children's welfare is still paramount[6].

[6] https://www.judiciary.gov.uk/wp-content/uploads/2015/10/pfd-guidance-radicalisation-cases.pdf

Prevent Officers are present on a very broad range of bodies – from 'MAPPA' panels, to 'social inclusion panels' and local authorities. Prevent Officers will normally be police. They will not be childcare experts.

Under the Children Act scheme a child may only be separated from his or her parent where there is either judicial authority or parental consent, save that extremely time-limited provisions in ss 38 and 46 Children Act 1989 provide for powers to separate parents and children where a high protection threshold is met.

The threshold for summary separation of a child from its parents *without* court authority is high. Section 46(1) Children Act 1989 provides that where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may remove the child to suitable accommodation or prevent his removal but that power, and the concomitant power to place restrictions on contact, is time-limited to 72 hours. Section 44 provides for applications to be made to the court for an Emergency Protection Order which if granted gives the court an ancillary power to grant an exclusion order under s 44A. But the power to grant an EPO is restricted to where there is
"*reasonable cause to believe that the child is likely to suffer significant harm*".
The court will evaluate carefully any claims to urgency or precipitate action – on the understanding that summary separation of a parent and child can do much more harm than good.

Thus Parliament has provided that where the state contemplates making a decision the consequence of which is to separate a child and its parent, or to assume control over aspects of a child's welfare, prior court authority is required save for extreme urgency. The family court will weigh any alleged risks against the children's right to be cared for by both parents. By contrast authorities on which a Prevent duty is imposed – or a safeguarding duty which is affected by Prevent – do not undertake that balance even when where the decision may result in a separation of a child from its parent or other lesser forms of state interference in families. An example might be the imposition of licence conditions by the probation service prohibiting contact with a child. In this way public authorities take executive action while circumventing

normal child law procedures which balance, in an expert way, the potentially adverse effect on the child of the proposed measure.

Risk of 'radicalisation'

Where a parent's beliefs are deemed to pose a risk to the children, under the child law framework such risks must be carefully evaluated and properly evidenced to the family court in order for the court to undertake firstly a threshold assessment 'serious harm' and secondly a proportionality assessment. In *Re X & Y (children)* **[2015] EWHC 2265 (Fam)** the risk in issue was that the parents would take the children to Syria. The local authority sought care orders in respect of the children. The President sought evidence from the Ministry of Justice (National Offender Management Service) as to how the risk of flight could be minimised *before* being willing to make an order. In the recent further judgment of the President in *In the matter of X Children (No 3)* [2015] EWHC 3651 (Fam) the court exemplifies the need for careful scrutiny in a child-sensitive manner of allegations of ideological abuse and in particular notes that whether separation from a parent is in a child's interests: "*There are, as I have noted, many matters on which I am suspicious, but suspicion is not enough, nor is surmise, speculation or assertion.*" (judgment at §110).

Neither the s 11 duty nor the Prevent duty adds to the functions of public authorities who have no statutory powers and duties to 'protect' children. The most that can and should be done is a referral to the bodies whose statutory task it is to take such action. Unfortunately, the high temperature surrounding the implementation of the Prevent duty – and its effects on other professional duties – have obscured its limits.

The new 'Working Together' guidance specifically deals with duties arising under the Counter-Terrorism & Security Act 2015 at §28, to establish multi-disciplinary panels to "assess the extent to which identified individuals are vulnerable to being drawn into terrorism and arrange for support to be provided to those individuals". Importantly the guidance points out that "Local authorities and their [panel] partners should consider how best to **ensure that these assessments align with assessments under the Children Act 1989**."

For public authorities which have no separate child protection functions of their own – the s 11 safeguarding duty is (and should be) essentially one of referral to children's social services. In the event that a public authority considers that social services has failed to take adequate safeguarding steps, as Presidential guidance makes clear, it can itself apply to the family court.

The risk posed by Prevent is that the drivers of national security policy – along with austerity, xenophobia, retrograde and ill-thought out proposed legislation and all the other threats to children's rights – are applying a 'must have due regard' duty as a form of override to established child protection principles. Public lawyers engaged in cases which concern children must be astute to steer public law principle back on course.

Amanda Weston
12 October 2016