

Effective Human Rights Protection for Children in Care. Does the UK Provide Effective Remedies Under the European Convention on Human Rights Against the Non-Implementation of Care Orders?

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Abstract

This article analyses whether the legal system for children in care in the United Kingdom complies with the European Convention on Human Rights in providing effective remedies against the failure of local authorities to implement care orders. The point of departure of this analysis is the division of responsibilities between the local authority and the court under the Children Act 1989. Whilst the court has initial powers to issue a care order on the basis of the local authority care plan, it lacks the competence to supervise the correct implementation of that order. Part 2. of this article provides an overview of the legal system and the corresponding jurisprudence on this issue. It discusses the key case law of the House of Lords as well as subsequent relevant judgments. Part 3. describes the different remedies available in the case of non-implementation of care orders provided for by the Children Act and the Human Rights Act. It also demonstrates the difficulties children and their parents face in choosing the appropriate remedy to challenge the local authority's misconduct. Finally, Part 4. examines the relevant standards for care proceedings under the European Convention on Human Rights by focusing on the procedural guarantees of the right to respect for family life, the right to fair trial, and the right to an effective remedy. By way of conclusion, this article argues that the lack of judicial control over the local authority's conduct shows certain deficiencies when compared to the European human rights standards relevant to the effective protection for children in care.

1. Introduction

The system of making and implementing care orders for children in the United Kingdom has raised a number of questions and attracted criticism in the last few years. The key problem lies in the division of responsibilities between the local authority and the court. While procedural safeguards are quite well established during the process of making a care order, the court - having issued an order on the basis of the authority's care plan - has no continuing role in monitoring or enforcing the implementation of that care order.¹ It thus operates as a 'gateway into care' but has no supervisory power if the local authority does not fulfil the care plan (often due to financial or resource constraints). In a recent case before the High Court, for example, a young mother complained that the local authority took her son into care contrary to the care plan and without prior notification (because it considered her too immature to look after her child). The complex and long lasting proceedings in this case demonstrate the difficulties children

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See Children Act 1989, s. 100.

and their parents are faced with in obtaining effective protection against the local authorities' misconduct.²

In one leading case of two families challenging the non-implementation of care orders, the Court of Appeal in 2001 tried to solve the lack of judicial control by interpreting the Children Act 1989 (hereinafter CA) in the light of the Human Rights Act 1998 (hereinafter HRA).³ It established a system of so-called 'starred milestones' of the care plan, which had to be under the court's supervision. In 2002 the House of Lords did not uphold this interpretation and ruled that the CA was not incompatible with the European Convention on Human Rights (hereinafter ECHR), but only showed a 'statutory lacuna' which had to be solved by Parliament.⁴ It was also of the opinion that parents could generally obtain effective relief against misconduct by the local authority by means of either the CA or the HRA. The European Court of Human Rights (hereinafter ECtHR), to which the case was thereafter addressed, did not provide any answer to this question, but declared the complaint inadmissible in 2004.⁵

As such, the problem of how to enforce the implementation of care orders remains unsolved. The main issue on which this article focuses is whether the existing system in the United Kingdom provides effective remedies under the ECHR to challenge the local authority's failure in implementing care orders. For this reason it first provides a closer analysis of the problem in question by describing the existing legal system and key case law. Secondly, it discusses the different remedies for challenging the local authority under the CA and HRA. Following that, the discussion examines the corresponding standards of the ECHR, before finally presenting conclusions as to whether or not the UK system is compatible with these human rights standards.

2. The implementation of care orders in the UK: legal system and key case law

2.1 The division of powers between the court and the local authority

One cardinal principle of the Children Act 1989 is the separation of powers between the court and the local authority.⁶ The main provisions concerning their different duties in care proceedings are found in sections 31 to 40 CA. Pursuant to section 37, which lists the court's powers in child-welfare proceedings, the court cannot of its own accord direct that a child be taken into care, but has to wait for a local authority to seek such an order. All the court may do, when it is concerned about the welfare of a child, is to direct the

² *Re C. (a child) (care order: application to discharge)*, Court of Appeal, [2005] EWCA Civ 1329, 10 November 2005; High Court, [2006] EWCA Civ 1125, 11 July 2006.

³ *Re W. and B., Re W. (Care Plan)*, [2001] 2 FLR 582.

⁴ *Re S. and others, Re W. and others*, House of Lords, 14 March 2002, [2002] UKHL 10, paras 85 and 112.

⁵ *C. and D. & S. and Others v. United Kingdom*, 31 August 2004, appl. nos. 34407/02, 34593/02.

⁶ A. Bainham, *Children: The Modern Law*, (Family Law, 3rd ed., 2005), at 55.

authority to investigate the circumstances and determine the necessary level of intervention.

It is therefore the main responsibility of the local authority to decide what kind of social work involvement is necessary to guarantee the well-being of children in difficult family situations. The reasoning behind this is that the local authority should be better equipped and more appropriate than courts to perform this 'managerial' role. The duty of the authority is to elaborate a care plan, which (since the amendment by the Adoption and Children Act 2002) constitutes a fundamental prerequisite and the basis for the court in deciding about the imposition of a care order (sections 31 and 31A CA). After the care order has been issued by the court it is the sole responsibility of the local authority to implement the care plan and to provide day-to-day management of the child in care.

Once it has issued a care order after a careful examination and approval of the care plan the court has rather limited powers. It generally plays more of an 'adjudicative' than a participative role. Specifically, it has no supervision power over the implementation of the care order (section 100(2) CA). The court can only influence the circumstances of the child in care by deciding on contact orders (section 34 CA), residence, supervision or interim orders. Furthermore, it can give certain directions to the authority under section 37 CA or can decide to discharge the whole care order, if the care plan is radically changed or left unfulfilled (section 39 CA). In practice, these powers are seen as rather toothless for the purpose of monitoring the authority's implementation of the care plan.⁷

This system of divided powers between the court and the local authority has been both criticised and welcomed by commentators.⁸ Nonetheless, it is clear that it causes problems in instances where the local authority does not provide the services set out in the care plan, or even acts contrary to it. The following description of the key case law in the United Kingdom demonstrates the main obstacles of the system.

2.2 Key case and following jurisprudence

2.2.1 *House of Lords: Re S. and Re W. (14 March 2002)*

The key case dealing with the problem at hand - being whether the court has any power under the Human Rights Act to monitor the implementation of a care plan - was decided by the House of Lords in *Re S. and Re W.* in 2002.⁹ As mentioned in the introduction, the Court of Appeal had previously found in this case (by interpreting the CA in the light of the HRA) that the existing system was compatible with the ECHR.

On appeal to the House of Lords, the Lords found that the introduction of a system of essential 'milestones' for care plans, that were elevated to a 'starred status' and brought under certain judicial control, was beyond the powers of the Court of Appeal under section 3 HRA to interpret domestic legislation in a way compatible with the ECHR.¹⁰ It was argued that such a starring system was not intended by Parliament and would go

⁷ J. Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis Butterworths 2nd ed., 2003), at 509.

⁸ See e.g. criticising: J. Dewar, 'The Courts and Local Authority Autonomy' (1995) 7 *CFLQ*, at 16, and consenting: M. Hayes, 'The Proper Role of Courts in Child Care Cases' (1996) 8 *CFLQ*, at 216.

⁹ See n. 4; see also for case analysis: C. Smith, *Re W. and B.; Re W. (Care Plan) and Re S. (Minors) (Care Order: Implementation of Care Plan); Re W. (Minors) (Care Order: Adequacy of Care Plan)*, Human rights and the Children Act 1989' (2002) 14 *CFLQ*, at 427-445; N. Mole, 'Re W. and B.; Re W. (Care Plan) and Re S. (Minors) (Care Order: Implementation of Care Plan); Re W. (Minors) (Care Order: Adequacy of Care Plan) - A Note on the Judgment from the Perspective of the ECHR 1950' (2002) 14 *CFLQ*, at 447-460; R. Tolson QC, *Care Plans and the Human Rights Act* (Family Law 2002).

¹⁰ *Re S. and Re W.*, n. 4, paras. 45-50.

much further than the provision of a judicial remedy to victims of unlawful conduct by local authorities, as provided for by sections 7 and 8 HRA. It would impose obligations on local authorities even in circumstances where the authority has not committed a breach of a Convention right or is not proposing to do so. In the opinion of the House of Lords, failures in the fulfilment of a care plan could not necessarily be equated with a breach of Convention rights but may also have been due to a change in circumstances which, in the best interest of the child, called for a variation from the original care plan.¹¹ As a result, the Lords concluded that section 3 HRA did not authorise such a new scheme, even if this meant that the CA would be inconsistent with the ECHR.

In the second part of its decision, the House of Lords went on to examine the compatibility of the CA with articles 8, 13 and 6 ECHR and concluded that it was not incompatible but rather showed a certain 'statutory lacuna', which could solely be solved by Parliament, or, meanwhile, lead to actions under the HRA. The main arguments of the House of Lords which are relevant for the present discussion can be summarised as follows:

Regarding article 8 ECHR, the House of Lords first mentioned that the right to respect for family life could be violated by the manner in which a local authority discharged its parental responsibilities, or by its decision-making process, which must be conducted fairly and in respect of the interests under article 8. However, Lord Nicholls stated that 'the possibility that something goes wrong with the authority's discharge of parental responsibilities ... and this would be a violation of article 8 ... does not mean that the legislation itself is incompatible ... with article 8'. He went on to find that there is 'no suggestion in the Strasbourg jurisprudence that the absence of court supervision of a local authority's discharge of its parental responsibilities is itself an infringement of article 8' and finally concluded that the failure of the state to provide an effective remedy for a violation of article 8 is not, in itself, a violation of that article.¹²

Concerning the right to effective remedy (article 13 ECHR), the House of Lords argued that article 13 was not incorporated into the HRA but was implemented through the mechanism of sections 7 and 8 in conjunction with section 6 HRA. It held that proceedings under the HRA, which included the granting of any just and appropriate relief, together with other remedies of an administrative nature (such as reviews and complaints under the CA) or other court proceedings (such as judicial review), may be suitable and sufficient. Lord Nicholls finally concluded that 'in the ordinary course a parent ought to be able to obtain effective relief by one of these means' against the misconduct of a local authority which violated their article 8 rights.¹³

With regard to article 6 ECHR and the right to a fair trial, the House of Lords first noted that the system of the CA, concerning the issuance of a care order by a court in proceedings involving the parents, accorded with the requirements of article 6 ECHR. The same could be said for the procedures to discharge a care order (when the circumstances have predominantly changed) or to issue a contact order - both procedures in which the court is involved. In addition, Lord Nicholls considered that the process of judicial review was suitable for challenging the day-to-day management of a

¹¹ Ibid., para. 49.

¹² Ibid., paras. 56-59.

¹³ Ibid., para. 63. The only problem the House of Lords considers in this respect is a possible failure to provide a young child, not represented by a parent or guardian, with an effective remedy.

local authority. As such, Lord Nicholls found that these procedures were compatible with article 6.¹⁴ The only shortcomings he noted concerned certain decisions by the authority, which affected the parent-child relationship but were outside judicial control (e.g. the decision under section 33(3)(b) CA that a parent may not meet certain of his parental responsibilities). Here the House of Lords admitted that sections 7 and 8 HRA could not provide an effective relief (presupposing an *unlawful act* by a public authority under section 6 HRA), as the court in such cases had no responsibility under the CA and therefore could not act unlawfully for the purpose of the HRA. Although recognising this shortcoming, Lord Nicholls did not find a violation of article 6 ECHR in this specific case as he could not ‘think of any instance in this particular field where the civil rights of parents or children, protected by article 6 (1), are more extensive than their article 8 rights’. He therefore concluded that, as their article 8 rights are protected by sections 7 and 8 HRA and this protection would normally cover the same ground as article 6 (1) ECHR ‘any shortcoming is likely to be more theoretical than real.’¹⁵

To sum up, the House of Lords - in this leading case on the inability of the court to enforce the implementation of a care plan - did not find any violation of articles 8 and 13 ECHR; rather it considered the domestic remedies under the CA and the HRA as sufficient to provide effective protection. In relation to article 6 ECHR, the House of Lords saw some deficiencies but did not decide upon them in this specific case. The only thing the House of Lords stressed very clearly at the end of its judgment was that the problems mentioned required urgent attention from the Government and Parliament ‘so that we do not continue failing some of our most vulnerable children’.¹⁶

2.2.2. *Following case law*

Despite this clear recommendation by the House of Lords to the Government and Parliament, only a few rather small amendments have been made to the CA in subsequent years. For example, the Adoption and Children Act 2002 introduced a new section 31A CA, expressly requiring a care plan to be prepared by the local authority before a court can decide on a care order. The 2002 Act also made some amendments to section 26 CA regarding specific rules on reviewing care plans by the local authority.¹⁷ However, the main problem concerning the lack of judicial control over the local authority's implementation of a care plan has not, to date, been addressed and thus remains unsolved.

As a consequence of this ongoing problem, a number of cases have been brought before the courts, producing a growing jurisprudence on the remedies open to parents who wish to challenge post-care order changes by local authorities. Unfortunately, most of the cases brought under the HRA did not succeed, and no effective remedies were granted. To illustrate some of the main problems and outcomes of these cases, two examples will be considered.

In *Re L.*, 28 March 2003,¹⁸ the High Court provided a thorough analysis of the jurisdiction of courts dealing with applications under the HRA in care proceedings. In

¹⁴ *Ibid.*, paras. 75-78.

¹⁵ *Ibid.*, paras. 79-81.

¹⁶ *Ibid.*, para. 112.

¹⁷ See also Carole Smith, n. , at 444-445.

¹⁸ *Re L (care proceedings: human rights claims)*, [2003] 2 FLR 160.

this case, the local authority had initially planned to place the child within the wider family, but then decided that the child should be adopted. The mother asked the court to exercise its jurisdiction to compel the local authority to change the care plan or to provide a remedy under the HRA. The Court dismissed the application reasoning that the relief sought by the mother could have been granted by the Family Proceedings Court under its jurisdiction for judicial review or under section 7 HRA. The Court stressed that human rights arguments ‘should be dealt with within the context of the pending care proceedings’ and ‘should be identified and brought to the attention of the court at the earliest possible opportunity’.¹⁹ It is important to mention that the Court, after considering three different jurisdictions of the Family Proceedings Court and the High Court as unsatisfactory remedies for the matter in question (because they were unable to influence the authority's way of implementation),²⁰ emphasised the court's jurisdiction under sections 7 and 8 HRA as ‘the most appropriate’ and ‘likely to be the most satisfactory’.²¹ The Court went on to discuss in more detail the claims and remedies under the HRA and finally concluded that ‘substantive and procedural protection afforded to parents by Article 8 of the European Convention applies at all stages of child protection’, not merely during the care proceedings, but also after they have come to an end and ‘whilst the local authority is implementing the care order’.²² In the latter case the Court considered a free-standing application under section 7(1)(a) HRA as an appropriate remedy.

In another interesting case, *Re W.*, 4 May 2005,²³ the Court of Appeal had to deal with the change of a care plan by the local authority (concerning a change from parental care to state care for the children subject to the order). The parents sought discharge of the care order and issued an application for an injunction under the HRA, requiring the authority to return the children to their home. Although the parents argued that there was no serious change in their situation compared to the time the care order was made, with the result that the authority had no justification in altering the care plan, the Court dismissed both applications. In the Court's view, the application for discharge of the care order was not the appropriate means to challenge the lawfulness of the authority's decision; the application for an injunction under the HRA on the other hand was an appropriate challenge, but should have been brought at the earliest possible opportunity, i.e. prior to the removal of the children and not as a reaction to it.²⁴ The difficulties of the parents in obtaining public aid for a human rights claim and in raising it at an earlier stage of the proceedings were recognised by the Court but did not influence its final judgment.

These two example cases show some of the main difficulties that still remain in monitoring the authorities' conduct and in obtaining an effective remedy against human rights violations in care cases. Although the House of Lords, in its leading cases *Re S.* and *Re W.*, found that parents generally should be able to find an effective remedy under the CA and the HRA, it seems from the recent case law that in many situations this is still

¹⁹ *Ibid.*, paras. 31 and 34.

²⁰ *Ibid.*, paras. 9-14; these jurisdictions are: statutory jurisdiction under Part IV CA, inherent jurisdiction of the High Court under s. 100 CA and supervisory jurisdiction by way of judicial review.

²¹ *Ibid.*, para. 15.

²² *Ibid.*, para. 22 with reference to *Re L. (care: assessment: fair trial)*, [2002] 2 FLR 730 and *Re G. (Care: challenge to local authority's decision)*, [2003] 2 FLR 42.

²³ *Re W. (removal into care)*, [2005] 2 FLR 1022.

²⁴ *Ibid.*, para. 25.

not the case. In order to answer the question as to whether the UK system as a whole provides effective remedies in the sense of the European Convention on Human Rights, however, it is first necessary to carry out a brief overview of the various domestic remedies available, before turning to the Convention standards.

3. Remedies for the non-implementation of care orders²⁵

As mentioned above, different remedies against the misconduct of local authorities affecting children in care can be found in the Children Act and the Human Rights Act. They can be summarised as follows:

3.1. Remedies under the Children Act 1989

Although the CA generally provides a high degree of discretion for a local authority, section 26 nonetheless contains some rules for review of its conduct. The local authority is obliged to keep the case of each child looked after by it under periodic review, and has the duty to establish procedures to deal with representations and complaints. Such complaints can relate to day-care, support services where the child is at home, accommodation, after-care etc. Although at least one person who is not a member of the authority must take part in the procedure, there remain serious doubts about how independent such internal procedures can be.²⁶ They may be an integral part of good practice and can contribute to a better understanding and exchange between the local authority and their clients; however, in the light of their status as internal measures, they do not seem to provide particularly effective protection against the authority's failure in implementing care plans.

Apart from section 26 CA, there are a number of other possible remedies under the CA or under general law, which could be used to enforce the implementation of a care plan. First, there is the possibility of judicial review. The difficulty with this remedy in care issues is that, in order to succeed, the applicant must show that the local authority has acted in a way in which no reasonable authority would have acted, that it has acted *ultra vires*, or that there has been a breach of the rules of natural justice. Apart from the narrowness of the grounds and the rather high threshold of proof, the court's options under judicial review are relatively limited. It could order the authority to discharge its duties properly (mandatory order), but generally will only quash the local authority's decision (quashing order); it could also issue a prohibition order or grant a declaration of unlawfulness. However, the court has no power to make orders in the best interest of the child. The procedure of judicial review therefore does not seem very suitable for individual child cases, but rather for challenging general policy decisions of the local authority.²⁷ Nonetheless, judicial review was mentioned by the House of Lords in *Re S. and Re W.* as a possible way to proceed in certain cases.²⁸ Secondly, one could use the default powers of the Secretary of State under section 84 CA as a remedy against the local authority. According to section 84, the Secretary of State can intervene in limited circumstances, where he is satisfied that a local authority has failed to comply with any of its duties, and may make an order declaring the authority to be in default with respect to

²⁵ See Bainham, n. 6, at 454-467.

²⁶ *Ibid.*, at 457.

²⁷ *Ibid.*, at 458.

²⁸ *Re S. and Re W.*, n. 4, para. 62.

that duty. Such an order may also contain directions for ensuring that the duty is complied with within a certain period of time. Again, this type of intervention by the central government is extremely unlikely to be useful for individual cases, as opposed to challenges to policy decisions. The House of Lords in *Re S. and Re W.* also considered that the powers of the Secretary of State ‘are not sufficient in practice to provide an adequate and timely remedy in individual cases’.²⁹ Thirdly, there may be some complaint procedures available before the local government ombudsman, the Children's Commissioner or similar institutions dealing with issues of ‘maladministration’. Although these were also referred to by the House of Lords as possible remedies of an administrative nature (mentioning an independent visitor, a children's complaints officer and a children's rights officer at Bedfordshire council),³⁰ these procedures are usually protracted and therefore not of immediate benefit to the children concerned.³¹ Finally, there have been some developments in recent years in the obtaining of damages from local authorities by civil actions of negligence for injuries caused by the authority's acts or omissions. After some initial actions of this kind had failed, the case law has been improved following two decisions of the EctHR, in which it found violations of article 3 and article 8 respectively, as well as of article 13 ECHR.³² However, these remedies are only applicable in very distinct cases and cannot generally be considered effective in challenging failures of the local authority in implementing care orders.

Besides these remedies, which might be applicable after a care proceeding has ended, there are also some tools during the proceedings which in certain circumstances could be used as remedies against the local authority. The courts are entitled, for instance, to issue specific orders listed in section 8 CA, including contact orders, discharge orders, residence orders and supervision or interim orders. It is also possible to obtain some court directions under section 37 CA to compel the authority to undertake investigations of the child's circumstances if it appears necessary to the court. However, all of these measures have a specific purpose and procedure and generally cannot be considered as effective remedies for challenging the non-implementation of care orders. For example, a care order can be discharged under section 39 CA if the circumstances which led to the imposition of the care order have manifestly changed. Unfortunately, however, this remedy is not normally useful for the problem in question, because in most cases there will still exist some reasons for a care order (even if they might have changed). Similarly, interim orders under section 38 CA have a specific function, namely to provide a temporary care order until a final order based on detailed consideration can be issued. Although the House of Lords in *Re S. and Re W.* in some way accepted, or even encouraged, greater judicial latitude in the use of interim orders,³³ it seems that this approach is not appropriate to solve the main problem of non-judicial control of the local authority, because it may only ‘increase uncertainty for the parties’ and ‘run counter to the “no-delay” principle under section 1(2) of the Children Act 1989’.³⁴

From this overview of remedies available under the CA, one can conclude that although there are a great number of different administrative and judicial possibilities of

²⁹ *Ibid.*, para. 58.

³⁰ *Ibid.*, para. 62.

³¹ Bainham, n. 6, at 460.

³² *Z. and Others v. United Kingdom*, 10 May 2001, (2002) 34 EHRR 3; *T.P. and K.M. v. United Kingdom*, 10 May 2001, (2002) 34 EHRR 2.

³³ *Re S. and Re W.*, n. 4, paras. 101-102.

³⁴ Smith, n. , at 442.

enforcing the implementation of a care plan by the local authority, most of these remedies are either too slow, too general or too weak, and are simply not appropriate to provide an effective remedy for individual care cases, which usually need a strong and immediate reaction against the authority's misconduct.

3.2 Remedies under the Human Rights Act 1998

Having said this, it seems that the most appropriate remedies against a local authority's failure to discharge a care plan are to be found in the mechanisms of the Human Rights Act 1998. The HRA incorporated the ECHR into English Law, and therefore provides remedies against violations of Convention rights, which are directly available in the English courts.³⁵ How, though, is this system of remedies under the HRA established, and how does it work in general, and especially with regard to care proceedings?

First, it is important to note that the HRA did not directly incorporate article 13 ECHR into domestic law (see section 1 HRA) but rather established a specific mechanism under sections 6 to 8 HRA to guarantee the right to an effective remedy. The working of this mechanism was well described by the House of Lords in *Re S. and Re W.* as follows:

Sections 7 and 8 of the Human Rights Act have conferred extended powers on the courts. Section 6 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 7 enables victims of conduct made unlawful by section 6 to bring court proceedings against the public authority in question. Section 8 spells out, in wide terms, the relief a court may grant in those proceedings. The court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Thus, if a local authority conducts itself in a manner which infringes the article 8 rights of a parent or child, the court may grant appropriate relief on the application of a victim of the unlawful act.³⁶

Since the entry into force of the HRA in October 2000, a number of HRA claims have been brought before the English courts. One of the first successful child care claims was decided by the High Court in *Re M.* in June 2001.³⁷ In this case, a violation of article 8 ECHR was found because the local authority had fundamentally changed its care plan without proper involvement of the parents in the decision-making process. Regarding the remedy given by the High Court (which quashed the authority's decision), it is instructive to consider Judge Holman's reasoning in more detail. He stated with regard to the local authority concerned (Cornwall):

As the decision on 23 April 2001 was reached unlawfully, I consider, in all the circumstances of this case, that it is just and appropriate that I should grant the remedy which is within my powers of quashing it. I shall not formally order Cornwall to reconsider, for it is obvious that they will have to do so. I am not prepared to make any express or positive directions as to the mechanism of that reconsideration.³⁸

He went on to cite the Court of Appeal in *Re W. and Re B.* (paragraph 32), saying that the responsibility on the courts in the exercise of extended or additional powers is of course to ensure that they are used only to avoid or prevent the breach of an article 6 or article 8 right of one of the parties. If no actual or prospective breach of right is demonstrated the power does not arise. ... Even if the application is well founded the court must always be mindful of its limitations and at the same time respectful of the responsibility and function of the local authority.

³⁵ See for more details: J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (Blackstone Press Ltd, 2nd ed., 2000).

³⁶ *Re S. and Re W.*, n. 4, para. 45.

³⁷ *Re M. (care: challenging decisions by local authority)*, [2001] 2 FLR 1300.

³⁸ *Ibid.*, at 1 (x).

These statements demonstrate very clearly the court's power to provide remedies in applications under the HRA. The court is only empowered to control the local authority if there was or might be a violation of Convention rights, but may not give a direct order to the authority on how to act in particular; this is to be left to the authority's own discretion.

Aside from this successful and relatively early case under the HRA, there have been a number of cases which for various reasons did not succeed. One example is the High Court's decision in *C. v. Bury Metropolitan Borough Council*, 18 July 2002,³⁹ in which an HRA application, regarding the revision of a care plan by the local authority to relocate the child far away from the mother's home, was dismissed. Here again, the applicants raised the lack of involvement of the mother in the decision-making process. However, the Court in this case found that these procedural flaws did not have an effect on the mother's or child's rights. It further considered the interference of article 8 ECHR as justified for being in the best interests of the child.⁴⁰ It was also mentioned that the matter of contact between the mother and the child was one in which the court under section 34 CA was involved and that the local authority was obliged to arrange suitable contact.

To conclude, having regard to the special mechanism under sections 6 to 8 HRA and its application by the courts, one may ask if this system is sufficient and suitable to provide effective remedies within the meaning of article 13 ECHR. In particular, the following questions arise:

- a) How do the criteria for an HRA application comply with those under article 13 ECHR? Article 13 does not necessarily require a violation of another Convention right but only refers to an 'arguable claim'. Is this requirement fulfilled by section 7 HRA, by which a person can claim that a public authority has acted or proposes to act in a way incompatible with the ECHR?
- b) How does the former question fit with the prerequisite of a complainant under the HRA to be a 'victim' of an unlawful act in the sense of article 34 ECHR? (This could be interesting with regard to the recent decision of the ECtHR in *C. and D. & S. and Others v. United Kingdom*, in which it declared the application inadmissible due to the lack of victim status).⁴¹ c) How does section 6(2) HRA, according to which an authority does not act unlawfully if it could not have acted differently under primary legislation, fit with the obligation of the state to provide an effective remedy?
- d) Finally, the most important and still unanswered question for the enforcement of care plans: what is the effect of remedies provided by the courts under the HRA? Are they efficient and practical in the sense of the ECHR, i.e. are the courts capable of providing effective protection of the children's (and parent's) rights, when they are actually excluded by the CA from directing the local authority's discharge of its duties?

4. Standards of the ECHR

To find some answers to these questions and to examine whether the UK enforcement system for care orders is in accordance with the obligations under the Convention, this

³⁹ *C. v. Bury Metropolitan Borough Council*, [2003] 2 FLR 868.

⁴⁰ *Ibid.*, para. 83.

⁴¹ *C. and D. & S. and Others v. United Kingdom*, n. 5.

article will now turn to the relevant standards elaborated by the European Court of Human Rights. For this purpose it is first necessary to consider some general principles, before discussing the different procedural guarantees of articles 8, 6 and 13 ECHR, with a special focus on the right to an effective remedy.

4.1. General principles of the ECHR in care cases

Although the ECHR was not especially designed for the protection of children and does not include any child-specific provisions, the Convention is applicable to *everyone* within the state's jurisdiction (article 1 ECHR) and therefore protects the rights of children in the same way as those of adults.⁴² More child related rights can be found in the UN Convention on the Rights of the Child (hereinafter CRC), which is also legally binding but does not provide an individual complaints procedure; as a result, its enforcement mechanism is rather weak and not suitable for the problem at hand. Nevertheless, the ECtHR is increasingly referring to the CRC when deciding on child cases, and apparently 'has established fundamental principles on the subject of family life that clearly reflect the approach of the CRC'.⁴³

These principles are based on the Court's understanding that 'the relationship between parents and children is a fundamental aspect of family life, which is not terminated by the child's placement into public care'.⁴⁴ As an overriding rule, the Court has acknowledged the 'best interest of the child – principle', which says that, if any balancing of interests is necessary, the interests of the child must prevail. Secondly, the ECtHR has developed a somewhat scrutinised way of examining care cases, although relying on its general principle that it is not the Court's function to substitute its view on the merits for that of the domestic authorities. Most of the care cases have therefore concentrated on procedural aspects, such as access to court, delay, legal representation etc.⁴⁵ Interestingly, the Court emphasises the implementation procedure and regards the margin of appreciation of the domestic authority as much narrower in respect of the manner in which care orders are implemented than as concerns the way in which they are made.⁴⁶ Finally, one of the Court's general principles, which is of particular importance in this context, is that of the effectiveness of the Convention. Based on article 1 ECHR, this principle states that the rights guaranteed in the Convention must be 'effective and practical in nature and not illusory and theoretical'.⁴⁷

4.2 Procedural guarantees of articles 6 and 8 ECHR

Articles 6 and 8 ECHR are both central provisions applicable in care proceedings providing different substantive and procedural guarantees.⁴⁸ Although the right to respect for family life can be seen as the most suitable for disputes between parents and the local authority regarding their children, the right to a fair trial has also been used in some cases to ensure certain procedural rights.

⁴² See U. Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, 2002), at 3.

⁴³ Ursula Kilkelly, 'Effective Protection of Children's Rights in Family Cases: An International Approach' (2002) 12 *Transnational Law & Contemporary Problems* 335, at 353.

⁴⁴ Kilkelly, n. 42 at 271; see also *Olsson v. Sweden*, 24 March 1988, (1989) 11 EHRR 259, para. 59.

⁴⁵ See K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Thomson Sweet & Maxwell, 2nd ed., 2004), at 211-212.

⁴⁶ Kilkelly, n. 42, at 271.

⁴⁷ E.g. *Airey v. Ireland*, (1979-80) 2 EHRR 305.

⁴⁸ Reid, n. 45 at 211-220; P. Leach, *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press, 2nd ed., 2005), at 297-303; Kilkelly, n. 42, at 284-293; Bainham, n. 6, at 470-473.

Article 8 ECHR mainly provides that each removal of children from their parents, which constitutes an interference with their family life, requires a justification under the proportionality test of article 8(2). According to this test, the interference has to be prescribed by law, must have a legitimate aim and has to be necessary in a democratic society. Apart from these substantive guarantees, the Court has also established a number of procedural requirements based on article 8, in particular to make sure that the decision making process affords sufficient procedural protection of the parents' (and children's) interests. As such, there must be procedural fairness throughout the entire care proceedings, to ensure that the parents are sufficiently involved in the decision-making process.⁴⁹ This also includes the right to legal representation of parents⁵⁰ as well as the disclosure of essential materials for the decision-making process.⁵¹ Finally, the Court in many cases has stressed the overriding principle that a care order should only be seen as a temporary measure and therefore measures of implementation should be consistent with the ultimate aim of reuniting the natural parent and child.⁵²

Although the Court has elaborated a considerable number of procedural guarantees from article 8, there are still some aspects left which can be covered by article 6 ECHR, providing the right to a fair trial. This norm has been used in care cases to ensure the right of access to court as well as the right to due process, including legal representation.⁵³ The Court stated that, where an important issue concerning the parent's relationship with a child is at stake, the parent should be able to challenge the local authority's decision in court.⁵⁴ Whether the non-implementation of care orders can be seen as such an important issue, and therefore be provided with judicial control, has not been decided yet.⁵⁵

This short summary of guarantees under articles 8 and 6 ECHR shows that in the last few years the Court has very much focused on procedural safeguards to protect the interests of parents in decisions on the future of their children. However, a major issue that remains to be considered by the Court are problems *after* this decision-making process, arising from the implementation of care orders. Indeed, as pointed out by Bainham, in the future 'the principal battleground for human rights arguments is likely to be related to the local authority's care plan, before and after a care order is made.'⁵⁶

4.3. Article 13 ECHR: right to an effective remedy

Apart from the abovementioned guarantees of articles 8 and 6, article 13 ECHR also plays an important role for care proceedings, which is still rather undermined in the literature as well as in the Court's jurisprudence. It provides the right to an effective remedy before a national authority for everyone who claims that their rights under the

⁴⁹ See *W. v. United Kingdom*, 8 July 1987, (1988) 10 EHRR 29, in which a violation of art. 8 was found because the applicant had been insufficiently involved in critical stages of the decision-making.

⁵⁰ See *P., C. and S. v. United Kingdom*, 16 July 2002, (2002) 35 EHRR 31.

⁵¹ See *T.P. and K.M. v. United Kingdom*, n. 32.

⁵² *Olsson v. Sweden*, n. 44, para. 81.

⁵³ See *P., C. and S. v. United Kingdom*, n. 50.

⁵⁴ See *W. v. United Kingdom*, n. 49, where a violation of art. 6 was found because the applicant was unable to have his right of contact determined by a court.

⁵⁵ See for arguments in favour of this: Mole, n. , at 457-460.

⁵⁶ Bainham, n. 6, at 471.

Convention have been violated.⁵⁷ Its objective is ‘to allow individuals the potential relief at national level before having to invoke the international machinery of the ECHR’; its effect therefore is ‘to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the complaint and to grant the appropriate relief’.⁵⁸ The required remedy need not be provided by a court but it must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the national authorities.⁵⁹ Article 13 does not necessarily require another Convention right to be violated, but can be invoked in relation to any ‘arguable claim’ of a violation of a Convention right. The notion of an ‘arguable claim’ has not thus far been defined by the Court in general, but is decided on a case-by-case basis. Article 13 ECHR is quite often applied in cases concerning deportations, disappearances or death in custody (combined with articles 2 and 3) or in claims against secret surveillances by the state (in combination with article 8).⁶⁰

In respect of the rights of children, the two leading cases applying article 13 are *Z. and others v United Kingdom* and *T.P. and K.M. v United Kingdom*, both from 2001.⁶¹ The first case concerned four children who were abused, and suffered from the non- (or insufficient) intervention by the local authority; the Court found a violation of articles 3 and 13 (whereas article 8 constituted no separate issue to article 3). In the second case, regarding the failure of the local authority to disclose to the parents important information about the child, the Court found a violation of articles 8 and 13. Interestingly, in both cases the ECtHR did not consider a violation of article 6 because there existed access to court (even though this remedy was not effective).⁶² For the problem of non-judicial control over the implementation of care orders, the latter judgment gives some important hints by mentioning that in this case ‘the possibility of applying to the ombudsman and to the Secretary of State did not however provide the applicants with any enforceable right to compensation’ (paragraph 109). It goes on (in paragraph 110) to consider that

the applicants did not have available to them an appropriate means for obtaining a determination of their allegations that the local authority breached their right to respect for family life and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby).

As Mole concludes in her commentary on these two cases, these decisions ‘have provided a much needed boost to the role of article 13’.⁶³

Unfortunately, so far the Court has been rather reluctant in applying these principles to the situation where children's and parent's rights are violated because the local authority fails to implement the care plan that was originally approved by the court and thus constitutes the legal basis for the care order. Two cases dealing with this specific problem brought before the Court were dismissed as inadmissible for different reasons.⁶⁴ In the first case (*Scott v. United Kingdom*), the Court found that the application for a

⁵⁷ C. Ovey and R. C. A. White, *European Convention on Human Rights* (Oxford: Oxford University Press, 3rd ed., 2002), at 386-395; e.g. *Klass and others v. Germany*, (1979-80) 2 EHRR 214, para. 64.

⁵⁸ See for some case law: Leach, n. 48 at 341.

⁵⁹ E.g. *Aksoy v. Turkey*, (1997) 23 EHRR 553, para. 95.

⁶⁰ See for some case law Leach, n. 48 at 342-343.

⁶¹ See n. 32.

⁶² See for more details N. Mole, ‘Z. and Others v. UK and T.P. and K.M. v. UK’ (2001) *International Family Law*, at 117-123.

⁶³ Mole, *ibid.*, at 121.

⁶⁴ *Scott v. United Kingdom*, appl. no. 34745/97, 8 Feb. 2000; *C. and D. & S. and Others v. United Kingdom*, n. 5.

discharge of the care order was an appropriate remedy. In the second, more recent case (*D., C., S. and others v. United Kingdom*), the ECtHR considered proceedings under section 7 HRA as effective remedies.

5. Conclusion

As this article has demonstrated, the key problem in the system of care orders in the United Kingdom lies in the statutory division of responsibilities between the local authorities and the courts. A closer look at some recent case law and an overview of the various remedies under the Children Act and the Human Rights Act showed that there is still a lack of judicial control over the authority's conduct after a care order has been issued. With regard to the described standards of the ECHR and the Court's case law on articles 8, 6 and 13, one may conclude the following:

The current system, which does not allow the court to supervise the implementation of a care order by the local authority, seems to be insufficient and incompatible with the Convention. In particular, the right to an effective remedy may be violated where parents (and children) do not have sufficient access to court. The main problem lies in the fact that the courts under section 8 HRA theoretically have the possibility to grant any relief within their powers that they consider just and appropriate. However, as their power under the CA is very much limited in the way that they are precluded from giving directions to the local authority, the right to an *effective remedy* is not fulfilled in practice. This is in contradiction to the general principle of the Convention that the guaranteed rights shall be effective and practical in nature and not illusory and theoretical. Another obstacle to the right to an effective remedy lies in the fact that, in practice, it is quite difficult or almost impossible for parents to obtain free legal aid for applications under the HRA. Finally, as also demonstrated by several cases, the different remedies provided by the CA and the HRA do not provide immediate and effective relief for ongoing violations of the family's rights. As any misconduct of the local authority in implementing a care plan can cause major disadvantages for the child's future, a prompt and effective control by the court is of the utmost importance. This point was already recognised by the House of Lords in its leading decision *Re S. and Re W.* in 2002, when it declared that the Government and Parliament should give urgent attention to this problem. Unfortunately, the revisions of the Children Act in subsequent years have not brought any change in this aspect. It is therefore to be hoped that the United Kingdom will act as soon as possible, either of its own volition or animated by specific jurisprudence of the ECtHR, to provide sufficient and effective protection of children in care through an empowerment of the court's responsibilities in supervising the local authorities.