FAMILY ADVOCACY WITHIN LOCAL AUTHORITY DECISION MAKING PROCESSES

An address by Mr Justice Munby
to the Family Rights Group's conference
'Professional Family Advocacy and Safeguarding Children'
on 10 June 2009

I am honoured to be invited here to speak to you. I am privileged and pleased to be able to say something to such a prominent and important organisation which does so much good work in a field which is so close to all our hearts. Thank you.

I make no apology for focussing your attention on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8, of course, protects the rights, amongst other things, to "respect" for "private and family life", so it obviously central to the work of an organisation that, not for nothing, is called the Family Rights Group.

I do not take up your time giving you a tutorial on what is meant by private life or family life. Instead I want to focus attention on one aspect of the duty of "respect" for family life which Article 8, read together with section 6 of the Human Rights Act 1998, imposes on every public authority.

I hope it is no longer necessary to quote authority in support of the indisputable proposition that Article 8 has both a *substantive* and a *procedural* component. The substantive component regulates the circumstances in which public authority can interfere with private or family life; the procedural component imposes upon public authority the obligation of engaging and discussing adequately with the family before it interferes. It is the latter obligation about which I wish to talk.

There are a number of features of this procedural obligation which need to be emphasised.

The first point – and this is crucial – is that Article 8 applies not merely to *judicial* but also to *administrative* decision-making. That is why, to take the familiar example of child protection, it is elementary – if still, as some might think, too little appreciated by too many – that Article 8 guarantees fairness in the decision-making process, and that the procedural safeguards afforded by Article 8 apply, at *all* stages of the process, both in and out of court. So parents have a right to be fully involved in the planning by public authorities of public authority intervention in the lives of their family and their children, *before* care proceedings have been commenced, *while* the care proceedings are on foot, as well as *after* the final care order has been made.

I emphasise *before* as well as during and after the care proceedings. Hence, the duty of the local authority to engage with the parents, fully and frankly, in the pre-proceedings – and, if the child is not yet born, in the pre-birth – planning and decision-making process. And if authority for that proposition is required it can be found most recently in my decision in the Unborn Baby D case: *Re Unborn Baby D, Bury Metropolitan Borough Council v D* [2009] EWHC 446 (Fam). In para [7] I said:

> "It is elementary that under Article 8 of the Convention parents have a right to be fully involved in the planning by public authorities of public authority intervention in the lives of their family and their children, whether before, during or after care proceedings, the emphasis for present circumstances obviously being upon that element of the obligation under Article 8 which arises before the commencement of the proceedings."

Now that was a case involving pre-birth planning for the removal of the child at birth, so the process did not involve section 47 of the Children Act 1989. But I can see no reason at all why the same principles should not apply to section 47 investigations. Nor, I should emphasise, does the Article 8 obligation arise only at the point at which Level 2 publicly funded legal advice becomes available.

Now these important principles are, of course, of general application. 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.

Secondly, and an application of this principle, Article 8 is not, of course, confined only to child protection. When we think of the child and the State we tend, I suspect, to think of those children who are in the care of local authorities or whom a local authority seeks to take into care. But children in the care of local authorities are not the only children in the care of the State. There are, for example, many children in prisons. And there are the children caught up in the immigration and asylum systems and who may sometimes be living – detained – in establishments little different from a prison. So, for example, Article 8 applies to decision-making by the Prison Service when the question for decision is whether or not to separate an imprisoned mother from her baby. Indeed, in principle the procedural safeguards mandated by Article 8 apply to all public authorities whose actions may engage someone's Article 8 rights.

The third feature to which I draw attention, and this is a matter of some importance, is that the procedural guarantees afforded by Article 8 apply as much to the child as to the parent. A child is, of course, just as much entitled to the protection of the Convention – and specifically of Article 8 – as anyone else. So the fairness which Article 8 guarantees to every parent is equally guaranteed to every child. Children are not the largely passive objects of more or less paternalistic parental, judicial or local authority decision-making. Family law is dominated by the concept that the child's welfare is paramount. This, no doubt, is as it should be. But it has a number of less desirable consequences. One is that the focus on the child's welfare tends to divert attention away from the child's rights – in the present context the child's right to be heard, to participate meaningfully in the process. Too often, especially, I fear in the context of administrative decision-making, we pay only lip service to the need to listen to, to take account of and, where appropriate, to give effect to the child's wishes and feelings – and how, in any event can we do any of those things unless the child is properly represented by someone acting for and in the interests of the child and not of anyone else?

The fourth feature of Article 8 to be noted is that although we tend primarily to think of the *negative* obligation on the State, as Article 8(2) puts it, not to interfere with family life, we have also to remember that Article 8(1) imposes a *positive* obligation on the State to respect both private and family life.

Now 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. 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. Where, for example, the State in the guise of the local authority has intervened in the child's family life by commencing care proceedings and taking a child into public care, the judicially enforced burdens upon the local authority under Article 8 can be onerous.

These principles which I have been discussing may seem rather abstract. But they are not mere rhetoric. The books already contain too many reports of cases in which the procedures adopted by local authorities in care cases were found to have breached Article 8.

And so I turn to the question of representation. There are two separate questions, both of great importance. The first is whether the effect of Article 8 is to impose on the decision-maker – the local authority for example – a duty to *permit* the parent or child to be represented. The other is whether there may be circumstances where the effect of Article 8 is to impose on the decision-maker a duty to *ensure* that the parent or child is represented.

As to the first, although one probably looks in vain in the books for any plain and unambiguous statement of principle, I believe the law to be clear. Certainly in the context of child protection, and in all probability in analogous situations, Article 8 requires the decision-maker to permit both the parent *and* the child to appear by some suitable representative. Clear statements of principle may be lacking but the indications in the cases are, I think, clear enough.

The second question obviously raises issues of much greater difficulty. It is one thing to say that the decision-maker – the local authority – must permit a parent or

child to bring a representative along; it is a very different thing to say that the decision-maker is under a duty to ensure that the parent and child are represented, for that may have serious public-funding implications.

The law on this point is still at an early stage in what I believe will turn out to be a continuing process of development and elaboration. It is probably too early to assert unequivocally that there is a duty to ensure representation, let alone to define or even to describe the circumstances in which the duty may come into play. But there are, I think, a number of significant indications, both in the Strasbourg jurisprudence and in our domestic case-law, and taken together they amount to more than mere straws in the wind. Let me give an illustration. In Re G (*Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam), [2003] 2 FLR 42) I was concerned with the fairness of local authority decision-making *after* a care order had been made. Parents complained that the local authority had, in effect, substituted an entirely new care plan, involving removal of their children, without involving them properly in the process. I agreed. Commenting on what Article 8 required I said this at para [43]:

> "A local authority, even if clothed with the authority of a care order, is not entitled to make significant changes in the care plan, or to change the arrangements under which the children are living, let alone to remove the children from home if they are living with their parents, without properly involving the parents in the decision-making process and without giving the parents a proper opportunity to make their case before a decision is made."

But what is more important for immediate purposes is something I added at para [59]:

> "Parents who find themselves involved in cases such as this are often themselves vulnerable, sometimes very vulnerable; they may suffer from physical or mental disabilities or be educationally, economically or socially disadvantaged. They are often ill-equipped to cope with those whom they understandably see as 'them'. The parents in the present case are both somewhat limited and largely illiterate. The mother functions within the mid

> part of the low–average range (IQ 80–89) and has a reading age of about 7 years. The father functions within the mid to upper part of the borderline range (IQ 70–79) and also has a reading age of about 7 years. The evidence suggests that they had difficulty accepting and understanding the local authority's reasons for concern and that the local authority had difficulty in getting them to understand the legal basis on which it was intervening. The local authority, I am sure, did its best. I mention the matter only to emphasise that Art 8 imposes positive obligations on a local authority to ensure that parents are properly involved in the decision-making process. Part of that obligation … is the obligation to ensure that … there is proper and timely disclosure to parents of relevant documents. But in appropriate cases – and given the parents' limitations this is such a case – the local authority's obligations will go further. Where for whatever reason – whether physical or mental disability, illiteracy or the fact that English is not their mother tongue – parents cannot readily understand the written word, the local authority must take whatever ameliorative steps are necessary to ensure that the parents are not for that reason prevented from playing a full and informed part in the decision-making process."

And that, of course, is merely one example of what I suspect is a much wider principle.

Merely because a decision is taken administratively rather than by a court is not of itself any reason why a parent or child should not be adequately represented. If the administrative decision-maker is to comply with the Convention he must not merely have regard to the parent's or the child's rights under Article 8. He must make sure that their interests are appropriately represented. He must ensure that the child's voice and the parent's voice are heard.

So much for the theory. What of the reality?

The first thing that strikes the lawyer is the almost astonishing contrast between the support and representation which is typically made available both to the parent and, separately, to the child when judicial decision-making is involved and the

startling lack of such support and representation which is available when the decision-making is administrative rather than judicial.

Care proceedings provide the most obvious and one of the most striking examples. In court the child has the assistance of both a guardian and a professional advocate. Once the final care order is made the child loses both, though decisions subsequently taken by the local authority can have just as drastic an effect on the child (and on the parents) as any order made by a judge.

Nor, unhappily, does experience indicate that this is a merely formal defect in our system. Too frequently for judicial ease of mind, if the court has occasion to discover what has been going on since a care order was made, the picture suddenly revealed is far from what it should be. The simple fact is that there are real problems affecting too many of the children in our care system. Too often their substantive rights under Article 8 are not respected as they should be. And too often these problems arise and continue because the children affected do not have the support and representation they should have and which Article 8 entitles them to have.

In relation to children in care the problems are particularly intractable, and I fear remain so notwithstanding legislatives attempts to remedy the situation created by the demise of "starred milestones" in care plans. One of the problems, of course, is that where a child is in care there may be no parent able and willing to become involved in questioning a care decision made by a local authority. So the Article 8 rights of a child may be violated by a local authority without anyone outside the local authority becoming aware of the violation. In practice, such a child may not always have an effective remedy, despite the introduction of Independent Reporting Officers. What is your experience as to how effective they are in protecting and promoting the interests of the children for whom they are responsible? And how effective are Personal Advisers in ensuring that the bold promises of the Leaving Care legislation are properly translated into robust, effective and appropriate pathway plans prepared in accordance with the statutory requirements?

My own experience in too many cases would unhappily suggest that too many local authorities are, in these vital respects, failing too many children – and I fear that

this too often reflects a 'mindset', a 'culture' of local authority decision-making, insufficiently mindful of the procedural obligations imposed by Article 8 and insufficiently attentive of the need to ensure that the interests of the child are appropriately, indeed vigorously, represented by people independent of the local authority and whose sole focus is on the welfare, the wishes and feelings, of the child.

How do we tackle the practical problems that arise in the context of administrative decision-making?

Too often still – and it is now more than eight years since the Human Rights Act came into force – one is left with the feeling that local authority social workers and team managers do not appreciate the vital impact of the Human Rights Act, and that in significant measure this is because the right message is not coming down from the top. Local authorities – senior management – need to ensure that they have in place policies and procedures which recognise and give effect in practical ways to both the substantive and the procedural rights guaranteed to parents and children by Article 8. There are, to repeat a point I have had to make on too many occasions, serious training and management issues here which still require to be addressed by too many local authorities.

But at the end of the day, policies and procedures, however carefully crafted and however carefully implemented, are not enough. Parents and children need support and representation just as much when important decisions are being taken by administrative decision-makers as when such decisions are being taken by judicial decision-makers. And it is here that for the foreseeable future we have to look to the voluntary sector. We can demand that public authorities put in place appropriate and Convention-compliant policies and procedures, but we have to recognise that their practical ability to provide support and representation may be limited.

It is hard to over-emphasise how vital are the services provided, for example, by the Children's Rights Officer of the National Society for the Prevention of Cruelty to Children, by NYAS, by the Howard League, by VOICE, by a host of other agencies and, not least, by you, the Family Rights Group.

What can the FRG and similar organisations do? Fundamentally, perhaps, their purpose is to empower those who are otherwise disempowered, to inform parents and children about their rights and to promote their full participation in planning and decision-making when local and other public authorities are involved. There are many ways in which they can empower otherwise disempowered and disadvantaged children and parents. They can educate and seek to influence developments in law and practice; they can provide information; and they can provide advice, support, representation and advocacy. Education of course is vital, and not just for the families and children who are the focus of your activities: public authorities also need to be educated.

Representation and advocacy in the context of administrative decision-making requires skilled and appropriately trained specialists. They need not be lawyers, but they must have specialist knowledge of the relevant law and practice. They need to be people who can be seen to be independent of the local or other public authority, but equally people who can win the trust and confidence of both 'sides'.

The task is huge. The challenge is great. I am delighted to hear of the work FRG is doing. It shows what can be achieved by the voluntary sector. And it illustrates how co-operation between public authorities and the voluntary sector can serve fruitfully to further and protect the rights – the human rights – of our families, our parents and our children.

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