

FOSTERING AND ADOPTION AS MEANS OF SECURING ARTICLE 6 RIGHTS IN ENGLAND

Brian Sloan
MA LLM PhD (Cantab)
College Lecturer & Fellow in Law, Robinson College, Cambridge*

1 Introduction

State foster care and domestic adoption are in principle means by which a child's "inherent right to life"¹ and his or her right to maximal "survival and development"² under article 6 of the United Nations Convention on the Rights of the Child ("UNCRC") can be protected,³ where that child cannot be looked after adequately by his or her parents. The concepts of foster care and adoption are the subject of an increasingly strong link in England,⁴ though both are shrouded in controversy. The aim of this article is to consider the compatibility of both foster care and adoption with article 6, which has been described as one of the "foundational principles of the Convention".⁵ Of course, article 6 must be read in the context of the UNCRC as a whole, since as the Committee on the Rights of the Child (the "Committee") itself has pointed out "the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention".⁶ The present article focuses particularly on recent developments in English Law concerning both foster care and adoption,⁷ including the reforms introduced by the Children and Families Act 2014 ("Children and Families Act").

At the outset, it is important to note that unlike the European Convention on Human Rights⁸ the UNCRC as a whole has not yet been incorporated into English

* The author is grateful for the opportunity to attend the Article 6 CRC Colloquium in Stellenbosch in March 2014, and to the other attendees and the anonymous referees for their comments on earlier versions of this paper. All errors are the responsibility of the author.

¹ Art 6(1) of the United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

² Art 6(2) of the UNCRC.

³ See also the child's right to "the enjoyment of the highest attainable standard of health" (art 24(1)) to "a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (art 27(1)), to education (art 28) and to special protection if he or she is disabled (art 23).

⁴ Since "[a]doption policy and functions of local authorities in relation to adoption are matters devolved to the Welsh Government" (Children and Families Act Explanatory Notes para 41), this article focuses on English Law *per se*.

⁵ T Buck *International Child Law* 3 ed (2014) 131.

⁶ United Nations Committee on the Rights of the Child General Comment 7 (2005): Implementing Child Rights in Early Childhood (CRC/C/GC/7/Rev.1, 2006) para 10.

⁷ For a full account of the law analysed in this article see for example A Bainham & S Gilmore *Children: The Modern Law* 4 ed (2013) 461-723 (part 3).

⁸ Human Rights Act 1998.

Law,⁹ which is a state of affairs that causes concern for the Committee.¹⁰ In its fifth periodic report to the Committee, the Government has sought to justify the status of the convention in the Law of the United Kingdom on the basis that “[a]s a general principle, the State Party does not incorporate international treaties directly into domestic law”.¹¹ However, the status of the European Convention is a very clear current exception to that principle. In any case, the UK Supreme Court Justice Lady Hale has nevertheless emphasised that the UNCRC imposes “binding obligation[s] in international law”.¹² Moreover, in a Supreme Court judgment citing the present author’s previous work on whether the English Law on adoption decisions *per se* is compatible with the UNCRC,¹³ its President Lord Neuberger said explicitly that the Adoption and Children Act 2002 “must be construed and applied bearing in mind the provisions of the UN Convention on the Rights of the Child 1989”.¹⁴ Whatever the precise status of the UNCRC in English Law, it is a basic premise of this article that its subject remains a worthwhile field of inquiry.

2 Foster Care

The “threshold” that must be crossed before a child can be compulsorily taken into full state care¹⁵ in England is contained in section 31(2) of the Children Act 1989 (“Children Act”). It requires a judicial finding that he or she “is suffering or is likely to suffer significant harm”,¹⁶ attributable among other things to the relevant care “not being what it would be reasonable to

⁹ See generally G van Bueren “The United Nations Convention on the Rights of the Child: The Necessity of Incorporation into United Kingdom Law” (1992) 22 *Fam Law* 373; A MacDonald “Bringing Rights Home for Children: Arguing the UNCRC” (2009) 39 *Fam Law* 1073; J Fortin *Children’s Rights and the Developing Law* 3 ed (2009) 47–54. Rights of Children and Young Persons (Wales) Measures 2011 and s 107 of the Children and Families Act.

¹⁰ Committee on the Rights of the Child Consideration of Reports submitted by States Parties under Article 44 of the Convention: Concluding Observations – United Kingdom of Great Britain and Northern Ireland (Third and Fourth Reports) (CRC/C/GBR/CO/4, 2008) para 10. See generally, arts 4, 42 and 44, para 6 of United Nations Committee on the Rights of the Child General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (CRC/GC/2003/5, 2003).

¹¹ HM Government *The Fifth Periodic Report to the UN Committee on the Rights of the Child: United Kingdom* (2014) 8. The report also claims that the UK “has no reservations or declarations in respect of the Convention” (7), but several remain listed on the relevant UN database: United Nations “Multilateral Treaties Deposited with the Secretary-General” *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 05-05-2015). See B Sloan “Post-adoption Contact Reform: Compounding the State-ordered Termination of Parenthood?” (2014) 73 *C L J* 378 401 for discussion of a declaration with implications for post-adoption contact and related matters.

¹² *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [2011] 2 AC 166 para 23. See also *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449.

¹³ *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 [2013] 1 WLR 1911 paras 103-104, citing B Sloan “Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child” (2013) 25 *CFLQ* 40 40-60.

¹⁴ *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 para 73.

¹⁵ Cf the tests for interim care orders, which can be made where *inter alia* “there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)” (s 38(2) of the Children Act 1989; emphasis added) and emergency protection orders, which may be made where *inter alia* “there is reasonable cause to believe that the child is likely to suffer significant harm” (s 44(1); emphasis added).

¹⁶ S 31(2)(a) of the Children Act.

expect a parent to give”.¹⁷ If the relevant “harm” is “the impairment of health or development”,¹⁸ the Children Act provides that its significance is to be determined with reference to the health or development that “could reasonably be expected of a similar child”.¹⁹ The word “significant” has been interpreted to mean “considerable, noteworthy or important”.²⁰ In deciding to make the relevant “care order”, moreover, the judge must still be satisfied that he or she is treating the child’s welfare as the “paramount” consideration, which is the general principle of English child law contained in section 1 of the same act. A judge must also demonstrate that the relevant order is sufficiently proportionate to comply with human rights standards.²¹

The “threshold” criteria have been considered a surprising number of times at the highest judicial level.²² It has been established that a likelihood of significant harm need only be a “real possibility” of harm for the purposes of the threshold.²³ In other words, it is not necessary to show that the predicted future harm to the child is more likely to happen than not to happen. However, the House of Lords has also said that the prediction of a real possibility of future harm must be based on facts proven on the balance of probabilities, which is the usual standard of proof in civil law cases.²⁴ Mere *suspicious* that a child has been harmed in the past cannot form the basis of a likelihood of significant harm to that child, or other children cared for by the same people, in the future. It should be noted that this principle was set down by only a majority in *Re H and R (Child Sexual Abuse: Standard of Proof)*²⁵ before being approved unanimously in the later House of Lords case of *Re B (Sexual Abuse: Standard of Proof)*.²⁶

On the question whether the harm or likelihood of harm is sufficiently attributable to the standard of care, by contrast, the courts have again been more willing to intervene in family life. It must be shown that there is suffering, or a likelihood of suffering, significant harm attributable to *one or more* of the child’s carers, based on facts relating to that child or (in the case of a likelihood of harm) another child cared for by all of the same people. But, once that has been demonstrated, it is *not* necessary to show which of

¹⁷ S 31(2)(b)(i). See also the analogous provision where the child is beyond parental control: s 31(2)(b)(ii).

¹⁸ S 31(9).

¹⁹ S 31(10).

²⁰ *Humberside County Council v B* [1993] 1 FLR 257 (Fam), approved in *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 para 193 (Lady Hale).

²¹ See especially *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33.

²² *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 AC 424 (HL); *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL); *Lancashire CC v B (A Child) (Care Orders: Significant Harm)* [2000] 2 AC 147 (HL); *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35 [2009] 1 AC 11; *Re S-B (Care Proceedings: Standard of Proof)* [2009] UKSC 17 [2010] 1 AC 678; *Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9 [2013] 1 AC 680; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33.

²³ *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL).

²⁴ *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL); *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35. A similar approach is taken at the welfare stage once the threshold has been crossed: *Re M and R (Minors) (Child Abuse: Expert Evidence)* [1996] 4 All ER 239 (CA).

²⁵ [1996] AC 563 (HL); compare the speeches of Lords Nicholls, Goff and Mustill with those of Lords Browne-Wilkinson and Lloyd.

²⁶ [2008] UKHL 35.

the relevant carers actually caused past harm.²⁷ All of the suspects are put into what is known as a “pool” of perpetrators if there is a real possibility that each of them caused the relevant harm, but the threshold is met even though the *precise* cause of past harm has not been identified. Controversially, this means that a child could be removed from his parents even if it is possible that the child’s previous injuries were caused by a non-parental child-minder, and that the parents themselves are innocent.²⁸

The law described thus far might be said to achieve something of a balance between various rights protected under the UNCRC while largely attempting to vindicate rights to life, survival and development. On the one hand, there are those article 6 rights, bolstered by the state’s obligation to protect children from abuse etcetera under article 19 of the UNCRC (albeit that regard must be given to “the least intrusive intervention as warranted by the circumstances” when implementing that article),²⁹ and to give “special protection and assistance” to those who cannot remain in their own family environment under article 20. On the other hand, there are the countervailing obligations to ensure that children are not separated from their parents unless it is determined as “necessary” for the child’s best interests under article 9, and that a child knows and is cared for by his parents under article 7(1). The threshold of “significant” harm means that the protection afforded to the child’s “development” inevitably varies from case to case, and it has been said that “society must be willing to tolerate very diverse standards of parenting including the eccentric, the barely adequate and the inconsistent”.³⁰ But, given the other requirements of the UNCRC, the right to develop must ordinarily relate to development *within* one’s home environment.³¹

The tension present in the UNCRC in this respect is reflected in the difficulties faced by those who work in child protection. In England, there have been some scandals not only involving children who have died in the care of their parents or other private individuals having been let down by the child protection system, notably baby Peter Connelly,³² but also involving children wrongfully removed from their family environments.³³ Often, however, the causative failure relates to the structure of the system and its operation “on the ground” rather than the overall legal framework governing the specific criteria for intervention. In the case of Peter Connelly, for example, Onoran and Williams identify an appearance that “the law was not properly implemented”, and that “[t]hose people entrusted with the task of protecting

²⁷ *Lancashire CC v B (A Child) (Care Orders: Significant Harm)* [2000] 2 AC 147 (HL). Again, a similar approach is taken at the welfare stage: *Re O and N (Children) (Non-Accidental Injury: Burden of Proof)* [2003] UKHL 18 [2004] 1 AC 523.

²⁸ *Lancashire CC v B (A Child) (Care Orders: Significant Harm)* [2000] 2 AC 147 (HL).

²⁹ United Nations Committee on the Rights of the Child General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms of Violence (CRC/C/GC/13, 2011) para 54.

³⁰ *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 (Fam) para 50 (Hedley J).

³¹ See for example R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* 3 ed (2007) 83 93.

³² See for example L Onoran & E Williams “Statutory Accountability in Safeguarding Children: The *Shoemith* Scenario” (2011) 41 *Fam Law* 979-986.

³³ See for example M Hedley “Family Life and Child Protection: Cleveland, Baby P et al” (2014) 26 *CFLQ* 7 7-13.

Peter failed to intervene and utilise the legal tools available to them”.³⁴ A local authority’s duties in relation to children include one to “make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child’s welfare”³⁵ where *inter alia* it has “reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm”.³⁶ It is significant and worrying, however, that a court cannot force a local authority to apply for a care order and it has been held that “if a local authority doggedly resists taking the steps which are appropriate to the case of children at risk of suffering significant harm it appears that the court is powerless”.³⁷

The Government has reported that the number of children subject to a child protection plan in England increased by 47% between 2008 and 2012, and said that the increase “may be due to better identification of children at risk, rather than because more children are being harmed.”³⁸ Efforts are also being made to streamline the child protection system,³⁹ although in the context of a new statutory *prima facie* requirement to complete care proceedings within 26 weeks⁴⁰ the President of the Family Division of the High Court has warned against “rigorous adherence to an inflexible timetable”.⁴¹ In any case, a loophole has recently been confirmed in the substantive law governing intervention itself that might prejudice a child’s article 6 rights by preventing a child from being taken into state care when he or she is potentially at risk of harm.

The cases preceding the 2013 Supreme Court decision in *Re J (Children) (Care Proceedings: Threshold Criteria)*⁴² had not conclusively resolved a vital question: what if a parent has previously been placed in a pool of perpetrators in relation to the harm of one child, but has separated herself from the other people in the pool and started to look after different children, perhaps with a new partner? Does the possibility that the parent *may* have been responsible for proven harm to a child in the past provide enough of a basis to say that the

³⁴ Onoran & Williams (2011) *Fam Law* 979 981.

³⁵ S 47(1) of the Children Act. See also s 37 on court-ordered investigations.

³⁶ S 47(1)(b) of the Children Act.

³⁷ In particular *Nottinghamshire v P* [1994] Fam 18 (CA) 43 (Sir Stephen Brown P, giving the judgment of the Court).

³⁸ HM Government *The Fifth Periodic Report to the UN Committee on the Rights of the Child: United Kingdom 4*.

³⁹ 25-28.

⁴⁰ S 14 of the Children and Families Act. Cf Children and Family Court Advisory and Support Service, “How Long do Care Applications Take? Cafcass Care Application Duration, by Designated Family Judge (DFJ) Area, to Date” (2014) *Cafcass* <<http://www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/how-long-do-care-applications-take.aspx>> (accessed 05-05-2015). See also s 13 of the Children and Families Act, which controls the use of expert evidence in such proceedings.

⁴¹ *Re B-S (Children) (Adoption: Leave to Oppose)* [2013] EWCA Civ 1146 [2014] 1 WLR 563 para 49 (Sir James Munby P, giving the judgment of the Court).

⁴² [2013] UKSC 9; see S Gilmore “*Re J (Care Proceedings: Past Possible Perpetrators in a New Family Unit)* [2013] UKSC 9: Bulwarks and Logic – The Blood which runs through the Veins of Law – But how much will be spilled in Future?” (2013) 25 *CFLQ* 215 215-237 for detailed discussion and criticism of this case.

threshold is met in relation to the other children that she is now looking after? The Supreme Court had to grapple with this issue in *Re J*.

The background facts of *Re J* are grim even by the standards of child protection cases. JJ and her partner SW had a child, T-L. T-L had a tragically short life. She died of asphyxiation at the age of three weeks, and was found to have sustained many non-accidental injuries including multiple rib fractures. JJ and SW then had a second child, S. Unsurprisingly, S was taken into care, even though the judge dealing with his case was not able to decide whether his sister T-L's injuries had been caused by their mother JJ, their father SW, or both of them. S was in the care of both possible culprits, and the threshold was met.

That was not, however, the end of the story. JJ then separated from SW and moved from South Wales to the north of England. Around four years after T-L's death, JJ started a relationship with DJ. JJ moved in with him and his two children from a previous relationship. She later had another child with SW, and she and DJ lived together with the three children as a family. When it eventually found out what had happened in South Wales, Stockton-on-Tees Borough Council applied for a care order in respect of all three children.

The issue that the Supreme Court had to decide was whether JJ's inclusion in a pool of perpetrators in relation to T-L could itself form the basis of a likelihood of a significant harm to the three children she was now looking after in her new relationship. The Court unanimously said that the answer was "no". Lady Hale, with whom the other Justices largely agreed, was conscious of the need for a balanced approach between intrusion and protection. But, she emphasised that, for the purposes of article 8 of the European Convention on Human Rights, there has to be a pressing social need before state intervention can be justified.⁴³ An analogy with article 9 of the UNCRC could admittedly be drawn here.

Lady Hale said that because of the doubt about whether SW or JJ had caused the injuries to T-L, there was only a "real possibility" that JJ had caused them. Her Ladyship held that to base the likelihood of future harm to the three other children on that "real possibility" would be inconsistent with the previous cases requiring facts on which the likelihood of harm was based to be proven on the balance of probabilities.⁴⁴ In her view, it made no difference that harm had definitely been caused to T-L, or that the courts had taken a more flexible approach to the attribution question. However, she and four other members of the Court of seven did not think that JJ's consignment to a pool of perpetrators should be ignored altogether. In their view, most clearly explained by Lord Hope,⁴⁵ if the Council had advanced other evidence that could be used to show a likelihood of harm, something it had chosen not to do in *Re J*, that evidence could be combined with JJ's presence in the pool to provide sufficient facts proven on the balance of probabilities.

⁴³ [2013] UKSC 9 para 44.

⁴⁴ [2013] UKSC 9 para 49.

⁴⁵ [2013] UKSC 9 para 87. Cf para 80 (Lord Wilson) and para 92 (Lord Sumption).

The Supreme Court did point out that few cases are so stark and simplistic that the only evidence on which the local authority's case is based will be a parent's inclusion in a previous pool of perpetrators. There will almost always be other provable facts ultimately giving rise to a finding of harm or a likelihood of harm. But evidence can be difficult to gather in the child protection context, and the law must surely be equipped to deal with the most extreme cases. Parents like JJ will now find it easier to make a new start in a new relationship where they have been merely *suspected* of harming children in the past, and their new partners are less vulnerable to having their own children taken away. Moreover, the example given in the text of article 9 of the UNCRC of a situation where separation from parents might be justified is where the parents have been found to have harmed *the child in question* and not where *each* of them *may* have harmed a different child. Nevertheless, the Supreme Court's conclusion could produce some odd results that raise questions about the compatibility of English child protection law with article 6 in terms of its ability even to attempt to protect the rights to life, survival and development of particular children.

It has been seen that S, a child being cared for by all of the people in a pool of perpetrators in *Re J*, could be taken into care without much difficulty following the harm to his sister. But *Re J* appears to mean that if SW and JJ both formed new relationships and had children in those relationships, the threshold could not be based on the harm to T-L alone in relation to either new household, even though it is clear that at least one of SW and JJ caused that harm to T-L.

The law is at least clearer now, and that is a positive development in itself even if local authorities will have to work harder in gathering evidence to protect (and thereby secure the article 6 rights of) some children. There was an attempt to reverse the Supreme Court's finding by legislation in what became the Children and Families Act.⁴⁶ Interestingly, Lord Lloyd, one of the minority judges in *Re H and R* who thought that suspicions of past harm could be enough to meet the threshold, made that attempt. The proposed amendment was ultimately withdrawn, however, and the article 6 issues remain given that local authorities may be unable to protect the rights to life, survival and development of certain children by taking them into full state foster care.

It should be emphasised that a finding that the threshold is met does not mean that a child will always and forever be removed from the parents. It merely gives the court *jurisdiction* to make the care order provided that it is consistent with the child's welfare and a proportionate response to the child's situation. The order, in turn, simply gives local authorities the ability to decide how best to secure a child's best interests, with foster care being one of the options, without altogether extinguishing the rights and responsibilities of the parents.⁴⁷ In this context, it could be argued that *Re J* places the bar too high in certain types of case, prejudicing article 6 rights to life, survival and

⁴⁶ House of Lords Hansard 17 December 2013 cols 1160-1179.

⁴⁷ S 33 of the Children Act.

development among other rights protected under the UNCRC by preventing some children from being removed from potential harm.

3 Adoption

A discussion of adoption in the English context is strongly linked to the previous discussion of foster care, since most adopted children are now adopted *out of* foster care.⁴⁸ It should nevertheless be made clear at the outset that while a care order does give a local authority parental responsibility for a child and allows the local authority to remove the child from the parents and restrict the ability of the parents to exercise *their* parental responsibility so long as the order subsists,⁴⁹ an adoption order as it is understood in England effectively terminates the legal relationship between current parent and child altogether and transfers parenthood itself to adoptive parents.⁵⁰ While both foster care and adoption might in principle protect a child's right to life, survival and development as required by article 6, adoption purports to do so in a much more permanent, but also much more invasive, manner.

Article 6 is not of course the most obvious starting point for an analysis of adoption so far as the UNCRC is concerned. Article 21 of the UNCRC requires states *inter alia* to “ensure that the best interests of the child shall be the paramount consideration” in the context of adoption.⁵¹ But as Hodgkin and Newell emphasise in the United Nations Children's Fund (“Unicef”)s *Implementation Handbook* (which aims to synthesise the Committee's Concluding Observations), “[t]he Convention is indivisible and its articles interdependent”, meaning that “[a]rticle 21 should not be considered in isolation”.⁵² This has significant implications, since the other provisions of the Convention including article 6 might provide clues as to the meaning of “best interests”, a notoriously uncertain concept⁵³ that has been interpreted narrowly by the English judiciary,⁵⁴ under article 21. This is true notwithstanding the fact that those other provisions are themselves qualified, and that the notion of indivisibility of rights is clearly problematic where multiple rights appear to conflict.

The “best interests” test in article 21 of the UNCRC must therefore be read alongside several of its other provisions, and a complex picture is thus produced.⁵⁵ In fact, even the rest of article 21 (specifically article 21(a)) might point in a different direction from suggesting that a simple “welfare” test is

⁴⁸ See for example N Lowe “The Changing Face of Adoption – The Gift/Donation Model versus the Contract/Services Model” (1997) 9 *CFLQ* 371 386 for discussion of the changing nature of adoption in this respect.

⁴⁹ S 33 of the Children Act.

⁵⁰ S 67, s 46 of the Adoption and Children Act 2002. Cf “step-parent adoption”, provided for by s 46(3)(b).

⁵¹ See for example Committee on the Rights of the Child Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations – France (Second Report) (CRC/C/15/Add.240, 2004).

⁵² Hodgkin & Newell *Implementation Handbook* 303.

⁵³ See for example H Reece “The Paramountcy Principle: Consensus or Construct?” (1996) 49 *CLP* 267 304.

⁵⁴ See for example *J v C* [1970] AC 668, 709 (Lord MacDermott). See, more recently, *Re B (A Child) (Residence: Biological Parent)* [2009] UKSC 5 [2009] 1 WLR 2496 para 37 (per Lord Kerr, giving the judgment of the court).

⁵⁵ See, generally, Sloan (2013) *CFLQ* 40.

applicable. It requires that the adoption is “permissible in view of the child’s status concerning parents, relatives and legal guardians” and makes specific reference to the “informed consent to the adoption” of relevant persons albeit without absolutely requiring any particular consent.⁵⁶ It has therefore been said that the paramountcy principle contained in article 21 is “in one sense circumscribed by the legal necessities of satisfying legal grounds and gaining necessary consents”,⁵⁷ and the relevance of consent to welfare is illustrated by the Committee’s statement about the need to ensure both “that the best interests of the child are of paramount consideration, and that the parents or legal guardians have given their informed consent to the adoption”.⁵⁸

Moreover, it has been seen that article 7(1), for example, states that a child has “as far as possible, the right to know and be cared for by his or her parents”. Hodgkin and Newell note that the phrase “as far as possible” “appear[s] to provide a much stricter and less subjective qualification than ‘best interests’”, although they concede that consideration of what is “possible” must include consideration of “best interests”.⁵⁹ In addition to article 7, article 8(1) obliges states to respect a child’s right to his or her identity and “family relations”. It is limited to those relations recognised by law and purports to prohibit only “unlawful” interference, but this has not prevented the Committee on the Rights of the Child from criticising states’ approach to identity even when the relevant rules are enshrined in national law.⁶⁰ Logically, Hodgkin and Newell do not consider that a state could use its own national law substantially to limit the scope of this right.⁶¹ A similar argument could be made in relation to article 7, which requires states to “ensure the implementation of the ... rights [it confers] in accordance with their national law and their obligations under the relevant international instruments”.⁶²

Moreover, as was summarised above, article 9 mandates states to ensure that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.⁶³ Those best interests, in turn, can be determined only via due consideration of the child’s relationship with the parents. It is also significant that article 18 obliges states to “render appropriate assistance to parents and legal guardians”,⁶⁴ who “have the primary responsibility for the upbringing and development of the child”,⁶⁵

⁵⁶ Art 21(a) of the UNCRC.

⁵⁷ Hodgkin & Newell *Implementation Handbook* 296.

⁵⁸ UN Committee on the Rights of the Child Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: Belarus (Third and Fourth Reports) (CRC/C/BLR/CO/3-4, 2011) para 48

⁵⁹ Hodgkin & Newell *Implementation Handbook* 107.

⁶⁰ See for example Committee on the Rights of the Child Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations – *Australia* (Fourth Report) (CRC/AUS/CO/4, 2012) paras 37-38.

⁶¹ Hodgkin & Newell *Implementation Handbook* 107 116.

⁶² Art 7(2) of the UNCRC.

⁶³ Art 9(1).

⁶⁴ Art 18(2).

⁶⁵ Art 18(1).

“in the performance of their child-rearing responsibilities and [to] ensure the development of institutions, facilities and services for the care of children”.⁶⁶ In addition, the UN Guidelines for the Alternative Care of Children direct that “efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members”, and that “[t]he State should ensure that families have access to forms of support in the caregiving role”.⁶⁷ On the other hand, it is clear that the “best interests” test under article 21 must also include the rights protected by article 6. Overall, the *Implementation Handbook* regards the UNCRC as “neutral about the desirability of adoption”,⁶⁸ and it has been seen that the Committee has emphasised the need to consider “the least intrusive intervention as warranted by the circumstances” when implementing article 19.⁶⁹ Even where some form of intervention is necessary to secure a child’s Convention rights, then, it does not necessarily follow that adoption is the most appropriate one.

Adoption policy in England, for its part, is dominated by the notion that the stability provided by swift adoption is generally beneficial for children who have to be removed from their parents and might otherwise drift through state-provided foster care.⁷⁰ Indeed, the poor outcomes for such children who remain in care in terms of educational attainment and criminal activity among other measures might be said to prejudice the system’s ability to secure article 6 rights for individual children,⁷¹ even taking into account the troubled backgrounds that many children in care will inevitably have before entering the system. Cases where children have been abused *while* in the care of local authorities illustrate the care system’s failure to secure universal article 6 rights even more clearly.⁷² Adoption might also be said to be consistent with the Committee on the Rights of the Child’s strong preference for “family-type care” as compared to institutional care,⁷³ although in England such “family-type care” is preferred as a matter of both policy and empirical fact for children who are merely in the subject of a care order even if permanence is not assured within one particular foster placement.⁷⁴

⁶⁶ Art 18(2).

⁶⁷ UN General Assembly Guidelines for the Alternative Care of Children: Resolution adopted by the General Assembly, 24 February 2010 UN Doc. A/RES/64/142 Annex para 3.

⁶⁸ Hodgkin & Newell *Implementation Handbook* 294.

⁶⁹ United Nations Committee on the Rights of the Child General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms of Violence (CRC/C/GC/13, 2011) para 54.

⁷⁰ See for example S Harris-Short “Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century” in R Probert & C Barton (eds) *Fifty Years in Family Law: Essays for Stephen Cretney* (2012) 147. Cf Local Government Ombudsman *Investigation into a Complaint against London Borough of Hillingdon* (reference number: 13 014 547) (2014). Cf also *Re P (A Child) (Adoption: Step-parent)* [2014] EWCA Civ 1174 [2014] 3 FCR 193, a recent judgment on step-parent adoption.

⁷¹ See for example Department for Education *Outcomes for Children Looked After by Local Authorities in England, as at 31 March 2013* (2014).

⁷² See for example A Jaye *Independent Inquiry into Child Sexual Exploitation in Rotherham 1997–2013* (2014).

⁷³ UN Committee on the Rights of the Child Consideration of Reports Submitted by States Parties under art 44 of the Convention – Concluding Observations: Belarus (Third and Fourth Reports) (CRC/C/BLR/CO/3-4, 2011) paras 45–46.

⁷⁴ Department for Education *Children Looked after in England (Including Adoption and Care Leavers) Year Ending 31 March 2013* (2013) 4-5.

In any case, the Committee has expressed concern about a state where “domestic adoption for children deprived of a family environment is not promoted, developed or applied as an alternative to public care, even in situations where it is in the best interests of the child”.⁷⁵ For its part, in its fifth periodic report to the Committee the UK Government simply assumed that a recent increase of 15% in the number of children adopted was one of a number “significant improvements in children’s outcomes” (clearly relevant for article 6) identified since its previous report.⁷⁶

The English Adoption and Children Act 2002 unashamedly aimed to bring about “more adoptions, more quickly” for children in care,⁷⁷ even before it was amended in 2014. Indeed, by virtue of the 2002 Act local authorities are placed under a duty to initiate adoption proceedings (by applying for an initial “placement order”)⁷⁸ where *inter alia* the authority is “satisfied that the child [in its care] ought to be placed for adoption”,⁷⁹ and it has been recognised as legitimate for a local authority to seek such an order “even though it recognises the reality that a search for adoptive parents may be unsuccessful”.⁸⁰ The policy of securing more adoptions, pursued in spite of apparently mixed outcomes for children adopted out of care as well as those who remain in care,⁸¹ can also be seen from the fact that the Act allows an adoption agency to place a child with a view to adoption by virtue of the consent of a child’s parents (with parental responsibility)⁸² or his or her guardian, without the need for a court order, and the fact that such people can provide advance consent to the final and necessary adoption order at the same time.⁸³ If consent is not forthcoming from parents with parental responsibility, a court can dispense with the need for it if “the welfare of the child requires the consent to be dispensed with”,⁸⁴ and the adoption can proceed on the basis of welfare alone provided either that the relevant parents have at some stage consented to the process or that the criteria for state care mentioned earlier have been made out.⁸⁵ Procedural restrictions are also placed on parents’ ability to withdraw their consent and/or oppose the making of the final adoption order,⁸⁶ notwithstanding the claim that “[t]he United Kingdom is unusual amongst members of the Council of Europe in permitting the total severance of family ties without parental

⁷⁵ UN Committee on the Rights of the Child Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations: Azerbaijan (Third and Fourth reports) (CRC/C/AZE/CO/3-4, 2012) para 54.

⁷⁶ HM Government *The Fifth Periodic Report* 3.

⁷⁷ S Harris-Short “New Legislation: The Adoption and Children Bill – A Fast Track to Failure?” (2001) 13 *CFLQ* 405 407.

⁷⁸ S 21 of the Adoption and Children Act.

⁷⁹ S 22.

⁸⁰ *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 para 137 (Wall LJ, giving the judgment of the Court).

⁸¹ Harris-Short “Holding onto the Past” in *Fifty Years 150–151*; cf J Selwyn, D Wijedasa & S Meakings *Beyond the Adoption Order: Challenges, Interventions and Adoption Disruption* (Department for Education, 2014).

⁸² S 52(6) of the Adoption and Children Act.

⁸³ S 20.

⁸⁴ S 52(1)(b). S 52(1)(a): Consent can also be dispensed with where “the parent or guardian cannot be found or is incapable of giving consent”.

⁸⁵ Ss 18, 21 and 47 of the Adoption and Children Act.

⁸⁶ Ss 52(4) and 47 of the Adoption and Children Act; see Sloan (2013) *CFLQ* 56-57.

consent”.⁸⁷ Moreover, the Act instructs the courts and adoption agencies “at all times” to “bear in mind that, in general, any delay in coming to [a] decision [relating to adoption] is likely to prejudice the child’s welfare”.⁸⁸

The prioritisation of adoptions obviously has profound implications for the child’s birth family and his or her relationship with them as protected by the UNCRC, including in articles 7, 8 and 9.⁸⁹ This is true notwithstanding the rather ambivalent and confusing attitude displayed to the concept in both the text of the Convention and the approach of the Committee to it, and the consequent serious limitations to the Convention’s ability to provide a single, clear answer to a given question. For reasons including the English Court of Appeal’s refusal to hold that there was any “enhanced” welfare standard applicable in cases of adoption⁹⁰ and its treatment of fathers lacking parental responsibility for prospective adoptees⁹¹ (neither of whose consent to adoption is even *prima facie* required),⁹² the present author had argued in a 2013 article that it was unclear whether English adoption law was compatible with the UNCRC taken as a whole.⁹³ It was also possible that the limitations on parents’ ability to oppose the final order, combined with the judicial suggestions that a “stringent” approach should be taken to deciding whether those limitations should be lifted in an individual case,⁹⁴ breached article 9(2)’s requirement that where a child is separated from his parents “all interested parties shall be given an opportunity to participate in the proceedings and make their views known”.⁹⁵ The potential problem remains even though the *de facto* separation will already have occurred before the final hearing.

The policy of more, speedier adoptions from state care is nevertheless carried further in the Children and Families Act in the light of continued concerns that adoption is not proceeding quickly enough.⁹⁶ Section 2 of this act imposes a duty on an English local authority considering adoption for a

⁸⁷ *Down Lisburn Health & Social Services Trust v H* [2006] UKHL 36, [2007] 1 FLR 121 para 34 (Baroness Hale).

⁸⁸ S 1(3) of the Adoption and Children Act.

⁸⁹ See generally Sloan (2013) *CFLQ* 40.

⁹⁰ *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535 [2009] PTSR 150 para 127 (Wall LJ, giving the judgment of the Court).

⁹¹ Compare *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206 [2008] Fam 54 and *Re A (Father: Knowledge of Child’s Birth)* [2011] EWCA Civ 273 [2011] 2 FLR 123.

⁹² S 52(6) and s 1(4)(a) of the Adoption and Children Act; Cf for example, Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: Papua New Guinea* (Initial Report) (CRC/C/15/Add.229, 2004) para 42; Committee on the Rights of the Child, *for example Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: New Zealand* (Second Report) (CRC/C/15/Add.216, 2003) para 34(a).

⁹³ See generally Sloan (2013) *CFLQ* 40.

⁹⁴ *Re W (A Child) (Adoption: Leave to Oppose)* [2010] EWCA Civ 1535 [2011] 1 FLR 2153 para 28 (Thorpe LJ).

⁹⁵ See also for example United Nations Committee on the Rights of the Child General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms of Violence (CRC/C/GC/13, 2011) para 54.

⁹⁶ Department for Education *An Action Plan for Adoption: Tackling Delay* (2011). Cf the increases in the number of placements for adoption and adoptions before the relevant aspects of the Children and Families Act took effect: Department for Education, *Adoption Leadership Board (ALB): Headline Measures and Business Intelligence – Quarter 4 2013-14 Update* (2014). Cf also the concern, addressed by the Court of Appeal in *Re R (A Child) (Adoption)* [2014] EWCA Civ 1625 [2015] 1 FLR 715 that its decision in *Re B-S* [2013] EWCA Civ 1146 (discussed below) caused a drop in the number of placement orders made.

given child also to consider placing the child “with a local authority foster parent who has been approved as a prospective adopter”,⁹⁷ albeit ultimately only where the local authority decides that placement with a “a relative, friend or other person connected with [the child] ... who is also a local authority foster parent”⁹⁸ is “not the most appropriate placement”.⁹⁹ This has become known as a “fostering for adoption” placement,¹⁰⁰ and it effectively requires the local authority to consider placing the child with prospective adopters notwithstanding the very fact that the local authority do not “yet have authorisation to place the child for adoption” from either the birth parents or a court.¹⁰¹ Where the local authority is considering adoption, the Act also expressly disapples¹⁰² the local authority’s statutory duty to give any further preference in foster placements to a foster parent who is also a “relative, friend or other person connected with” the child.¹⁰³ This raises issues under the several articles of the UNCRC that are designed to protect a child’s kinship links. The Government has claimed that it is not its intention that “kinship carers should be overlooked as a consequence of the [section in what is now the 2014 Act] concerning fostering for adoption”.¹⁰⁴ That said, interested parties including the Children’s Commissioner and the Joint Committee on Human Rights were concerned that this could in fact be the effect of the original Bill,¹⁰⁵ although admittedly it contained different drafting.¹⁰⁶

Other reforms contained in the Children and Families Act could also prove problematic from the perspective of the UNCRC. When evaluating English adoption law and practice in 2008, the UN Committee on the Rights of the Child expressed concern that “children of African descent and children of ethnic minorities sometimes face a long period waiting for adoption by a family of the same ethnic origin”,¹⁰⁷ and recommended that the state “strengthen its efforts to facilitate a situation in which children, always in their best interests, be adopted as speedily as possible, taking in due account, inter alia, [of] their cultural background”.¹⁰⁸ The new Act’s response to this problem of delay, however, is to remove¹⁰⁹ the specific obligation in the 2002 Act to “give due

⁹⁷ New s 26(9B)(c) of the Children Act, inserted by s 2(3) of the Children and Families Act. See also s 7 of the Children and Families Act.

⁹⁸ S 26(6)(a) of the Children Act 1989.

⁹⁹ New s 26(9B)(c) of the Children Act 1989, inserted by s 2(3) of the Children and Families Act.

¹⁰⁰ Explanatory Notes to the Children and Families Act 2014 para 53. See generally D Nickols “Fostering for Adoption: Progress or Unjustifiable ‘Fait Accompli’ or Something In-between? Part 1” (2014) 44 *Fam Law* 190-194; D Nickols “Fostering for Adoption: Part 2: Policy and Potential Difficulties” (2014) 44 *Fam Law* 339-339-343.

¹⁰¹ Explanatory Notes to the Children and Families Act 2014 para 54.

¹⁰² New s 26(9B)(a) of the Children Act inserted by s 2(3) of the Children and Families Act.

¹⁰³ S 22C(7)(a) of the Children Act.

¹⁰⁴ Joint Committee on Human Rights, *Legislative Scrutiny: Children and Families Bill; Energy Bill* (HL Paper 29/H.C. 452, 2013) 3.

¹⁰⁵ 3 (paras 13-22).

¹⁰⁶ Cf Children and Families Bill 2012-13 as introduced into the House of Commons cl 1(3).

¹⁰⁷ Committee on the Rights of the Child Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Kingdom of Great Britain and Northern Ireland (Third and Fourth Reports) (CRC/C/GBR/CO/4, 2008) para 46.

¹⁰⁸ Committee on the Rights of the Child Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Kingdom of Great Britain and Northern Ireland (Third and Fourth Reports) para 47.

¹⁰⁹ S 3 of the Children and Families Act.

consideration to the child's religious persuasion, racial origin and cultural and linguistic background".¹¹⁰ While the Government assumes that this measure will help to alleviate the Committee's concern,¹¹¹ there is a risk that the law is being pulled in the opposite direction by taking inadequate account of the relevant child's background and the parliamentary Joint Committee on Human Rights expressed concern about the compatibility of the original proposal with the UNCRC.¹¹² That said, the Explanatory Notes to the Act emphasise that a local authority "will remain under a duty to have regard to the child's religious persuasion, racial origin and cultural and linguistic background, amongst other factors, where relevant",¹¹³ and that the reform is merely "intended to avoid any suggestion that the current legislation places a child's religious persuasion, racial origin and cultural and linguistic background above the factors" listed elsewhere in the 2002 Act.¹¹⁴ The 2014 Act additionally aims to increase co-operation between adoption agencies in recruiting, assessing and approving prospective adopters,¹¹⁵ and to reform adoption support services¹¹⁶ among other things.¹¹⁷ It is not clear that the current drive towards increasing the number of adoptions still further embodied by the 2014 Act is consistent with the Supreme Court's decision of the previous year in *Re B (A Child) (Care Proceedings: Appeal)*,¹¹⁸ which was clearly influenced by the perceived requirements of the UNCRC.

In *Re B*, the Supreme Court's President Lord Neuberger was anxious to point out that "adoption of a child against her parents' wishes should only be contemplated as a last resort—when all else fails"¹¹⁹ meaning that "before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support".¹²⁰ In drawing this conclusion, Lord Neuberger made specific reference to the requirements of the UNCRC, to Hodgkin and Newell's Unicef *Implementation Handbook* and to the present author's own previous research on the topic. According to Lord Neuberger, "[a]lthough the child's interests in an adoption case are 'paramount' (in the UK legislation and under article 21 of UNCRC), a court must never lose sight of the fact that

¹¹⁰ S 1(5) of the Adoption and Children Act. See J Hayes & P Hayes "Adoption in England: The End of Placements dictated by Race, Culture, Religion and Language" (2014) 44 *Fam Law* 1288-1298 for discussion.

¹¹¹ HM Government *The Fifth Periodic Report to the UN Committee on the Rights of the Child: United Kingdom* 30.

¹¹² Joint Committee on Human Rights *Legislative Scrutiny: Children and Families Bill; Energy Bill* paras 23-33.

¹¹³ Explanatory Notes to the Children and Families Act para 56.

¹¹⁴ Para 57.

¹¹⁵ S 4 of the Children and Families Act. See, generally, Department for Education *Further Action on Adoption: Finding More Loving Homes* (2013).

¹¹⁶ Ss 5-6 of the Children and Families Act.

¹¹⁷ For discussion of the Act's approach to post-adoption contact in s 9 see Sloan (2014) *CLJ* 378.

¹¹⁸ [2013] UKSC 33.

¹¹⁹ *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 [2013] 1 WLR 1911 para 104. See, generally, B Sloan "Loving but Potentially Harmful Parents in the Supreme Court" (2014) 73 *CLJ* 28-31.

¹²⁰ [2013] UKSC 33 para 105.

those interests include being brought up by her natural family, ideally her natural parents, or at least one of them”.¹²¹

An admirable legacy of the reasoning in *Re B* is an apparently more rigorous approach to the adoption process in the lower courts.¹²² This is exemplified by the subsequent Court of Appeal judgment in *Re B-S (Children) (Adoption Order: Leave to Oppose)*,¹²³ where it was emphasised that in adoption-related decisions it is “essential” that there be “proper evidence” that “must address all the options which are realistically possible and must contain an analysis of the arguments for and against each option”.¹²⁴ Equally essential, according to the Court of Appeal in the same case, is an adequately reasoned judgment that “evaluate[s] all the options, undertaking a global, holistic and ... multi-faceted evaluation of the child’s welfare which takes into account all the negatives and the positives, all the pros and cons, of each option”.¹²⁵ The Court expressed concern that the matters it considered so essential were “[t]oo often ... given scant attention or afforded little more than lip service”.¹²⁶

This *Re B*-inspired approach has led to a number of non-consensual adoption-related decisions being overturned and remitted due to insufficient justification by first-instance judges.¹²⁷ There has also been an emphasis on the fact that a parent’s ability to oppose the final adoption order should be seen as a “meaningful remedy”, where appropriate, for both parent and child,¹²⁸ and a statement that applying words such as “stringent” to that remedy is “apt to mislead, with potentially serious adverse consequences”.¹²⁹

Re B-S sits uneasily with Government policy of increasing the speed and prevalence of adoption,¹³⁰ and there will be interesting times for domestic adoption now that the relevant provisions of the Children and Families Act are largely in force.¹³¹ While it is not clear that the recent approach of the courts has resulted in adoptions being ultimately refused where they would have been granted before *Re B*, the value of rigour and detail in the adoption process should not be underestimated for the purposes of compliance with the UNCRC. The state must be able fully to justify its specific decision to interfere so drastically with the family and identity-related UNCRC rights of adopted children, including so that such children can make sense of their early lives.¹³²

¹²¹ Para 104.

¹²² See for example B Sloan “Adoption Decisions in England: *Re B (A Child) (Care Proceedings: Appeal) and Beyond*” (2016) 38 *J S W F L* (forthcoming).

¹²³ [2013] EWCA Civ 1146.

¹²⁴ Para 34 (Sir James Munby P, giving the judgment of the Court).

¹²⁵ Para 44. Cf J Masson “What’s wrong with Linear Judgments?” (2014) 44 *Fam Law* 1277 1277-1283.

¹²⁶ [2013] EWCA Civ 1146 para 46 (Sir James Munby P, giving the judgment of the Court).

¹²⁷ See for example Sloan (2016) 38 *J S W F L* (forthcoming).

¹²⁸ *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146 para 70 (Sir James Munby, giving the judgment of the Court).

¹²⁹ Para 68 (Sir James Munby, giving the judgment of the Court).

¹³⁰ Cf para 49 (Sir James Munby, giving the judgment of the Court).

¹³¹ See for example A Bainham & H Markham “Living with *Re B-S: Re S* and its Implications for Parents, Local Authorities and the Courts” (2014) 44 *Fam Law* 991 991-1002. J Doughty “Where Nothing Else will do”: Judicial Approaches to Adoption in England and Wales” (2015) 39 *Adoption & Fostering* 105 105-118 is particularly concerned about the implications of this tension for timely decision-making for children.

¹³² See for example *Re A, B and C (care and placement orders)* [2014] EWFC B71 para 45 (Judge Lynch).

The irony is that, just as the judiciary have done much to alleviate my previous concerns that their approach to adoption may not have been clearly UNCRC-compatible, the Government and Parliament have risked undermining that increased chance of compatibility. This is an important reminder that different branches of a legal system can pull in different directions as regards compliance with an international convention.

There remains the difficult issue of the conflict between the apparently limited success of fostering in securing article 6 rights for particular children and the possible benefits of using adoption in order to do so, whatever its potential drawbacks for the purposes of other Convention provisions. It is arguable that the Government should do more to improve the fostering system rather than pinning its hopes to such an extent on adoption, not least for those children for whom adoption is clearly inappropriate. As O'Halloran has suggested, "the need for a new adoption law to expedite the transfer from public care to private care ... of those children requiring a permanent home following failed parenting", such as that provided by the 2002 Act, "would not have been so pressing if a greater investment had been made in family support services".¹³³ This is arguably consistent with Sir James Munby P's adamant statement in *Re B-S* that a local authority "cannot press for a more drastic form of order, least of all ... adoption, because it is unable or unwilling to support a less interventionist form of order".¹³⁴

4 Conclusion

This article has sought to analyse recent developments in the English Law of fostering and domestic adoption against the backdrop of article 6. A conclusion might be that the threshold for original compulsory state intervention in family life is in some respects set too high in England for the purposes of article 6 as a result of judicial activity. In addition, however, the Government's fondness for adoption once that threshold is crossed could significantly contribute to article 6 protection but cause problems under other Convention provisions.

Many of the issues raised in the article, however, reflect the tensions and contradictions inherent in the Convention itself and the Committee on the Rights of the Child's interpretation of its requirements. This is perhaps inevitable, but it endorses Alston's conclusion decades ago that the UNCRC does not contain "a specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in a given situation among the different rights recognized".¹³⁵

¹³³ K O'Halloran *The Politics of Adoption: International Perspectives on Law Policy & Practice* 2 ed (2009) 106. See also Harris-Short "Holding onto the Past" in *Fifty Years* 159 on the potentially ulterior motives of successive UK Governments in transferring responsibility for children "from the State back to the private sector".

¹³⁴ [2013] EWCA Civ 1146 para 29; see also United Nations Committee on the Rights of the Child General Comment No 7 (2005): Implementing Child Rights in Early Childhood (CRC/C/GC/7/Rev.1, 2006) para 18.

¹³⁵ P Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" (1994) 8 *Int'l J L & Fam* 1 2.

SUMMARY

This article considers the English Law relating to fostering and adoption in the light of article 6 of the UNCRC. State foster care and domestic adoption are in principle means by which a child's article 6 can be secured where state intervention is necessary to protect the child. The article will nevertheless argue that recent judicial decisions relating to child protection prejudice the law's ability, as implemented by local authorities, to secure article 6 rights through foster care, but also that the UK Government's preference for adoption for those children who are taken into care (reflected in recent legislation) might cause difficulties as regards the other requirements of the UNCRC, including the right to know and be cared for by one's parents as far as possible.