Making sure the child is heard: Part II – representation

by The Honourable Mr Justice Munby

This two part article is taken from a lecture for NYAS (the National Youth Advocacy Service) given at The Law Society in February 2004.

I arrive at the issue 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 or the Prison Service, 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 – I have in mind, for example, the situation where a mother in prison is facing separation from her baby – Article 8 requires the decision-maker to permit both the parent and the child, if they wish, to appear by some suitable representative. Clear statements of principle may be lacking but the indications in the cases are, I think, clear enough (*R v Cornwall County Council ex p LH* [2000] 1 FLR 236 at 244C, *Re L* at paras [151], [154], *Re G* at para [45], *R (D) v Secretary of State* at para [29] and *Claire F v Secretary of State* at para [159]).

The second question obviously raises issues of much greater difficulty. It is one thing to say that the decision-maker – the local authority or the Prison Service – 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, and taken together they amount to more than mere straws in the wind.

In the first place there is the Strasbourg jurisprudence. As long ago as 1979 the Strasbourg Court had to consider the complaint of an Irish woman who had been unable to obtain legal aid and had therefore been compelled to represent herself in the Irish High Court in proceedings for judicial separation (*Airey v Ireland* (1979) 2 EHRR 305). Holding that there had been a breach of Article 6, which guarantees the right to a fair trial, the Court at para [26] said that Article 6:

> *"may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court … by reason of the complexity of the procedure or of the case."*

Now Article 6 is not itself relevant to the matters of administrative decision-making that I am discussing, but the case is nonetheless of some significance in the present context, because the Strasbourg Court went on to hold that there had *also* been a breach of Article 8. The Court said that the fact that Irish law entitled spouses in certain circumstances to petition for a decree of judicial separation "amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together." It continued at para [33]:

> *"Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court, she was unable to seek recognition in law of her de facto separation from her husband. She has therefore been the victim of a violation of Article 8."*

In short, in relation to a dispute relating to private or family life, Article 8 – at least in the particular circumstances of that case – imposed on the state the

obligation to provide the assistance of a lawyer. Comments by the European Commission of Human Rights in a later case (*Munro v United Kingdom* (1987) 10 EHRR 516 at p 518) suggest that this obligation may extend generally to any case that can be described as "an application … which regulates the legal relationship between two individuals and may have serious consequences for any children of the family." More recently, the Court has held (*P, C and S v United Kingdom* (2002) 35 EHRR 1075 at paras [88]–[91], [99]–[100], [137]–[138]) that there were breaches of both Article 6 and Article 8 when a parent was compelled to represent herself during care and subsequent freeing proceedings. Importantly, it may be noted, the consequence of this was that although it was only the parents' rights under Article 6 that were held to have been breached, both the parents' *and* the child's rights under Article 8 were held to have been breached.

There are also indications to be found in our domestic case-law. Referring to the predicament faced by parents when a local authority which holds a care order is proposing to remove their children, who have been placed with them in accordance with the care plan approved by the court, I ventured to make these general comments (*Re G* 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 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 Article 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 the local authority's decision-making process is properly documented and 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."*

I emphasise the last sentence. The implications are clear – and it might be thought that they extend beyond the narrow category of parental disability which I there had in mind.

CHILDREN IN MOTHER AND BABY UNITS

The most recent cases on the point relate to children in mother and baby units ("MBUs"). I have already mentioned Maurice Kay J's comment about the *mother's* rights under Article 8. But he went on to make an important observation when speaking of the interests of the *child*. He said (*R (D) v Secretary of State* at para [32]) that, if it was not obvious what the best interests of the child may be:

> *"it is incumbent upon the decision-maker to enlist assistance from appropriately expert sources, including social services. Even where it is accepted that the best interests of the child are in remaining with its mother, the sort of questions which will arise in carrying out the proportionality exercise will often be answerable only with the benefit of externally provided expertise."*

I adopted the same approach recently when quashing the Secretary of State's decision to separate Lia-Jade from her mother, Claire. Both complained that the decision-making process was flawed in such a way as to breach their rights under Article 8. I rejected the complaint insofar as it was put forward on behalf of the mother but accepted the corresponding complaint put forward by the Official Solicitor on behalf of the baby, Lia-Jade. It is perhaps worthwhile to explain why I came to that conclusion (*Claire F v Secretary of State* at paras [167]–[168]). I said that:

> *"This was a decision that turned entirely on an assessment and evaluation of Lia-Jade's best interests. … The prison very properly recognised that Lia-Jade needed an independent voice to represent her interests and, entirely appropriately, turned to [the local authority] for that purpose. Ms B was the person charged with that vital function. The importance of her role, and the significance of the views she expressed during the course of the meeting … were plainly recognised by the prison and would have been apparent to all those present at the meeting. After all … the minutes show that on no fewer than three occasions it was stated that the purpose of the meeting was to decide what was in Lia-Jade's best interests and that Ms B was present in order to represent Lia-Jade and to ensure that a decision was made in her best interests. Sadly, and fatally, that representation proved to be wholly inadequate."*

I explained why at para [169]. Essentially it was because:

> *"Ms B seems to have been woefully unprepared for the task in hand. On her own admission she first became involved with Lia-Jade on the very day of the meeting. There is nothing to suggest that she had seen any relevant papers prior to arriving at [the prison]. Her knowledge of the case – her knowledge of Lia-Jade – was confined to what she was able to glean immediately before and during the course of the meeting … [I]t was … incumbent on Ms B to familiarise herself with the detail of the case and to study the relevant papers before she arrived at the meeting. For whatever reason that never*

happened. … In consequence Ms B was severely crippled, – in truth almost wholly disabled – in performing her appointed task."

I added at para [172] that the Secretary of State was fixed with this procedural inadequacy. As I said:

"It is nothing to the point that the Prison Service did its best to get social services there. It is no answer for the Prison Service to say that it has no control over [the local authority], or that any error in the procedure that derives from the local authority is not its fault. Its failure was not to adjourn the meeting when the representation was demonstrably so inadequate. At the end of the day the issue is the integrity of the decision-making process, not the blame."

In other words, if his decision to separate mother and baby was to be Article 8 compliant, the Secretary of State's obligation was to ensure that the baby was properly represented and that the baby's representation was adequate to the gravity of the matter in hand.

What I have been considering here is the question of fairness in the context of administrative rather than judicial decision-making about children. This, of course, is why the focus of my analysis has been on Article 8 and not on Article 6 of the Convention. What is appropriate in the context of a judicial hearing – what is mandated by Article 6 – may not be necessary in the context of administrative decision-making: it will not necessarily be mandated by Article 8. But administrative decision-makers should be under no illusions. Article 8 imposes procedural safeguards which impose on administrative decision-makers whose decisions impinge on private or family life burdens significantly greater than I suspect many of them really appreciate. And the burden may extend in some instances to an obligation not merely to *permit* representation but even to *ensure* that parents – and particularly children – are properly represented when decisions fundamental to the children's welfare are being taken.

Finally, in this context, I draw particular attention to what I venture to think is an important observation by Maurice Kay J (*R (D) v Secretary of State* at para [32]). It relates to Prison Service decision-making in the context of proposed separation of a mother and her baby in a MBU, but its implications, as it seems to me, go much wider than that:

"It has to be appreciated that the Prison Service is not a family proceedings court but nor must it be forgotten that, in a case such as this, it is required to make a decision of equal importance implicating the welfare of a child."

In other words, 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 child's rights under Article 8. He must make sure that the child's interests are appropriately represented. He must ensure that the child's voice is heard.

So much for the theory. What of the reality?

REPRESENTATION AND ADMINISTRATIVE DECISION-MAKING

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 almost complete lack of such support and representation which is available when the decision-making is administrative rather than judicial. Whilst this may reflect the fact that Article 6 does not apply to administrative decision-making, it does not necessarily take appropriate account of the fact that the corresponding procedural guarantees to be found in Article 8 apply as much to administrative as to judicial decision-making. 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. It was the parents' application for contact which in the *Lambeth* case in 2000 (*Re F, F v Lambeth Borough Council* [2002] 1 FLR 217) revealed the local authority's scandalous and shaming dereliction of duty in relation to two boys who had been "lost in care" for the best part of nine years. Sometimes parental concerns about what is happening – or not – prompts applications for the discharge of the care order. And the High Court receives a steady trickle of cases where a child is forced to see judicial assistance in obtaining contact with a sibling, one or other or both of the children being in care, and where the fact that contact is not taking place appears on closer investigation to be merely an example of more pervasive deficiencies in local authority planning for the child or children in care. Thus, a short time ago, I had a sibling contact case which incidentally revealed the local authority's practice of sometimes holding "virtual" reviews, that is, a review that is a purely paper exercise, where there is no meeting and no consultation documents are prepared.

Indeed, it was in major part this judicial perception of unease that led the Court of Appeal to commend the system of "starred milestones" in care plans which, most unfortunately as many would think, was then overturned by the House of Lords (*In re S (Minors) (Care Order:*

Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan) [2002] UKHL 10, [2002] 2 AC 291, reversing *Re W and B, Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582).

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, it might be thought, Article 8 entitles them to have. Nor is there room for complacency about the children who find themselves in prison. The facts revealed both in the *Howard League* case and in Moses J's case, as in many searing reports of inspections of YOIs by Her Majesty's Chief Inspectors of Prisons, past and present, are disturbing and should concern us all.

In relation to children in care the problems are particularly intractable. The problem, as the House of Lords has pointed out (*In re S (Minors)* at paras [63], [82]), 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 young 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. As Lord Nicholls of Birkenhead put it: "The law may provide a panoply of remedies. But this avails nothing if the problem remains hidden." Lord Mackay of Clashfern added bleakly at para [113]:

> *"As a practical matter I do not see how a child who has no person to raise the matter on his behalf can be protected from violation of his or her human rights or the rights conferred on him or her by our domestic law, other than by reliance on an effective means by which others bring the violation to notice."*

I should like to think that there is more the judges could be doing to alleviate the problem identified by the House of Lords. But our room for manoeuvre as care judges is limited. One thing we can do, and perhaps more rigorously now than sometimes in the past, is to insist that the care plans we are invited to approve set out in appropriate detail just what the local authority's plan for the child really is. Too often one is presented with care plans that are as long on rhetorical platitudes as they are short on specific detail. We all know that Johnny needs a safe and secure environment where his emotional, psychological and educational needs are met. What we need to be told, and too often are not, is, for example, that Johnny has certain identified mental health needs, that they are going to be addressed by Dr X, that the local authority has arranged that Dr X will be starting a six-month course of therapy starting on some specified date, and that the funding for this therapy is in place, having been authorised by the appropriate officer with decision-making powers. A care plan which contains clear and specific detail of this sort minimises the risk of the child drifting in care, for it sets out a clear programme whose performance can be monitored and checked.

But the fact is that most of the problems arise in the context of administrative decision-making, an arena over which, by definition, the courts have no control, unless, that is, someone brings an action either for judicial review or under the Human Rights Act.

How do we tackle the practical problems that arise in the context of administrative decision-making, whether by a local authority, the Prison Service or any other public authority?

It is in fact in the prison context that one can see the beginnings of at least a partial solution. In the first place, the Prison Service is subject to centralised planning and control. This means that it is much easier for the Prison Service than it is for local authorities generally to plan, implement and enforce policies and procedures which are appropriately child-centred and, critically, which recognise and give effect to the Article 8 rights of the children for whom the Secretary of State is responsible, whether in YOIs or MBUs. These policies and procedures are set out in very detailed Prison Service Orders which, with only minor exceptions, have rightly received judicial endorsement and praise and which, importantly, are fully Convention compliant. That these policies are of a quality which, if I may say so, deserves recognition and praise, is in large measure due to the care which has gone into their formulation, in particular the care that has been taken by the Prison Service to enlist multi-disciplinary advice from many outside experts. Local authorities could do worse than to adopt similar approaches. The contrast between the two is striking. Prison Service policies and procedures recognise at every turn the imperative need to comply with the requirements of the Convention. Too often still – and it is now more than three 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 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.

Another advantage that the Prison Service appears to have is in the impact of the work of its Inspectorate. I appreciate that the role of any Inspectorate is limited but one feature of the *Lambeth* case was the rather limited impact that the Social Services Inspectorate seems to have had in bringing about improvements in a situation that was as long-standing as it was concerning. That there were serious problems at Lambeth, and that these problems had been identified by the Inspectorate, was borne out by the fact that it was one of eight local authorities which in

October 2000 was given assistance in the form of the Adoption and Performance Task Force set up under the chairmanship of the Chief Inspector of the Social Services Inspectorate. But this could have been of little comfort to the boys who had been lost in care, as I have said, for the best part of nine years, or to the 274 other children in Lambeth who in 1999 had been "looked after" for at least four years, and of whom more than 100 were still awaiting permanent placements, or to the 70 children, the responsibility of just one team alone, who had no allocated social worker, even though many of them were child protection cases requiring priority. This is a very large topic but should there not be, as part of a system of inspection by the Inspectorate or of regulation or monitoring by a Children's Commissioner, some form of audit to enable such cases to be identified, coupled with effective administrative machinery, external to the local authority, designed to ensure that such cases, once identified, are promptly taken in hand.

NEED FOR GREATER INTER-AGENCY CO-OPERATION

If there is one fundamental lesson that emerges from the *Howard League* case and the case about Claire F and her baby it is that if the interests of children and babies in YOIs and MBUs are to be properly protected, and if their interests are to be properly represented, there is a pressing need for much greater inter-agency co-operation, in particular much greater involvement by the relevant local authorities. I make no apology for repeating what I said very recently (*Claire F v Secretary of State* at paras [174]–[177]):

> *"the local authority within whose area a prison is located has a responsibility for all the children within the walls of the prison … those children who are themselves serving sentences, usually in [YOIs] … and those children … who are in prison MBUs because their mothers are serving sentences. The local authority with primary responsibility for such children is the authority local to the prison …"*

Referring to the evidence I had read both in that case and earlier in the *Howard League* case I recorded my uncomfortable impression that the system is not working as well as it might and that, in consequence, there are children both in YOIs and also in MBUs who are not receiving the support from the local authority to which it might be thought they are entitled. I continued:

> *"I am aware that active steps are being taken to remedy the institutional and organisational difficulties that were highlighted by the Howard League case. That endeavour is to be applauded. In this, as in so many other areas involving children, the key to their welfare is to be found in effective inter-agency and cross-disciplinary co-operation and co-ordination. The Prison Service and the relevant local authorities must 'work together' to secure the welfare of the children for whom the Secretary of State is responsible – whether they are in YOIs or in MBUs."*

I made clear my belief that, if there are deficiencies in inter-agency working between the Prison Service and local authorities, the responsibility for that is not, by and large, to be laid at the door of the Prison Service, adding:

> *"Both the policies which regulate YOIs and the policies which regulate MBUs acknowledge the important role of the local authority. I have the impression – I hope it is wrong, but I fear it is not – that too often this is not reciprocated by the local authorities. … But the position is now clear. Appreciating the undue burden that falls on the comparatively small number of local authorities involved – there are, after all, only 18 YOIs and four MBUs – I do nonetheless hope that in future all the good work being done by the Prison Service will be reciprocated by the 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 the Family Rights Group and, not least, by NYAS. I know, because I have had children pursuing cases in front of me, enabled to do so only because of the help and support they have had from the NSPCC and from NYAS. I am not, of course, the first judge publicly to recognise the contribution that NYAS can make: the President, Hale LJ and Wall J have all delivered reported judgments on the point (*Re A (Contact: Separate Representation)* [2001] 1 FLR 715 at paras [21], [32], *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636 at para [18], and *A v A* [2004] EWHC 142 (Fam) at paras [24], [131]–[133]). The President and Hale LJ, it may be noted, recognised, as Hale LJ put it (at para [31]), that "children … need a voice" or, as the President put it (at para [22]), that "children should be seen and heard in child cases and [are] not always sufficiently seen and heard by the use of a court welfare officer's report".

What can NYAS and similar organisations do? Fundamentally, perhaps, their purpose is to empower those who are otherwise disempowered, specifically, to inform children and parents 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 or 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 children or parents who are the focus of your activities: public authorities also need to be educated.

How are you to do all this? Websites are invaluable means of educating and of providing information and generic advice. And given the ready access to the internet that so many children enjoy, and the remarkable facility that even quite young children have for logging onto and surfing the internet, there is real scope here for getting the message over in a way that would have been unimaginable even a few years ago. Confidential telephone advice- and help-lines are essential as means of providing advice and support. And what about e-mails? 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 are in fact, and 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'.

And what are the areas in which you ought to be operating? The need is almost unlimited, so many are the public authorities and so many are the contexts in which administrative decision-making can affect the lives of our children and our parents. One obvious area where the needs are particularly pressing is local authority decision-making in child protection and child care cases. Another important area is in relation to children in prisons, particularly children in YOIs but also perhaps mothers and their children in MBUs. Another area of concern is where children themselves have health, mental health or educational problems, or have parents who have housing or mental health problems. As every care judge very quickly discovers, many of the families who pass through the care system are afflicted by a variety of problems and difficulties extending far beyond those which alone concern social services. Often their problems involve other public authorities or other departments within the local authority, and all too often there is a striking lack of co-ordination in planning for the overall needs of the family. NYAS and similar organisations have a crucial role to play here if the voice of the child is to be heard.

The task is huge. The challenge is great. I am delighted to hear of the work that NYAS is doing with children in YOIs. It is heartening to hear that, after lobbying by NYAS and others, a decision has been taken to introduce advocacy services for children in YOIs. This 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 of our children.

Let me finish with a rather different aspect of listening to the child, and one that too often, I fear, we forget. There are children who are old enough to have minds of their own and who want to talk – sometimes to talk publicly – about their experiences of the care system or of other parts of the family justice system (see *Re W (Wardship: Discharge: Publicity)* [1995] 2 FLR 466 at p 474, *Kelly v British Broadcasting Corpn* [2001] Fam 59 at p 79 and *Re Angela Roddy* at paras [48]–[60]). This is not the occasion for any extended discussion of a topic which is as important as it is topical, but my own very clear view is that the workings of the family court system and, perhaps most importantly of all, the views about the system of the children caught up in it, are matters of public interest which can and should be discussed publicly (*Re Angela Roddy* at para [83]; see further *Kelly v British Broadcasting Corp* pp 77, 87, and *Harris v Harris, Attorney-General v Harris* [2001] 2 FLR 895 at para [363]). Many of the issues litigated in the family justice system require open and public debate in the media. And what more important voice can there be in such a debate than that of a teenager who has gone through all that so many children caught up in the care system have experienced? There is, I believe, an important public interest in us making sure that the voices of such children are heard. But there is also a very important private interest founded in the Article 8 rights of the child (*Re Angela Roddy* at para [35], applying *Botta v Italy* and *Gaskin v United Kingdom* (1990) 12 EHRR 36):

> *"For, as the Strasbourg jurisprudence recognises, the ability to lead one's own personal life as one chooses, the ability to develop one's personality, indeed one's very psychological and moral integrity, are dependent upon being able to interact and develop relationships with other human beings and with the world at large. And central to one's psychological and moral integrity, to one's feelings of self-worth, is the knowledge of one's childhood, development and history. So amongst the rights protected by Article 8, as it seems to me, is the right, as a human being, to share with others – and, if one so chooses, with the world at large – one's own story, the story of one's childhood, development and history."*

So I end where, in a sense, I began: with Article 8. It is fundamental to everything we do as professionals concerned with children and their families. It is something we all need to take very seriously, more seriously, perhaps, than sometimes we do. Unless we do, the voice of the child will not be heard.

The Honourable Mr Justice Munby