

Legal fundamentals

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Key points

- The law of England and Wales comes from a number of sources, including statutes, secondary legislation, case-law and statutory guidance.
- In addition, human rights law – as laid down in the European Convention on Human Rights and other international conventions – plays an increasingly important role in court decisions relating to children ‘in need’.
- Where a local authority is subject to a ‘specific duty’ in law, a breach of that duty will be challengeable by an individual in the courts.
- However, if the law imposes a ‘general duty’, this is owed to a group as a whole and not to any particular individual and a breach of the duty cannot therefore be challenged in the courts unless there is other unlawfulness.
- Local authorities’ functions are also governed by the ‘powers’ with which they are provided in legislation; these powers may not be exceeded and must be exercised in a reasonable and fair way.
- Following reforms contained in the Children Act 2004, structures exist at local authority level to ensure that all public bodies concerned with children operate in a way which is co-operative and safeguards children.
- Challenges to local authority decisions in relation to children ‘in need’ can be undertaken by various means, including the statutory complaints procedure; a complaint to the local government ombudsman; or judicial review.
- The choice of which route of redress to use will depend on the facts of each case; for a judicial review challenge, assistance from a specialist solicitor is highly advisable, for which legal aid may be available.

Introduction

2.1 As this book demonstrates, the law relating to children ‘in need’¹ is contained in a wide range of domestic and international sources. Before these sources of law are addressed in their specific context

1 For more on the legal meaning of this phrase, see chapter 4 at paras 4.10–4.13.

later in the book, this chapter will introduce the general context within which they operate. It will provide an overview of the structure of English law, with particular consideration of the way in which the law imposes binding duties, and confers powers, on local authorities in relation to children ‘in need’. The institutional structures by which services to children are organised will also be examined. Finally, there will be discussion of procedures for challenging decisions made in relation to children ‘in need’, including by way of complaints and through applications for ‘judicial review’ in the High Court.

Sources of law

- 2.2 The law in relation to children ‘in need’ and their families derives from several sources, which may carry different degrees of weight when considered by the courts, depending on their origin. While, therefore, courts are required strictly to apply the terms of an Act of parliament, a less authoritative source of law, such as ‘statutory guidance’, will be treated more flexibly. In addition, instruments of international law, such as the United Nations Convention on the Rights of the Child (UNCRC), may in certain circumstances be relied on by individuals in domestic courts. This section will identify the key legal sources and how the courts apply the rules they contain. For the sake of clarity, it will start with legislation and statutory guidance, before proceeding to case-law and finishing with human rights and EU law.

Legislation and guidance

- 2.3 Legislation, or ‘statute law’, can be divided into two types: ‘primary legislation’, which refers predominantly to the law passed by parliament in the form of Acts (other forms of primary legislation, such as Orders in Council, are not relevant to the subject-matter of this book); and ‘secondary’ or ‘delegated legislation’, which is law made by a public body (such as a government minister) under powers given to him or her in an Act of parliament. Linked to both of these are the various forms of guidance which contain explanations as to how legislation should be interpreted and public duties performed. These sources of law will be examined in turn below.
- 2.4 Primary legislation, such as the Children Acts of 1989 and 2004, has historically been regarded as the highest form of law in England and Wales. While recent developments in EU law and human rights

law have modified this view,² it is generally the case that courts are required to apply the terms of an Act of parliament ahead of any other source of law and that, outside certain very limited exceptions, no challenge can be made to an Act in the courts. Consideration of the rights of any individual child should therefore start with the relevant parts of any applicable Act.

2.5 Secondary legislation is often used as a convenient mechanism for fleshing out the rules in an area already covered in a more general way by an Act. This allows a decision-maker to set detailed standards and procedures in a given area without the need for full parliamentary scrutiny. However, a public body may only legislate in this way under powers conferred on it by an Act. Therefore, while secondary legislation must in most cases be strictly applied by the courts in the same way as an Act, it is possible to challenge the validity of a piece of secondary legislation by arguing that, for instance, a minister in making the legislation has exceeded the powers given to him or her in the relevant Act (or, to use the technical term, has acted ‘ultra vires’) or has acted in a procedurally unfair way.³

2.6 There are many types of secondary legislation or ‘statutory instruments’, with the most relevant for present purposes being ‘regulations’ and ‘rules’. The former are often the means by which substantive requirements contained in an Act are given a fuller content. Therefore, while the Children (Leaving Care) Act (CLCA) 2000 sets out in broad terms the duties owed towards young people who have previously been looked after by a local authority, the Care Leavers (England) Regulations (CLE Regs) 2010⁴ contain greater detail as to who is eligible for support under the Act, and how their needs should be met.⁵ A different type of secondary legislation known as ‘rules’ often stipulate the procedures which should be followed by a specific decision-maker or tribunal, such as the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008⁶ which govern the procedure of the tribunal with responsibility for determining cases involving the education of children with special educational needs.

2 See below, paras 2.12–2.29.

3 See, for instance, *R (British Waterways Board) v First Secretary of State* [2006] EWHC 1019.

4 Separate regulations for Wales, entitled the Children (Leaving Care) (Wales) Regulations 2001 SI No 2189 (W151), have been made.

5 For more on the contents of the CLCA 2000 and the CLE Regs 2010, see chapter 7.

6 SI No 2699.

2.7 ‘Guidance’ is not legislation and is not strictly speaking binding, although it can impose obligations on local authorities if it is ‘statutory guidance’ issued under an Act which specifies that the guidance must be followed or taken account of (see para 2.8 below). Guidance is usually contained in documents published by central government departments (and now almost always accessible online), which expands upon statutory duties in order to regulate the functions of other public bodies, such as local authorities. The key division in this context is between ‘statutory guidance’ and ‘non-statutory guidance’.

2.8 As the name suggests, statutory guidance is made under powers conferred by statute, such as section 7 of the Local Authority Social Services Act (LASSA) 1970 or section 11(4) of the Children Act (CA) 2004. The first of these two provisions requires local authorities, in the social services context, to act ‘under the general guidance of the Secretary of State’, while the latter obliges a range of public bodies with responsibilities relating to children to ‘have regard to any guidance given to them for the purpose by the Secretary of State’. The courts have interpreted the LASSA 1970 s7 duty to mean that local authorities may deviate from the terms of statutory guidance only ‘where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course’.⁷ As a result, and as the later chapters of this book demonstrate, the courts will regularly require local authorities to comply with obligations imposed by the key statutory guidance relating to children ‘in need’. These include:

- *Working together to safeguard children* (March 2013) (Working Together 2013), which contains requirements imposed on various English public bodies concerning the safeguarding and promotion of the welfare of children, including in relation to the assessment of the children’s needs;⁸
- *Statutory guidance on the roles and responsibilities of the director of children’s services and the lead member for children’s services* (April 2013); and
- *Safeguarding children and safer recruitment in education* (January 2007), which sets out the responsibilities of local authorities, schools and further education colleges in England to safeguard and promote the welfare of children and young people.

7 *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR at 119 per Sedley J.

8 See paras 2.42–2.47. For the position in Wales, see para 2.42 below.

- 2.9 By contrast, non-statutory guidance is not underpinned by any duty found in legislation. It often consists of best practice approaches to the provision of services which may be read alongside relevant statutory guidance and can assist professionals and practitioners to put the statutory guidance into effect. This is the case (in England, but not in Wales)⁹ with the *Framework for the assessment of children in need and their families* practice guidance (June 2000) and the *Safeguarding disabled children* practice guidance (July 2009), which supplement the *Working together to safeguard children* statutory guidance through the specification of further detailed procedures and standards. However, while the guidance in documents of this sort may be important in informing the court's view of the reasonableness, fairness or 'proportionality'¹⁰ of the conduct of a local authority (and therefore the lawfulness of its actions), it does not, of itself, give rise to binding obligations. In general it will be far harder for a child or a child's parents to win a case by relying on a breach in the practice guidance than it will be to win by relying on a contravention of statutory guidance.

Case-law

- 2.10 Given the diversity of legal sources and the complexity which arises in applying legislation to individual cases, the interpretative role of the courts has always been central to the operation of the law in England and Wales. It is through examining the plain meaning of a legislative provision, but also the purpose of a given statute and the legislative context in which it appears, that courts seek to apply legislation to individual cases. In addition, courts are bound by the principle of '*stare decisis*', which requires them to follow the statements of law, or 'precedents', produced by superior courts. Thus, previous cases in which a relevant statutory provision or factual scenario was considered will be of key importance in resolving any legal dispute. Although the courts do not 'make' the law, the common law tradition means that certain requirements, for instance in consulting on the formulation of public policy,¹¹ stem from court judgments rather than Acts of parliament or other legislation.
- 2.11 'Judicial review' is an important legal mechanism by which cases challenging the acts or omissions of public bodies will come to

9 See para 2.42 below.

10 See para 2.15.

11 See, for example, *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

court.¹² This procedure embodies the core ‘rule of law’ principle that everyone (including local and central government) is equal under the law, and that courts will therefore hold bodies such as local authorities to their legal obligations just as they would any individual.¹³ Applications for judicial review are heard in the first instance in the Administrative Court, part of the Queen’s Bench Division within the High Court, where cases will generally be heard by a single judge or occasionally two judges sitting as a ‘Divisional Court’. Appeals from the High Court go to the Court of Appeal, with onward appeals in cases of significant public importance to the Supreme Court. Cases involving human rights issues may be taken to the European Court of Human Rights (ECtHR) in Strasbourg once domestic remedies have been exhausted – in other words, once an individual has lost in the UK courts and exhausted all rights of appeal.

Human rights law

The European Convention on Human Rights and the Human Rights Act 1998

- 2.12 Where human rights law is referred to in the UK context, this is likely to be a reference to the law contained in the European Convention on Human Rights (ECHR), which is given effect in domestic law by the Human Rights Act (HRA) 1998. The ECHR, an international treaty to which the UK has been a party since 1951, contains a number of fundamental rights which the contracting states have agreed to respect, subject to certain well-defined exceptions (see paras 2.13 and 2.20 below).
- 2.13 Prior to 2000, UK citizens could only rely directly on ECHR rights before the ECtHR in Strasbourg. This entailed a time-consuming and expensive process which was poorly understood by many lawyers in the UK, never mind individuals who may have had their rights violated. The intention and effect of the HRA 1998 was to ‘domesticate’ these rights by making them enforceable in UK courts. Of particular importance are sections 3, 4 and 6 of HRA 1998. The first of these (section 3) requires domestic courts to interpret domestic legislation compatibly with Convention rights insofar as it is possible to do so. The second (section 4) obliges courts to declare legislation to be

12 See paras 2.65–2.67.

13 For a highly accessible and informative discussion of the concept of the ‘rule of law’ from one of the greatest recent judges and jurists, see T Bingham, *The rule of law*, Allen Lane, 2010.

incompatible with the ECHR where a Convention-compliant reading is not possible.¹⁴ The third (section 6) prohibits public authorities (including local authorities and almost all other bodies with responsibility for children ‘in need’) from acting in a way that is inconsistent with a Convention right. While the constitutional changes brought about by sections 3 and 4 of HRA 1998 have been hugely significant, section 6 generally has more practical application in cases challenging the acts of public bodies since it requires compliance with Convention rights in the day-to-day provision of services and support to children ‘in need’.

2.14 Of the rights contained in the ECHR, articles 3 (the prohibition of torture and inhuman or degrading treatment or punishment), 8 (the right to respect for private and family life) and 14 (the prohibition of discrimination) may be particularly relevant in cases relating to children ‘in need’, with the rights protected under ECHR article 8 having the greatest potential to improve the services and support made available to children and families.

2.15 Article 8 prohibits interference with ‘the right to respect for private and family life’ except in the pursuit of one of a series of specified aims.¹⁵ Further, even where the ‘interference’ relates to one of these aims, it will still breach ECHR article 8 unless it is ‘in accordance with the law’ and ‘proportionate’. It is the second of these requirements that is frequently relied upon in individual cases since a decision that is ‘not in accordance with the law’ for article 8 purposes is likely to be otherwise unlawful under domestic law and thus amenable to challenge as such. Proportionality demands that an interference must bear a ‘reasonable relationship’ to the objective pursued and that the means used to achieve the objective must be no more restrictive of

14 Following such a ‘declaration of incompatibility’ parliament is likely to amend the offending piece of legislation to bring it in line with the ECHR, potentially under the special procedure established by HRA 1998 s10. See *R (Royal College of Nursing) v Secretary of State for the Home Department and another* [2010] EWHC 2761 (Admin) for an example of a declaration of incompatibility, made in relation to the ‘auto barring’ provisions of the Safeguarding Vulnerable Groups Act 2006 which, to the extent that they required workers to be barred from working with children and vulnerable adults without being given the chance to make representations, were incompatible with ECHR articles 6 (right to a fair hearing) and 8 (right to respect for a private and family life).

15 The specified aims being ‘national security’, ‘public safety’, ‘the economic well-being of the country’, ‘the prevention of disorder or crime’, ‘the protection of health or morals’ or ‘the protection of the rights and freedoms of others’.

the right to family and private life than is necessary.¹⁶ It is a concept which therefore entails a particularly high degree of scrutiny by a court of the way in which the state, including local authorities, interacts with individuals.¹⁷ The ultimate question on a proportionality review is whether a fair balance has been struck between the rights of the individual and wider public interest.

2.16 The ‘right to respect for private and family life’ has been interpreted broadly by the Strasbourg and domestic courts. ‘Private life’ encompasses ‘personal autonomy’ and includes a person’s ‘physical and psychological integrity’, aspects of his or her ‘physical and social identity’, his or her ‘personal development’, and his or her ‘right to establish and develop relationships with other human beings and the outside world’.¹⁸ The prohibition on unjustified interference with this right under article 8 does not only impose negative obligations by forbidding the state from taking active steps which run counter to a person’s private and family life. In certain cases, article 8 also requires positive action by the state to safeguard a person’s rights,¹⁹ particularly where there is a ‘direct and immediate link between the measures sought by an applicant and the latter’s private and/or family life’.²⁰ Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner that enables family life to continue.²¹

2.17 The courts have found breaches of the ‘negative’ obligations under ECHR article 8 where, for instance:

- children of blind parents were placed in care in circumstances where no actual harm to the children had been recorded and decisions were based on the evidence of occasional visits by the authorities, uncorroborated by independent evidence and without consideration of other, less drastic, means of improving the children’s welfare;²² and

16 See *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675 and *Huang v Secretary of State for the Home Department* [2007] UKHL 11 per Lord Bingham at para 19.

17 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 21, [2001] 2 AC 532 per Lords Bingham, Steyn and Cooke.

18 *Pretty v UK* (2002) 35 EHRR 1 at para 61.

19 *Kroon v The Netherlands* (1994) 19 EHRR 263 at para 31.

20 *Botta v Italy* (1998) 26 EHRR 241, (1999) 2 CCLR 121 at para 34.

21 *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] 1 QB 1124, (2003) 6 CCLR 415.

22 *Savinj v Ukraine* (2010) 51 EHRR 33.

- a Jamaican national was detained under immigration powers, resulting in her separation from her young children without regard having been had to the best interests of those children.²³

2.18 Similarly, findings of violations of the ‘positive’ obligation under article 8 have been made where:

- prosecuting authorities refused to bring proceedings against an individual accused of raping a mentally disabled girl, in part because the girl was legally incapable of making the criminal complaint and no one was permitted to make it on her behalf;²⁴ and
- a local authority failed to adapt the housing occupied by a physically disabled woman making it impossible for her to access the toilet, to leave the house or go upstairs without her husband’s assistance, which severely impacted upon her family life with her husband and children.²⁵

2.19 ECHR article 8 also imposes important procedural obligations on the state which may supplement common law safeguards of procedural fairness. In the landmark case of *W v UK*²⁶ the ECtHR held that the pre-CA 1989 child protection scheme breached parents’ article 8 rights by failing to ensure a fair procedure for taking children into public care. In the context of the CA 1989 regime, Munby J (as he then was) held in *Re X: Barnet LBC v Y and X*²⁷ that local authorities must carefully consider all information relevant to the assessment decision to ensure adequate regard is had to the family’s Convention rights, including adequate participation in the process. A court must examine whether the decision-making process leading to any interference with the right to respect for private and family life was fair and afforded due respect to the individual’s interests which are safeguarded under article 8. Similar statements of this principle in different but comparable contexts are found in *Connors v UK*,²⁸ *R (H) v A City Council*²⁹ and *R (B) v Chief Constable of Derbyshire*.³⁰

23 *R (MXL) v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin).

24 *X and Y v Netherlands* (1986) 8 EHRR 235.

25 *R (Bernard) v Enfield LBC* [2002] EWHC 2282, (2002) 5 CCLR 577. See also *R (Hughes) v Liverpool City Council* [2005] EWHC (Admin), (2005) 8 CCLR 243.

26 (1987) 10 EHRR 29 at [63].

27 [2006] 2 FLR 998.

28 (2005) 40 EHRR 9.

29 [2011] EWCA Civ 403.

30 [2011] EWHC 2362 (Admin).

EU law, the EU Charter and the Lisbon Treaty

2.20 By virtue of the HRA 1998, most of the rights contained in the ECHR are now part of UK law.³¹ As a result of the European Communities Act (ECA) 1972, European Union (EU) law also has effect in UK law, in an even more direct manner. In fact, in contrast to HRA 1998, ECA 1972 has been interpreted as requiring courts to ‘disapply’ a piece of primary legislation which is inconsistent with directly effective rights provided for in EU law.³² So far, EU law has not proven to be significant to the protection of children ‘in need’ in domestic courts. However, given the entry into force in 2009 of the Lisbon Treaty, which gives the Charter of Fundamental Rights of the European Union (‘the EU Charter’) equal status to the EU treaties,³³ it may be that the Charter rights will provide additional grounds on which the rights of children in need can be safeguarded. The EU Charter will only apply where a domestic authority is implementing, or acting within the scope of, EU law and so will only assist in cases with the necessary EU connection.

2.21 Of the rights contained in the EU Charter, article 24 on ‘the rights of the child’ and article 26 on the ‘integration of persons with disabilities’ may be the most relevant.³⁴

2.22 The former (article 24) states:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

31 One exception is ECHR article 13, the ‘right to a remedy’, which is excluded from the HRA 1998. This is one reason why cases involving breaches of ECHR rights by the UK may still be heard by the ECtHR.

32 See *R v Secretary of State for Transport ex p Factortame* [1991] 1 AC 603, [1990] 3 WLR 818.

33 There is a UK protocol to the charter, widely described in the media as an ‘opt out’, but the Court of Justice of the European Union made clear in C-411/10 NS and others that the protocol does not exempt the UK from complying with the charter in matters falling within the scope of EU law.

34 Article 7, which is intended to reflect ECHR article 8, will also be relevant, as will the right to dignity under article 1.

2.23 The latter (article 26) provides:³⁵

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

The UNCRC and the Disability Convention

2.24 The position is somewhat different again as regards the international agreements concerning the rights of children to which the UK is party but which have not been given effect in domestic law. The key instruments in this context are the UNCRC, ratified by the UK in 1991,³⁶ and, in relation to disabled children, the UN Convention on the Rights of Persons with Disabilities ('the Disability Convention'), ratified in 2009. Since these treaties are not incorporated by domestic legislation, they cannot be directly applied by English courts. However, while the UNCRC is an international law instrument, it is relevant to the domestic courts as it is taken into account by the ECtHR when assessing the parameters of and applying ECHR article 8, and it thus, by virtue of section 2(1) of the HRA 1998, has a place in the interpretation of Convention rights by the courts in this jurisdiction.³⁷ The courts have also on a number of occasions confirmed the centrality of the UNCRC to interpretative questions of domestic law concerning children.³⁸ Furthermore, in appropriate cases courts will be strongly influenced by the rights both of these treaties contain, regardless of ECHR article 8. This is because it has been a long-standing principle of the common law that legislation is, in the absence of express words to the contrary, presumed to be in accordance with international law.³⁹ In a case concerning the UNCRC itself

35 Note, however, that article 26 embodies a 'principle' rather than a 'right' under the charter and therefore may be relied upon only when an EU legislative or executive act is being interpreted or applied.

36 And indeed by every other member nation of the UN except Somalia and the USA. A UK reservation in relation to immigration control was removed in 2008.

37 See eg *R (P) v Secretary of State for the Home Department*; *R (Q) v Secretary of State for the Home Department* [2001] EWHC 357 (Admin), [2001] 2 FLR 383 at para 33, *R (SR) v Nottingham Magistrates' Court* [2001] EWHC 802 (Admin) at paras 65–67.

38 See eg *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 at para 81; *R (SR) v Nottingham Magistrates' Court* [2001] EWHC 802 (Admin) at paras 65–67.

39 See, for example, *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588.

and its application to two regulations dealing with child support, Baroness Hale stated:⁴⁰

Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child.

Therefore, while the rights detailed below in the unincorporated UNCRC and Disability Convention are not self-standing, they can be called upon to inform the domestic courts' interpretations of legislation and the ECHR⁴¹ (or, in the case of the Disability Convention, give rise to a separate route of redress through the UN Committee on the Rights of Persons with Disabilities).⁴²

2.25 Among the key provisions contained in the UNCRC for present purposes are:

- article 2, which prohibits discrimination in the securing of rights for children;
- article 3, which requires states to ensure that the best interests of the child are a 'primary consideration' in all actions concerning children;
- article 4, which obliges states to take all measures 'to the maximum extent of their available resources' for the implementation of children's economic, social and cultural rights;
- article 9, which prohibits separation of child and parents against their will, except where it is necessary in the child's best interests;

40 *Smith v Smith* [2006] UKHL 35, [2006] 1 WLR 2024. In *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484, Munby J (as he then was) stated in relation to the UNCRC and the EU Charter that they can 'properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention'.

41 See, for instance, *Maslov v Austria* [2009] INLR 47 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

42 See paras 2.28–2.29.

- article 12, which gives children the right to express their views in matters concerning them;⁴³
- article 23, which recognises a range of rights envisaged by mentally or physically disabled children (see para 2.26); and
- articles 28 and 29, which recognise the right to education ‘on the basis of equal opportunity’ and with a view to ‘[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential’.

2.26 Returning to article 23, a number of key principles are set out in relation to disabled children, who are recognised as belonging to a particularly vulnerable group. Recognition is given to the right of disabled children to ‘a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community’. Further, states are required to ‘encourage and ensure’ the provision of assistance (free whenever possible, subject to carers’ finances) to the child and the child’s carers, ‘subject to available resources’. This is with a view to ensuring that the child receives ‘education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development’.

2.27 When a court determines any question with respect to the ‘upbringing’ of a child, the child’s welfare ‘shall be the court’s paramount consideration’.⁴⁴ By contrast, until the passage of CA 2004 (see paras 2.36 and 2.42) local authorities were under no common-law or statutory duty to promote children’s welfare generally. There is no general statutory principle in the CA 1989 applicable to local authorities similar to that in CA 1989 s1(1)(a) which binds the courts.⁴⁵ However, the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department*⁴⁶ has recognised that the right to respect for private and

43 The ‘right to participation’ under UNCRC article 12 is of particular importance and underpins the duties on public bodies under domestic legislation to engage meaningfully with children ‘in need’ when decisions are taken about their lives; see, for example, CA 1989 s17(4A) and para 2.27 below.

44 CA 1989 s1(1)(a). The welfare ‘paramountcy principle’ does not govern the application of CA 1989 Part III; see *Re M (Secure Accommodation Order)* [1995] 3 All ER 407, [1995] Fam 108.

45 *R (Howard League for Penal Reform) v Secretary of State for the Home Department and another* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484 per Munby J (as he then was) at para 35.

46 [2011] UKSC 4.

family life under ECHR article 8 must be interpreted in the light of UNCRC articles 3 and 12 (see para 2.25 above). Therefore, in carrying out any of their functions, public authorities are expected to treat the best interests of the child as a ‘primary consideration’ and where possible give ‘due weight’ to the child’s views in accordance with his or her age and maturity. This ‘primary consideration’ requirement has since been applied in decisions concerning public bodies’ duties and powers in relation to children: see, for instance, *HH v Deputy Prosecutor of the Italian Republic, Genoa*⁴⁷ and *R (HC) v Secretary of State for the Home Department*.⁴⁸ The application of this obligation to local authorities, in particular in discharging their duties under CA 1989 s17, was emphasised by Hickinbottom J in *R (Sanneh) v Secretary of State for Work and Pensions*.⁴⁹

2.28 The Disability Convention, which entered into force in 2008, can be seen as building on several of the UNCRC provisions detailed above. In accordance with well-established tenets of statutory construction, the rights it protects can be taken into account in interpreting legislation or in determining the meaning of rights under the European Convention, where these sources are elusive or uncertain.⁵⁰ Among the significant principles and rights provided for in this instrument are the following:

- article 3, which sets out a number of general principles, including ‘[r]espect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities’;
- article 4, which imposes general obligations on states, including to take into account the human rights of disabled persons ‘in all policies and programmes’;

47 [2012] UKSC 25.

48 [2013] EWHC 982 (Admin).

49 See [2013] EWHC 793 (Admin) at para 45 in which Hickinbottom J stated: ‘There is no doubt that, in exercising its obligations under sections 17, a local authority is bound to consider the article 8 rights to respect for family life of all relevant family members, but particularly the child in need; and it is bound to do so “through the prism of article 3(1)” of the UNCRC (*HH v Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v Polish Judicial Authority* [2012] UKSC 25 at [155] per Lord Wilson).’

50 See *Burnip v Birmingham City Council* [2012] EWCA Civ 629 at para 22 where Maurice Kay LJ stated that the Disability Convention ‘has the potential to illuminate our approach to both discrimination and justification [for such discrimination]’. See also *R (SL) v Westminster City Council* [2013] UKSC 27, (2013) 16 CCLR 161 at para 40.

- article 7, which requires states to take all necessary measures to secure the full enjoyment of disabled children’s human rights and ensure that disabled children’s views are given due weight;
- article 9, which requires states to take appropriate measures to ensure that disabled people can gain access to the physical environment, information and communications;
- article 19, which recognises the equal right of disabled people to live independently and participate fully in society;
- article 23, which recognises the rights of disabled people to respect for their home and family, including the right of disabled children and their families to ‘early and comprehensive information, services and support’ with a view to preventing ‘concealment, abandonment, neglect and segregation of children with disabilities’; and
- article 24, which enshrines the right of disabled people to education ‘without discrimination and on the basis of equal opportunity’.

2.29 The Optional Protocol to the Disability Convention, which the UK ratified in 2009, provides for a Committee on the Rights of Persons with Disabilities, which may hear complaints from individuals claiming a breach of the Disability Convention. Any such complaint may generally only be brought once all domestic legal remedies have been exhausted.⁵¹

Duties and powers

2.30 Local authorities are the bodies principally responsible for delivering support and services under Part III of CA 1989 as ‘social services authorities’.⁵² As bodies whose structure and operation is founded in legislation, they are legally required to act in accordance with any statutory provision imposing a duty and are prohibited from acting outside the limits of any power conferred on them. It is the wording of a statutory provision which is key to identifying whether it creates a duty or a power, with the word ‘shall’ or ‘must’ imposing a duty, and the word ‘may’ establishing a power. Many cases involving children ‘in need’ will turn on the scope and application of the relevant duty

⁵¹ Article 2(d).

⁵² Meaning (in England) county councils, metropolitan districts (‘unitary authorities’) and London boroughs; and (in Wales), county councils and county boroughs; LASSA 1970 s1. See paras 2.36–2.41 below in relation to the duties imposed on other public bodies in this context by CA 2004 ss10 and 11.

or power. It is therefore necessary to be as clear as possible as to the precise nature and scope of each statutory provision. This can only be achieved after consideration of some important general principles.

Duties

- 2.31 The notion of a public law duty is not straightforward. Even where a duty has arisen in law, it may not be enforceable on behalf of an individual child. This is because public law duties come in two forms, termed ‘specific’ duties and ‘general’ (or ‘target’) duties. The first, more clear-cut, type is owed to each individual falling within the category set out in the relevant provision. A key example in relation to CA 1989 Part III comes in section 20(1), which, as was held in *R (G) v Southwark LBC*,⁵³ requires a local authority to accommodate each and every child ‘in need’ where he or she requires accommodation for the reasons set out in the subsection.⁵⁴ Where a specific duty such as this arises, an individual can meaningfully be said to have a ‘right’ to the service. This is because any failure to fulfil a specific duty in an individual case should be declared unlawful by the courts on an application for judicial review (see paras 2.66–2.69 below) and if necessary the public body should be compelled to fulfil its duty by way of a mandatory order.
- 2.32 By contrast, a general duty is owed to the relevant population as a whole and cannot (without more) be relied upon by an individual before the courts to establish a ‘right’ to particular treatment. Thus, the ‘general’ duty under CA 1989 s17(1) ‘to safeguard and promote the welfare of children within their area who are in need; and ... so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children’s needs’ does not provide for a specific duty equivalent to that in section 20(1).⁵⁵ Rather, it sets out general requirements as to the way in which a local authority should approach the provision of services and support to children in need and does not bestow a legal right on any one child. ‘General’ or ‘target’ duties, however, remain of higher legal importance than powers as public

53 [2009] UKHL 26, [2009] 1 WLR 1299, (2009) 12 CCLR 437.

54 See chapter 5 on the duty to accommodate children under CA 1989 s20(1).

55 *R (G) v Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208, (2003) 6 CCLR 500; see more detailed discussion below at paras 4.37 and 6.32–6.40.

bodies should always strive to comply with their duties but need not exercise their powers unless they deem it necessary to do so.⁵⁶

- 2.33 Distinguishing between different types of duties is centrally important, not least at a time such as this when there is intense pressure on the resources of public bodies. As Lord Nicholls stated in *R (G) v Barnet LBC*, ‘the extent to which a duty precludes a local authority from ordering its expenditure priorities for itself varies from one duty to another’.⁵⁷ The precise nature of each of the different duties which may arise in relation to an individual child ‘in need’ is identified throughout this book.

Powers

- 2.34 On the other hand, where a ‘power’ to do something (for instance, the broad ‘well-being’ power under Local Government Act 2000 s2) is conferred on a local authority by parliament, no general obligation to exercise it arises since the authority has a ‘discretion’ as to the circumstances and manner of its performance. However, in accordance with well-established public law principles, a local authority must not act beyond the limits of the power as set out in legislation and must also not ‘fetter its discretion’ by ruling out the exercise of a power without giving consideration to each individual case.⁵⁸ Furthermore, any such consideration must be made in a way that is reasonable, procedurally fair and in accordance with relevant human rights requirements and (where appropriate) statutory guidance. Failure to consider exercising a power or an unreasonable refusal to do so, particularly in a context where not to do so may lead to a breach of an ECHR right, is likely to result in a court declaring the act or omission of the public body to be unlawful.

- 2.35 The courts have repeatedly reiterated the central importance of distinguishing between ‘powers’ and ‘duties’. In *R v East Sussex CC ex p Tandy*, for instance, Lord Browne-Wilkinson stated that ‘Parliament has chosen to impose a statutory duty, as opposed to a power ... In my judgment, the courts should be slow to downgrade such duties

56 ‘A power need not be exercised, but a duty must be discharged’; *R (G) v Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208, (2003) 6 CCLR 500 per Lord Nicholls at [12]. See also *R v Inner London Education Authority ex p Ali* (1990) 2 Admin LR 822 per Woolf LJ; a target duty may be enforced by the courts against a public body if it is not at least working towards compliance with that duty.

57 [2003] UKHL 57, [2004] 2 AC 208, (2003) 6 CCLR 500 at para 13.

58 See, for instance, *British Oxygen v Minister of Technology* [1969] 2 Ch 174, [1969] 2 WLR 877.

into what are, in effect, mere discretions over which the court would have very little real control'.⁵⁹

Key local structures and processes

Introduction

- 2.36 In January 2003 the report of Lord Laming's inquiry into the tragic death of eight-year-old Victoria Climbié, who was murdered by her guardians at a time when several public bodies were involved in her case, was published. It exposed significant failings on the part of the public bodies with responsibility for Victoria's case and recommended widespread changes to the organisation of children's services. Many of these were implemented, following the publication of the *Every child matters* green paper (2003), by the enactment of the CA 2004 in November 2004. In particular, new obligations and structures were created with a view to securing co-operation between, and a more child-centred focus within, local authorities and other public bodies in the delivery of support to children.⁶⁰
- 2.37 These innovations were themselves subject to change following the coalition government's entry into office in 2010 and its commissioning of a review of child protection by Professor Eileen Munro, whose report *A child-centred system* was published in May 2011. In its formal response to Professor Munro's report, the government stated its belief in the need for a 'child protection system with less central prescription and interference, where we place greater trust and responsibility in skilled professionals at the front line'. Subsequently the government went on to abolish some of the reforms implement-

59 [1998] AC 714 at 749E–F. See also the speech of Lord Scott in *R (G) v Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208, (2003) 6 CCLR 500 at para 133, stating 'no doubt it is right that a statutory duty must not be downgraded to a mere discretionary power'. Lord Scott was in the majority which held that the duty under CA 1989 s17 was 'general' rather than 'specific'; see chapter 4 at para 4.37.

60 CA 2004 Part 2 (for England) and Part 3 (for Wales). See also Childcare Act 2006 s4 in relation to the duty of English local authorities to work together with relevant partners in relation to the welfare of young children. Sections 157 and 175 of the Education Act 2002 and the Education (Independent School Standards) (England) Regulations 2010 SI No 1997 and Independent School Standards (Wales) Regulations 2003 SI No 3234 (W314) require schools and other educational settings to exercise their functions with a view to safeguarding and promoting the welfare of children who are pupils at a school or students under 18 attending further education institutions.

ed by the previous administration, such as the obligation to produce Children and Young People's Plans (see para 2.39 below). Therefore, although many of the structures introduced by the CA 2004 remain in place, as set out below, the concern exists that further reforms could result in the loss of vital legal safeguards for children in need under the cover of 'cutting red tape'.

Legal structures

2.38 Although CA 1989 s27 had already conferred powers and duties on each local authority to request (and, where appropriate, receive) help from a variety of local government and healthcare bodies in the exercise of their functions under Part III of the Act, the CA 2004 extended and deepened the scope of inter-agency co-operation designed to safeguard and promote children's welfare.

2.39 Central to these reforms was the establishment of a number of new institutions and mechanisms to enable co-operation between bodies concerned with children's welfare within each local authority area, including:

- Children's Trusts, by which local authorities make arrangements to promote co-operation with a range of public bodies with a view to improving the well-being of children in their area in relation to the five outcomes identified by *Every child matters*.⁶¹ Among the local bodies between which such co-operation must take place are the police, the probation board, the youth offending team, the local health authorities and (in England) the governing bodies of maintained schools.⁶² In England these partnerships act under the oversight of Children's Trust Boards;⁶³
- Local Safeguarding Children Boards (LSCBs), which are formed of the local authority and other public bodies such as the police, probation and health authorities with the purpose of safeguarding

61 CA 2004 s10 (for England) and s25 (for Wales). The five outcomes are: being healthy, staying safe, enjoying and achieving, making a positive contribution and economic well-being.

62 CA 2004 s10(4) (for England) and s25(4) (for Wales).

63 As required by CA 2004 ss10 and 12A–12D (for England) and s25 (for Wales, where Children's Trust Boards have not been established by statute). As of the date of publication, the position of the Department of Education appears to be that '[t]he Government still intends to remove the requirement to have a Children's Trust Board but it is not a high legislative priority' (see www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/a00202990/faqsonchildrenstrusts). The equivalent duty to promote co-operation among public bodies in Wales is provided for by CA 2004 s25.

and promoting the welfare of children, and which have a number of specific functions relating to the development and scrutiny of safeguarding policies and procedures (including serious case and child death reviews);⁶⁴

- Children and Young People's Plans (CYPPs), which detail how the bodies participating in Children's Trusts will co-operate to improve children's wellbeing within each local authority area;⁶⁵
- the Director of Children's Services (in England) or Lead Director for Children and Young People's Services (in Wales),⁶⁶ which is an appointed post with professional responsibility and accountability for children's services at local authority level; and
- the Lead Member for Children's Services (in England) or Lead Member for Children and Young People's Services (in Wales),⁶⁷ who is the elected member within the local authority with political responsibility and accountability for children's services.

2.40 A further important duty was imposed on local authorities in England by the Apprenticeships, Skills, Children and Learning Act 2009, which amended the Childcare Act 2006 to require authorities to arrange, so far as is reasonably practicable, sufficient provision of children's centres⁶⁸ to meet local need.⁶⁹ 'Local need' is defined as 'the need of parents, prospective parents and young children in the authority's area'.⁷⁰ Obligations also exist on local authorities in England and Wales to secure sufficient childcare for working parents was also established.⁷¹ The Childcare Act 2006 also imposes a duty on

64 As required by CA 2004 ss13–16 and the Local Safeguarding Children Boards (LSCB) Regulations 2006 SI No 90 (for England) and CA 2004 ss31–34 and the Local Safeguarding Children Boards (LSCB) (Wales) Regulations 2006 SI No 1705 (W167) (for Wales).

65 As provided for in CA 2004 ss17 and 17A (for England) and CA 2004 s26 (for Wales). The Children's Trust Board (Children and Young People's Plan (England) Regulations 2010 SI No 591, which required English local authorities to prepare and publish such a plan, were revoked in the year they were made, with the result that such plans are now optional in both England and Wales.

66 As required by CA 2004 s18 (England) and s27(1)(a) (Wales).

67 As required by CA 2004 s19 (England) and s27(1)(b) (Wales).

68 A place, or group of places, providing integrated early childhood services: Childcare Act 2006 s5A(4). This supplements the duty to provide integrated early childhood services in Childcare Act 2006 s3.

69 Childcare Act 2006 s5A, as amended by Apprenticeships, Skills, Children and Learning Act 2009 s198.

70 Childcare Act 2006 s5A(2).

71 Childcare Act 2006 s6 (England) and s22 (Wales).

English local authorities to improve the well-being of young children⁷² in their area, and to reduce inequalities between young children in relation to the *Every child matters* outcomes.⁷³ By the Child Poverty Act 2010 local authorities in England are required to co-operate with a number of partner bodies with a view to reducing and mitigating the effects of child poverty in their area.⁷⁴

2.41 These additional duties on local authorities to safeguard and promote children's welfare have been mirrored in a general duty on the secretary of state (now the Education Secretary) to 'promote the well-being of children in England'⁷⁵ and to ensure that a number of targets are met in relation to children living in deprived circumstances across the UK.⁷⁶

Safeguarding, and promoting the welfare of, children

2.42 As mentioned above, the principal statutory guidance governing the duties of English local authorities and other public bodies to safeguard and promote the welfare of children is contained in *Working together to safeguard children* (March 2013) ('Working Together 2013'). This came into effect on 15 April 2013 and replaced the earlier guidance contained in *Working together to safeguard children* (2010); *Framework for the Assessment of Children in Need and their Families* (2000) ('Assessment Framework'); and *Statutory guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004* (2007). However it should be noted that Working Together 2013 does not apply to Wales, where the primary statutory guidance remains the Welsh version of Assessment Framework, which is closely modelled on the previous English Guidance.⁷⁷

2.43 Working Together 2013 is to be followed by children's services departments and relevant professionals unless exceptional reasons

72 In relation to this duty a child is a 'young child' during the period from the child's birth to the 1 September following the date on which the child attains the age of five: Childcare Act 2006 s19.

73 Childcare Act 2006 s1(1).

74 Child Poverty Act 2010 ss19–25.

75 Children and Young Persons Act 2008 s7.

76 Child Poverty Act 2010 ss1–7.

77 For detailed analysis of the Assessment Framework readers are referred to the previous edition of this book.

apply.⁷⁸ Although superseded as statutory guidance, chapter two of the Assessment Framework remains available as practice guidance (see para 2.9 above) and can be used in support of the process of assessing the needs of children.

2.44 Safeguarding and promoting the welfare of children is defined in Working Together 2013 as:⁷⁹

- protecting children from maltreatment;
- preventing impairment of children’s health or development;
- ensuring that children grow up in circumstances consistent with the provision of safe and effective care; and
- taking action to enable all children to have the best outcomes.

2.45 The achievement of these aims is founded on the principle that each person and agency involved with a child should treat the child’s needs as paramount and co-operate with other relevant parties in order to meet those needs.⁸⁰ Accordingly, the guidance specifies that a wide range of bodies must take a child-centred and co-ordinated approach to children’s welfare and protection. In addition to local authorities, these include health services; the police; the Probation Service; prisons, young offender institutions and secure training centres; youth offending teams; schools and colleges; early years and childcare providers; the UK Border Agency; the Children and Family Court Advisory and Support Service; the Ministry of Defence (for overseas service families); and voluntary and private providers and faith organisations that deliver services to children.⁸¹

2.46 At the core of the guidance are the early identification and assessment of a child’s needs, and the delivery of services to meet these needs.⁸² The detail of these processes, particularly in relation to assessments of need under CA 1989 s17, is addressed more fully elsewhere in this book.⁸³ At an organisational level, the guidance sets out the responsibility of each LSCB for agreeing with the local authority, and publishing, the processes and criteria for assessments of children’s needs and services to be provided.⁸⁴ Local authorities, with their partners, should develop and publish local protocols for assessment, consistent with the requirements of Working Together

78 Working Together 2013, Summary, paras 6–7.

79 Working Together 2013, Introduction, para 2.

80 Working Together 2013, Introduction, paras 6–16.

81 Working Together 2013, chapter 2.

82 Working Together 2013, chapter 1, paras 1–2.

83 See chapter 4.

84 Working Together 2013, chapter 1, paras 17–18.

2013 and containing clear arrangements for the management of cases once a child is referred to children's services.⁸⁵

2.47 At a case-specific level, a wide range of agencies have responsibilities in connection with the early identification of children requiring support, assisting in the assessment process and co-operating in the provision of services.⁸⁶ This co-ordinated approach is necessary in cases involving not only children 'in need' or those who are suffering, or are likely to suffer significant harm (as provided for in the CA 1989), but also where a child would benefit from early help but does not meet the relevant statutory criteria. There is an emphasis on the need for agencies to have in place a range of effective, evidence-based services to address such needs early,⁸⁷ as well as effective and proactive inter-agency information sharing processes to enable identification and assessment of needs and service provision.⁸⁸ Additional good practice in information sharing is set out in *Information sharing: guidance for practitioners and managers* (2008).

2.48 The guidance also seeks to inculcate a culture of accountability and lesson-learning among agencies working with children. Under the leadership of the LSCB, areas should have in place a local learning and improvement framework shared with relevant agencies. Reviews of particular cases (including, but not confined to, serious case reviews⁸⁹ and child death reviews⁹⁰) and audits of practice within agencies should be aimed at promoting good practice through the involvement of professionals and families, the publication of findings and regular monitoring and follow-up.⁹¹

2.49 Further statutory guidance has been issued to reinforce the safeguarding and welfare obligations owed by local authorities to particular groups of children, for instance the guidance issued in June 2009 entitled *Safeguarding children and young people from sexual exploitation*. In accordance with this guidance, action to prevent sexual exploitation 'should be proactive',⁹² a principle which should underpin the way in which local authorities work with all children in need. This guidance was held to have been unlawfully breached in *R (B) v Bar-*

85 Working Together 2013, chapter 1, paras 62–63.

86 Working Together 2013, chapter 1, paras 3–25.

87 Working Together 2013, chapter 1, para 13.

88 Working Together 2013, chapter 1, paras 22–25.

89 Working Together 2013, chapter 4, paras 12–18.

90 Working Together 2013, chapter 5.

91 Working Together 2013, chapter 4, paras 1–11.

92 Para 2.3.

net LBC⁹³ where an authority had failed to put in place any services to address the risk of sexual exploitation in relation to a girl with complex needs who had been assessed as ‘at very high risk of sexual abuse or statutory rape’.

Parents and child protection⁹⁴

2.50 The CA 1989 confers a wide range of powers and duties on local authorities to protect children from harm, including by way of care proceedings under Part IV of the Act. This highly important subject falls outside the scope of Part III of CA 1989, and therefore beyond the remit of this book.⁹⁵ Nevertheless, in approaching a local authority for support it may be that parents of, or others with responsibility for, children ‘in need’ have worries about the type of intervention that an authority may undertake, especially if there is disagreement about the appropriate steps required.

2.51 In the first place, it is important to note that it would be unlawful for a local authority to use its powers under Part III of the CA 1989 in a way which is incompatible with the general purpose of this part of the legislation, which has been identified as being ‘that local authorities should provide support for children and families’.⁹⁶ Both the High Court and the ombudsman have been called upon to consider the interplay between the duties of local authorities to safeguard children and the statutory purpose of supporting families.

2.52 *Re A*⁹⁷ concerned two separate cases relating to the care of individuals (called ‘A’ and ‘C’ in the court’s judgment: the first of whom was a child, the second an adult) with significant behavioural difficulties. As a protective measure, their parents – who, the court found, provided ‘devoted and exemplary care’ – would lock the children in their bedrooms at night to safeguard against the considerable risks posed by their night-time behaviour. The court was asked to consider whether this amounted to a deprivation of liberty under ECHR article 5 such that the local authority was required to intervene. Munby

93 [2009] EWHC 2842 (Admin).

94 The author acknowledges with gratitude that much of the material for this section (paras 2.50–2.54) is taken from S Broach, L Clements and J Read, *Disabled children: a legal handbook*, LAG, 2010 at paras 3.94–3.97.

95 For more on this topic, reference should be made to White, Carr and Lowe, *The Children Act in Practice*, Lexis Nexis Butterworths, 4th edn, 2008.

96 *R (M) v Gateshead Metropolitan Borough Council* [2006] EWCA Civ 221 per Dyson LJ at para 42.

97 [2010] EWHC 978 (Fam).

LJ held that the parents' approach represented 'a reasonable, proportionate and entirely appropriate regime implemented by devoted parents in the context of a loving family relationship with the single view to the welfare, happiness and best interests' of the two individuals concerned. It could not therefore come close to engaging article 5.

2.53 In addition, Munby LJ provided general guidance as to the approach to be taken by local authorities in cases of this nature. In response to the suggestion that a local authority 'is not merely "involved" with people in the situation of A and C and their families but that it may also have "complete and effective control ... through its assessments and care plans",⁹⁸ he stated that this suggestion, which 'worryingly some local authorities seem almost to assume and take ... for granted' was 'simply wrong in law'.⁹⁹ Munby LJ went on:

52 Moreover, the assertion or assumption, however formulated, betrays a fundamental misunderstanding of the nature of the relationship between a local authority and those, like A and C and their carers, who it is tasked to support – a fundamental misunderstanding of the relationship between the State and the citizen. People in the situation of A and C, together with their carers, look to the State – to a local authority – for the support, the assistance and the provision of the services to which the law, giving effect to the underlying principles of the Welfare State, entitles them. They do not seek to be 'controlled' by the State or by the local authority. And it is not for the State in the guise of a local authority to seek to exercise such control. The State, the local authority, is the servant of those in need of its support and assistance, not their master ...

53 This attitude is perhaps best exemplified by the proposition that 'in the event that the parents were to disagree with the *decisions* of the local authority (which will always be based upon the opinion of relevant professionals) it would seek to *enforce its decisions* through appropriate proceedings if necessary' (emphasis added). This approach, which to repeat is not the approach of the local authority in this case, though reflecting what I have come across elsewhere, reflects an attitude of mind which is not merely unsound in law but hardly best calculated to encourage proper effect being given to a local authority's procedural obligations under Article 8 of the Convention ... Moreover, it is likely to be nothing but counter-productive when it comes to a local authority 'working together', as it must, with family carers. 'Working together' involves something more – much more – than merely requiring carers to agree with a local authority's 'decision' even if, let alone just because, it may be backed by professional opinion ...

98 At para 50.

99 At para 51.

- 2.54 The local government ombudsman has also made trenchant criticism of ineffective and insensitive interventions by local authorities in children ‘in need’ cases. In a complaint from 2008,¹⁰⁰ the ombudsman considered the case of a young man with cerebral palsy and epilepsy, who by the time of the complaint had turned 21 years old. Because of local authority delays in the provision of a hoist for the young man, his father had to carry him upstairs to be bathed. The local authority responded to this approach by making a referral under its protection of vulnerable adults procedures. The ombudsman recognised the hurt caused by this procedure and stated: ‘It beggars belief that the referral was made at all.’ In another case of maladministration,¹⁰¹ a local authority delayed for several years the provision of suitable accommodation to a family with two seriously disabled children. During this time, the mother of the children was faced with the choice of strip-washing them in a downstairs toilet, risking serious injury by taking them to a small and inadequate bathroom upstairs or washing them with a hose in the garden. Despite its failure to provide any sufficient cleaning facilities, the local authority told the children’s mother that it would be ‘abusive’ to wash the children outside. The ombudsman considered that the council’s approach showed ‘breathhtaking insensitivity’ and ‘institutionalised indifference’ and recommended the issuing of a personal apology along with the payment of compensation.

Means of redress

- 2.55 As set out below (paras 2.66–2.69), the courts are most likely to intervene in a case involving a child ‘in need’ by way of the judicial review procedure. However, local authority decisions can also be challenged outside the courts: indeed, where ‘alternative remedies’ are ‘convenient and effective’¹⁰² there is an important presumption that these will be pursued before resort to judicial review is made. Any failure to explore alternative remedies may result in the High Court refusing permission, the first stage of any application for judicial review.¹⁰³ Alternatively, the courts may refuse to grant any relief at full hearing

100 Case number 07 B 07665 (10 September 2008).

101 Case number 07 C 03887 (14 October 2009).

102 *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 per Lord Bingham at para 30.

103 See *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935.

if there has been no or insufficient consideration of alternative remedies, as relief in judicial review proceedings is always at the court's discretion.¹⁰⁴ This section therefore discusses both judicial review and the available alternative remedies as they may apply in cases concerning children 'in need'.

Complaints procedures under the Children Act 1989

2.56 By virtue of CA 1989 s26 and in accordance with regulations passed under section 26,¹⁰⁵ local authorities are obliged to set up systems for considering any complaint in relation to the discharge of their functions under Part III of CA 1989, and certain of their functions under Parts IV and V of the Act.¹⁰⁶ Complaints may be submitted by parents or others with an interest in the child's welfare. In practice, this means that the local authority functions covered in this book are subject to the section 26 complaints procedure.

2.57 Consideration of a complaint proceeds in a three-stage process. The first step, where a complainant and the local authority consent, is to consider the complaint through 'local resolution', which can be undertaken internally by the local manager of the relevant service. In all but complex cases, this stage must be completed within ten working days.¹⁰⁷

2.58 Where the parties do not consent to local resolution, or where the complainant is not content with the outcome of the procedure, the complaint will proceed to stage two, an 'investigation' or (in Wales) a 'formal consideration'. This will be undertaken by an 'independent person' and must be completed within 25 working days (which may be extended to a period of up to 65 working days).¹⁰⁸

2.59 If the outcome of the investigation is unsatisfactory, the complainant may (in England) request the appointment of a review panel to consider the complaint. This consists of three independent panel members who must meet within 30 working days of the receipt of the complainant's request in order to consider the representations of the complainant, the local authority and any other interested parties.

104 See, for instance, *R (F) v Wirral BC* [2009] EWHC 1626 (Admin).

105 Children Act 1989 Representations Procedure (England) Regulations (RPE Regs) 2006 SI No 1738; and Representation Procedure (Children) (Wales) Regulations (RPW Regs) 2005.

106 CA 1989 s26(3) and (3A).

107 RPE Regs 2006 reg 14; RPW Regs 2005 reg 15.

108 RPE Regs 2006 reg 17; RPW Regs 2005 regs 17 and 18 – note that there is no formal time limit in the Welsh legislation.

The panel will then, within five working days, send a written report containing recommendations to the complainant and local authority. The authority must, along with the independent person appointed in stage two, then notify the complainant as to how it will respond to the recommendations.¹⁰⁹

The ombudsman

- 2.60 The local government ombudsman (LGO) (in England) and the public services ombudsman (PSO) (in Wales) are charged with conducting independent investigations of complaints about maladministration and service failures by local authorities and certain other public bodies. They examine complaints relating to failures and inadequacies in decision-making or in the delivery (or non-delivery) of services, including delay, unfairness, incompetence, impropriety and other instances of fault on the part of local authorities.
- 2.61 Procedurally, the ombudsman will (except in urgent cases) expect complaints to be made directly to the local authority in the first instance (for example, by the complaints procedure identified above). If the complainant is unsatisfied with the outcome or if no response is made by the local authority within a reasonable time, a complaint may then be directed to the ombudsman. Normally, a complaint should be made within 12 months of the complainant becoming aware of the subject-matter of the complaint. Complaints can be submitted to the ombudsman over the phone or online.¹¹⁰
- 2.62 The ombudsman is then likely to request representations from the complainant and the local authority as well as taking further investigatory steps, such as requests for documents and site visits, if necessary. The LGO completes most investigations within three months, although complex cases may take up to a year. The ombudsman may make findings of ‘no fault’, ‘insufficient injustice’ (where the harm caused is too minor to justify continued investigation), ‘local settlement’ (where the local authority consents to the recommendations proposed by the ombudsman) or a ‘report’. It is the last of these which is likely to result in the most significant consequences, with ombudsman reports often delivering robust criticisms of local authority conduct and recommending substantial remedies, including financial compensation.

109 RPE Regs 2006 regs 19 and 20.

110 See www.lgo.org.uk/making-a-complaint/submitted-a-complaint (England) or www.ombudsman-wales.org.uk/making%20a%20complaint.aspx (Wales).

2.63 Examples of such reports include:

- A case involving the London Borough of Waltham Forest and a child who had been the victim of very serious abuse.¹¹¹ Although the girl had repeatedly sought help from the local authority, she had been either sent away or subject to inadequate assessments, which meant that services to which she was entitled were withheld and her schooling suffered. The LGO found maladministration causing injustice and recommended that the local authority apologise, pay £7,000 in compensation to the girl and conduct reviews of its assessments and complaints procedures.
- A case in which Liverpool City Council, in assessing the age of a girl of Cameroonian nationality who said she was 15 years old, had breached relevant guidance, ignored important medical evidence and failed to clarify uncertainties with the girl herself.¹¹² As a result, the council had wrongly assessed the girl as an adult and therefore deprived her of services to which she was entitled as a child over a period of 15 months, during which time she had fallen pregnant and been subject to sexual abuse. In March 2010, maladministration and injustice was found by the LGO and compensation of £5,000 was recommended, as well as reviews of the local authority's age assessment procedures.
- A case in which the London Borough of Lambeth failed properly to assess, take account of or plan for the needs of a young man who had been looked after by the local authority while a child and subsequently left its care.¹¹³ The young man had suffered distress, frustration and uncertainty as a consequence of the shortcomings in the assessment of his needs, the pathway plans formulated to meet those needs and the information passed to his personal adviser. The LGO found service failures, failures to provide a service or maladministration which caused injustice and recommended a review of the young person's pathway plan, the payment of £5,000 compensation and £2,000 to be paid to a charity which had assisted him in the absence of adequate support from the local authority.
- A case in which Isle of Wight Council wrongly withdrew support under the CA 1989 from a child in need who had complex diagnoses including autistic spectrum disorder, reactive attachment

111 Case number 08 016 986 (December 2009).

112 Case number 08 005 858 (March 2010).

113 Case number 08 013 283 (May 2009).

disorder and bipolar disorder.¹¹⁴ The cessation of assistance from the local authority had resulted in the breakdown of the girl's placement at a residential school, leading to a loss of continuity in her education and care and significant harm to the wellbeing of the girl and her family. The LGO found maladministration causing injustice and recommended a full apology; compensation of £5,000 to the girl for educational purposes, £2,000 to the parents for the use of the family and a further £250 to the father for the time and trouble in pursuing the complaint; and a thorough review of practices and procedures.

- A case in which Kent County Council failed to meet a 16-year-old boy's housing and welfare needs when he became homeless, and failed to assess him and provide him with services as a 'looked after' child.¹¹⁵ At the age of 16 the boy approached the council and was offered a foster placement but no other housing alternatives. No welfare provision was offered. Having found accommodation with friends, the complainant became homeless again at the age of 18 but was not given accommodation by the housing department as he was not considered in priority need. The LGO found maladministration causing injustice and recommended: that the complainant be recognised as a former looked after child, entitled to services under the leaving care provisions; an award of £3,000 for the injustice caused by the loss of welfare benefits; a review of the council's joint protocol to ensure the needs of homeless young people were being met; and that the council's committee and Lead Member for Children's Services be made aware of the report.

2.64 LGO reports, which are published unless special reasons apply, are not binding on local authorities but are usually complied with.¹¹⁶ While challenges involving a dispute on legal issues may best be made through judicial review (see paras 2.65–2.68 below), an ombudsman is nevertheless likely to consider the relevant legal standards in examining a complaint.¹¹⁷ Any error of law in an ombudsman's decision

114 Case number 10 010 527 (November 2012).

115 Case number 12 001 464 (May 2013).

116 See *R (Gallagher) v Basildon DC* [2010] EWHC 2824 (Admin), which reinforced both the non-binding nature of ombudsman reports and the general expectation that local authorities will act on their conclusions.

117 See *R (Mencap) v Parliamentary and Health Service Ombudsman* [2011] EWHC 3351 (Admin).

can be challenged by way of judicial review (see paras 2.66–2.69 below).

- 2.65 The complaints procedures, particularly through the ombudsman, may therefore provide a child with a significant remedy in the form of a recommendation for substantial financial compensation which will normally be complied with by the public body. However, a complaint is unlikely to be a ‘convenient’ and ‘effective’ remedy in cases whether there is an *ongoing* breach (or alleged breach) of a public body’s duties towards a vulnerable child and/or their family. In such serious and urgent cases the courts are likely to accept that the appropriate remedy is judicial review, as the judgments referred to throughout this book amply demonstrate.

Judicial review

- 2.66 As has been alluded to over the course of this chapter, local authorities are subject to the oversight of the courts primarily by means of the judicial review procedure, which permits courts to review the lawfulness of the conduct of public bodies. The senior courts¹¹⁸ have the power to provide various forms of remedy in the event of unlawful action or inaction, including a ‘declaration’ (a statement that unlawfulness has occurred), a ‘quashing order’ (which nullifies a particular decision, generally requiring the decision to be taken again), a ‘mandatory order’ and an ‘injunction’ (which require particular acts to be taken, or prohibit acts from being taken) and, in very limited categories of cases, financial damages.¹¹⁹

- 2.67 Judicial review is particularly appropriate for cases involving potential unlawfulness on the part of a public body where a degree of legal analysis is required to resolve the dispute, or where a particular urgency exists (in which case the claimant can ask that the matter be dealt with expeditiously¹²⁰). As stated above, if ‘convenient’ and ‘effective’ alternative avenues are not pursued prior to a claim

118 High Court, Court of Appeal and Supreme Court. In certain cases, the Upper Tribunal also has this power; see Tribunals, Courts and Enforcement Act 2007 s15.

119 The only situation in which a child ‘in need’ is likely to obtain any damages on an application for judicial review is in relation to a breach of the ECHR (most likely article 8), and any such damages are likely to be modest in all but the most exceptional cases.

120 Applications for urgent consideration using form N463 are likely to need to be made in many cases involving a child ‘in need’ – as unless the matter needs to be considered urgently it is likely that the dispute should be dealt with by way of a complaint.

for judicial review, the court may not consider the case. Where, however, any such alternative route would be inadequate or inappropriate, judicial review should be used. It is possible, indeed common, for the High Court to order ‘interim relief’ and require a public body to act to protect a child’s interests while the case waits to come before the court (which even on urgent cases can be several months). This is a very powerful tool for children and families to obtain vital services from an authority which may not be acting swiftly to safeguard and promote their welfare.

2.68 An important consideration for any potential claimant are the costs necessarily involved in any judicial review claim. The losing party in a judicial review claim will be required to pay not only his or her own legal costs but also, normally, those of his or her opponent (generally here a local authority but also potentially a health body or one of the secretaries of state). In the absence of entitlement to funding (or ‘legal aid’) from the Legal Aid Agency (LAA), which carries with it ‘costs protection’,¹²¹ costs implications may well dissuade claimants from proceeding to judicial review. However, because cases involving children ‘in need’ are usually brought in the name of the child, and entitlement to legal aid is generally considered by reference to the child’s financial resources, legal aid may be more readily available in these cases than in other cases involving vulnerable people. The restrictions on the scope of legal aid effected by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 did not extend to judicial review cases involving children ‘in need’. However, further limitations to legal aid proposed in the Ministry of Justice Transforming legal aid consultation paper (April 2013) will, if implemented, impact on such cases, for instance by removing the entitlement to legal aid for individuals who are not lawfully resident in the UK or who have not resided lawfully in the UK for at least 12 months.

121 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 s26(1) provides that costs ordered against a party in receipt of legal aid shall not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including the financial resources of all of the parties to the proceedings, and their conduct in connection with the dispute to which the proceedings relate. For a child with no financial resources in his or her own name, the child’s contribution should be zero. However, there is a residual risk to any parent who has a substantial income and who acts as a child’s litigation friend. Solicitors and other advisers should always highlight this theoretical costs risk to families. See also the Civil Legal Aid (Costs) Regulations 2013 SI No 611.

2.69

Given the complex nature and importance of any judicial review claim, advice from a specialist solicitor should be sought by any child or family contemplating such a step. It is also important to note that any judicial review challenge is subject to strict time-limits: a claim is expected to be brought 'as soon as possible' and, in any event, within three months of the date on which the grounds to make the claim first arose. Extensions of time are granted by the court only where there is good reason to do so.¹²² Although time may be extended when a child or family has not had access to specialist legal advice, and although a court may allow a claimant to challenge an 'ongoing' failure by a public body, there is no guarantee of either of these things happening in an individual case. Families and their advisers therefore need to be alive to the possibility of bringing a judicial review claim as soon as it appears there is a significant legal dispute with a public body – while at the same time not acting too quickly and ignoring potentially available alternative remedies. This is one of the reasons why specialist legal advice is so important at the earliest possible stage in any proposed claim for judicial review.

122 Civil Procedure Rules (CPR) 54.5. See *White Book 2013* (Sweet & Maxwell) at 54.5.1 for commentary on circumstances where time is likely to be extended. Any application for judicial review made out of time should be accompanied by an application for a direction that time for the claim form to be issued be extended to the date of issue. Such a direction may be made by the judge considering the papers either in relation to an application for urgent consideration or at the permission stage.