UNITED KINGDOM

Legal opinion from Aidan O'Neill QC on the incorporation of the United Nations Convention on the Rights of the Child into Scots law

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Overview

In the context of recent debate around introducing legal duties to place children's rights at the heart of all legislation, policy and practice in Scotland, UNICEF UK commissioned a legal opinion from Aidan O'Neill QC at Matrix Chambers to explore powers under current devolved arrangements (the Scotland Act 1998) to incorporate the UN Convention on the Rights of the Child (CRC) into domestic Scots law.

Summary of advice

The following should be taken as a summary of the advice received only, and read in conjunction with the full legal opinion that follows in Annex 1.

- Paragraph 7(2)(a) of Schedule 5 of the Scotland Act 1998 puts it within the legislative competence of the Scottish Parliament to 'observe and implement international obligations'. In principle it is therefore within the powers of Scottish Government and Scottish Parliament to directly and fully incorporate the CRC into domestic Scots law in relation to devolved issues. In doing so, enforceable rights and new channels of redress would be created within the Scottish judicial system.

- The same Schedule provides a proper legal basis for Scottish Government and Scottish Parliament to impose a legal children's rights duty on Scottish Ministers and / or public authorities – either to have due regard to, or to act compatibly with, the CRC when exercising any of their functions.

- A "due regard" process may – if provided for in statute – require certain provisions of the CRC (for example, Article 3, the best interests of the child) to be given specific weight or particular consideration.

- If a legal children's rights duty were extended to public authorities, it would cover all and any agencies carrying out a public function in Scotland, including local authorities, the police and prosecution authorities. Unless specifically excluded, it would also cover courts, tribunals and the Scottish Parliament.

- International human rights instruments are intended to be interpreted and applied in a mutually consistent manner. The direct incorporation of the CRC into domestic law would not run contrary to the requirements of the European Convention on Human Rights. Scottish courts also already have an obligation where possible to interpret and apply the provisions of domestic law consistently with any relevant UK treaty obligations. As such, the Children (Scotland) Act 1995 and the Equality Act 2010 should already be interpreted and applied consistently with the CRC.

For more information

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Annex 1: Advice from Aidan O'Neill QC, Matrix Chambers, to UNICEF UK on the ability of the Scottish Government under current devolved arrangements (Scotland Act 1998) to fully and directly incorporate the United Nations Convention on the Rights of the Child (CRC) into domestic law

1. INTRODUCTION

1.1 I refer to the brief set out in the e-mail of 4 April 2012 from Samantha Whyte, UNICEF UK Domestic Policy and Parliamentary Manager.

1.2 The Scottish Government has recently consulted on a proposed Rights of Children and Young People Bill, which would impose duties on Scottish Ministers to have due regard to the United Nations Convention on the Rights of the Child.[1] The Children's Hearings (Scotland) Act 2011, designed to strengthen and modernise Scotland's distinctive hearings system, is due to be implemented in 2013. Consultation has also recently taken place on improving advocacy for children and young people, and there is shortly to be a Children's Services Bill brought forward by the Scottish Ministers before the Scottish Parliament.

1.3 Against that background, I am asked to advise on the following issues:

1) To what extent it is within the powers of the Scottish Government and Scottish Parliament to directly and fully incorporate the CRC (in relation to devolved issues) under the terms of the Scotland Act 1998.

2) To what extent it is within the powers of the Scottish Government and Scottish Parliament to partially incorporate the CRC (in relation to devolved issues) under the terms of the Scotland Act 1998.

3) The validity of the Scottish Government's position in paragraph 73 of the consultation paper [2] (subsequently departed from in oral exchanges) that it is not possible to incorporate the CRC due to a conflict with equalities and ECHR obligations.

4) To what extent it is within the powers of the Scottish Government and Scottish Parliament to strengthen the duty to require Scottish Ministers to act compatibly with the CRC.

5) What would be the likely impact of strengthening the proposed duty from "due regard" to "act compatibly", i.e. would it increase the likely number of actions against Ministers or require a different method of justiciability?

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[1] See http://www.scotland.gov.uk/About/programme-for-government/2011-2012/RightsofChildren

[2] See the Scottish Government *Consultation on Rights of Children and Young People Bill* (Edinburgh, September 2011) at paragraph 73: 'The Scottish Government is not proposing to incorporate the UNCRC into Scots law. One reason for this is because the Scottish Ministers have other considerations and obligations to take into account in the exercise of their functions. Importantly, some of these considerations and obligations relate to human rights under ECHR and rights under the Equalities Act 2010 (which applies across the UK). When considering the rights of different persons, it is inevitable that there will be circumstances where those rights come into conflict. For example, in making any legislative provision or other decision promoting the rights of children, in pursuance of the UNCRC, these rights have to be balanced with the rights of parents, under Article 8 of ECHR, to have family life with their children. In such situations, the UNCRC, ECHR and the Equalities Act 2010 are all relevant to the provision made. The due regard approach outlined in Proposal 1 above gives the Scottish Ministers the opportunity to weigh up the requirements of the UNCRC against these other considerations and obligations. Furthermore, under the terms of the Scotland Act, the Scottish Parliament cannot pass legislation which runs contrary to ECHR'.

6) Is it legally possible within a due regard process to give additional weight to the CRC (namely Article 3, the best interests of the child) when balancing other considerations?

7) Who/which agencies would the proposed "due regard duty" on Scottish Ministers cover in practice (and who would it not cover)?

8) Should the due regard duty be extended to public authorities, which agencies would it then cover?

9) Based on developments resulting from the UK Supreme Court judgment in the AXA case, will children's representatives (including third party claimants) be able to pursue judicial review under the proposed due regard process? What if any might be the limitations of this?

10) What likely impact may disparities in child rights legislation across the UK (due regard duties in Wales and Scotland) have on judgments relating to children's rights from the UK Supreme Court and the European Court of Human Rights?

11) A brief analysis of the relationship between the CRC and the Human Rights Act 1998 in Scots law, and the CRC and the Children (Scotland) Act 1995.

2. JUSTICIABLE LIMITS ON THE POWERS OF THE SCOTTISH PARLIAMENT AND SCOTTISH GOVERNMENT

2.1 In its devolution of political power to Scotland, the UK Parliament deliberately created devolved institutions of government in Scotland that were not "sovereign" in the classic Diceyan sense, but instead were to be limited by law and by the courts. The Scotland Act 1998 is premised on a unitary constitutional model (the United Kingdom as a 'Nation State' rather than a 'State of Nations'). Under this model legal power is devolved to Holyrood, but not divested from Westminster. On this constitutional analysis, Section 1(1) of Scotland Act provides that 'there shall be a Scottish Parliament' because the Crown, acting on the advice of the Westminster Parliament, so wills it; not because the 'Scottish people' has brought it into being.[3] The Scotland Act modifies the terms, but maintains the fact, of Union between Scotland and England: section 37 states that 'The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act'.

2.2 More radically yet, in essence what the Scotland Act has done is to ensure the juridicalisation of politics in Scotland, on a constitutional model reminiscent of the judicial constitutional primacy seen in the United States. It remains to be seen where this will lead us.

[3] See *AXA General Insurance Ltd v The Lord Advocate* [2011] 3 WLR 871 per Lord Hope at para 46: 'The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament ... Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes'.

Scotland Act 1998

Limits on the legislative competence of the Scottish Parliament

2.3 The Westminster Parliament has set legally enforceable limits on the power of the Scottish Parliament by providing in Section 29 of the Scotland Act as follows:

> '29.— **Legislative competence**
> (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
> (2) A provision is outside that competence so far as any of the following paragraphs apply –
> (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
> (b) it relates to reserved matters [4]
> (c) it is in breach of the restrictions in Schedule 4,
> (d) it is incompatible with any of the Convention rights or with EU law,
> (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. [5]

2.4 Statutory functions and functions derived from the royal prerogative may be conferred upon and exercised by the Scottish Ministers insofar as the exercise of these functions are compatible with the limits imposed on the legislative competence of the Scottish Parliament: see Section 53 SA. It follows from this that it falls outside the Scottish Ministers' devolved competence to confirm, approve, make *or maintain* any provision by subordinate legislation which would be beyond the legislative competence of the Scottish Parliament. Section 54(2) of the Scotland Act 1998 provides that it is outside the "devolved competence" of the Scottish Ministers '(a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or (b) to confirm or approve any subordinate legislation containing such provision'.

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[4] See *Martin v. Most*, 2010 SC (UKSC) 40 *per* Lord Walker at para 44, 49: '44. The Scotland Act 1998 is on any view a monumental piece of constitutional legislation. Parliament established the Scottish Parliament and the Scottish Executive and undertook the challenging task of defining the legislative competence of the Scottish Parliament, while itself continuing as the sovereign legislature of the United Kingdom. That task is different from defining the division of legislative power between one federal legislature and several provincial or state legislatures (as in Canada or Australia, whose constitutional difficulties the Judicial Committee of the Privy Council used to wrestle with, often to the dissatisfaction of those dominions). The doctrine of 'pith and substance' …. is probably more apt to apply to the construction of constitutions of that type. But both have to face the difficulty of defining (necessarily in fairly general and abstract terms) permitted or prohibited areas of legislative activity…

49. … Section 29(2)(b) prohibits legislation by the Scottish Parliament which 'relates to' reserved matters. That is an expression which is familiar in this sort of context, indicating more than a loose or consequential connection, and the language of sec 29(3), referring to a provision's purpose and effect, reinforces that.'

[5] *Imperial Tobacco v. Scottish Ministers* [2012] CSIH 9 per Lord Brodie at para 164: '164. …Section 29 [of the Scotland Act 1998] defines the scope of the devolved power. It does so by identifying the characteristics of a provision which place it outside the legislative competence of the [Scottish] Parliament. The scheme whereby legislative competence is conferred on the Scottish Parliament is one where what is not specifically identified as being outside competence is devolved, albeit that in terms of section 28(7), the Parliament of the United Kingdom, consistent with its sovereign character, retains all of its pre-Act power to make law for Scotland (this is qualified in practice by the 'Sewel Convention' in terms of which the Parliament of the United Kingdom will not legislate with regard to devolved matters without the consent of the Scottish Parliament).'

2.5 These provisions of the Scotland Act allow challenges to be made before the court as to the validity of all and legislation passed by the Scottish Parliament or made by the Scottish Ministers (and indeed any acts having legal effect).

Equal opportunities a "reserved matter"

2.6 Paragraph L2 of Schedule 5 to the Scotland Act 1998 specifies as among "reserved matters", "equal opportunities", which is defined as: 'the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions'

and includes '…the subject-matter of— (a) the Equal Pay Act 1970, (b) the Sex Discrimination Act 1975, (c) the Race Relations Act 1976, and (d) the Disability Discrimination Act 1995'.

2.7 The same paragraph L2 of Schedule 5 SA allows that it is within the legislative competence of the Scottish Parliament and the devolved competence of the Scottish Ministers to *encourage* (other than by prohibition or regulation) equal opportunities, in particular the observance within Scotland of the requirements of the law for the time being relating to equal opportunities.

Convention rights limitations on the acts of the Scottish Government

2.8 Section 100(4)(a) SA allows for the possibility of an Article 34 ECHR "victim" bringing court proceedings (including a claim for just satisfaction damages) in respect of any acts of the Scottish Parliament and/or the Scottish Government – including their 'making any legislation' - which is Convention incompatible.

2.9 Although Section 63 SA, on its face, allows for the transfer (by Order in Council) to the Scottish Ministers of further powers or functions which may *exceed* the legislative competence of the Scottish Parliament, this transfer cannot be used as a means of allowing the Scottish Ministers to act incompatibly with Convention rights or with EU law. This is confirmed by the provisions of Section 57(2) SA which states that 'a member of the Scottish Executive has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law'. Section 57(2) SA makes clear that the any Convention incompatible act on the part of the Scottish devolved institutions is rendered void and of no effect as Lord Clyde noted in *H.M. Advocate v. R*.[6] And as Lord Rodger of Earlsferry observed in the same case:

[6] *H.M. Advocate v. R*, 2003 SC (PC) 21 per Lord Clyde at pp 49-50, para 2: 'The critical question is one of the construction of section 57(2) of the Scotland Act 1998. Section 57(2) provides as follows: "A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law." We are not concerned in the present case with subordinate legislation and accordingly I shall take no further notice of that element in the provision. The subsection imposes a limitation on the powers of members of the Scottish Executive. It thereby states the consequence of doing an act which is incompatible with any of the Convention rights or with Community law. *The consequence is that the act, being ultra vires, is necessarily void and of no effect*. It does not detail what remedy, if any, beyond that invalidity there may be where someone has suffered because a member of the Scottish Executive has acted beyond his or her power *but it does render ineffectual <u>any</u> act incompatible with the Convention rights* or with Community law.'

'23. ... [W]henever a member of the Scottish Executive does an act which is incompatible with Convention rights, the result produced by all the relevant legislation is not just that his act is unlawful under section 6(1) of the Human Rights Act. That would be the position if the Scotland Act did not apply. When section 57(2) [SA] is taken into account, however, the result is that, so far as his act is incompatible with Convention rights, the member of the Executive is doing something which he has no power to do: his act is, to that extent, merely a purported act and is invalid, a nullity. In this respect Parliament has quite deliberately treated the acts of members of the Scottish Executive differently from the acts of Ministers of the Crown.'

24. So in all such cases of positive acts by a member of the Scottish Executive the legal consequence of incompatibility with Convention rights is that the purported act is invalid so far as it is incompatible. That is the legal consequence which Parliament has chosen to attach to this situation—whether or not it is the consequence that would most suit the party who challenges the act." [7]

Convention rights limitations on failures to act by the Scottish Government

2.10 In *R v HM Advocate* 2003 SC (PC) 21, both Lord Hope and Lord Rodger noted that "act" in section 57(2) SA does not include a failure to act, a point also supported in argument by Lord Walker: see paragraphs 47 (per Lord Hope) and 125 (per Lord Rodger). As Lord Rodger went on to explain, that does not mean, however, that a Scottish Minister's failure to act may not have legal consequences under the Scotland Act. For example Section 100(4)(b) SA allows for the possibility of an Article 34 ECHR "victim" bringing court proceedings (including a claim for just satisfaction damages) in respect of the Scottish Government "failure to act" in a manner otherwise required of it by the ECHR. This is confirmed too by the terms of paragraph 1(e) of Schedule 6 to the SA (devolution issues include the question whether a failure to act by a member of the Scottish Executive was incompatible with Convention rights). A failure to act on the part of the Scottish Ministers may constitute Convention incompatible inaction in situations in which the Convention article in question is interpreted as imposing positive duties upon the State in an area within the competence of the Scottish devolved institutions. As Baroness Hale has observed:

'57. … [T]he state has positive obligations under many articles of the Convention to take steps to prevent violations of an individual's human rights. These include taking general steps, such as enacting laws to punish and deter such violations: as in *X and Y v The Netherlands* (1985) 8 EHRR 235, where Dutch law did not afford an effective remedy to a mentally disabled girl who had been raped by a relative of the directress of the care home where she lived. They also include making effective use of the steps which the law provides: as in *Z v United Kingdom* (2001) 34 EHRR 97, in which a local social services authority did not use its powers to protect children whom they knew to be at risk of serious abuse and neglect'.

2.11 And the European Court of Human Rights has noted:

'[C]onvention provisions protect various fundamental aspects of physical integrity. Article 2 § 1, in its first sentence, enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate

[7] *H.M. Advocate v. R*, 2003 SC (PC) 21 per Lord Rodger of Earlsferry at pp 63-4, paras 23-4

steps to safeguard the lives of those within its jurisdiction Those principles apply not only to criminal law enforcement but also in the public-health sphere too and impose positive obligations on the State to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 48-49, ECHR 2002-I). Positive obligations also arise under Article 3 requiring States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment (see *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, § 22; *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V). Article 8 covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22); choices about one's own body in the context of medical treatment and how, in extreme cases, one manages one's death, also fall in principle within its scope (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 61-67, ECHR 2002-III).'[8]

Human Rights Act 1998

2.12 In addition to the limits imposed by the Scotland Act 1998 the Scottish Parliament and Scottish Government are also subject to the provisions of the Human Rights Act 1998 ("HRA"). The position of the Scottish Ministers and of the Scottish Parliament differs in material respects from that of Ministers of the Crown and the United Kingdom Parliament.

2.13 First, the Scottish Parliament (like the Scottish Parliamentary Corporate Body: s21(1) Scotland Act 1998 ("SA")) is a public authority. Unlike the Houses of Parliament, it is not excluded from the definition of "public authority" found in s6(3) HRA.

2.14 Secondly, since the Parliament referred to in s6(6)(a) HRA is the Westminster Parliament, an "act" under s6(1) might in some circumstances include a failure to introduce in, or lay before, the Scottish Parliament a proposal for legislation. Such actions generally fall within the functions of the Scottish Ministers.

Public international law and the devolved institutions

2.15 Paragraph 7(2)(a) of Schedule 5 SA provides that it is within "devolved competence" for the Scottish Ministers to observe and implement 'international obligations, obligations under the Human Rights Convention and obligations under EU law'. [9]

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[8] *Burke v. United Kingdom*, non-admissibility decision, ECtHR, 11 July 2006

[9] See to similar effect paragraph 3(c) of Schedule 2 to the Northern Ireland Act 1998 which defines among the 'excepted matters which Section 6(2)(b) plays beyond the competence of the NI Assembly: 3. International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations and extradition and international development assistance and co-operation, but not—

…(c) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law.

In this paragraph "the Human Rights Convention" means the following as they have effect for the time being in relation to the United Kingdom—

(a) the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950; and
(b) any Protocols to that Convention which have been ratified by the United Kingdom.

2.16 Section 126(10) SA defines "international obligations" as meaning 'any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights'. Thus the Scottish Ministers have the power under the Scotland Act to take any action which might be said to be in implementation of the United Kingdom's international obligations, including all those under the Convention of the Rights of the Child. Indeed, in granting the Scottish devolved institutions power to implement international obligations Paragraph 7(2)(a) of Schedule 5 to the Scotland Act may in fact expand the competences of the Scottish Government even into areas which otherwise look to be reserved to the UK Parliament.

2.17 Certainly the intention of the UK Parliament as revealed in the scheme of the Scotland Act 1998 was also that the Scottish Government should *not* exercise the powers that were devolved to it by the 1998 Act in a manner which would put the United Kingdom in breach of its international treaty obligations. As a matter of constitutional principle and good government it is clear that *if* the United Kingdom's international obligations are to be breached it will only be as a result of a deliberate and conscious decision on the part of Crown in right of the UK Government. It is for this reason that Section 58 SA was enacted (to give the Secretary of State power to prevent action by the Scottish Ministers incompatible with international obligations). Further, insofar as the Scottish Ministers fail to act in a manner which might otherwise be required to be done in Scotland under and in terms of an international obligation binding upon the United Kingdom they may be subject to enforcement action against them on the part of the Secretary of State by virtue of Section 58 SA.

2.18 The purpose of the Westminster Parliament in enacting Section 58 SA was that disputes between the United Kingdom Government and the Scottish Government as to the requirements of international law should be justiciable before the courts. Thus the Secretary of State is obliged under Section 58(5) SA to state the reasons for making any order forbidding or directing that action be taken by the Scottish Ministers in implementation of international obligations. Similarly Section 35(2) SA requires the Secretary of State to provide a statement of reasons for making a Section 35(1)(a) SA order prohibiting the Presiding Officer of the Scottish Parliament from submitting a Bill passed by the Parliament for Royal Assent, on grounds that it would be incompatible with any international obligation or the interests of defence or national security. As the Government promoter of the Scotland Bill before the House of Lords, the then Lord Advocate Lord Hardie of Blackford advised:

> 'It is also intended that, when a UK Minister of the Crown makes an order under Clause 54 [now section 58(1) SA] requiring some action to be taken by Scottish ministers, it should be possible for Scottish ministers to seek a judicial review of that order and for the UK Minister to seek a court order enforcing his order against Scottish ministers, subject of course to the provisions of the Crown Proceedings Act 1947. …. Equally, as I said, if a Minister of the UK Government made an order [under Section 35(1) SA] requiring the Scottish parliament to do something and it wished to challenge it, the Scottish parliament could review the decision by virtue of this provision. It would give the ability to litigate about that particular matter just as this provision will give United Kingdom Ministers the ability to litigate about the failure of the Scottish executive to give effect to the order.'[10]

[10] See Hansard HL Volume 594 per the Lord Advocate, Lord Hardie of Blackford at columns 75, 77

2.19 There are no parallel provisions in the Human Rights Act which set out the continued significance of public authorities abiding by the United Kingdom's international obligations. Collectively these provisions of the Scotland Act might be said to bind the Scottish Ministers to exercise their powers in a manner which respects the whole range of international treaty obligations entered into by the United Kingdom even where they have not been incorporated into the domestic law of the United Kingdom.[11] Thus, while not making international obligations directly part of the domestic Scots law, the Scotland Act may be said to embody a legitimate expectation that the actions of the Scottish devolved institutions will be compatible with the United Kingdom's "international obligations" under the ECHR.

2.20 The Scotland Act 2012 also now inserts a new section 57A into the 1998 Act to allow UK Ministers, concurrently with Scottish Ministers, to implement international obligations in relation to matters within devolved competence. The 1998 Act already allows UK Ministers to act concurrently with Scottish Ministers to implement EU law obligations in areas that are devolved to the Scottish Government. New section 57A will allow UK Ministers to implement international obligations using a similar approach.

Standing to challenge

2.21 The (strictly obiter) remarks of Lord Hope in the decision of the House of Lords in *Whaley v. Lord Advocate* makes clear, given the specific statutory machinery provided for in the Scotland Act as regards the direct enforcement of public international law obligations of the UK against the Scottish Ministers and the Scottish Parliament, there would be some hurdles to overcome for any party other than the UK Government seeking to challenge decisions of the Scottish Ministers for their compatibility with the (unincorporated) requirements of public international law.[12]

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[11] Compare, pre-devolution, *T Petitioner*, 1997 SLT 724, IH on the relevance of provisions of the ECHR prior to the incorporation of various of its provisions into domestic law by the Human Rights Act 1998 and the devolution statutes.

[12] In *Whaley v. Lord Advocate*, 2008 SC (HL) 107 Lord Hope observed at 110-1: '*International obligations* [8] Mr. Friend submitted that, as observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law are all excluded by para 7(2)(a) of schedule 5 SA from the list of reserved matters, the Scottish Parliament was obliged to observe and implement international obligations in just the same way as it was obliged to implement and observe the Convention rights and Community law. That however is not how observing and implementing international obligations has been provided for by the Scotland Act. Section 126(10) SA provides that in the Act the expression 'international obligations' means any international obligations of the United Kingdom 'other than' obligations to observe and implement Community law and the Convention rights. The distinction that is inherent in the definition recognises that it is for Parliament, not the courts, to decide whether the international treaties should form part of domestic law. On the one hand there are the Convention rights which have been incorporated into domestic law by the Human Rights Act 1998 and Community law which has been incorporated into domestic law by the European Communities Act 1972 (cap 68). On the other hand there are international obligations of the kind that have not been incorporated. The international obligations that Mr. Friend relies on all fall into the latter category. None of them are enforceable in the domestic courts as part of the law of Scotland. Nor is the Scottish Parliament bound to implement them, although it may choose to do so as they are not among the reserved matters that are outside its legislation competence (SA, sec 29(2)(b)). As senior counsel for the respondent put it, the Scottish Parliament has the right so to legislate, not a duty to do so.

> [9] Recognising that international obligations are not part of domestic law, the Scotland Act provides for them in a different way. Section 35(1) SA provides that the Secretary of State may make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent if it contains provisions which he has reasonable grounds to believe would be incompatible with any international obligations. Section 58(1) SA provides that the Secretary may also intervene at the stage when a Bill is introduced in the Parliament if he has reasonable grounds to believe that its

2.22 But as we have seen an argument could properly be presented to the effect that the scheme of the Scotland Act creates a general statutorily based legitimate expectation to the effect that the Scottish Parliament and the Scottish Government will act in a manner which is consistent with the requirements of public international law.[13]

2.23 And there is no reason why such a statutory legitimate expectation should not be able to be enforced by any private party demonstrating "sufficient interest". Compliance with the requirements of public international law may be said to be encompassed in the concept of the preservation of the rule of law. And as Lord Reed noted in *AXA*:

> 'The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights. As Lord Hope of Craighead DPSC, delivering the judgment of the court, said in *Eba v Advocate General for Scotland (Public Law Project intervening) (Note)* [2011] 3 WLR 149, para 8: "The rule of law . . . is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it: *West v Secretary of State for Scotland* 1992 SC 385, 395. This favours an unrestricted access to the process of judicial review where no other remedy is available."
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> There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing.
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> 170. For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the

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> introduction would be incompatible with any international obligations. He may so do by directing by order that that action shall not be taken. What these provisions do is enable the Secretary of State, who is a minister of the UK government, to intervene if he thinks it appropriate to do so in the interests, for example, of international comity. They do not limit the legislative competence of the Scottish Parliament in a way that can be decided upon by a court. I agree with both the Lord Ordinary and the Extra Division that the averments that refer to the international obligations are irrelevant.'

[13] See *Salah Abdadou v. Secretary of State for the Home Department*, 1998 SC 504, OH. The idea of a legitimate expectation that international obligations will be respected was not the subject of consideration in *Whaley v. Lord Advocate*, 2008 SC (HL) 107

public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.'[14]

Judges as "state actors"

2.24 Because we are dealing with *legal* norms, it is the duty of all courts to ensure so far as within their legal jurisdiction, that those norms are duly respected by those properly bound by them. The fact that these norms are derived from customary international law (or specifically incorporated Convention law) does not lessen their binding force or the duty of national courts, in accordance with the requirements of the rule of law, to ensure respect by other State authorities for their legal commitments. From the perspective of international law this duty may be expressed in the doctrine of the national courts as "State actors"; from the perspective of the domestic courts themselves it is more simply expressed as the duty to ensure respect by the national Executive and legislature for the Rule of Law. As Lord Hoffman noted in *Montgomery v. HM Advocate* in the context of the protection of the rights granted under the European Convention:

> '[T]he European Court [of Human Rights] administering the [European] Convention as an international treaty adjudicates upon the obligations which it imposes upon the member States as States. It is not, however, concerned to distinguish, from the point of view of the imposition of the obligation, between the various organs of the State. The question is whether a Convention right has been infringed by the State, and it does not matter whether this is attributable to the acts or omissions of the executive, legislative *or judicial* branches of government.'[15]

2.25 In similar vein, the then Professor Rosalyn Higgins QC (subsequently President of the International Court of Justice) wrote as follows:

> 'The international responsibility of a State is engaged when it violates international law, with various possible consequences. And from the perspective of international law, 'the State' encompasses *all* the organs of the State, the *judiciary* as well as the executive and legislative. The responsibility of the State is incurred by the acts and decisions of the judiciary, notwithstanding the proper separation, in a democracy, of the judiciary from other State organs.'[16]

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[14] *AXA General Insurance Ltd v The Lord Advocate* [2011] 3 WLR 871, UKSC per Lord Reed at paras 169-70

[15] *Montgomery v. HM Advocate* [2003] 1 AC 641, JCPC *per* Lord Hoffman at 648G-F

[16] R. Higgins "The Relationship between International and Regional Humanitarian law and Domestic Law" (1992) 18 CLB 1268 at 1268.

2.26 Within domestic case law the doctrine of "judges as State actors" in international law has been transformed into a general interpretative principle that domestic statutes will if possible be interpreted and applied in line with the requirements of international obligations. As Lord Diplock observed in *Garland v British Rail Engineering*:

> '[I]t is a principle of construction of United Kingdom statutes, now too well established to call for any citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it. A fortiori is this the case where the Treaty obligation arises under one of the Community treaties to which section 2 of the European Communities Act 1972 applies.'[17]

2.27 There is a strong presumption in favour of interpreting domestic law in the UK (whether common law or statute) in a way which does not place the United Kingdom in breach of its international obligation.[18] As Lord Goff of Chieveley said in *Attorney General v Guardian Newspapers Ltd (No 2)*:

> 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention].'[19]

The principles of constitutional review

2.28 Clearly the direct judicial review of Acts of the Scottish Parliament (and of the failure on the part of the Scottish Ministers to lay a proposal before the Scottish Parliament for legislation where this is required under and in terms of the ECHR) raises interesting but difficult questions regarding the proper relationship of the courts to the democratically-elected legislature. It is essential to develop new principles of legitimacy which can justify the priority of the individual's fundamental rights over the claims of the legislature and the executive to protect the general public interest in a democracy as well as principles for determining the legitimate relationships among the Scottish, UK and European legislatures and executives governing the land. The courts in Scotland are still finding their way in this regard. Initially, it appeared that the Scottish Parliament would be regarded as just another statutory body, unproblematically subject to scrutiny by the courts. Lord President Lord Rodger of Earlsferry made certain robust remarks apparently to this effect in his decision in *Whaley v Lord Watson*, in declaring that the Scottish Parliament would be regarded as 'any other litigant' in challenges to its acts before the courts. [20] But these remarks must now be seen in context. They may now be read as no

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[17] *Garland v British Rail Engineering* [1983] 2 AC 751 *per* Lord Diplock at 771A–B.
[18] See for example *R v. Lyons* [2003] AC 976, HL per Lord Hoffmann at para 32
[19] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283

[20] *Whaley and others v. Lord Watson of Invergowrie and The Scottish Parliament*, 2000 SC 340, IH *per* Lord Rodger at 348H, 349D-E, 350B-C: '[T]he [Scottish] Parliament [i]s a body which - however important its role - has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. *In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law…..* [I]n many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which uphold the law. The Scottish Parliament has simply joined that wider family of parliaments. Indeed, I find it almost paradoxical that counsel for a member of a body which exists to

more than an assertion that the internal workings and privileges of the Scottish Parliament are not to be regarded as immune from judicial scrutiny. However, once the Scottish Parliament has duly acted in a legislative capacity, the court has to recognise the legitimacy that inheres to the substance of the resulting statute, by virtue of its being produced by a democratically-mandated assembly. Consider, for example, *A v Scottish Ministers* which was a challenge to the Convention compatibility of first ever Act of the Scottish Parliament, emergency legislation which had been passed by the Scottish Parliament with retrospective effect and targeted and specific intent to close a perceived loop-hole in the law whereby persons who had been sentenced after trial to be detained indefinitely in a secure hospital were able to secure their release on the grounds that they were not now held to be suffering from any treatable mental illness. This challenge was unsuccessful in both the Inner House and on appeal to the Privy Council.[21] Both the First Division and the Privy Council held that the Scottish Parliament's legislation was justified by considerations of continued safety of the general public as well as the staff and inmates of ordinary prisons all of which could properly be used to justify the continued detention of restricted patients in hospital, whether or not their mental disorder was treatable, notwithstanding that Medical opinion had shifted since these individuals had been sentenced such that their condition - psychopathic disorder manifested by abnormally aggressive or seriously irresponsible conduct – was not now regarded as being capable of receiving treatment likely to alleviate or prevent a deterioration in their condition… In granting the legislature a degree of deference as regards its judgment on these issues, Lord Rodger of Earlsferry noted:

> '[52] One might envisage situations in which it was far from clear whether the minister concerned or the legislature had applied their minds to the balance which the Convention requires a State to hold between the community interest and the rights of individuals. But this is not such a situation. It is indeed plain from the report of the proceedings in the Scottish Parliament not only that ministers and members were aware of the Convention hovering above the debate, but also, more specifically, that they were conscious of the need to hold just that very balance…..
>
> [53] What we must therefore decide is whether, even though the members were conscious of the need to have regard to the human rights of the patients, the Parliament none the less failed to maintain the necessary fair balance by giving too much weight to the perceived danger to members of the public and, thereby, giving too little weight to the requirements of the protection of the patients' right to freedom and in particular their rights under art 5(1)(e) and (4). *In determining that issue, as the authorities show, it is right that the court should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved*.'[22]

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create laws and to impose them on others should contend that a legally enforceable framework is somehow less than appropriate for that body itself.

…While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a Parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a 'self-denying ordinance' which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law.'

[21] *A v. Scottish Ministers*, 2002 SC (PC) 63
[22] *A v. Scottish Ministers*, 2001 SC 1, IH per Lord Rodger of Earlsferry at 20-1

2.29 The fact that the courts have been accorded by statute the power to rule upon the lawfulness of Acts of the Scottish Parliament and to suspend or disapply these provisions does not mean that the judges are now to be regarded as have untrammelled power or discretion over the democratic legislature. The judges' powers are circumscribed by the very statute which accords them this role and by broader constitutional considerations such as requires them to apply, for example the doctrine of proportionality should be applied in a careful and nuanced way, with the court not rushing in to substitute its assessment of policy matters for that of the legislature. This is certainly the approach taken by the courts in *AXA General Insurance v. Lord Advocate*[23] the unsuccessful judicial review taken by various companies providing employer's liability insurance challenging the validity and Convention compatibility of the Damages (Asbestos-related conditions) (Scotland) Act 2009 which declared (for the avoidance of doubt engendered by the decision of the House of Lords to the contrary effect in the English test litigation *Rothwell*[24] that asymptomatic plural plaques (and other related conditions) constituted actionable personal injury under the law of Scotland in which Lord Hope in the UKSC observed as follows:

> '[49] The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances. As Lord Bingham of Cornhill said in *R (on the application of Countryside Alliance) v Attorney General*, at [2008] 1 A.C., p.755, para.45, the democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act achieve through the courts what they could not achieve through Parliament.'[25]

2.30 But as the First Division noted in *Imperial Tobacco v. Scottish Ministers* (which concerned the issues as to whether sections 1(1) and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 banning retail display of tobacco products and outlawing tobacco vending machines was outside the legislative competence of the Scottish Parliament and accordingly not law) even if one were to characterise the Scotland Act as a "constitutional statute", that did not mean that there was any legal presumption in favour of the validity of the acts of the devolved authorities under the statute. Lord Reed said this:

> '[71] The Scotland Act is not a constitution, but an Act of Parliament. There are material differences. The context of the devolution of legislative and executive power within the United Kingdom is evidently different from that of establishing a constitution for an independent state such as Jamaica or

[23] *AXA General Insurance v. Lord Advocate* [2011] 3 WLR 871, UKSC; 2011 SLT 439, IH; 2010 SLT 179, OH.
[24] *Rothwell v Chemical & Insulating Co Ltd* [2008] 1A.C. 281
[25] *AXA General Insurance v. Lord Advocate* [2011] 3 WLR 871, UKSC *per* Lord Hope at para 49

Barbados, or a British overseas territory such as Bermuda. In form, the Scotland Act does not resemble the fundamental rights provisions of a constitution: its provisions are dense and detailed. The Scotland Act can also be amended more easily than a constitution: a factor which is relevant, since the difficulty of amending a constitution is often a reason for concluding that it was intended to be given a flexible interpretation. Although the UK Government's stated policy on legislation concerning devolved matters, [26] known colloquially as the Sewel Convention, may impose a political restriction upon Parliament's ability to amend the Scotland Act unilaterally, there have nevertheless been many amendments made to the Act. They include amendments to Schedules 4 and 5, which can be effected under section 30 by Order in Council'

and

'[T]he power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it. As Lord Bridge of Harwich observed in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48: "The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law".'[27]

3. OTHER INTERNATIONAL LAW PROVISIONS IMPACTING UPON THE RIGHTS OF THE CHILD

EU law

3.1 In *Parliament v Council: re immigration and family reunification* the Grand Chamber of the Court confirmed that in the interpretation of EU law regard may also properly be had to the provisions on the Convention on the Rights of the Child, noting:

'The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of EU law (see, *inter alia*, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 31; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 68; and Case C-249/96 *Grant* [1998] ECR I-621, paragraph 44). That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States'.[28]

Charter of Fundamental Rights

3.2 The CJEU now, as a matter of course, refers to provisions of the EU Charter of Fundamental Rights ("CFR") as setting out the general principles against which provisions of Directives and EU regulations (and provisions of EU soft law) have to

[26] Currently embodied in the Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, Cm 7864, 2010, para 14
[27] *Imperial Tobacco v. Scottish Ministers* [2012] CSIH 9 per Lord Reed at para 58
[28] Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraphs 35- 38

be interpreted and applied. Article 52(7) CFR also enjoins the courts of the European Union and of the Member States to have "due regard" to "the explanations drawn up as a way of providing guidance in the interpretation of this Charter". These explanations, insofar as illuminating, are footnoted to the list of those Charter Rights which may be relevant and applicable to the circumstances of the rights of the child. These include:

> *'Article 24*
> **The rights of the child** [29]
> 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.'[30]

3.3 The Praesidium explanation to this provision makes explicit the link to the terms of the CRC noting as follows:

> 'This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof. Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.'

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[29] *Explanation on Article 24 — The rights of the child*
'This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof. Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.'

[30] Case C-211/10 PPU, *Doris Povse v Mauro Alpago*, 1 July, [2010] ECR I-nyr where the CJEU expressly referred to and relied upon Article 24(3) CFR – which expresses the right of every child 'to maintain on a regular basis a personal relationship and direct contact with both his or her parents' – in construing, in a dispute between warring parents, Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial and parental matters. And in Case C-400/10 PPU *J McB v LE*, 5 October, [2010] ECR I-nyr the Court of Justice observed:

> '[I]t must also be borne in mind that Article 7 CFR, mentioned by the referring court in its question, must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) CFR, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) CFR.'

ECHR case law on the relevance of Convention on the Rights of the Child

3.4 A proper understanding of the Charter's provisions requires, too, a proper understanding of the relevant Strasbourg jurisprudence since Article 52(3) CFR requires that those Charter rights which correspond to rights already guaranteed by the ECHR be given the same meaning and scope as, and no lesser degree of protection than, provided under the ECHR by specifying that:

> 'in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

3.5 In *J McB v LE*, the CJEU ruled that where Charter rights paralleled ECHR rights, the Court of Justice should follow any clear and constant jurisprudence of the European Court of Human Rights.[31] This will have the result that EU law and ECHR law will increasingly come to be seen as 'as a single, converging legal system'.[32]

Article 8 ECHR

3.6 Article 8 of the European Convention of Human Rights ('the ECHR') states as follows:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-

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[31] Case C-400/10 PPU *J McB v LE*, 5 October, [2010] ECR I-nyr at para 53. (emphasis added): '[I]t follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by European Union law. Under Article 7 of the Charter, '[e]veryone has the right to respect for his or her private and family life, home and communications'. The wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression 'correspondence' instead of 'communications'. That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. *Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights* (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48).

See also the Grand Chamber CJEU decision in Case C-256/11 *Murat Dereci and others v. Bundesministerium für Inneres* 15 November [2011] ECR I-nyr at paras 70-2:

> '70. [I]t must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, *the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights* (Case C-400/10 PPU *McB*. [2010] ECR I-0000, paragraph 53)'.

[32] See for example the *Handbook on European non-discrimination law* (Luxembourg: Publications Office of the European Union, 2011 – available have jointly produced a which is available online at http://fra.europa.eu/fraWebsite/attachments/FRA-CASE-LAW-HANDBOOK_EN.pdf) which was produced by the EU's Agency for Fundamental Rights together with the European Court of Human Rights and which avowedly and which seeks to present and explain the body of non-discrimination law stemming from the ECHR and EU law as just such a 'single, converging system'.

being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

3.7 There is no doubt that children notwithstanding their dependent status [33] and even where they suffer from severe disabilities [34] are endowed, directly and in their own right, with rights to respect for their private lives under and in terms of Article 8 ECHR which public authorities are duty bound to respect.[35]

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[33] See for example *Reklos v Greece*, ECtHR 15 January 2009 concerning a commercial photographer's photographing of a one day old baby in hospital without consent in which the Court found there to be a violation of the baby's rights to respect for his private life as follows:

'41. In the present case the Court first observes that, as regards the conditions in which the offending pictures were taken, the applicants did not at any time give their consent, either to the management of the clinic or to the photographer himself. In this connection it should be noted that the applicants' son, not being a public or newsworthy figure, did not fall within a category which in certain circumstances may justify, on public-interest grounds, the recording of a person's image without his knowledge or consent (see *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002). On the contrary, t*he person concerned was a minor and the exercise of the right to protection of his image was overseen by his parents.* Accordingly, the applicants' prior consent to the taking of their son's picture was indispensable in order to establish the context of its use. The management of the clinic I. did not, however, seek the applicants' consent and even allowed the photographer to enter the sterile unit, access to which was restricted to the clinic's doctors and nurses, in order to take the pictures in question.

42. In addition, the Court finds that it is not insignificant that the photographer was able to keep the negatives of the offending photographs, in spite of the express request of the applicants, who exercised parental authority, that the negatives be delivered up to them. Admittedly, the photographs simply showed a face-on portrait of the baby and did not show the applicants' son in a state that could be regarded as degrading, or in general as capable of infringing his personality rights. However, the key issue in the present case is not the nature, harmless or otherwise, of the applicants' son's representation on the offending photographs, but the fact that the photographer kept them without the applicants' consent. The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents (see, *mutatis mutandis*, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001-IX).
43. The Court notes that, during the examination of the case at issue, the domestic courts failed to take into account the fact that the applicants had not given their consent to the taking of their son's photograph or to the retention by the photographer of the corresponding negatives. In view of the foregoing, the Court finds that the Greek courts did not, in the present case, sufficiently guarantee the applicants' son's right to the protection of his private life. There has therefore been a violation of Article 8 of the Convention.'

[34] See for example *Glass v. the United Kingdom* (2004) 39 EHRR 15 where the first applicant, born in 1986, was described as being 'a severely mentally and physically disabled child' needing 24 nursing and medical care and where the Court held (at para 76) that the decision to impose treatment on the first applicant in defiance of the second applicant's [his mother] objections gave rise to an interference with the first applicant's right to respect for his private life, and in particular his right to physical integrity.

[35] The observations of the Lord Ordinary, Lord Brodie, in *SM as guardian for the child JM v Advocate General for Scotland* [2010] CSOH 15 in relation to a claim of entitlement of a very severely disabled child under 3 to Disability Living Allowance that: '[I]f a difference in treatment is to amount to discrimination as prohibited by article 14 because it falls within the ambit of article 8 one would expect to find an adverse impact of whatever is complained of on the relationships which are of the essence of family life or the personal or sexual autonomy which are of the essence of private life. Agreeing with Mr Creally, I can find no such adverse impact here. Although it may appear to be a stark way to put it, I consider that Mr Creally was correct to say, in the circumstances of this case, that *J does not have personal autonomy which can be infringed. He is entirely dependent on his parents*.'

would appear to be wholly misplaced and made, *per incuriam*, in ignorance of the relevant Strasbourg case law.

3.8 As with EU law, in construing and applying provision of the ECHR it is not only permissible but may be required to have regard to relevant provisions of international law.[36] As the Grand Chamber of the Strasbourg Court observed in *Demir and Baykara v. Turkey:*

> '76. The Court recently confirmed, in the *Saadi v. the United Kingdom* judgment (cited above, § 63), that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty…
>
> 85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> 86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[37]'.[38]

3.9 The Strasbourg Court has repeatedly referred to and relied upon provisions of the CRC in coming to its judgments on the correct interpretation and application of the provisions of the ECHR. [39] For example in *Timishev v Russia* (2007) a case which was specifically concerned with the ECHR right to education set out in Article 2 of Protocol 1, the Strasbourg Court made direct reference to the right of education contained in other international instrument, noting:

> "In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No.1 would not be

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[36] See generally Jonathan L. Black-Branch "Equality, non-discrimination and the right to special education; from international law to the Human Rights Act" (2000) 3 *European Human Rights Law Review* 297-314

[37] See, *mutatis mutandis*, *Marckx*, cited above, § 41

[38] *Demir and Baykara v. Turkey* (2009) 48 EHRR 54 at paras 76, 78, 80, 82-4

[39] See for example *T and V v. United Kingdom* (2000) 30 EHRR 121 on the fair trial requirements of treatment of child offenders and *Neulinger v Switzerland* [2010] ECHR 41615/07 (Grand Chamber, 6 July 2010); [2011] 1 FLR 122:

> '132. In matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must therefore be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 51, ECHR 2003-V, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I) and the Convention on the Rights of the Child of 20 November 1989 (see *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII § 72).'

consistent with the aim or purpose of that provision. This right is also to be found in similar terms in other international instruments such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights , the International Convention on the Elimination of All Forms of Racial Discrimination, and *the Convention on the Rights of the Child*."[40]

4. APPLICATION OF THE LAW TO THE QUESTIONS ASKED

4.1 Against the foregoing background and survey of the law, I would answer the questions posed to me as follows:

1) Paragraph 7(2)(a) of Schedule 5 SA puts it within the legislative competence of the Scottish Parliament allows the Scottish Ministers to 'observe and implement international obligations'. It is therefore, in principle, within the powers of the Scottish Government and Scottish Parliament to directly and fully incorporate the CRC so far as relates to devolved issues into domestic Scots law and in so doing to create enforceable rights and new channels of redress through the Scottish judicial system.

2) Again Paragraph 7(2)(a) of Schedule SA provides a proper legal basis for the Scottish Government and Scottish Parliament partially incorporate the CRC in the sense of imposing an administrative Ministerial "due regard" or "act compatibly" or by placing a children's rights duty on public authorities in Scotland in relation to devolved issues.

3) In their consultation paper on the *Rights of Children and Young People Bill* the Scottish Government's suggest that that it would not propose to incorporate the CRC into Scots law for the following reasons: (i) because of the possibility of conflict between obligations under the CRC and the Scottish Ministers' obligations under the ECHR and separately under the Equality Act 2010; (ii) because the Scottish Parliament cannot pass legislation which runs contrary to ECHR. I find this a surprising objection. It is clear that international human rights instruments, among them the CRC and the ECHR, seek to ensure that they are interpreted and applied in a mutually consistent manner. I find it difficult to conceive of cases in which a decision of the European Court of Human Rights would seek to depart from any provision of the CRC and have been unable to identify any. Rather the opposite in fact occurs with the Strasbourg Court and the Court of Justice of the European Union, as we have seen, alluding to and relying upon provisions of the CRC among other fundamental rights treaties. Against that background I find it surprising for it to be suggested that the incorporation of the CRC might in any sense run contrary to the ECHR or the requirements of the Equality Act 2010.

4) It is within the powers of the Scottish Government and Scottish Parliament to strengthen the duty to require Scottish Ministers not simply to "have regard to" but, also to require the Ministers to act compatibly with the CRC where this is compatible with their existing overriding obligations to comply with the requirements of Convention rights and separately of EU law.

5) It may be anticipated that changing the proposed duty from "due regard to the CRC" to one of "act compatibly with the CRC" might be to increase the possible court actions challenging decisions. It should however be borne in

[40] *Timishev v Russia* (2007) 44 EHRR 37

mind that the two duties are distinct and have different focuses: the duty to "have regard" is a duty in relation to the process of reaching a decision; the duty to "act compatibly" looks instead at the outcome of the decision, however reached.

6) It is legally possible within a "due regard process" to provide by statute that provisions of the CRC (for example Article 3, the best interests of the child) be given specific weight or particular consideration. Example of such focussing on specific considerations is even in the Human Rights Act Sections 12 and 13 of which make specific provision in respect of freedom of expression. And freedom of thought conscience and religion, respectively.

7) "Office-holders in the Scottish Administration" is defined in Section 126(7)(a) of the Scotland Act 1998 as "(i) members of the Scottish Executive and junior Scottish Ministers, and (ii) the holders of offices in the Scottish Administration which are not ministerial offices". A due regard duty in relation to the Scottish Ministers would therefore apply to the Scottish Ministers, their civil servants and agencies of the Scottish Ministers. It would not cover – unless specific provision is made under Section 126(8)(b) SA distinct office holders such as governors of prisons [41] or local authorities.

8) If the due regard duty be extended to public authorities, it would cover all and any agencies carrying out a public function and would extend to local authorities, the police and prosecution authorities in Scotland, as well as, unless specifically excluded, courts and tribunals and indeed the Scottish Parliament itself.

9) The UK Supreme Court judgment in the AXA case has sought to align the issue of standing in public law matters in Scotland with the position in England and Wales where a very liberal approach to standing has long held sway and representative actions from reputable public interest groups and NGOs have long been accepted as being a proper use of court time. Due regard duties under the equalities legislation have been particularly litigated upon in England and Wales to challenge funding and allocation of public resources decisions by public bodies, including local authorities. These actions have been brought by a wide variety of public interest and pressure groups. The clear intention of the UKSC in AXA was for Scots public law to follow a similar pithy as already trod in England in this regard. Whether the Scottish courts will be happy to do so remains to be seen.

10) As a matter of private international law, at least, Scotland and England and Wales are foreign countries. The decision in one jurisdiction are therefore not binding on the courts of the other jurisdiction, but are at best of persuasive force[42]) even in the interpretation of common provisions of EU or other internally derived law. As Lord Justice Laws noted in *Caulfield and others v. Marshall Clay Products Ltd*. in declining to follow an earlier decision of the First Division of the Inner House of the Court of Session in *MPB Structures Ltd v Munro* [43] on the proper interpretation of the EU Working Time Directive

[41] See *Somerville v. Scottish Ministers*, 2008 SC (HL) 45; 2007 SC 140, IH
[42] Thus the House of Lords decision in *M v Home Office* [1994] 1 AC 377 on the proper interpretation of Section 21 of the Crown Proceedings Act was not followed by the Inner House in *McDonald v. Secretary of State* 1994 SC 234, IH. See, now, *Davidson v. Scottish Ministers (No. 1)*, 2006 SLT 110, HL
[43] *MPB Structures Ltd v. Munro* [2004] ICR 430, IH

93/104/EC and its implementing UK regulations, the Working Time Regulations 1998:

> '[P]recedent confines the very power of the courts subject to it. It is not a rule of discretion or comity or anything of the kind. *It is therefore of necessity a doctrine whose reach is limited to the jurisdiction in which the courts in question operate*.
> …
> [I]it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or – most assuredly – *vice versa*. Comity and practicality are another thing altogether. They exert a wholly legitimate pressure.
> …
> The EAT here [in England] was *not* obliged by law to follow the Court of Session. And this court certainly is not.'[44]

Consistently with this Section 41(1) of the Constitutional Reform Act 2005 – which set up the UKSC Supreme Court and transferred to it the jurisdiction of the House of lords in Scottish civil appeals and of the Judicial Committee of the Privy Council in devolution issues - affirms that 'nothing in this …. is to affect the distinctions between the separate legal systems of the parts of the United Kingdom'. Accordingly disparities in child rights legislation across the UK (due regard duties in Wales and Scotland) should have no direct impact upon judgments relating to children's rights from the UK Supreme Court in relation to English cases. At times however the European Court of Human Rights has regard to the fact that different provision is made within the UK on a particular matter and draws its own conclusions from this. [45]

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[44] *Caulfield and others v. Marshall Clay Products Ltd*. [2004] ICR 1502, CA *per* Laws LJ at 1514-1515, paragraphs 30-33.

[45] See for example *S and Marper v. United Kingdom* (2009) 48 EHRR 50 at paras 109-112:

> '109. The current position of Scotland, as a part of the United Kingdom itself, is of particular significance in this regard. As noted above, the Scottish Parliament voted to allow retention of the DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and even then, for three years only, with the possibility of an extension to keep the DNA sample and data for a further two years with the consent of a sheriff. This position is notably consistent with Committee of Ministers' Recommendation R(92)1, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases.
>
> Against this background, England, Wales and Northern Ireland appear to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence. The Government lay emphasis on the fact that the United Kingdom is in the vanguard of the development of the use of DNA samples in the detection of crime and that other states have not yet achieved the same maturity in terms of the size and resources of DNA databases. It is argued that the comparative analysis of the law and practice in other states with less advanced systems is accordingly of limited importance.
>
> The Court cannot, however, disregard the fact that, notwithstanding the advantages provided by comprehensive extension of the DNA database, other Contracting States have chosen to set limits on the retention and use of such data with a view to achieving a proper balance with the competing interests of preserving respect for private life. The Court observes that the protection afforded by art.8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. In the Court's view, the strong consensus existing among the

11) As noted above courts in Scotland already have an obligation where possible to interpret and apply provisions of domestic law, whether in common law or under statute, consistently with any relevant Treaty obligations of the United Kingdom. The Children (Scotland) Act 1995 should therefore where possible already be interpreted and applied consistently with the CRC. And as we have also noted above the Strasbourg Court attempts to ensure that its interpretation of the ECHR is consistent too with the requirements of the CRC. In principle, then, in the interests of international judicial and legal polity there should be no conflict among these various sources of law.

4.2 I trust that the foregoing is sufficient for the purposes of those instructing me. I have nothing more to add at this stage other than to note that those instructing me should not hesitate to contact me if there is anything further on which I might usefully add, whether in writing or at a consultation, to any of the above.

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contracting states in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere. The Court considers that any state claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard.'