

THE HUMAN RIGHTS ACT 1998: IMPLICATIONS FOR THE DETENTION AND TRIAL OF YOUNG PEOPLE

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INTRODUCTION

In contrast with other human rights treaties, the European Convention on Human Rights provides little protection for children and young people in conflict with the law. For example, Article 14 paragraph 4 of the International Covenant on Civil and Political Rights 1966 provides that the procedures faced by such juveniles shall take account of their age and the desirability of promoting their rehabilitation.¹ Article 10 of the Covenant stipulates that accused minors shall be separated from adults during pre-trial detention and brought as speedily as possible for adjudication.² These principles are echoed and elaborated upon in the UN Convention on the Rights of the Child 1989.³ In particular, Article 37 of this Convention requires the use of detention for the shortest possible period of time and as a measure of last resort, and Article 40 encourages the development of alternative measures for dealing with children without resorting to judicial proceedings and provides that children, who cannot be diverted from the criminal process, must be treated with dignity and respect for human rights.⁴ Moreover, young persons in trouble with the law must be treated in a manner consistent with their age and the desirability of reintegrating them into society.⁵

In line with its absence of children's rights generally, the European Convention on Human Rights contains no principles or provisions of this kind. Importantly, however, two of the Convention's rare references to children can be found in Article 5, which safeguards the right to liberty and Article 6, which guarantees the right to a public hearing before an independent and impartial tribunal. These references are not overtly positive however and they both can be said to limit rather than extend the protection which the Convention offers in this area. Paragraph 1(d) of Article 5 permits the detention of minors for the purpose of educational supervision, and Article 6 paragraph 1 provides that the public may be excluded from all or part of a trial where the interests of juveniles so require. Neither provision contains any expression of the manner in which young people in conflict with the law should be treated either before trial or following conviction. While this absence of specific provision for children is unfortunate, nevertheless young people are equally entitled to the more general protection offered by these and other European Convention provisions. This is supported strongly by Article 1 of the Convention, which guarantees its

¹ UNTS vol 999, p 171.

² Article 10 (2)(b), *ibid.*

³ UN Doc A/44/25.

⁴ Article 40 (3)(b), *ibid.*

⁵ Article 40 (1).

rights to 'everyone', as well as Article 14, which forbids discrimination in the enjoyment of Convention rights on various grounds, including the unenumerated ground of age. It is clear, therefore, that children and young people in conflict with the law must enjoy the right to liberty, as well as the safeguards which flow from it, including the right to have the legality of their detention reviewed regularly. Juveniles must also be guaranteed a fair trial before an independent and impartial tribunal, with all of the attendant rights which Article 6 conveys. In addition, other Convention provisions, which provide important protection for the rights of all minors, take on added importance for young people in detention. They include the right to respect for private and family life under Article 8, the right to have their life protected by law under Article 2, the freedom from inhuman and degrading treatment under Article 3, and the right to education under Article 2 of the First Protocol.

The Human Rights Act 1998 brings these and many other substantive provisions of the European Convention on Human Rights into domestic law. By the end of 2000 individuals who wish to do so will be able to rely on these provisions in domestic courts across the United Kingdom and to challenge public authorities acting in breach of Convention obligations. This article aims to introduce the relevant case law of the European Commission and Court of Human Rights on issues of juvenile justice and detention relevant to the United Kingdom, but Northern Ireland in particular. The undeveloped nature of Strasbourg case law in this area means that conclusions cannot be drawn with absolute certainty. It also means, however, that this is an area particularly ripe for challenge under the Human Rights Act. The article's course will follow the route of the young offender from arrest and questioning through to trial and conviction, and it will conclude by looking at some of the issues around detention.⁶

Questioning Child Suspects

The first likely stage at which children in conflict with the law will require protection is during questioning. In this regard, it is relevant that Article 5 paragraph 1 (c) of the Convention permits arrest or detention in order to bring a person before the competent legal authority on suspicion of having committed an offence. The fact that minors are not criminally responsible before a certain age does not preclude their interrogation where they are suspected of involvement in activities which would be punishable if they were criminally responsible.⁷ The Commission has held this to be justifiable with regard to the proper administration of justice and the protection of the rights of others. However, it has also established that the interrogation of children should be carried out in a manner respecting their age and susceptibility. Given that the police constitute a 'public authority' for the purposes of section 6 of the Human Rights Act 1998, the failure to take appropriate steps to take into account the age and vulnerability of young suspects during questioning would undoubtedly be subject to challenge in the domestic courts. What steps are appropriate in this context would clearly be for such courts to decide although the European Court's increasing

⁶ See generally Kilkelly, *The Child and the ECHR*, (1999).

⁷ No 8819/79 *Sargin v Germany*, Dec 19.3.81, DR 24, p 158, 4 EHRR 276.

references to UN Convention standards would make this approach an obvious one for the United Kingdom courts too.

Article 5 paragraph 2 of the European Convention requires that everyone arrested shall be informed promptly, in a language which he understands, of the reasons for the arrest and any charge against him. Normally, this requires that the arrested person be told the essential legal and factual grounds for his arrest in “simple, non-technical language that he can understand”, so as to enable a challenge to its lawfulness to be made if appropriate.⁸ According to the Commission, the application of this provision in children’s cases requires that their special needs and status are taken into account.⁹ In order to be effective, therefore, it is arguable that the application of Article 5 paragraph 2 to child suspects requires either that the police use language which children and young people understand, and/or that an appropriate adult, who understands the situation, be present to explain the charge to the child. The fact that this explanation should enable a challenge to the legality of arrest to be initiated suggests also that a legal representative should be present at this stage.¹⁰

Detention on Remand

It is not incompatible with the Convention to detain the accused – whether an adult or a young person – pending trial and this is envisaged by Article 5. Significantly, however, the Criminal Justice (Northern Ireland) (Children) Order 1998 envisages remand as a measure of last resort only.

Article 5 paragraph 3 of the Convention guarantees those detained on reasonable suspicion of having committed an offence the right to be brought promptly before a judge and the right to trial within a reasonable time or release pending trial. In the case of a juvenile on remand, however, the obligation to bring the accused to trial is greater than in the case of an adult.¹¹ Considering a case against Bulgaria in 1998, the Court noted that in the light of the relevant domestic law, which provides that minors should be remanded only in exceptional circumstances,

“it was more than usually important that the authorities displayed special diligence in ensuring that the applicant was brought to trial within a reasonable time.”¹²

On the facts of the case, the applicant had been detained on remand for approximately two years, during one of which virtually no action was taken in connection with the investigation: no new evidence was collected and Mr Assenov was questioned only once. According to the Court, therefore, bearing in mind the importance of the right to liberty and the possibility, for example, of copying the relevant documents rather than sending the original

⁸ Eur Court HR *Fox, Campbell and Hartley v UK*, judgment of 30 Aug 1990, Series A no 182, 13 EHRR 157, para 40.

⁹ No 21528/93 *Bohuslav and Lausman v Austria*, Dec 12.10.94, unreported, where the applicants failed to exhaust domestic remedies.

¹⁰ See further below.

¹¹ Eur Court HR *Assenov v Bulgaria*, judgment of 28 Oct 1998, Reports 1998, VIII, no 96.

¹² *Ibid*, para 157.

file to the authority concerned on each occasion, the applicant's many appeals for release should not have been allowed to have the effect of suspending the investigation and thus delaying his trial.¹³ The consequence of failing to show the appropriate diligence in bringing the minor to trial in this case gave rise to the Court's finding that he had been denied the right to a trial within a reasonable time.

There is a clear parallel with the Northern Ireland situation here as, similar to the Bulgarian legislation, Article 12 of the 1998 Order also reflects the need to refrain from remanding juveniles where possible.¹⁴ That the Convention obliges states to expedite criminal proceedings involving children and young people is a natural deduction therefore and it is arguable that this burden is even greater where the accused is particularly young and/or where s/he has been remanded to a secure unit or detained alongside committed juveniles. Yet, notwithstanding the obligation on the authorities to display exceptional diligence in minor's cases, it is unclear to what extent the test under Article 5 paragraph 3 differs from that applied in adult cases.¹⁵ Similarly, in the absence of further case law on the subject it is difficult to determine whether the length of time during which detention on remand is compatible with the Convention is shorter in juveniles' than in adults' cases. At the very least, it would appear that when assessing whether a minor has been brought to trial within a reasonable time, the court should attach weight to the age of the applicant, in addition to other relevant factors, such as the complexity of the case, the use of unnecessary or cumbersome procedures and the conduct of applicant.

Right to a Fair Trial

Once brought to trial it is clear that the young accused must enjoy all the same safeguards as adults under Article 6. This requires therefore that s/he enjoy a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In addition, where the interests of juveniles or the protection of the private life of the parties requires, Article 6 allows the exclusion of the press and public from all or part of a trial. Under Article 6 paragraph 2 everyone has the right to be presumed innocent until proven guilty and paragraph 3 of the fair trial provision sets out more specific and detailed rights. They include, for example, a person's right to have adequate time and facilities for the preparation of his defence (sub paragraph b); the right to a defence lawyer of one's own choosing, including free legal aid where necessary (sub paragraph c) and the right to examine and cross-examine witnesses (sub paragraph d). The difficulty involved in striking a balance between ensuring that the fundamental right to a fair and impartial trial is protected, and treating young accused in an appropriate

¹³ *Ibid.*

¹⁴ Article 12 provides that where a court remands or commits a young person for trial it shall release him/her on bail unless, *inter alia*, his/her detention is necessary to protect the public and/or the charge relates to a violent or sexual crime.

¹⁵ In such cases, the Court has tolerated detention on remand for lengthy periods where the criminal investigation and/or the legal proceedings are complex in nature. See, for example, Eur Court HR *W v Switzerland*, judgment of 26 Jan 1993, Series A no 254-A, 17 EHRR 60 and compare it with Eur Court HR *Scott v Spain*, judgment of 18 Dec 1996, Reports 1996-VI no 27.

manner so as to facilitate their reintegration into society, is clear from the *Nortier* case.¹⁶ This involved a challenge to the Dutch judicial system and in particular the fact that the judge appointed to each juvenile's case took all the relevant decisions both before and during his/her trial. The young offender in this case therefore claimed that this raised questions about the impartiality of the tribunal considering the criminal charge against him, contrary to Article 6. His challenge failed on the basis that the Court refrained from examining the general issue of whether the Dutch system was compatible with the Convention and confined itself to the claim of bias in this individual case, which it rejected. Despite the narrow focus of the Court's deliberations, however, numerous members of the Commission and Court in their separate and dissenting opinions referred both to the need to avoid diluting the fundamental guarantees in Article 6, as well as the importance of affording juvenile offenders special protection in line with the standards of the UN Convention on the Rights of the Child.¹⁷ For example, Mr Justice Morenilla, in his concurring opinion, referred expressly to the UN Convention and attached considerable importance to the need to afford juvenile offenders special protection identified in its Preamble and Article 40.¹⁸ His judgment also attempts to place the complaint in the context of the need to set up

“juvenile courts under specific procedural rules to apply penal or protective measures aiming at the correction or re-education of the minor rather than the punishment of criminal acts for which he is not fully responsible.”¹⁹

The principles underlying this and other similarly minded opinions were developed by the Court in the cases of *T* and *V v UK* in 1999, where it articulated, for the first time, what constitutes a fair trial for children.²⁰ These cases concerned whether it was compatible with Article 6 of the Convention to try two 11 year old boys for murder in an adult court with all the attendant publicity. In the circumstances, the Court concluded that it was not and what was fundamental was that:

“a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.”²¹

This is a strongly worded principle that requires that the ability of children to understand and participate in their own criminal proceedings be facilitated by the authorities. Moreover, the application of this principle is not confined to children charged with murder or serious crime, to which it admittedly has

¹⁶ Eur Court HR *Nortier v the Netherlands*, judgment of 24 Aug 1993, Series A no 267, 17 EHRR 273.

¹⁷ See the dissenting opinion of Commissioner Mr Geus, joined by Mr Weitzel and Mr Marxer in No 13924/88 *Nortier v the Netherlands*, Comm Rep, 9.7.92, Series A no 267. See also the concurring opinion of Mr Trechsel, *ibid*.

¹⁸ *Nortier* judgment, *op cit*. See also the opinion of Mr Justice Walsh.

¹⁹ *Ibid*.

²⁰ Eur Court HR *T v UK* and *V v UK*, judgments of 16 Dec 1999.

²¹ *T* judgment, *ibid* at 84.

most relevance, but it has a more important, general application to the way in which the criminal justice system deals with child offenders.

In the light of the specific circumstances of *T* and *V*, the Court went on to note that where a child is charged with a grave offence which attracts high levels of media and public interest, it is necessary to conduct the hearing in a way that reduces his/her feelings of intimidation and inhibition as far as possible. According to the facts, the trial of *T* and *V* took place over three weeks in public in the Crown Court, although special measures were taken in view of their young age and to promote their understanding of the proceedings: for example, the hearing times were shortened and the procedures were explained to the children in advance. Nevertheless, the Court observed that the formality and ritual of the Crown Court must, at times, have seemed incomprehensible to a child of eleven. There was also evidence that certain modifications to the courtroom – such as the raised dock which was designed to enable them to see what was going on – had the effect of increasing their sense of discomfort during the trial and their sense of exposure to the scrutiny of the press and the public. Moreover, considerable psychiatric evidence showed that the boys suffered from post-traumatic stress disorder which made it difficult if not impossible for them to instruct their lawyers and follow the trial. In such circumstances, the Court held that it was insufficient for the purposes of Article 6 that the applicants were represented by skilled and experienced lawyers because it was highly unlikely that they would have felt sufficiently uninhibited, in the tense courtroom and in the glare of public scrutiny, to have consulted with them during the trial. Indeed, given their immaturity and disturbed emotional state, it considered it unlikely that they were capable of cooperating with their lawyers even outside the courtroom in order to give them information for their defence. In essence, then, the Court concluded that neither applicant was able to participate effectively in the criminal proceedings against them and they were, as a consequence, denied a fair hearing.

The Lord Chief Justice of Northern Ireland issued a Practice Direction on the trial of children and young persons in the Crown Court in June 2000.²² The document contains some positive elements, including its overriding principle that the “trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress”. Its recommendations that young defendants should be brought into the court out of hours in order to familiarise them with the surroundings, that the court should explain the course of proceedings to the young defendant in terms s/he can understand and that the court should be prepared to make an order restricting reporting of the trial are welcome. However, it remains to be seen whether the Practice Direction will in itself be sufficient to implement the *T* and *V* judgments in full. It is contentious, for example, that the steps to be taken to comply with the Practice Direction in any given case fall within the discretion of each individual trial judge.²³ Moreover, it also remains to be

²² Lord Chief Justice of Northern Ireland, Practice Direction: Trial of Children and Young Persons in the Crown Court, 15 June 2000. The Lord Chief Justice of England and Wales issued a Practice Direction on Crown Court: Trial of Children and Young Persons on 16 February 2000.

²³ See Gillespie, “Practice direction on child defendants and the case of *T v United Kingdom*” (March 3 2000) NLJ 320.

determined whether Article 6 of the ECHR will require that young people be tried in the youth court system regardless of the nature of their crime or the age of co-defendants.²⁴

Detention

Article 5 provides that no one shall be deprived of his liberty save in the circumstances set out in the first paragraph of that provision. These include: following conviction by a court; in order to bring some-one before a legal authority on suspicion that they have committed an offence; for the purpose of providing a minor with educational supervision; on the grounds of psychiatric illness and with a view to deportation. This list is exhaustive and, moreover, the deprivation of liberty will only be consistent with the Convention where it falls within the scope of one of the sub-paragraphs in Article 5 and is otherwise lawful insofar as it pursues one or more of the aims set out in that provision. According to the Court, the fundamental importance of the right to liberty requires that the express exceptions contained in Article 5 paragraph 1 must be narrowly interpreted.²⁵ There are thus limited circumstances in which a minor can be detained lawfully under Article 5, in particular, following conviction under Article 5 paragraph 1(a); on remand under Article 5 paragraph 1(c) and for the purpose of educational supervision under Article 5 paragraph 1(d).²⁶ The detention of a minor for any other purpose is not permitted therefore and in principle, it is clear that detaining a young person who is at risk, such as placing a child in secure accommodation, falls outside the scope of Article 5.

Challenging the Legality of Detention

Although the protection minors enjoy under Article 5 of the European Convention is inadequate when compared with that which the UN Convention offers in this area,²⁷ the provision nevertheless contains important safeguards. In particular, Article 5 paragraph 4 guarantees everyone deprived of his/her liberty the right to take proceedings to have the lawfulness of that detention determined speedily by a court, which is empowered to order release if the detention is not lawful.²⁸ This holds particular relevance for minors for the following reason. According to the case law, the detained person must have the opportunity to question whether his/her detention is consistent with the applicable domestic law, with the Convention, and free from arbitrariness.²⁹ This means, first, that in order to comply with Article 5 paragraph 4 the body considering the challenge to the lawfulness of the detention, whether on remand or following conviction, must consider its compatibility with domestic law. For example, a juvenile

²⁴ Under Article 28 of the NI Order, a child jointly charged with an adult can be tried in a court other than a youth court.

²⁵ Eur Court HR *Bouamar v Belgium*, judgment of 29 Feb 1988, Series A No 129, 11 EHRR 1.

²⁶ Clearly, there is nothing to prevent the State detaining a minor who has a psychiatric illness under Article 5 para 1 (e) or with a view to deportation under Article 5 para 1 (f).

²⁷ See above.

²⁸ See further Kilkelly, *op cit*, pp 46-52.

²⁹ Eur Court HR *Van Droogenbroeck v Belgium*, judgment of 1982, Series A no 50.

may seek to question whether his/her detention on remand is consistent with the Criminal Justice (Children) (Northern Ireland) Order 1998, particularly its principle to detain or remand as a measure of last resort. In addition, the detainee must be able to challenge any detention alleged to be arbitrary, and in this context, the European Court normally considers simply whether the detention is consistent with its purpose. In some cases, however, it introduces considerations of proportionality and thus the domestic courts, responding to a challenge under Article 5 paragraph 4 may choose to consider, for example, the basis for remanding or committing the juvenile. Thus, it may examine the legality of the detention in the light of the legislation's commitment to restricting custodial sentences to those whose offences are serious or so persistent that only a custodial sentence would be justified. The extent to which practice corresponds to what is prescribed or directed by the legislation may thus be the focus of challenge under the Human Rights Act 1998.

Indeterminate Sentences and Article 5

It is not the task of the European Court to pass judgment on whether the length of a particular sentence is compatible with Article 5 and consequently, it confines its consideration of whether an indeterminate sentence, such as the sentence of detention on Her Majesty's pleasure frequently imposed on young people, is compatible with the Convention to the question of whether the right to have the legality of such detention reviewed has been respected.

The Court has established that the imposition of an indeterminate sentence on a young person can only be justified by reasons based on the offender's perceived dangerousness to society.³⁰ In the light of the fact that this must involve taking into account any developments in the young offender as s/he grows older, and characteristics, which are susceptible to change with the passage of time, it is clear that new issues of lawfulness may arise in the course of such detention. Consequently, a young person must be entitled to take proceedings to have these issues decided by a court at reasonable intervals. Indeed, according to the Court, failure to have regard to the changes which inevitably occur as a young person matures would mean that they "would be treated as having forfeited their liberty for the rest of their lives", a situation which might raise an issue under Article 3.³¹

When it imposes an indeterminate sentence on a convicted young offender the national court also imposes a fixed sentence for the purposes of punishment, known as a tariff. Although the supervision required by Article 5 paragraph 4 is incorporated into that decision³² this is not the case in respect of any ensuing period of detention in which new issues affecting the lawfulness of the detention may arise.³³ Thus, in *Hussain v UK*, the Court found that once the tariff expires Article 5 paragraph 4 requires that a young

³⁰ Eur Court HR *Hussain v UK*, judgment of 21 Feb 1996, Reports 1996-I, no 4, p 252, 22 EHRR 1, para 52-54.

³¹ *Singh* judgment, para 62.

³² Eur Court HR *De Wilde, Ooms and Versyp v Belgium*, judgment of 18 June 1971, Series A no. 12, 1 EHRR 373, para 76.

³³ Eur Court HR *Weeks v United Kingdom*, judgment of 2 March 1987, Series A No 114, 10 EHRR 293 para 56.

offender detained during Her Majesty's pleasure be able periodically to challenge the continuing legality of his detention. This is necessary, according to the Court, because the only justification for the detention could be dangerousness – a characteristic which is subject to change.³⁴ The Court has not yet considered what the position is under Article 5 paragraph 4 before the tariff has expired – pertinent perhaps where the offender is very young and the tariff set is high. It did establish in the *T* and *V* cases, however, that where the tariff element of the offenders' sentences has been quashed,³⁵ any failure to set a new tariff will set at nought their entitlement to access a court to have the lawfulness of the detention reviewed causing a violation of Article 5 paragraph 4.³⁶

Procedural Safeguards implicit in Article 5 paragraph 4

In addition to the fundamental guarantee of *habeas corpus*, Article 5 paragraph 4 has also been found to include implicit procedural safeguards, which are particularly pertinent to young people. In the *Bouamar* case, the Court found that the treatment of the minor, who appeared in person but unrepresented before the court reviewing the lawfulness of his detention, was inadequate for the purposes of Article 5 paragraph 4, in light of his young age at the time.³⁷ According to the Court, it is essential that the minor should have the effective assistance of a lawyer, in addition to having the opportunity to be heard in person.³⁸ Although flexible and informal proceedings, such as in a juvenile court, may be entirely consistent with the Convention, Article 5 paragraph 4 makes it essential that minors challenging the lawfulness of their detention must not only be present at the proceedings, but they must also enjoy the effective assistance of a lawyer. The same principle could be said to apply to any review of the young offender's detention, particularly where it concerns the nature of the detention or sentence – such as whether it is to be served in a closed or open institution. In all such cases, therefore, it is important that the child not only be present, but be supported by independent representation in order to safeguard from arbitrary detention.

Detention for the Purpose of Educational Supervision

Article 5 paragraph 1(d) makes an express exception to the right to liberty, where the minor's detention is for the purpose of educational supervision. This is one of the few child-specific provisions in the entire Convention, and it reflects the important need to divert juvenile offenders and suspects from the criminal process. Notwithstanding that it provides for the minor's detention rather than his/her liberty, the provision has been interpreted in a

³⁴ *Hussain* judgment, *op cit*, para 54.

³⁵ The House of Lords quashed the tariff element of the offenders' sentences in 1998. See *R. v Secretary of State for the Home Department, ex parte V and T* [1998] AC 407.

³⁶ *T* judgment, *op cit*, para 120.

³⁷ *Bouamar* judgment, *op cit*.

³⁸ No 15006/89 *Abbott v UK*, Dec 10.12.90, unreported. The settlement reached in this case involved making legal representation available to minors who as wards of court were neither party to, nor represented in, the proceedings concerning their detention.

dynamic manner by the Court, which has found that, in certain circumstances, it may place a strict positive obligation on States to put in place appropriate facilities, which ensure the education and reformation of juveniles in conflict with the law.

Bouamar v Belgium concerned a 16 year old boy who was detained on remand on nine successive occasions, for a total of 119 days within the period of one year.³⁹ The placements had been made by a juvenile court pursuant to legislation which promoted the diversion of young offenders from the criminal process. The relevant provision of that law permitted the detention of a juvenile in a remand prison for up to 15 days, when it was 'materially impossible' to place him in a reformatory immediately.⁴⁰ The Court made a number of initial points before going on to consider whether the boy's detention was compatible with Article 5 paragraph 1(d). In particular, it established that the provision does not preclude the use of an interim measure as a preliminary to an educational placement. Nor does it require that this placement be immediate. However, in order to be consistent with Article 5, any interim measure of imprisonment must be speedily followed by actual application of an educational regime. The 'material impossibility' in this case was that Belgium did not have an appropriate institution in which to place the juvenile. As a result, it fell to the Court to examine whether the detention on remand fulfilled the requirements of Article 5 paragraph 1(d) as regards its purpose of educational supervision. In short, the Court held that it did not, and found on the facts that:

"the detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering the educational aim."⁴¹

Moreover, the Court went on to find that taken together, the nine placement orders were incompatible with Article 5 paragraph 1(d) as their "fruitless repetition had the effect of making them less and less lawful especially as proceedings were never instituted against the boy".⁴²

Bouamar clearly establishes that Article 5 paragraph 1(d) is to be interpreted narrowly to mean that where a State has chosen a system of educational supervision as its policy on juvenile delinquency, it is obliged to put in place appropriate institutional facilities which meet the demands of security and the educational objectives of the domestic law. Moreover, if the fulfilment of this obligation should necessitate the building or provision of appropriate reformatories then this action should be undertaken by the State, regardless of the cost. It is unfortunate that the Court failed to offer more specific guidance as to how the educational objective so clearly reflected in Article 5 paragraph 1(d) should be achieved. However, it did advise that the placement must occur in a setting designed and with sufficient resources for the purpose.

³⁹ *Bouamar* judgment, *op cit*.

⁴⁰ Here, the material impossibility had arisen because there were no closed reformatories with educational facilities in his region and his difficult behaviour meant that available open reformatories were unwilling to accept him.

⁴¹ *Bouamar* judgment, *op cit*, para 52.

⁴² *Ibid*, para 53.

It is apparent from *Bouamar* then that where the purpose of detaining juveniles, as set out in legislation or elsewhere, is to address their behaviour and needs as well as to protect themselves and society from their criminal behaviour, then they must be placed in institutions which pursue this objective. Placing young people in institutions which resemble prisons, and which do no more than contain and restrain the young people they accommodate, is a practice which is likely therefore to be subject to challenge under the Human Rights Act.

Detention on Other Grounds

Article 5 paragraph 1(d) contains a second specific ground on which a minor can be detained, that is, for the purpose of bringing him before a competent legal authority. The Court has not yet had the opportunity to clarify the meaning of this ambiguous provision and the only clear situation to which the Commission has found it applicable is the detention of a young delinquent in order to study his behaviour.⁴³ In this case, the Commission had to consider whether the detention of a 15 year old boy who was held for eight months 'under observation', which was ordered by the judge investigating him for a variety of offences, was unlawful under Article 5. Given that the applicant was a minor for the purpose of the provision and agreeing that he was deprived of his liberty being detained and forbidden to leave, the Commission had little difficulty finding Article 5 to be applicable. It went on to find that the detention fell within the meaning of Article 5 paragraph 1 (d) because its purpose was to bring the minor before the competent legal authority. However, it did not find that the detention of the boy in these circumstances violated the provision. Even though the Commission expressed concern about the duration of the detention, this fact alone did not cast doubt either on the purpose of the detention or its conformity with Article 5. Instead, in reaching its conclusion, the Commission was guided by the fact that the decision to detain the youth had been taken by a juvenile court (a competent legal authority) and had been prompted by the ineffectiveness of earlier measures and the need to gain a better understanding of the boy's personality. These elements are important insofar as they confirm the lawfulness of the detention within the domestic system, as well as its purpose under Article 5 paragraph 1(d).

The practice of detaining a minor in order to supervise or assess his behaviour will be consistent with Article 5 paragraph 1(d), therefore, as long as it is carried out by lawful order and is considered to be proportionate in the circumstances. It is also possible that, given the provision's drafting history, the detention of a young person who is a danger to society in order to secure her/his protection may fall within its scope, although the limited case law in this area makes this very uncertain. Moreover, the Commission's concern about the length of the detention flags this as a potential problem. Finally, while it is not a decisive factor in its compatibility with Article 5 paragraph 1, the fact that the provision applies to the detention will require that the right to have the lawfulness of the detention reviewed at regular intervals be secured.

⁴³ No 8500/79 *X v Switzerland*, Dec 14.12.79, DR 18, p 238.

Respect for Private and Family Life

It is clear that the rights to respect for private and family life and correspondence, safeguarded by Article 8 of the European Convention, do not cease once the child or young person is placed in detention. Restrictions on these rights may be Convention compatible however once they fulfil the requirements of Article 8 paragraph 2 by being in accordance with the law and proportionate to the requirements of preventing disorder and maintaining security in detention centres for example. Under the Human Rights Act 1998 it will fall to the domestic courts to assess whether limits placed on the exercise of such rights are compatible with the Convention. With regard to the child's right to privacy in detention, for example, it will be possible to invoke Article 8 when claiming individual breaches of the provision caused by the reading of mail, placing restrictions on the right to communicate with family members and advisors and failing to allow young people privacy during visits and telephone conversations. On a general note, it is important that freedom of correspondence for prisoners is protected to a high degree under the European Convention and interferences are thus difficult to justify under Article 8.⁴⁴ While there may be circumstances in which such interferences with young offenders' private lives may be necessary in order to prevent disorder or to protect the secure environment of the detention centre there must always be a proper balance achieved between both interests. Moreover, according to the *de minimis* rule, the measure used must be no greater than is strictly necessary in the circumstances.

There is similar potential for invoking the right to respect for family life under Article 8 in circumstances where the authorities fail to accommodate visits to offenders, particularly in secure units, by their parents, siblings, other family members and friends. Again, any interference with a juvenile's family life falls to be justified under Article 8 paragraph 2, but notably there is no ground for imposing such restrictions as a punishment measure. The Court's emphasis on the effective protection of rights means that where there is a practical obstacle to maintaining contact between young people and their family (such as a long distance separating them) then the State may be required to surmount this to ensure that family life is respected.⁴⁵ Thus, where the location of a detention centre makes it difficult for parents to visit their children regularly or for long periods, the State may be required under the Convention to take practical measures to facilitate such contact, such as making elongated or overnight visits possible. It is important to remember too, that family life exists not only between parents and their children but also between siblings and other close family members.⁴⁶

⁴⁴ For the Court's case law on this topic generally see Eur Court HR *Golder v UK*, judgment of 21 Feb 1975, Series A no 13, 1 EHRR 524, *Silver v UK*, judgment of 25 March 1983, Series A no 61, 5 EHRR 347 and *Campbell v UK*, judgment of 25 March 1992, Series A no 233-A, 15 EHRR 137.

⁴⁵ Eur Court HR *Olsson v Sweden*, judgment of 24 March 1988, Series A no 130, 11 EHRR 259.

⁴⁶ *Ibid.*

Death in Custody: Article 2

Article 2 of the European Convention provides that everyone's right to life shall be protected by law. Despite its somewhat restrictive wording the Court has established that the authorities are under an obligation to protect individuals in their custody.⁴⁷ Moreover, the Commission has found that the existence of this obligation is not affected by the fact that the death or injury occurs as a result of the prisoner's attempts, successful or otherwise, to commit suicide, although this may have consequences for the scope of the State's obligation under Article 2.⁴⁸ At the same time, it has held that it would run counter to respect for other Convention rights – such as the right to respect for private and family life – to impose a regime designed to make attempts at self-harm impossible. The case of *Keenan v UK* concerned the question of whether the prison authorities were responsible for the suicide of the applicant's 28 year old son in prison where he was serving a short sentence for assault. The man had a history of depression and other psychiatric illness and had received on-going treatment of which the prison authorities were aware. The question of whether the authorities were, ultimately, responsible for his death depended, said the Commission, on two factors: the extent of the knowledge of the prison authorities and the reasonableness of the steps taken. On both counts, however, the Commission failed to find that the prison authorities had acted in an unreasonable manner, finding that their decision to place him in a segregation block was supported by medical evidence that he was fit to receive such punishment; that the level of social deprivation or hardship there was not such as could foreseeably have caused a suicide attempt and that the decision not to place him under a suicide watch was justifiable. Taking all the circumstances into account, then, the Commission concluded by 15 votes to 5 that there had been no violation of Article 2. However, the dissenting opinion of Mr Rozakis, joined by Mrs Liddy and Mr Geus, was written in strong language. Their conclusion – that despite knowing about the suicidal tendencies of the prisoner and having in their hands reasonable means to avert the fatal incident, the authorities opted for a policy towards him which contributed to rather than avoided his taking of his life – does not appear harsh on the facts of the case.

In any event, however, it is clear that the authorities are under a significant positive obligation under Article 2 of the Convention to do all that can reasonably be expected of them to avoid risk to the life of anyone in their custody. The extent of this burden will depend on the circumstances of the case and will be heightened where a risk of self-harm is believed to exist.

Conditions of Detention: Article 3

Article 3 of the Convention prohibits torture, inhuman and degrading treatment or punishment. Once ill-treatment is held to fall within the scope of this provision, it cannot be justified in any circumstances. With regard to young people it is clear that extremely long periods of detention, especially without an opportunity to have their sentence reviewed, may raise an issue of

⁴⁷ Eur Court HR *Salman v Turkey*, judgment of 27 June 2000.

⁴⁸ No 22729/95 *Keenan v UK*, Comm Rep of 6 Sept 1999, para 79.

inhuman and degrading punishment.⁴⁹ Other matters too, such as those relating to the nature of a child's detention, may be incompatible with Article 3. The use of physical punishment, restraints, or solitary confinement or isolation, for example may be problematic in this regard. Admittedly, only ill-treatment which reaches a particular level of severity will fall foul of Article 3.⁵⁰ However, this test is relative insofar as it depends on all the circumstances of the case, including the age and state of health of the victim. The use of physical restraint on a young person, whose bone structure may not yet have formed fully, will thus be more harmful than on an adult, and may indeed be severe enough to fall within the meaning of inhuman and degrading punishment under Article 3. Similarly, the fact that the effect of solitary confinement on an adult may not be severe enough to bring it within the scope of the provision does not mean that the same conclusion should be reached in the case of a minor, who may find isolation from his/her peers a much greater psychological hardship to endure.⁵¹ Bearing in mind the Commission's view that a person deprived of liberty is vulnerable to the extent that responsibility for his/her welfare has been relinquished to the authorities,⁵² it is arguable that the use of harsh measures and techniques to deal with disorder in detention centres may be open to challenge under the Human Rights Act 1998.

Education in Detention: Article 2 First Protocol

Despite the negative wording (no one shall be denied . . .) of Article 2 of the First Protocol it is well established that the provision does contain a right to education which must be secured to all children.⁵³ Thus, although the obligation on the State under the provision stops short of requiring states to introduce education of a particular kind or type, such as through a particular language, it does encompass equal access to existing systems of education. This would appear to have direct relevance to the situation of children in detention or juvenile justice centres, and notwithstanding the demands of the secure setting, young people in such institutions must obtain a basic level of educational training, from which they are entitled to draw benefit.⁵⁴

In relation to education in the wider sense, there is also scope for arguing that a young person has a right to access adequate rehabilitation services while in detention. In *Bouamar*, for example, the Court noted that detention in conditions of virtual isolation and without assistance of staff with

⁴⁹ See *Weeks* judgment *op cit* and *Singh* judgment, *op cit*, para 66. See also the arguments made in the *T* and *V* judgments, *op cit*.

⁵⁰ Eur Court HR *Tyrer v UK*, judgment of 25 April 1978, Series A no 26, 2 EHRR 1.

⁵¹ See also *Keenan*, Comm Rep, *op cit*, where the Commission held by 11 votes to 9 that the conditions of detention in which the applicant's son was held were not severe enough to breach Article 3. The view of the significant minority was that the authorities, in total disregard of his particular needs, had applied measures against him, which were unfit for his health conditions and contributed to his suffering and to his anxiety.

⁵² *Ibid*, at para 79.

⁵³ Eur Court HR *Costello-Roberts v UK*, judgment of 25 March 1993, Series A No 247-C, 19 EHRR 112, at para 27.

⁵⁴ Eur Court HR *Belgian Linguistics Case*, judgment of 23 July 1968, Series A no 6, 1 EHRR 242, at para 4.

educational training cannot be regarded as furthering the educational aim. There would appear to be potential, therefore, for invoking this approach in a challenge to poor conditions of detention for young people or in conditions where their wider educational needs are not being addressed adequately.

CONCLUSION

While the implications of the Human Rights Act 1998 for juvenile justice in Northern Ireland may be daunting, it is important to remember that the Convention does more than proscribe certain treatment of children in conflict with the law. It also contains considerable examples of good practice, many of which have been highlighted here, which must be taken on board to ensure compatibility with the Convention under the Human Rights Act 1998. Admittedly, there are many areas concerning young people which have not yet been considered by the European Court and for which there is no Convention precedent. In their consideration of such matters under the Human Rights Act the courts would do well to reflect on the extent to which the European Court has been influenced in this area by the UN Convention on the Rights of the Child 1989. The child-specific standards in this Convention include the principles of reintegrating and rehabilitating, rather than punishing young offenders, and treating them in an appropriate manner. In the absence of more specific rules, the application of this important, albeit general guidance would ensure that the Human Rights Act 1998 has a positive impact on the way in which young people face detention and trial in Northern Ireland and the United Kingdom as a whole.