

Conflicting rights: English adoption law and the implementation of the UN Convention on the Rights of the Child

Brian Sloan*

Adoption – UNCRC – birth parents – welfare

The welfare of the relevant child became the ‘paramount’ consideration in adoption decisions as a result of the Adoption and Children Act 2002. This ostensibly brought English law into line with Article 21 of the United Nations Convention on the Rights of the Child, which requires states inter alia to ‘ensure that the best interests of the child shall be the paramount consideration’ in the context of adoption. This article considers the scheme of the 2002 Act and conducts a survey of the domestic adoption case law under it in the light of some of the requirements of the UNCRC, with particular reference to the implications of the Act for the child’s relationship with his or her birth family. It argues that the judiciary’s approach to the Act is not necessarily compatible with certain provisions of the Convention, but that in any event, the Convention suffers from internal inconsistency in this context that reduces its normative force.

Introduction

Under the Adoption Act 1976, the welfare of a child to be adopted was merely the ‘first’ consideration in adoption decisions in England and Wales.¹ The child’s welfare (or best interests as it is often expressed) became the ‘paramount’ consideration when the Adoption and Children Act 2002 (the 2002 Act) was brought into force in 2005.² This ostensibly brought English law into line with Article 21 of the United Nations Convention on the Rights of the Child 1989 (UNCRC), which requires states inter alia to ‘ensure that the best interests of the child shall be the paramount consideration’ in the context of adoption. Of course the UNCRC as a whole has not yet been incorporated into English law,³ a state of affairs that continues to cause concern for the UN Committee on the Rights of the Child (the Committee).⁴ Lady Hale has

* College Lecturer and Fellow in Law, Robinson College, Cambridge.

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¹ Adoption Act 1976, s 6. For an historical overview of English adoption law and practice, see S Harris-Short, ‘Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century’, in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), at pp 152–154.

² Adoption and Children Act 2002, s 1(2).

³ See, generally, G van Bueren, ‘The United Nations Convention on the Rights of the Child: The Necessity of Incorporation into United Kingdom Law’ [1992] Fam Law 373; A MacDonald, ‘Bringing Rights Home for Children: Arguing the UNCRC’ [2009] Fam Law 1073; J Fortin, *Children’s Rights and the Developing Law* (CUP, 3rd edn, 2009), at pp 47–54. cf Rights of Children and Young Persons Measure (Wales) 2011.

⁴ Committee on the Rights of the Child, ‘Consideration of Reports submitted by State[] Parties under Article 44 of the Convention: Concluding Observations – United Kingdom of Great Britain and Northern Ireland’ (Third and Fourth

nevertheless emphasised in the Supreme Court that the UNCRC imposes ‘binding obligation[s] in international law’⁵ and the Convention is cited by the European Court of Human Rights when applying the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR),⁶ which has been incorporated into English law.⁷ Compatibility with the UNCRC is also a very important measure of the protection afforded to children’s rights in national law.⁸ That said, there are significant limitations of the UNCRC in providing guidance for national law on adoption that weaken both its utility and its normative authority, and these become clear as this article progresses. This reflects Philip Alston’s contention, made early in the UNCRC’s life, that it does not contain ‘a specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in a given situation among the different rights recognized’.⁹

This article considers the scheme of the 2002 Act and conducts a survey of the domestic adoption case-law under it in the light of the relevant requirements of the UNCRC, with particular reference to the implications of the Act for the prospective adopted child’s relationship with his or her birth family. It is particularly appropriate to consider the consistency of adoption law and practice under the Act with the UNCRC (as distinct from the ECHR, where the focus of scholarly discussion often tends to lie)¹⁰ given that the terminology of the Act appears explicitly to ensure compatibility and may thereby generate political advantage for the government of the day.¹¹ While there are limits to the government’s ability to control the judiciary’s interpretation of legislation (short of amending the relevant Act), the overall compatibility of English law with the UNCRC cannot be measured without considering the prevailing judicial approach.

The article argues that while the 2002 Act contains a framework that could implement the UNCRC, the policy underlying it and the judiciary’s understanding of the ‘paramountcy’ of best interests when applying the Act are both normatively questionable and not necessarily compatible with the provisions of the Convention designed to protect the child’s relationship with the birth parents. It is suggested that this is true even if much of the doubt about compatibility is caused by a lack of clarity in the UNCRC itself. Provisions relevant to this issue include Article 21 itself, which requires that the adoption is ‘permissible in view of the child’s status concerning parents, relatives and legal guardians’ and makes specific reference to the ‘informed consent to the adoption’ of relevant persons. Other pertinent provisions of the UNCRC include Article 7, which protects the right of the child to know and to be cared for by his or her parents as far as possible; and Article 8, under which the child has a right to preserve his or her identity and family relations.

It is not contended in this article that the additional rights protected by the UNCRC should be given priority over the child’s judicially-determined individual and immediate best interests in every adoption decision. Moreover, Article 20 of the UNCRC obliges States to provide ‘special protection and assistance’, with the range of options explicitly including adoption, to those children who cannot be allowed to remain in their birth-familial environment on account of their own best interests. But the aim of this article is to highlight the fact that the implementation of the UNCRC in the field of adoption law is far from straightforward, which in turn emphasises the serious difficulties with the notion of ‘paramountcy’ under the UNCRC as well as

Reports) (CRC/C/GBR/CO/4, 2008), at para 10. See, generally, Committee on the Rights of the Child, ‘General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)’ (CRC/GC/2003/5, 2003).

⁵ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, [2011] 1 FLR 2170, at para [23]. See also, eg U Kilkelly, ‘The CRC at 21: Assessing the Legal Impact’ (2011) 62 *Northern Ireland Legal Quarterly* 143, at p 144.

⁶ See, eg *Keegan v Ireland* (App No 16969/90) (1994) 18 EHRR 342, at para 50, U Kilkelly, ‘The CRC at 21: Assessing the Legal Impact’ (2011) 62 *Northern Ireland Legal Quarterly* 143, at pp 151–152.

⁷ Human Rights Act 1998.

⁸ See, eg U Kilkelly and L Lundy, ‘Children’s Rights in Action: Using the UN Convention on the Rights of the Child as an Auditing Tool’ [2006] CFLQ 331; Children’s Rights Alliance for England, ‘State of Children’s Rights in England 2011’ (2011).

⁹ P Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *International Journal of Law and the Family* 1, at p 2.

¹⁰ See, eg S Choudhry, ‘The Adoption and Children Act 2002, the Welfare Principle and the Human Rights Act 1998 – A Missed Opportunity?’ [2003] CFLQ 119. See now *YC v United Kingdom* (App No 4547/10) [2012] 2 FLR 332.

¹¹ See M King, ‘Children’s Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention’ (1994) 67 *Modern Law Review* 385 for a discussion of the potential for formalistic claims of compatibility to be made under the Convention.

national law. It begins by examining the ‘paramountcy’ of best interests under the UNCRC and English law and analysing the implications of other aspects of the UNCRC. It then considers English law’s compatibility with the UNCRC in view of the judicial approach to the child’s relationship with the birth parents in adoption decisions, focussing particularly on situations where adoption occurs without the consent of one or both parents.

Throughout the discussion, reference is made to the Concluding Observations issued by the UN Committee on the Rights of the Child, which is said to be ‘recognized as the highest authority for interpretation of the Convention’,¹² in response to national reports submitted by state parties.¹³ Another invaluable tool is Unicef’s *Implementation Handbook for the Convention on the Rights of the Child*.¹⁴ While not itself a source of law, the *Handbook* is endorsed by the Chairs of the Committee and aims to synthesise the Committee’s views and provide ‘a detailed reference for the implementation of law, policy and practice to promote and protect the rights of children’.¹⁵

The paramountcy of best interests under the UNCRC and the 2002 Act

Textual analysis

Before the English judicial approach to adoption can be evaluated against the requirements of the UNCRC, the relevant text of both the UNCRC and the 2002 Act must be explored.

Article 21 of the UNCRC and section 1 of the 2002 Act

Adoption is expressly recognised as a possible form of alternative care for a child removed from his or her family environment by virtue of Article 20 of the UNCRC. Adoption itself is primarily governed by Article 21, much of which is concerned with inter-country adoption.¹⁶ The relevant parts of Article 21 for the purposes of domestic adoption provide as follows:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary ...

Article 21 does not therefore regard adoption as an essential concept. It seemingly imposes a higher level of protection for child welfare in respect of adoption than that generally stipulated by the UNCRC as a whole, since Article 3(1) provides that ‘[i]n all actions concerning children ... the best interests of the child shall be a *primary* consideration’ (emphasis added). While the *Implementation Handbook* regards Article 21 as a provision in which the Article 3 principle, which on Jane Fortin’s account ‘underpins all the other provisions’,¹⁷ is ‘evident’,¹⁸ the *Handbook* later acknowledges that Article 21 requires welfare to be more

¹² P Hodgkin and R Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), at p xvii. See C Hamilton, ‘Children’s Rights and the role of the UN Committee on the Rights of the Child: Underlying Structures for States in Implementing the Convention on the Rights of the Child’ [2010] *International Family Law* 31 for a discussion of the Committee’s role.

¹³ See, generally, Committee on the Rights of the Child, ‘Treaty-specific Guidelines regarding the Form and Content of Periodic Reports to be Submitted by States Parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child’ (CRC/C/58/Rev.2, 2010).

¹⁴ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*.

¹⁵ *Ibid.*, at p xiii.

¹⁶ See, generally, T Buck (ed), *International Child Law* (Routledge, 2nd edn, 2011), ch 6.

¹⁷ J Fortin, *Children’s Rights and the Developing Law* (CUP, 3rd edn, 2009), at p 40.

¹⁸ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, at pp 35–36.

‘than simply “a primary” consideration as in [A]rticle 3’.¹⁹ On its interpretation, ‘no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or be considered equal to, the child’s’.²⁰

Turning to domestic law, the Adoption and Children Act 2002 reflects the previous UK Government’s policy (carried through by the current Coalition Government)²¹ that adoption, by which a child acquires new legal parents, should be used as a means of finding a permanent home for children who might otherwise ‘drift’ through foster care provided by the state.²² Taken at face value, section 1 of the 2002 Act in substance implements Article 21 by specifying that welfare is to be the paramount consideration in adoption decisions. Both the UK Government²³ and the Joint Committee on Human Rights²⁴ appear to have been satisfied of the Act’s compatibility with the UNCRC on that basis, although it is significant that even the UK’s 1994 Initial State Report to the UN Committee on the Rights of the Child claimed that ‘[p]resent law and practice [governed principally by the previous 1976 Act] comply fully with all the provisions of [A]rticle 21’.²⁵ By stipulating that the welfare of the relevant child is to be the ‘paramount’ and not the ‘first’ consideration, the 2002 Act also brought adoption law into line with the more general principle of English child law.²⁶ The proper meaning of the so-called ‘paramountcy’ principle is elusive. Nevertheless, it has often been interpreted individualistically such that ‘the course to be followed will be that which is most in the interests of the child’s welfare’ even as against unimpeachable parents,²⁷ a state of affairs that has been criticised.²⁸

¹⁹ Ibid, at p 295. See also Committee on the Rights of the Child, ‘General Comment No 7 (2005): Implementing Child Rights in Early Childhood, (CRC/C/GC/7/Rev.1, 2006), at para 36(b). cf the Committee’s use of the word ‘primary’ in relation to adoption: Committee on the Rights of the Child, ‘Consideration of Reports submitted by State[] Parties under Article 44 of the Convention – Concluding Observations: Tongo’ (Third and Fourth Reports) (CRC/C/TGO/CO/3-4, 2012), at para 48.

²⁰ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, at p 295.

²¹ See, eg Department for Education, ‘Adoption Scorecards show the Serious Extent of Delays across England’ (11 May 2012), available at <http://www.education.gov.uk/inthenews/inthenews/a00208881/adoption-scorecards-show-the-serious-extent-of-delays-across-england> (last accessed 16 February 2013).

²² Secretary of State for Health, *Adoption: A New Approach*, Cm 5017 (TSO, 2000). The Act nevertheless applies equally to step-parent adoptions. These have drastic consequences as regards the child’s relationship with the person who thereby loses legal parenthood, although the 2002 Act did introduce the concept of special guardianship, whereby an applicant can acquire parental responsibility and exercise it ‘to the exclusion’ of others without transferring legal parenthood (Children Act 1989, s 14C(1)(b)). This provides a less drastic alternative to adoption for step-parents and others, though only as regards legal parenthood and not parental responsibility. In *Re I (Adoption: Appeal: Special Guardianship)* [2012] EWCA Civ 1217, [2013] 1 FLR (forthcoming) McFarlane LJ held that: ‘the distinction between special guardianship and adoption ... should have been uppermost in the court’s consideration ... where it is common ground that the natural family ... will continue to play a meaningful part in the young child’s life over the years’ (para [16]).

²³ UK Government, ‘The Consolidated 3rd and 4th Periodic Report to UN Committee on the Rights of the Child’ (2007), at para 103. See also UK Government, ‘The United Nations Convention on the Rights of the Child: How Legislation underpins Implementation in England’ (2010), at paras 5.114–5.117.

²⁴ Joint Committee on Human Rights, *The Adoption and Children Bill: As Amended by the House of Lords on Report*, HL 177/HC 979 (HMSO, 2002).

²⁵ UK Government, ‘Initial reports of State[] Parties due in 1994: United Kingdom of Great Britain and Northern Ireland’ (1994), at para 284. The report is critiqued in U Kil Kelly, ‘The UN Committee on the Rights of the Child – An Evaluation in the Light of Recent UK Experience’ [1996] CFLQ 105. The UK’s view on compatibility as regards adoption was not apparently disputed by the Committee on the Rights of the Child in its Concluding Observations: Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland’ (CRC/C/15/Add.34, 1995), although concern was later expressed with regard to access to information by adopted children: Committee on the Rights of the Child, ‘Consideration Of Reports submitted by State[] Parties under Article 44 of the Convention – Concluding Observations: United Kingdom of Great Britain and Northern Ireland’ (Second Report) (CRC/C/15/Add.188, 2002), at para 31. Bernadette Walsh considered it ‘possible to argue that British [sic] law [before the 2002 Act] attaches less weight to the interests of the children than is required by the Convention’: B Walsh, ‘The United Nations Convention on the Rights Of The Child: A British View’ (1991) 5 *International Journal of Law, Policy and the Family* 170, at p 192 fn 42.

²⁶ Children Act 1989, s 1.

²⁷ *J v C* [1970] AC 668, at 709, per Lord MacDermott. See, more recently, *Re B (A Child) (Residence: Biological Parent)* [2009] UKSC 5, [2009] 1 WLR 2496, [2010] 1 FLR 551, at para [37], per Lord Kerr, giving the judgment of the court.

While there are certainly links between the 2002 Act and Article 21, it is evident that the Article itself qualifies the paramountcy of best interests through the additional requirements of paragraph (a). It could also be telling that the UNCRC is explicitly referred to neither in the White Paper preceding the 2002 Act,²⁹ nor in the Explanatory Notes on the Act.³⁰ The UNCRC and its apparent underpinning principle that '[i]t is the fundamental right of every child to belong to a family' are mentioned in the first paragraph of the government's revised adoption guidance,³¹ but neither appears to be the particular subject of further reference in the course of the specific guidelines provided in the 244 page document. This arguably reflects the difficulty in balancing the various requirements of the UNCRC throughout the adoption process. This article sets out to highlight those difficulties.

Implications of other Convention Provisions

Even if the 2002 Act prima facie implements the 'paramountcy' required by Article 21, that does not necessarily ensure compatibility with the UNCRC. As Unicef's *Implementation Handbook* emphasises, '[t]he Convention is indivisible and its articles interdependent', meaning that 'Article 21 should not be considered in isolation'.³² This has significant implications, since the other provisions of the UNCRC might provide clues as to the meaning of 'best interests' (a notoriously uncertain concept)³³ under Article 21. This is true notwithstanding the fact that those other provisions are themselves qualified, and that the notion of indivisibility of rights is clearly problematic where multiple rights appear to conflict. In spite of the paramountcy of children's interests and the fact that the UNCRC explicitly seeks not to 'affect any provisions which are more conducive to the realization of the rights of the child' in either national or international law,³⁴ Hodgkin and Newell suggest that 'there is a presumption within the Convention that children's best interests are served by being with their parents wherever possible'.³⁵

It should also be noted that while it is unarguably important that adoption should not primarily be viewed as a service for prospective adopters, the very idea that the interests of a child to be adopted should be 'paramount' (whether as a matter of domestic or international law) is a controversial one in view of the fact that adoption usually terminates the legal relationship between the birth parents and the child.³⁶ Inevitably, the rights (such as those under Article 8 of the ECHR)³⁷ of birth parents who do not consent to the adoption are prima facie infringed, usually irreversibly,³⁸ by the adoption. It is extremely problematic if their interests

²⁸ See, eg J Eekelaar, 'Beyond the Welfare Principle' [2002] CFLQ 237; J Herring, 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' [1999] CFLQ 11.

²⁹ Secretary of State for Health, *Adoption: A New Approach* Cm 5017 (TSO, 2000).

³⁰ Explanatory Notes to the Adoption and Children Act 2002, available at: <http://www.legislation.gov.uk/ukpga/2002/38/notes> (last accessed 16 February 2013).

³¹ Department for Education, 'The Adoption and Children Act 2002: Adoption Statutory Guidance – First Revision' (including amendments) (2012), at para 1.

³² R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), at p 303.

³³ See, eg H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267.

³⁴ UNCRC, Art 41.

³⁵ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, at p 296.

³⁶ See, eg Adoption and Children Act 2002, s 67. cf 'simple adoption', a form of adoption available in France and some other civil law jurisdictions, which 'does not sever the relationship with the family of origin so that the adopted child is not entirely integrated into his or her adoptive family': Explanatory Report to the European Convention on the Adoption of Children (Revised) 2008, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/202.htm> (last accessed 16 February 2013), at para 63. See also *Kafalah*, an Islamic institution recognised explicitly in Art 20(3) of the UNCRC that has consequences similar to the western notion of adoption but does not involve a full change of legal parenthood. The concept is discussed in S Ishaque, 'Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity' (2008) 22 *International Journal of Law, Policy and the Family* 293. cf *Re Q (A Child) (Adoption: Welfare Requirements)* [2011] EWCA Civ 1610, [2012] 1 FLR 1228, at para [67].

³⁷ See, eg *Re A (Children) (Adoption: Placement Order)* [2010] EWCA Civ 344, [2010] 2 FLR 661, at para [64], per Baron J.

³⁸ See, eg *Webster v Norfolk County Council* [2009] EWCA Civ 59, [2009] 1 FLR 1378.

are given no independent consideration,³⁹ especially since (as discussed in the next section of this article) the 2002 Act mandates the use of a welfare test to determine whether the parents' consent to the adoption should be dispensed with. It must be conceded that the European Court of Human Rights' stance on adoption is not always consistent,⁴⁰ and in *YC v United Kingdom* it saw no incompatibility between assertions that 'the best interests of the child are paramount' and that 'family ties may only be severed in very exceptional circumstances and ... everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family'.⁴¹ Nevertheless, in spite of its self-evident focus on the rights of children, Article 5 of the UNCRC itself instructs states to 'respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention'. Moreover, by virtue of Article 3(2), states 'undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. Jonathan Herring and Shazia Choudhry convincingly claim that the UNCRC provides no real guidance on balancing the interests of children and adults,⁴² and Dominic McGoldrick points out that the protection afforded to parental rights under Article 5 is extremely difficult to implement because of the conflict of interest between parent and child.⁴³ Nevertheless, Herring and Choudhry do suggest that it is more open about the need for a balance between rights than either the Children Act 1989 or ECHR.⁴⁴

Notwithstanding the 'paramountcy' principle contained in Article 21, and whatever the status of parents' independent rights under the UNCRC, involvement of the birth parents in the adoption process and beyond, or as a counterweight to that process, should be considered as a significant aspect of the child's own welfare for the purposes of the UNCRC, as well as his or her right to respect for family life under the ECHR.⁴⁵ Article 21 of the UNCRC must also be read alongside several of its other provisions. Article 7, for example, states that a child has 'as far as possible, the right to know and be cared for by his or her parents'.⁴⁶ The *Handbook* notes that the phrase 'as far as possible' 'appear[s] to provide a much stricter and less subjective qualification than "best interests"',⁴⁷ although it admits that consideration of what is 'possible' must include consideration of 'best interests'.

In addition to Article 7, Article 8 obliges states to respect a child's right to his or her identity and 'family relations'.⁴⁸ It is limited to those relations recognised by law and purports to prohibit only 'unlawful' interference,⁴⁹ but this has not prevented the Committee from criticising states' approach to identity even when the relevant rules are enshrined in national law.⁵⁰ Logically, the *Handbook* does not consider that a state could use its own national law substantially to limit the scope of this right.⁵¹ A similar argument could be made in relation to Article 7, which requires states to 'ensure the implementation of the[] rights [it confers] in accordance with their national law and their obligations under the relevant international

³⁹ See, eg S Harris-Short, 'New Legislation: The Adoption And Children Bill – A Fast Track To Failure?' [2001] CFLQ 405, at p 420; S Harris-Short, 'Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012).

⁴⁰ See, eg the differing opinions expressed in *Eski v Austria* (App No 21949/03) [2007] 1 FLR 1650.

⁴¹ [2012] 2 FLR 332, at para [134] (judgment of the majority).

⁴² S Choudhry and J Herring, *European Human Rights and Family Law* (Hart, 2010), at p 227.

⁴³ D McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 *International Journal of Law and the Family* 132, at pp 138–139.

⁴⁴ S Choudhry and J Herring, *European Human Rights and Family Law*, at p 227.

⁴⁵ On the difficult relationship between welfare and rights in child law, see e, eg S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (OUP, 2nd edn, 2011), at p 556.

⁴⁶ UNCRC, Art 7(1).

⁴⁷ R Hodgkin and R Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), at p 107.

⁴⁸ UNCRC, Art 8(1).

⁴⁹ *Ibid.*

⁵⁰ See, eg Committee on the Rights of the Child, 'Consideration of Reports Submitted by State[] Parties under Article 44 of the Convention: Concluding Observations – France' (Second Report) (CRC/C/15/Add.240, 2004).

⁵¹ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, at pp 107, 116.

instruments'.⁵²

Moreover, Article 9 mandates states to ensure that 'a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'.⁵³ Those best interests, in turn, can be determined only via due consideration of the child's relationship with the parents, and the provisions of Articles 7 and 8 remind us that adoption may not be appropriate even where some form of 'separation' is necessary. While adoption certainly need not preclude contact with the birth family⁵⁴ (purportedly protected by Article 9(3) of the Convention),⁵⁵ in England and Wales 'it is "extremely unusual" to make an order [for contact] with which the adoptive parents are not in agreement'.⁵⁶

One situation where separation between parent and child is expressed potentially to be permissible under Article 9 is where there is 'abuse or neglect of the child by the parents'.⁵⁷ Indeed, states are obliged by Article 19 to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation' while in the care of parents, legal guardians or others.⁵⁸ Neglect has been defined by the Committee as 'the failure to meet children's physical and psychological needs, protect them from danger, or obtain medical ... or other services when those responsible for children's care have the means, knowledge and access to services to do so'.⁵⁹ Further, it has been seen that a child who has been 'temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment' is entitled to 'special protection and assistance' from the state,⁶⁰ and there is a specific obligation to secure alternative care for such a child under Article 20.⁶¹ It is also true to say that for individual children, adoption could be an important means for a state to protect the child's 'inherent right to life' and to perform its obligation to 'ensure to the maximum extent possible the survival and development of the child', both contained in Article 6. The permanent and state-sanctioned nature of adoption could arguably help to secure other Convention rights, including the child's right to 'the enjoyment of the highest attainable standard of health',⁶² to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development',⁶³ to education⁶⁴ and to special protection if he or she is disabled.⁶⁵ Indeed, the Committee has expressed concern about a state where 'domestic adoption for

⁵² Ibid, Art 7(2).

⁵³ UNCRC, Art 9(1).

⁵⁴ See, eg E Neil, 'Post-Adoption Contact and Openness in Adoptive Parents' Minds: Consequences for Children's Development' (2009) 39 *British Journal of Social Work* 5.

⁵⁵ Article 9(3) obliges states to 'respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. A difficulty in this regard, however, is the declaration made on ratification that '[t]he United Kingdom interprets the references in the Convention to "parents" to mean only those persons who, as a matter of national law, are treated as parents' (United Nations, 'Multilateral Treaties Deposited with the Secretary-General', Ch IV, No 11, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last accessed 15 October 2012)). This interpretation is expressly said to apply 'where the law regards a child as having only one parent, for example where a child has been adopted by one person only'.

⁵⁶ *Re J (A Child) (Adopted Child: Contact)* [2010] EWCA Civ 581, [2011] Fam 31, at para [26], per Lord Neuberger MR, giving the judgment of the court. See K Hughes and B Sloan, 'Post-adoption Photographs: Welfare, Rights and Judicial Reasoning' [2011] CFLQ 393 for detailed discussion. See now Children and Families Bill 2012-13, cl 8.

⁵⁷ UNCRC, Art 9(1).

⁵⁸ Ibid, Art 19(1).

⁵⁹ Committee on the Rights of the Child, 'General Comment No 13' (2011): The Right of the Child to Freedom from All Forms of Violence' (CRC/C/GC/13, 2011), at para 20.

⁶⁰ UNCRC, Art 20(1). See also Art 39, which requires states to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment ...', and UN General Assembly, *Guidelines for the Alternative Care of Children* (resolution A/RES/64/142, 24 February 2010), Annex, at paras 5-6, 9(b) inter alia.

⁶¹ Ibid, Art 20(2). cf *A and S v Lancashire County Council* [2012] EWHC 1689 (Fam), [2013] 1 FLR (forthcoming).

⁶² UNCRC, Art 24(1).

⁶³ UNCRC, Art 27(1).

⁶⁴ UNCRC, Art 28.

⁶⁵ UNCRC, Art 23.

children deprived of a family environment is not promoted, developed or applied as an alternative to public care, even in situations where it is in the best interests of the child'.⁶⁶

In spite of this, it is important to note that Article 18 obliges states to 'render appropriate assistance to parents and legal guardians',⁶⁷ who 'have the primary responsibility for the upbringing and development of the child',⁶⁸ 'in the performance of their child-rearing responsibilities and [to] ensure the development of institutions, facilities and services for the care of children'.⁶⁹ Significantly, Kerry O'Halloran suggests that 'the need for a new adoption law to expedite the transfer from public care to private care ... of those children requiring a permanent home following failed parenting', such as that provided by the 2002 Act, 'would not have been so pressing if a greater investment had been made in family support services'.⁷⁰ Indeed, the UN Guidelines for the Alternative Care of Children direct that 'efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members', and that '[t]he State should ensure that families have access to forms of support in the caregiving role'.⁷¹ Similarly, the Committee directs that states' overall goals should include reducing the number of young children abandoned ... as well as minimizing the numbers requiring institutional or other forms of long-term care', albeit that there is an exception where 'this is judged to be in a young child's best interests'.⁷²

One of the potential types of alternative care provided under Article 20 is adoption,⁷³ the Committee strongly prefers 'family-type care' (including adoption) to institutional care,⁷⁴ and 'due regard' must be paid to 'the desirability of continuity in a child's upbringing' when deciding upon the appropriate type of alternative care.⁷⁵ Nevertheless, the *Implementation Handbook* regards the UNCRC as 'neutral about the desirability of adoption',⁷⁶ and the Committee has said that in implementing Article 19, 'due process must be respected' and regard must be given to 'the least intrusive intervention as warranted by the circumstances'.⁷⁷ Even where some form of intervention is necessary to secure a child's Convention rights, then, it does not necessarily follow that adoption is the most appropriate one. The foregoing discussion of the many relevant provisions of the UNCRC has, however, demonstrated the serious limitations to its ability to provide a single, clear answer to a given question.

⁶⁶ UN Committee on the Rights of the Child, 'Consideration of Reports submitted by State[] Parties under Article 44 of the Convention – Concluding observations: Azerbaijan' (Third and Fourth reports) (CRC/C/AZE/CO/3-4, 2012), at para 54.

⁶⁷ UNCRC, Art 18(2).

⁶⁸ UNCRC, Art 18(1).

⁶⁹ UNCRC, Art 18(2).

⁷⁰ K O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy & Practice* (Springer, 2nd edn, 2009), at p 106. See also S Harris-Short, 'Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), at p 159 on the potentially ulterior motives of successive UK Governments in transferring responsibility for children 'from the State back to the private sector'.

⁷¹ UN General Assembly, *Guidelines for the Alternative Care of Children* (resolution A/RES/64/142, 24 February 2010), Annex, at para 3.

⁷² Committee on the Rights of the Child, 'General Comment No 7 (2005): Implementing Child Rights in Early Childhood', at para 18.

⁷³ UNCRC, Article 20(3). See also Committee on the Rights of the Child, 'General Comment No 7 (2005): Implementing Child Rights in Early Childhood', at para 2(a).

⁷⁴ UN Committee on the Rights of the Child, 'Consideration of Reports submitted by State Parties under Art 44 of the Convention – Concluding Observations: Belarus' (Third and Fourth Reports) (CRC/C/BLR/CO/3-4, 2011), at paras 45–46. The treatment of children in institutional care has received much recent media attention in England and Wales: see eg, BBC News, "'Weaknesses' in how children's homes help runaways revealed' (18 June 2012), available at <http://www.bbc.co.uk/news/uk-18478670> (last accessed 16 February 2013).

⁷⁵ UNCRC, Art 20(3). See also Committee on the Rights of the Child, 'General Comment No 7 (2005): Implementing Child Rights in Early Childhood', at para 36(b).

⁷⁶ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), at p 294.

⁷⁷ Committee on the Rights of the Child, 'General Comment No 13 (2011): The Right of the Child to Freedom from All Forms of Violence' (CRC/C/GC/13, 2011), at para 54.

Policy behind the 2002 Act

In something of a contrast to the UNCRC's apparent neutrality on adoption's desirability, the English 2002 Act unashamedly aimed to bring about 'more adoptions, more quickly' for children in care.⁷⁸ Indeed, local authorities are placed under a duty to initiate adoption proceedings (by applying for an initial 'placement order')⁷⁹ where inter alia the authority is 'satisfied that the child ought to be placed for adoption',⁸⁰ and it has been recognised as legitimate for a local authority to seek such an order 'even though it recognises the reality that a search for adoptive parents may be unsuccessful'.⁸¹ The policy of securing more adoptions, pursued in spite of apparently mixed outcomes for children adopted out of care,⁸² can be seen from the fact that the Act allows an adoption agency to place a child with a view to adoption by virtue of the consent of a child's parents (with parental responsibility)⁸³ or his or her guardian, without the need for a court order,⁸⁴ and the fact that parents with parental responsibility can provide advance consent to the final and necessary adoption order at the same time.⁸⁵ Moreover, the Act instructs the courts and adoption agencies 'at all times' to 'bear in mind that, in general, any delay in coming to [a] decision [relating to adoption] is likely to prejudice the child's welfare'.⁸⁶

In spite of the policy focus behind the Act, a more recent campaign by *The Times* newspaper criticised local authorities' failure to achieve the Government's objective of securing more adoptions of children in care, particularly in cases involving older children and those from ethnic minorities.⁸⁷ This led to the appointment of (now Sir) Martin Narey as a 'ministerial adviser on adoption' who has declared that adoption 'has drifted out of fashion' and vowed to help in reversing the trend.⁸⁸ Sonia Harris-Short has rightly expressed concern about Narey's 'unequivocally pro-adoption' stance and its potential impact on policy.⁸⁹ While statistics on English adoption from care in 2012 showed an increase of 12% on the equivalent 2011 figure,⁹⁰ the Government is planning reforms aimed at increasing the speed of adoptions.⁹¹ Nevertheless, the legislation even as it stands could still be said to reflect a preference for adoption over other types of care for certain categories of children.⁹²

It is ultimately unclear whether the Act's provisions are compatible with the UNCRC given its apparent

⁷⁸ S Harris-Short, 'New Legislation: The Adoption and Children Bill – A Fast Track to Failure?' [2001] CFLQ 405, at p 407.

⁷⁹ Adoption and Children Act 2002, s 21.

⁸⁰ *Ibid*, s 22.

⁸¹ *Re P (Adoption: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, at para [137], per Wall LJ, giving the judgment of the court.

⁸² S Harris-Short, 'Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), at pp 150–151.

⁸³ Adoption and Children Act 2002, s 52(6).

⁸⁴ *Ibid*, s 19.

⁸⁵ *Ibid*, s 20. As discussed in the next section of this article, restrictions are then placed on parents' ability to withdraw their consent and oppose the making of the final adoption order.

⁸⁶ *Ibid*, s 1(3).

⁸⁷ See, eg R Bennett, 'Written Off: The Children Lost in Adoption Shambles', reported in *The Times* (18 April 2011).

⁸⁸ M Narey, 'Adoption has to Come Back into Fashion', reported in *The Independent on Sunday* (31 July 2011). See, generally, M Narey, 'The Narey Report: A Blueprint for the Nation's Lost Children', reported in *The Times* (5 July 2011).

⁸⁹ S Harris-Short, 'Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), at p 149.

⁹⁰ Department for Education, 'Statistical First Release: Children Looked After in England (Including Adoption and Care Leavers) year ending 31 March 2012' (2012), available at <http://www.education.gov.uk/rsgateway/DB/SFR/s001084/sfr20-2012.pdf> (last accessed 16 February 2013).

⁹¹ Department for Education, 'Children and Families Bill to give Families Support when they Need it Most' (9 May 2012), available at <http://www.education.gov.uk/inthenews/inthenews/a00208753/childrens-bill-family-support> (last accessed 16 February 2013). See now Children and Families Bill 2012-13, part 1.

⁹² cf UNCRC, Art 2(1), which requires the rights under the Convention to be secured 'irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status; and Art 2(2), which protects a child from discrimination 'on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'.

emphasis on adoption as a solution for looked-after children. But the text of the Act does at least attempt to give effect to the various interests protected under the UNCRC, for example by specifically directing the decision-maker to consider the effect throughout the child's life of ceasing to be a member of the birth family⁹³ and the child's relationships with relatives (including their ability and willingness to meet the child's needs)⁹⁴ as aspects of the child's welfare.

Whatever the implications of a textual analysis of the Act, the compatibility of national law with an international convention inevitably involves consideration of the interpretation and application of relevant legislation, and the Committee has requested reporting states to provide 'relevant and updated information, including on the principal legislative, judicial, administrative or other measures in force' with regard to adoption.⁹⁵ Judicial approaches are a major concern of this article, and the next subsection begins the analysis with a critique of the general approach of the judiciary to the notion of 'paramountcy' under the Act.

The general approach of the courts to paramountcy

As mentioned earlier, English courts have often utilised a distinctly narrow and individualistic conception of welfare when applying the 'paramountcy' principle to more general decisions about the upbringing of children outside the context of adoption,⁹⁶ and this approach appears to have continued in the early case law under the 2002 Act notwithstanding the Act's attempts to protect the child's pre-existing relationships. An example of such a case is the decision of the Court of Appeal in *Re C (A Child) (Adoption: Duty of Local Authority)*.⁹⁷ There, although Arden LJ accepted that the Act set out an 'extended meaning' of welfare because of the need to consider the long-term effect of acquiring a new legal family,⁹⁸ she considered that Parliament had intentionally prioritised the 'no delay' principle above all other aspects of welfare and felt unable to 'quarrel with that basic value judgment'.⁹⁹ In the case at hand, the priority was therefore 'finding a long-term carer for the child without delay',¹⁰⁰ even if that meant her adoption taking place without her father being assessed as a potential carer or even being aware of her existence and without her grandparents being assessed as carers, because her mother had consented to the adoption.

Rather than reflecting the UNCRC's preference for care by birth parents where possible, Arden LJ expressly stated that the 2002 Act did not prioritise the birth family over the adoptive family simply because of their status.¹⁰¹ Similarly, Thorpe LJ thought it unfortunate that the local authority in *Re C* had assumed a duty to 'explore profoundly' the possibility of a placement within the wider family rather than an adoption by strangers.¹⁰² When citing *Re C* in the later case of *Re A (Father: Knowledge of Child's Birth)*, Black LJ accepted that the Court of Appeal had prioritised 'the interests of the child as an individual'.¹⁰³

As discussed above, the 2002 Act does provide that '[t]he court or adoption agency must at all times bear in

⁹³ Adoption and Children Act 2002, s 1(4)(c).

⁹⁴ *Ibid*, s 1(4)(f).

⁹⁵ Committee on the Rights of the Child, 'Treaty-specific Guidelines regarding the Form and Content of Periodic Reports to be Submitted by States Parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (CRC/C/58/Rev.2, 2010), at para 31.

⁹⁶ cf, eg J Herring, 'The Human Rights Act and The Welfare Principle In Family Law – Conflicting or Complementary?' [1999] CFLQ 11.

⁹⁷ [2007] EWCA Civ 1206, [2008] Fam 54. For a more detailed analysis of the case, see B Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in "Fast Track" Adoption Cases' [2009] CFLQ 87. See also *Re A (Adoption: Obligation to Contact Father)* (HC, 26 January 2010, unreported).

⁹⁸ [2007] EWCA Civ 1206, [2008] 1 FLR 1294, at para [18], per Arden LJ.

⁹⁹ *Ibid*, at para [17].

¹⁰⁰ *Ibid*, at para [3].

¹⁰¹ *Ibid*, at para [15].

¹⁰² *Ibid*, at para [69]. This was caused by a supposed error surrounding the legislation under which the professionals were acting: See B Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in "Fast Track" Adoption Cases', at pp 90–91 for discussion. cf *UN Guidelines for Alternative Care of Children*, considered at the text to [fn 71](#) above. But see also, eg Committee on the Rights of the Child, 'Consideration of Reports Submitted by State[] Parties under Article 44 of the Convention – Concluding Observations: Chad' (Initial Report) (CRC/C/15/Add.107, 1999), at para 22, where the Committee emphasised the need regularly to review informal family placements in order to comply with Art 25 of the Convention.

¹⁰³ [2011] EWCA Civ 273, [2011] 2 FLR 123, at para [39].

mind that, in general, any delay in coming to [a] decision is likely to prejudice the child's welfare'.¹⁰⁴ Similarly, the Committee on the Rights of the Child has 'stressed the principle that delay is likely to be prejudicial to the best interests of the children'.¹⁰⁵ In an observation on a Nicaraguan report, for example, the Committee expressed concern that 'children that could be declared adoptable are left in institutions for long periods'.¹⁰⁶ Even so, it is not necessarily the case that either the Act or the Committee require delay to be given greater weight than all other potential causes of detriment to welfare in every case, especially since both the Act and the UNCRC specify other relevant factors.

The English cases, however, do not always send out an unambiguous message, due in part to a fact-sensitive approach. In *Re P (Placement Orders: Parental Consent)*, for example, Wall LJ emphasised that 'adoption, unlike other forms of order...is something with lifelong implications',¹⁰⁷ and the courts have at times required significant evidence of why adoption is more appropriate than foster care for particular children whose parents have not consented to the adoption process.¹⁰⁸ Moreover, by contrast to the views expressed in *Re C*, a High Court judge has opined in a case with some factual similarities to *Re C* that '[a]doption is a last resort for any child' that should be considered only 'when neither of the parents nor the wider family and friends can reasonably be considered as potential carers for the child'.¹⁰⁹ The judge also recognised the child's 'right to be brought up by her own family', albeit without specific reference to the UNCRC.¹¹⁰ Nevertheless, as will continue to be seen below, the English courts' frequent emphasis on quickly achieving a secure adoption placement at the expense of other interests may not give sufficient weight to the various aspects of the UNCRC. This in spite of the fact that, as acknowledged above, the Act itself could conceivably provide a broad framework through which the judiciary could give effect to the various requirements of the UNCRC.

Adoption and consent

This section further considers English adoption law as against the status of the child's relationship with his or her birth parents under the UNCRC. It focuses specifically on the issue of parental consent, and the circumstances in which it can be dispensed with.¹¹¹ That said, Jonathan Herring has implied that adoption is not necessarily consistent with the rights of a child even where his or her parents have consented to it.¹¹² This must be correct from the perspective of the UNCRC, since protection of the child's status and identity is an independent right of the child and an aspect of his welfare. A special guardianship order in favour of the prospective adopters may therefore be appropriate in circumstances where the parents consent to adoption but this is not in the child's best interests or compatible with rights under the UNCRC or the ECHR.¹¹³ As a matter of practical reality, however, it will often be doubtful whether it is consistent with a child's welfare to remain the legal child of (as distinct from being able to receive information about or have contact with) a parent who has made a free and informed decision to relinquish his or her parental status.

On a related issue, it is necessary to consider the impact of Article 12 of the UNCRC, which requires states to 'assure to the child who is capable of forming his or her own views the right to express those views freely

¹⁰⁴ Adoption and Children Act 2002, s 1(3).

¹⁰⁵ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), pp 295–296.

¹⁰⁶ Committee on the Rights of the Child, 'Consideration of Reports Submitted by State[] Parties under Art 44 of the Convention – Concluding Observations: Nicaragua' (Fourth Report) (CRC/C/NIC/CO/4, 2010), at para 56.

¹⁰⁷ [2008] EWCA Civ 535, [2008] 2 FLR 625, at para [128].

¹⁰⁸ *Re G (Children) (Care orders)* [2010] EWCA Civ 127, [2011] 1 FCR 282.

¹⁰⁹ *Re A (A child) (Disclosure of Child's Existence to Paternal Grandparents)* [2006] EWHC 3065 (Fam), [2007] 1 FLR 1223, at para [73], per Sumner J.

¹¹⁰ *Ibid*, at para [76], per Sumner J. Cf Family Rights Group, 'Understanding Family and Friends Care: Summary' (2012).

¹¹¹ For a discussion of the compatibility of English law's consent requirements with the European Convention on the Adoption of Children (Revised) 2008, see B Sloan, 'The Revised Adoption Convention and the Compatibility of National Law on Parental Consent: The English Example' [2010] *Praxis des Familienrechts* (FamPRA) 585.

¹¹² J Herring, *Family Law* (Pearson, 5th edn, 2011), at p 681.

¹¹³ See [AQ – we do not cross reference – please provide necessary reference in full] fn 22 above and, eg *Re S (Adoption Order or Special Guardianship Order)* [2007] EWCA Civ 54, [2007] 1 FLR 819.

in all matters affecting the child', with 'the views of the child being given due weight in accordance with the age and maturity of the child'.¹¹⁴ Article 12(2) specifically provides that 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'. In a General Comment, the Committee has stipulated that '[w]hen a child is to be placed for adoption...and finally will be adopted...it is vitally important that the child is heard', even where 'step-parents or foster families adopt a child' and 'the child and the adopting parents may have already been living together for some time'.¹¹⁵ In the Committee's view, 'the "best interests" of the child cannot be defined without consideration of the child's views'.¹¹⁶

Under the 2002 Act, while the court must have regard to 'the child's ascertainable wishes and feelings regarding [an adoption] decision (considered in the light of the child's age and understanding)' before making one,¹¹⁷ the child's consent is not essential in English law. This does not comply with the Committee's recommendation of a requirement 'that children of a certain age consent to their adoption'.¹¹⁸ What consultation with children English Law does facilitate may be vulnerable to the Government's streamlining agenda.¹¹⁹

This section proceeds by examining the judicial treatment of parental consent where it is prima facie required but not given. It then examines the particular position of the unmarried father without parental responsibility, whose consent is not even prima facie required in English law.

Dispensing with parental consent

It has been seen that Article 21(a) of the UNCRC instructs states to ensure that 'the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary'. According to the *Handbook*, the UNCRC's 'requirement for proper consent for adoption has arisen because of cases in which children have been wrongfully removed from their parents',¹²⁰ and this requirement has been interpreted as appropriate 'assistance' to the child in preserving identity for the purposes of Article 8(2).¹²¹ The *Handbook* suggests that the paramountcy principle contained in Article 21 is 'in one sense circumscribed by the legal necessities of satisfying legal grounds and gaining necessary consents'.¹²² Indeed, in a recent Concluding Observation concerning adoption the Committee recommended that a state ensured both 'that the best interests of the child are of paramount consideration, and that the parents or legal guardians have given their informed consent to the adoption'.¹²³ That said, the UNCRC itself does not explicitly specify that any particular consent is in fact required, a significant weakness.

Rachel Hodgkin and Peter Newell nevertheless assert in Unicef's *Handbook* that '[a]n adoption can only occur if parents are unwilling or are deemed by judicial process to be unable to discharge' their responsibilities towards the child.¹²⁴ In its view, 'any legislation that permits adoption under less stringent conditions would probably amount to a breach of both children's and parents' rights under the

¹¹⁴ UNCRC, Art 12(2).

¹¹⁵ Committee on the Rights of the Child, 'General Comment No 12 (2009): The Right of the Child to be Heard' (CRC/C/GC/12, 2009), at para 55.

¹¹⁶ *Ibid.*, at para 56.

¹¹⁷ Adoption and Children Act 2002, s 1(4)(a).

¹¹⁸ Committee on the Rights of the Child, 'Consideration of Reports Submitted by State [] Parties under Article 44 of the Convention – Concluding Observations: New Zealand' (Second Report) (CRC/C/15/Add.216, 2003), at para 34(a). See also Art 12 of the UNCRC, covering the child's right to be heard.

¹¹⁹ See, generally, Department for Education, *An Action Plan for Adoption: Tackling Delay* (TSO, 2011).

¹²⁰ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), at p 296.

¹²¹ *Ibid.*, at p 117.

¹²² *Ibid.*, at p 296.

¹²³ UN Committee on the Rights of the Child, 'Consideration of reports submitted by State [] Parties under Article 44 of the Convention – Concluding Observations: Belarus' (Third and Fourth Reports) (CRC/C/BLR/CO/3-4, 2011), at para 48.

¹²⁴ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, at p 296.

Convention'.¹²⁵ English law is broadly consistent with those stipulations.¹²⁶ In England and Wales, the basic position is that adoption requires the consent of all parents with parental responsibility¹²⁷ and legal guardians.¹²⁸ Compatibly with the UNCRC, the consent must be 'given unconditionally and with full understanding of what is involved',¹²⁹ and a mother's consent to adoption (though not to placement) is 'ineffective if it is given less than six weeks after the child's birth'.¹³⁰

Nevertheless, once the adoption has been found to be in the best interests of the child, parental wishes can be overridden under the 2002 Act where 'the welfare of the child requires the consent to be dispensed with'.¹³¹ The 2002 provisions, unlike the old law,¹³² have the potential to conflate the questions whether adoption is in the best interests of the child and whether parental consent should be dispensed with, in substance setting down a single welfare-based test.¹³³ In doing so, at the final stage of the adoption process they risk violating what Elizabeth Cooke has called the 'central principle' of English child law that 'a simple welfare test is... inadequate to justify the compulsory removal of children from their parents'.¹³⁴ As demonstrated by the first section of this article, that 'central principle' is seemingly compatible with the UNCRC given the content of Article 7 inter alia, even if a superficial view of Article 21 might be thought to indicate that it applies such a 'simple welfare test'.

It had been hoped that the use of the word 'requires' in the 2002 Act might result in a higher standard of welfare test being applied to dispensing with consent,¹³⁵ which would have reflected the requirement in Article 9 that separation from parents is 'necessary' for the child's best interests. Nevertheless, the Court of Appeal in *Re P (Placement Orders: Parental Consent)* has rejected the suggestion that there is 'some enhanced welfare test to be applied in cases of adoption'.¹³⁶ At the same time, somewhat inconsistently but with the subsequent approval of the Supreme Court in a Scottish case,¹³⁷ it opined that the word 'requires' has a 'connotation of the imperative'.¹³⁸ The court also emphasised the need to consider the child's welfare throughout his or her life,¹³⁹ and in the later case of *Re S-H (Children) Wilson LJ* denied that dispensation involves 'a straightforward enquiry into best interests'.¹⁴⁰ But given the uncertainty surrounding this vital question and the apparent willingness swiftly to dispense with parental consent brought about by the Act,¹⁴¹

¹²⁵ Ibid, at p 296.

¹²⁶ See S Harris-Short, 'Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012) for concerns about the potential future marginalisation of English courts' role in adoption.

¹²⁷ Adoption and Children Act 2002, s 52(6). cf The following subsection on the consent of fathers without parental responsibility.

¹²⁸ Ibid, ss 47(2), 47(4).

¹²⁹ Ibid, s 52(5).

¹³⁰ Ibid, s 52(3).

¹³¹ Ibid, s 52(1)(b). Consent can also be dispensed with where 'the parent or guardian cannot be found or is incapable of giving consent': ibid, s 52(1)(a). See K McK Norrie, 'Welfare and the New Grounds for Dispensing with Parental Consent to Adoption' [2008] *Scots Law Times* 213 and J M Scott, 'Welfare and the New Grounds for Dispensing with Parental Consent to Adoption – A Reply' [2009] *Scots Law Times* 17 for a discussion of the implications of a similar provision in Scotland as regards compatibility with the UNCRC.

¹³² Under the Adoption Act 1976, if the relevant parent could be found and was capable of giving agreement (cf s 16(2)(a)) it had to be shown that he or she was withholding consent 'unreasonably' (s 16(2)(b)), or had mistreated the child in some way. The mistreatment-based grounds were that the parent had 'persistently' failed without reasonable cause to discharge his or her parental responsibility (s 16(2)(c)), and that he or she had abandoned, neglected, (s 16(2)(d)) or persistently (s 16(2)(e)) or seriously (s 16(2)(f)) ill-treated, the child.

¹³³ See, eg A Bainham, *Children: The Modern Law* (Family Law, 3rd edn, 2005), at p 295.

¹³⁴ E Cooke, 'Dispensing with Parental Consent to Adoption – A Choice of Welfare Tests' [1997] *CFLQ* 259, at p 263.

¹³⁵ L Davis, 'Adoption and Children Act 2002 – Some Concerns' [2005] *Fam Law* 294.

¹³⁶ [2008] *EWCA Civ* 535, [2008] 2 *FLR* 625, at para [127], per Wall LJ, giving the judgment of the court.

¹³⁷ *S v L* [2012] *UKSC* 30, [2012] *SLT* 961, at para [35] per Lord Reed.

¹³⁸ [2008] *EWCA Civ* 535, [2008] 2 *FLR* 625, at para [125], per Wall LJ, giving the judgment of the court. See also *Re Q (A Child) (Adoption: Welfare Requirements)* [2011] *EWCA Civ* 1610, [2012] 1 *FLR* 1228, at para [58].

¹³⁹ Adoption and Children Act 2002, s 1(4)(c).

¹⁴⁰ [2010] *EWCA Civ* 1184, (2010) 154(35) *SJLB* 29, at para [32].

¹⁴¹ See, eg *Coventry City Council v C* [2012] *EWHC* 2190 (Fam), [2013] 1 *FLR* (forthcoming), at paras [20]–[22] per Hedley J.

it is not easy to argue that the English judicial approach is compatible with, inter alia, the preference for parental care expressed in Article 7 of the UNCRC or the protection for the child's 'family relations' provided by Article 8.¹⁴² This is true notwithstanding the fact that both domestic law and the UNCRC are founded upon the best interests of the child, since much again depends on the proper but elusive meaning of 'best interests'. In any event, in applying the 2002 Act the judiciary have not unequivocally taken an approach to the evaluation of best interests that is consistent with the holistic and balanced process demanded by the UNCRC, particularly since adoption is a notably onerous form of 'separation' even where it is 'required' under Article 9.

Moreover, procedural obstacles placed in front of the birth parents seeking to halt the adoption process also cause problems under Article 9, which inter alia stipulates that where a child is separated from his or her parents 'all interested parties shall be given an opportunity to participate in the proceedings and make their views known'.¹⁴³ The importance of procedural propriety in the adoption context has been recognised by the Court of Appeal.¹⁴⁴ Nevertheless, the fact that parents whose consent to adoption is prima facie required must apply for leave to revoke a placement order¹⁴⁵ (the means by which an agency may place a child without consent)¹⁴⁶ or to oppose a final adoption order where the child has been placed,¹⁴⁷ and that such leave will not necessarily be granted,¹⁴⁸ means that a parent's 'opportunity to participate in the proceedings' can be extinguished in advance of the final hearing such that consent does not even have to be dispensed with at that final point.

Unmarried fathers without parental responsibility

While the preceding sub-section of this article has demonstrated that parents with parental responsibility can often find the need for their consent readily dispensed with, the situation is worse still for those parents without parental responsibility.

The Unicef *Handbook* opines that '[s]tates should reconsider ... laws that do not permit fathers of children born outside marriage to have any potential rights in adoption procedures'.¹⁴⁹ For its part, the Committee has referred to the need for 'both legal parents' to consent to adoption.¹⁵⁰ It is well-known that in English law, however, fathers who are not married to the mother of their biological children (unlike married fathers and all mothers) do not automatically have parental responsibility ('PR') for those children,¹⁵¹ and a father's

¹⁴² cf Family Justice (Transparency, Accountability and Cost of Living) Bill 2012–13, a draft Private Members' Bill sponsored by John Hemming MP. Clause 4 of the proposed Bill would amend s 52 of the 2002 Act so that a judge who considers that parental consent should be dispensed with is specifically required to 'explain how he has considered the requirement of section 1 (4) of [the 2002] Act' and 'then only make an order placing a child in the care of a local authority after considering whether it is possible and in the interest of the welfare of the child to place the child with one of his relatives'. Thanks are due to Florence Bellone for bringing the Bill (available at http://john.hemming.name/pmb/family_justice_bill_draft_bill.pdf (last accessed 16 February 2013)) to the author's attention.

¹⁴³ UNCRC, Art 9(2). See also UN General Assembly, *Guidelines for the Alternative Care of Children* (resolution A/RES/64/142, 24 February 2010), Annex., at paras 57, 66.

¹⁴⁴ *Re P (Care Proceedings)* [2012] EWCA Civ 401, [2012] 2 FLR 1184.

¹⁴⁵ Adoption and Children Act 2002, s 24(2)(a).

¹⁴⁶ Adoption and Children Act 2002, s 18(1).

¹⁴⁷ *Ibid*, s 47(3), s 47(5).

¹⁴⁸ Leave will be given only where the court is 'satisfied that there has been a change in circumstances' since either the original consent was given or the placement order was made: Adoption and Children Act 2002, s 47(3), s 47(7). Such a change is a necessary but not sufficient condition: *Re M (Children) (Placement Order)* [2007] EWCA Civ 1084, [2008] 1 WLR 991, [2008] 1 FLR 1093. In *NS-H v Kingston Upon Hull City Council* it was said that it would be only 'occasionally' appropriate to give leave to apply for the revocation of such an order where it is unlikely that a child will return to live with a parent: [2008] EWCA Civ 493, [2008] 2 FLR 918, at para [1], per Wilson LJ.

¹⁴⁹ R **Hodgkin and P Newell**, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef, 3rd edn, 2007), at p 296.

¹⁵⁰ Committee on the Rights of the Child, 'Consideration of Reports Submitted by State[] Parties under Article 44 of the Convention – Concluding Observations: Papua New Guinea' (Initial Report) (CRC/C/15/Add.229, 2004), at para 42.

¹⁵¹ Compare Children Act 1989, ss 2(1) and 4.

consent to the adoption is not required (or required to be dispensed with) if he does not possess PR.¹⁵² Since most unmarried fathers nevertheless obtain PR (usually through registration on the child's birth certificate),¹⁵³ it would be an exaggeration to say that English law excludes unmarried fathers from the adoption process as a rule. Moreover, in *Re F (Placement Order)*, a 'travesty of good practice' was said to have occurred when a local authority failed to respond to queries from an unmarried father about the adoption of his daughter despite the fact that he did not have PR.¹⁵⁴ But *Re C (A Child) (Adoption: Duty of Local Authority)* illustrates that the interests of such a father can nevertheless be prejudiced on a questionable basis.¹⁵⁵

Re C involved a mother who had become pregnant after a one-off sexual encounter, and who made it clear that she wished the resulting child to be adopted shortly after birth. She kept the pregnancy secret from the biological father (as well as her own parents), who did not have PR, and refused to identify him.¹⁵⁶ The local authority charged with the child's care and eventual adoption sought judicial guidance on whether it should attempt to identify the father, inform him of the child's birth and possible adoption and assess him as a potential carer even though he did not have parental responsibility. The first instance judge held that the local authority was under a duty to take these measures on the basis of the new focus on welfare throughout the child's life in the 2002 Act.¹⁵⁷ However, the Court of Appeal ordered the local authority not to take any steps to identify the father. As we have seen, the priority was held to be finding a permanent home for the child, who was four months old by the time of the hearing, without any further delay. This was the course of action most compatible with the child's best interests, on the court's analysis, and there was no evidence that the father could care for her based on what the mother had told the court. Arden LJ was to some extent influenced by the fact that the father's consent was not relevant to the adoption. She admitted that in most cases disclosure of the child's birth and the adoption process would be consistent with the best interests of the child. But she held that in 'exceptional situations' such as this one it was appropriate for relatives, including a father, to remain ignorant of a child's birth at the time of the adoption.¹⁵⁸ It is not entirely clear why *Re C* was exceptional. The precise nature of the parents' relationship is not given detailed consideration in the Court of Appeal's judgments, which is problematic in itself. In any event, this may simply have been a case where the mother, irrespective of the child's interests, did not disclose the resulting pregnancy to the father simply because she wanted nothing further to do with him.¹⁵⁹ Similarly, in *Re L (Adoption: Contacting Natural Father)*,¹⁶⁰ Munby J held that nothing could be done than asking the intransigent mother for her co-operation once more where it was impossible to identify the father of a prospective adoptee without the mother's help. Any alternative method, he held, 'smacks too much of the Inquisition to be tolerable'.¹⁶¹ It could be difficult to conclude that the eventual adoption in such cases would be permissible 'on the basis of all pertinent and reliable information', as explicitly necessitated by Article 21 of the UNCRC.

The stark contrast between the positions of the married and the unmarried father as regards consent to adoption was illustrated in the more recent case of *Re A (Father: Knowledge of Child's Birth)*,¹⁶² the facts of which many people would more readily describe as 'exceptional' as compared to those of *Re C*. In that case, a mother similarly sought to prevent a father from finding out about the birth and development of their child, whom she intended to give up for adoption. The key difference was that the parents were married and lived together with their adult children. The couple had originally lived in Afghanistan, but were granted permanent asylum in the UK after several family members were murdered by the Taliban. Unsurprisingly, the father suffered from 'Severe Depression with Psychotic Symptoms and Post Traumatic Stress

¹⁵² Adoption and Children Act 2002, s 52(6).

¹⁵³ Children Act 1989, s 4(1)(a).

¹⁵⁴ [2008] EWCA Civ 439, [2008] 2 FLR 550, at para [34], per Wall LJ.

¹⁵⁵ [2007] EWCA Civ 1206, [2008] 1 FLR 1294.

¹⁵⁶ It was likely that he could have been identified if independent enquiries were made.

¹⁵⁷ [2007] EWCA Civ 1206, [2008] 1 FLR 1294, at para [2].

¹⁵⁸ *Ibid*, at para [24].

¹⁵⁹ cf J Marshall, 'Concealed Births, Adoption and Human Rights Law: Being Wary of Seeking to Open Windows into People's Souls' [2012] *Cambridge Law Journal* 325 for a defence of mothers' rights in cases of concealed birth.

¹⁶⁰ [2007] EWHC 1771 (Fam); [2008] 1 FLR 1079.

¹⁶¹ *Ibid*, at para [40].

¹⁶² [2011] EWCA Civ 273, [2011] 2 FLR 123.

Disorder'.¹⁶³ As a result his behaviour was unpredictable, and violent towards both his wife and himself. The Court of Appeal nevertheless refused to grant the order sought by the mother. A 'very high degree of exceptionality' was required before such secrecy could be justified,¹⁶⁴ and that test was not held to be satisfied. A significant aspect of Mostyn J's decision at first instance, which the Court of Appeal was upholding, was that as the mother's husband the father had both parental responsibility for, and 'family life' under Article 8 of the ECHR with, the child. His consent was therefore prima facie necessary before the adoption could proceed, and the judge failed to see 'how the consent could reasonably be dispensed with if it has never actually been sought'.¹⁶⁵ With reference to the child's welfare throughout his life, the judge also refused to hold that the concealment of the child's existence from the father was in the child's best interests. A comparison between *Re C* and *Re A* suggests that more importance was attached to the relationship between the parents than the de facto relationship between each parent and the child. Again, it is doubtful whether this approach is compatible with the UNCRC as a whole since the Convention does not obviously distinguish between married and unmarried parents.¹⁶⁶ In fact, the UN Guidelines on the Alternative Care of Children provide that '[s]pecial efforts should be made to tackle discrimination on the basis of any status of the child or parents', including inter alia 'birth out of wedlock' and 'all other statuses and circumstances that can give rise to relinquishment, abandonment and/or removal of a child'.¹⁶⁷

Conclusion

This article has highlighted several respects in which the compatibility of English adoption law as applied by the judiciary with the UNCRC is open to question. It has focussed on the treatment of the prospective adopted child's relationship with his or her birth parents before the adoption has taken place.

In spite of questionable judicial approaches, it could be that the Adoption and Children Act 2002 is nevertheless itself compatible with the UNCRC. Indeed, the specific adoption-related concerns mentioned by Committee on the Rights of the Child in its 2008 Concluding Observations on the UK's third and fourth periodic reports focussed on the time taken for children of ethnic minorities to be adopted by a family of the same ethnic origin and the lack of an extension of the Hague Convention on Intercountry Adoption to overseas territories.¹⁶⁸ The inevitable but inherent inconsistencies within the UNCRC itself and the Committee's guidance, as well as within the case law under the 2002 Act, make it very difficult to assess overall compatibility, such that the 'blame' for any incompatibility cannot solely rest with national institutions. Much depends on the proper interpretation of both 'paramountcy' and 'welfare'/'best interests', and such a 'proper' interpretation may never be arrived upon. This is a particular risk in the absence of a supranational judicial body applying the UNCRC equivalent to the European Court of Human Rights,¹⁶⁹ but it also applies in the domestic context. Moreover, even if the English courts had given weight (or in fact any recognition at all) to the various UNCRC rights possessed by the child in adoption cases, they may well have reached the same conclusions and would inevitably have been less influenced by the UNCRC than the ECHR.

The essential argument advanced in this article is that the implementation of the UNCRC in the field of adoption law is an extremely complex process, partly due to weaknesses in the UNCRC's own ability to guide national law that reduce incentives to ensure genuine compliance. Whatever one's view of the merits of adoption as compared to other forms of care, the difficult process of implementing the UNCRC in this

¹⁶³ Ibid, at para [4].

¹⁶⁴ Ibid, at para [25], per Longmore LJ.

¹⁶⁵ Ibid, at para [7].

¹⁶⁶ See, eg the anti-discrimination provision in Art 2.

¹⁶⁷ *UN Guidelines on the Alternative Care of Children*, at para 10.

¹⁶⁸ Committee on the Rights of the Child, 'Consideration of Reports submitted by State[] Parties under Article 44 of the Convention – Concluding Observations: United Kingdom of Great Britain and Northern Ireland' (Third and Fourth Reports) (CRC/C/GBR/CO/4, 2008), at paras 46-48. cf Department for Education, *An Action Plan for Adoption: Tackling Delay* (TSO, 2011), at paras 50-52 and Children and Families Bill 2012-13, cl 2.

¹⁶⁹ See, eg P Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law and the Family* 1; and S Parker, 'The Best Interests of the Child – Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26 for a discussion of the role played by the 'best interests' principle within the Convention.

field cannot be considered complete in England and Wales merely because the best interests of the child are now expressed to be the paramount consideration in adoption decisions, although it may be impossible conclusively to deem the implementation process complete. Adoption could be one area where the state (including via the judiciary), in Fortin's words, is able to 'exploit[] the UNCRC's internal incoherence' in order to pursue its own ends.¹⁷⁰

¹⁷⁰ J Fortin, *Children's Rights and the Developing Law* (CUP, 3rd edn, 2009), at p 48.