UN Convention on the Rights of the Child (UNCRC): Case Studies

UNCRC interacting with EU law

The 2006 Communication from the European Commission set out that:

The rights of the child, guaranteed by Article 24 of the Charter, are one of the fundamental rights mentioned explicitly in the Commission's Strategy. It is thus included in the regular "fundamental rights check" which the Commission applies to relevant draft EU legislation.

The requirement to consider children’s rights is included broadly across EU legislation and policy, including in areas of competence such as EU free-movement law, immigration and asylum law, EU family law, and policies seeking to tackle poverty and social exclusion, and children’s rights in a criminal-justice context.

UNCRC for areas of law under EU competence

The definition of ‘EU –competence’ relates to a series of different levels of legislative competence, based on who can act. At its highest, competence is exercised exclusively by the EU (‘exclusive competence’) but there can also be supporting competence, where both the EU and an individual member state act, and there is no harmonisation.

The requirement to have due regard to the UNCRC in all areas of EU competence reflects the Commission’s mainstreaming of the UNCRC across the work of the EU. This is a commitment that will continue to transform the landscape for children’s rights across the EU, while leaving the UK behind if we do not adopt a similar broad brush approach.

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1 See, for instance, Art 28(3) Dir 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, which prohibits the deportation of migrant children unless it is in their best interests.


3 See, for instance, a commitment to safeguarding children’s article 12 CRC right to participate in decisions that affect them, in Arts 11(2), 23(b) and 41(2)(c) Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1.


6 [Website Link]
Case study: criminal justice

In 2013 Just for Kids Law brought a case challenging the Government policy that 17 year olds who were arrested could be held as if they were adults, rather than children. This meant they were not entitled to have an appropriate adult, and had no unqualified right to inform a parent or responsible adult about the arrest, or to speak to them. In one case, a 17 year old, Hugh Cousins-Chan, was held overnight in a police station on suspicion of participation in a robbery without being able to contact his Mother, although a check of his oyster card revealed he could not have been present during the offence. In three other cases, 17 year olds had committed suicide after being held as adults (http://www.bbc.co.uk/news/uk-29989777)

In deciding the case, the High Court relied on Article 3 of the UNCRC, which outlined that the best interests of children must be considered in decision making, as well as the rights and responsibilities for a parent to provide guidance to their child (Article 5). The High Court looked at the criticisms of the Committee on the Rights of the Child that 17 year olds in police custody were not protected by domestic legislation. Further the court looked at the EU guidelines on ‘child friendly justice’, commenting that “The importance of this Guidance is not merely that the child is given the opportunity of speaking to and obtaining assistance from one he trusts, but that it recognises the need to correct the imbalance between the child and the criminal justice system.”

Case study: legal aid for victims

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) made significant changes to legal aid, including removing legal aid for compensation for victims of human trafficking. Although the Modern Slavery Act 2015 amended LASPO to ensure that victims were entitled to legal aid for compensation claims and for employment law claims, there were no practical measures to allow anyone – whether child or adult – to access this legal advice.

Therefore, in challenging the Ministry of Justice’s failure to provide a mechanism to access legal aid, individuals – including children – relied on the Trafficking Directive 2011/36 for their case that they required access to a mechanism that allowed them to bring these cases. Thanks to the children’s rights provisions, and the importance of a child being heard in proceedings, it was clear that they should be entitled to legal aid and this resulted in a consultation from the Ministry of Justice on how this could be enacted: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577351/tmscc-review.pdf
**Case Study: children as victims of trafficking**

Child victims of trafficking are a particularly vulnerable and at risk group. The EU directive on trafficking in human beings provides strong, binding guarantees for children to be assisted by independent guardians, and that their interests must be a primary consideration. In Article 13, the Directive states: *Child victims of trafficking in human beings shall be provided with assistance, support and protection. In the application of this Directive the child’s best interests shall be a primary consideration.*

Where a child victim of trafficking is arrested in a cannabis factory, for example, then in England & Wales, they can rely on prosecutors conducting a public interest test in deciding whether to continue their prosecution, which should include consideration of their best interests as a primary consideration. Where a prosecution continues, a child may then be able to rely on the statutory defence in the Modern Slavery Act.

The consideration of the best interests of the child is only available in the Directive and the Charter of Fundamental Rights. It is not contained in any domestic legislation, and unlike the police, the Crown Prosecution Service is not bound by s11 Children Act 2004. Loss of children’s rights at an EU level would mean that child victims of trafficking would face the same test as adults if the had been compelled to commit a crime.

In England, a child victim of trafficking whose age was disputed could rely on the age presumption to access immediate support using the directive, and enjoy special protection as a child victim, even prior to referral into the NRM. The Modern Slavery Act does not apply these protections until the child has a reasonable grounds decision as a potential victim of trafficking. For criminal proceedings, the process of determining age remains the 1933 Children and Young Persons Act to make ‘due inquiry’ as to the young person’s age.

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**Case Study: EU Directive on fighting sexual abuse and exploitation of children**

EU Directive 2001/93/EU of the European Parliament and of the Council, on combating the sexual abuse and sexual exploitation of children and child pornography⁷, was adopted in 2011. It takes a comprehensive approach including prevention, prosecution of offenders, and protection of child victims. It includes provisions on criminal procedures and judicial cooperation within and between the EU Member States, as well as policy and administrative measures in the prevention and response to child sexual abuse and exploitation, and provisions on the assistance, support and protection of children who are victims of such crimes. The Directive emphasises the imperative for Member States to protect children from all forms of sexual abuse and exploitation, in accordance with Article 34 of the UN Convention on the Rights of the Child (UNCRC). It explicitly refers to the UNCRC (including the Optional Protocol on the sale of children, child prostitution and child pornography) and to the EU Charter of Fundamental Rights. It explicitly highlights the need to ensure that children’s best interests are the primary consideration when carrying out any measures to

combat these offences and when providing assistance, support and protection to victims. It also emphasises that Member States must take due account of children’s views, needs and concerns in actions to assist and support child victims. These are fundamental principles and standards contained in the UNCRC.

Since the adoption of the Directive, the European Parliament set up a cross-part Intergroup on Children’s Rights, in 2014, which aims to mainstream children’s rights in EU policy and legislation and to assess their impact on children. The group’s work is based on the Child Rights Manifesto⁸ which was developed by a coalition of child-focused organisations working on the promotion and protection of children’s rights and the implementation of the UNCRC at EU level.

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Case Study: EU Directive of the European Parliament and the Council establishing minimum standards on legislative and practical measures to support victims of crime

The EU Directive 2012/29/EU¹ establishes minimum standards on the rights, support and protection of victims of crime. It explicitly recognises the specific needs of children and the need to pay attention to services and support that may be needed by children, including in situations where they are direct or indirect victims of gender-based or domestic violence crimes. The Directive includes specific references to the need to ensure children’s best interests are a primary consideration when implementing its provisions (in accordance with the EU Charter of Fundamental Rights and the UN CRC) and to ensure a child-sensitive approach, taking due account of a child’s age, views, maturity, needs and concerns.

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