Neutral Citation Number: [2013] EWHC 982 (Admin)

Case No: CO/7772/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2013

Before:

LORD JUSTICE MOSES
MR JUSTICE KENNETH PARKER

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Between:

The Queen on the Application of HC (a child, by his litigation friend CC)	**Claimant**
- and -	
The Secretary of State for the Home Department	**1st Defendant**
The Commissioner of Police of the Metropolis	**2nd Defendant**

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Ms Caoilfhionn Gallagher (instructed by **Lawrence & Co**) for the **Claimant**
Mr Hanif Mussa (instructed by **Treasury Solicitors**) for the **1st Defendant**
Ms Sarah Le Fevre (instructed by **The Metropolitan Police**) for the **2nd Defendant**
Ms Joanne Cecil (instructed by **Coram Children's Legal Centre**) **Intervener**
Ms Felicity Williams and Ms Laura Janes (instructed by **The Howard League**) **Intervener**

Hearing dates: 26th-27th February, 2013

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Approved Judgment

Lord Justice Moses:

1. Four weeks after his 17th birthday at 3.55 p.m., on 19 April 2012, the claimant was arrested on suspicion of robbery of a mobile phone on a bus. Shortly after he was taken to Battersea Police Station he asked that his mother be informed. That was not allowed. She did not learn that he was in custody for about four and a half hours after he had been arrested, at 8.30 p.m. She was not allowed to speak to him. The claimant was released after 11½ hours in custody, on 20 April 2012. One month later he was informed by letter that his bail was cancelled. No charges were ever brought against him. The claimant had never been in trouble before.

2. This first experience of the criminal justice system occurred not as a result of the police ignorance of the claimant's age or disregard of their obligations to children. The police applied Code C of the Code of Practice under the Police and Criminal Evidence Act 1984. Both the Police and Criminal Evidence Act 1984 and the Code permitted the police to treat a 17 year-old as an adult. As an adult, he had no unqualified right to let his mother know what had happened, nor did his mother have a right to speak to him. Under PACE and the Code an inspector was permitted to delay such contact in light of his belief that it would interfere with the investigation.

3. The experience of the claimant puts into sharp relief the issue which arises in this application for judicial review. The focus of the challenge is not on the Metropolitan Police, the second defendant, but rather on the first defendant, the Secretary of State for the Home Department. She has decided that she will not exercise the power, which she accepts she has (subject to approval by resolution of each House of Parliament), to revise the Code of Practice so as to distinguish the procedures applicable to a 17 year-old detainee from those applicable to an adult. This application raises the question whether it was lawful for the Secretary of State to refuse to revise the Code so as to prevent a future similar experience to that suffered by this claimant and, so the court was told, by many other 17 year-olds. Parents of 17 year-old detainees have provided evidence in support of this claim. Annex 2 comments on the effect of the intervention of Coram Children's Legal Centre and the Howard League.

4. Most of the statutory provisions relating to criminal justice draw a line between those who have reached 18 and those under that age. Such provisions treat those under 18 differently from adults. But when those aged 17 are taken into custody by police for questioning, they are treated as adults. This is described as an anomaly by those with the greatest experience of the treatment of detainees, HMI Constabulary, HMI Prisons, HMI Probation, the Care Quality Commission, the Health Care Inspectorate, Wales, and the Care and Social Services Inspectorate, Wales :

> "This report considers 'juveniles' (children and young people aged 10 to 16 years), because the special provisions of care under the Police and Criminal Evidence Act 1984 apply to that age group only. This makes 17 year-olds an anomaly. Under all other United Kingdom law and United Nations Conventions,

> a child or young person is considered to be up to 18 years old. However, in a police station, a 17 year-old is treated as an adult." (report of December 2011: *Who is Looking Out for the Children?)*

The report recommends that a 17 year old should not be treated as an adult (recommendation 9).

5. There is a leaden irony in the title to these proceedings. As a 17 year-old, the claimant, under the Civil Procedure Rules (C.P.R.21.1(2)(b) and 21.2.(2)), required the assistance of his mother or of another adult to challenge Code C which denied him the unqualified right to the assistance of his mother.

The Facts

6. Some further details of the facts are important. This is not so much because the second defendant's conduct at Battersea Police Station is impugned, but because the details illustrate the consequences of treating this 17 year-old as an adult in police detention. The claimant was living with his grandmother during the week, while he attended a Sixth Form College. At about 3.55 p.m. on 19 April 2012 he was handcuffed, cautioned and arrested after, as the custody record shows, having been identified as matching the description of one of two males involved in a knifepoint robbery where an "iPhone" was stolen. He arrived nearly an hour later at 4.40 p.m. at Battersea police station and the custody record was opened at 5.13 p.m. He gave the address of his grandmother at 5.28 p.m. and was described on arrival as "cooperative". At 5.35 p.m., during a risk assessment, when asked how he was feeling, he said "like I want to go home". The claimant, who, I repeat, had never been arrested, still less been in custody before, had his rights read to him:-

> "You have the right to have someone informed that you have been detained. You have the right to consult privately with an independent solicitor either in person, in writing or on the telephone. Independent legal advice is available from the duty solicitor free of charge. You also have the right to consult a copy of the Codes of Practice covering police powers and procedures. You may do any of these things now, but if you do not, you may still do so at any time whilst detained in the police station."

7. The skeleton argument of the second defendant says that the claimant's rights were explained to him. In the absence of evidence, the court does not know precisely what explanation was given but reading those rights to this appellant would hardly constitute explanation. The record shows, by means of a tick, that he did not request a solicitor and that when reminded of his right to speak to a solicitor, declined for a second time. It is of significance that the record notes that no reason was given for not wanting legal advice. He now says that he did not appreciate that the solicitor

would be independent from the police. Whatever his reasons, there was no independent person in the police station to recommend that he should obtain the services of a solicitor.

8. The record shows that the claimant did want a "nominated person" informed. That was his mother, whose telephone number was given. But he was not allowed to tell his mother and his mother was not informed. An inspector authorised delay in making a telephone call to his mother:-

> "…as the detained person is in custody for an indictable offence and has not been charged and there are reasonable grounds for believing that the exercise of that right/those rights will hinder the recovery of property obtained in consequence of the commission of such an offence. The grounds are Subject has been arrested for suspicion of robbery and the stolen property is outstanding."

That entry in the record is shown at 5.49 p.m. and signed by the inspector. His own mobile was examined shortly after, revealing nothing untoward, and DNA, fingerprints and a photograph were taken.

9. At 6.08 p.m., that is, one and a half hours after he had been brought to the police station and over two hours since his arrest, the inspector authorised the search of the address he had given, the address, be it noted, of his grandmother, although the evidence does not reveal whether the claimant had tried to explain that his mother did not live there because he only stayed with his grandmother during the week. The search was to be for the "iPhone" or evidence of some other offences. In the entry authorising a search it was recorded that evidence was sought for anything that "might constitute evidence of a money-laundering offence such as unexplained income or assets not commensurate with an individual's circumstances".

10. The detention dragged on pending a search of the grandmother's home. The claimant was visited in his cell just over one hour later, at 7.12 p.m., and an hour after that, and said he was "OK".

11. At 8.03 p.m. his grandmother's home was searched. The records show that the search lasted seven minutes and finished at 8.10 p.m. His grandmother was there when four police officers searched. It appears nothing of interest was found, not even any assets not commensurate with an individual's circumstances indicating involvement in money-laundering. By 8.30 p.m., 20 minutes after the negative search, this claimant's mother had learnt what had happened. The note records that, when she rang the police station, she demanded to know what was going on. She was told that her son was in the police station and was "OK". She wanted to know why he had not been allowed to make a call telling her what was happening. The officer explained that:-

> "Her son didn't need an appropriate adult as he was 17 and he couldn't call due to the s.18 being in place. She then told me to tell him to ring her. I explained I couldn't tell him what to do."

There was then a conversation as to the location of the police station and a note that the claimant's mother asked how she could talk to him. She was told she could call back "in an hour or so or she could wait for him to call her". She hung the phone up.

12. At 8.41 p.m. the inspector carried out a review and the claimant was reminded of his right to free legal advice. At 9.12 p.m., four and a half hours after he had first arrived at the police station, he was walking up and down in his cell and said that he was "OK". The duty solicitor was called at 9.31 p.m. but due to an error as to the reference number, he had to be called again a half an hour later at 10.01 p.m. Finally, at 10.40 p.m., a solicitor did attend. It was not a solicitor from the duty solicitor scheme but one whose services were obtained by the claimant's mother. At 11.41 the claimant, by now in custody for seven hours, was allowed out of his cell for consultation with his solicitor. Half an hour later, he was allowed out again for interview, at one minute past midnight. At 2.31 a.m. he asked when he was getting out. At 4.01 a.m. he was bailed to a police station. It was by now 12 hours since his arrest and 11½ since he had arrived at the police station. As I have recalled, subsequently, his bail was cancelled and no charges were ever brought against him. Had the details on his oyster card been checked earlier, it would have been apparent that he could not have been at the scene of the offence.

***The Statutory Scheme (*Annex 1 sets out some of the relevant statutory provisions and of Code C)**

13. The Children and Young Person's Act 1933 distinguishes between the treatment to be afforded by police to those who are 17 years-old and to those younger than 17. By s.107(2), before amendment by the Criminal Justice Act 1991, a young person meant a person who has attained the age of 14 and is under the age of 17. A child is defined by s.107(1) of the 1933 Act as a person under the age of 14. Section 34 of the 1933 Act imposes an obligation for a parent or another person responsible for a child or young person's welfare to be identified and informed of that child or young person's arrest and detention. That obligation involves a duty to ascertain the identity of the person responsible for his welfare (s.34(2)) and to inform that person that the child or young person has been arrested, the reasons for arrest, and where he has been detained (s.34(3)). The information must be given as soon as practicable (s.34(4)).

14. By s.68 and Schedule 8 of the Criminal Justice Act 1991, s.107(1) of the 1933 Act was amended so that a young person meant a person who had attained the age of 14 and was under the age of *18 years* for the purposes of many key provisions in the Children and Young Persons Acts, 1933, 1963 and 1969, the Magistrates Court Act 1980, the Rehabilitation of Offenders Act 1974 and the Prison Act 1952. But the Criminal Justice Act 1991 (Commencement No 3 Order) 1992 (SI 1992/331) retained the definition of young person as one *under 17* for the purposes of s.34 of the 1933

Act. (The amendment to s.31 of the 1933 Act proposed in Schedule 8 to like effect has never been brought into operation). Seventeen year-olds did not come within the category of those entitled to have a parent, guardian or other person responsible for their welfare informed of their arrest and detention.

15. Similarly, the Police and Criminal Evidence Act 1984 draws a line under those who have reached the age of 17. By section 37(15), an "arrested juvenile" is a person who "appears to be under the age of 17". Pursuant to Part IV of PACE those arrested under the age of 17 are subject to particular obligations in relation to detention and local authority accommodation (s.38(1)(6)).

16. Section 56(1) of PACE confers a right on anyone arrested and held in custody to have a friend, relative or other person told of his arrest and detention. But the right is qualified and delay may be permitted where an officer of at least the rank of inspector believes that telling such a person will, for example, lead to interference with evidence connected with an indictable offence (s.56(5)(a)). It was this section which authorised the delay in informing this applicant's mother. Had he been under 17 his right would not have been so qualified. He would have had an unqualified right for his mother to be told under s.34(2) of the 1933 Act as substituted by s.57 of PACE.

17. Under Part V appropriate consent to the taking of samples may be given by a person who has attained the age of 17 (s.65(1)), but not by those under 17. In the case of those under 17 no request for a sample may be made, nor may a sample be taken, save in the presence of an appropriate adult, defined as a parent or guardian, or others concerned with the juvenile's welfare (see s.63B(5A)(10)). Again, it is important to recall that s.63B was introduced by the Criminal Justice and Court Services Act 2000 and s.63B(5A), relating to persons who have not attained the age of 17, was inserted by the Criminal Justice Act 2003.

18. These provisions make good the proposition that Parliament has, in relation to the treatment of those detained in police custody from 1933 to the present day, retained the distinction between those under 17 who are afforded special protection and those over 16 who are to be treated as adults.

19. In written argument and throughout the hearing it was accepted by Mr Hanif Mussa, on behalf of the Secretary of State, that these provisions in the 1933 Act and PACE were the only statutory provisions within the criminal justice system which treated those aged 17 as adults.

20. After the hearing had finished, the Home Department drew the attention of the court to provisions relating to reprimands and warnings, youth cautions and youth conditional cautions. Reprimands or warnings must be given in the presence of an appropriate adult where the offender is under the age of 17 (s.65(5) of the Crime and Disorder Act 1998). Explanation and warning for the purposes of youth conditional cautions under ss.66A-H must be given in the presence of an appropriate adult when the offender is aged 16 or under. The Legal Aid, Sentencing and Punishment of

Offenders Act 2012, (LASPO) which gained Royal Assent on 1 May 2012, will make amendments to the Crime and Disorder Act 1998, establishing a system of youth cautions for offenders under the age of 18. They would preserve the system requiring the presence of an appropriate adult in relation to persons under the age of 17 (ss.66ZA(2)(3)).

21. Kenneth Parker J has discovered a reference to those under 17 in s.3(7) of the Bail Act, 1976, preserved by Schedule 11 of LASPO.

Code C

22. The Secretary of State is required to issue a Code of Practice in connection with the detention, treatment, questioning and identification of persons by police officers (s.66(1)(b)). Code C is consistent with the existing legislation to which I have referred. It affords special protection to those who appear to be under 17 but otherwise treats 17 year-olds as adults. It is fundamental to this application that the Secretary of State has accepted both orally and in writing that she has power to revise the Code so as to include 17 year-olds within the definition of juveniles afforded special protection (s.67(2) and (3)), but subject to the approval of both Houses of Parliament (s.67(7) and (7A)).

23. The Code treats as a juvenile any one who "appears to be under 17" in the absence of clear evidence that they are older (paragraph 1.5). The two key provisions designed to protect juveniles are:

> "3.13 If the detainee is a juvenile, the custody officer must, if it is practicable, ascertain the identity of a person responsible for their welfare. That person:
>
> > may be the parent or guardian (other alternatives are then identified)
> >
> > must be informed as soon as practicable that the juvenile has been arrested and where they are detained. This right is in addition to the juvenile's right not to be held incommunicado"
>
> "3.15 If the detainee is a juvenile….the custody officer must, as soon as practicable:
>
> > inform the appropriate adult, who in the case of a juvenile may or may not be the person responsible for the juvenile's welfare, as in 3.13, of:
> >
> > > the grounds for their detention;
> > >
> > > their whereabouts."

24. The essential distinction between the treatment of a juvenile detainee under 17 and of an adult detainee is the unqualified right conferred on the juvenile to have a person responsible informed, and the support and help of an appropriate adult during the custody procedures. In the case of adults, the right to have someone informed may be delayed. There is no right to the assistance of an appropriate adult (save in cases of apparent mental vulnerability).

25. By Paragraph 3.1 of Code C a custody officer must ensure that an arrested person is told clearly about his continuing right to have someone informed of their arrest *in accordance with Paragraph 5* (Paragraph 3.1(i)). Paragraph 5 deals with the right not to be held incommunicado. An arrested person is entitled to have, on request, one person known to them or likely to take an interest in their welfare, informed at public expense of their whereabouts as soon as practicable (5.1). If the detainee agrees, then at the custody officer's discretion, he may receive visits from friends, family or others likely to take an interest in the detainee's welfare (5.4). If a friend, relative or person with an interest in the detainee's welfare enquires about their whereabouts the information shall be given if the suspect agrees (5.5). The detainee may be allowed to telephone (5.6).

26. But these rights may be delayed in the circumstances identified in Annex B to the Code. In connection with an indictable offence, where a detained person has not yet been charged and an officer with the rank of inspector or above has reasonable grounds for believing that the exercise of rights under paragraph 5 may lead to interference with, or harm to, evidence connected with an indictable offence, these rights may be delayed (Annex B A1). This power to delay under the Code is derived from s.56(2) of PACE. As I have said, this was the power exercised in the instant case.

27. Had this claimant been regarded as a child or young person (as they are described in PACE) or a juvenile (as described in the Code) no such delay would have been possible. The police would not have been entitled to delay before informing his mother or permitting her to speak to him. The claimant would not have been able to refuse to see a solicitor or obtain free independent legal advice without seeing an appropriate adult and obtaining the benefit of their advice.

28. All detained persons must also be told of their right to consult privately with a solicitor and that free independent legal advice is available (3.1(ii)). They must also be asked whether they would like legal advice (3.5(a)(i)) and asked whether they want someone informed of their detention (3.5(a)(ii)). But if the detainee is a juvenile then the requirements of paragraphs 3.1-3.5 must be complied with in the appropriate adult's presence or, if the appropriate adult has not yet arrived, must be complied with again in the presence of that appropriate adult (3.17). The juvenile detainee must also be advised that the duties of the appropriate adult include giving advice and assistance and that they can consult privately with the appropriate adult at any time (3.18).

29. The Secretary of State contended that even though the claimant was treated as an adult, he was afforded sufficient protection. If a custody officer has any suspicion that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, he is required to be treated as mentally vulnerable and afforded the special protection of the attendance and assistance of an appropriate adult (under paragraph 3.15). But the proposition that all detainees are afforded some protection does not meet the essential question in this application: whether the Secretary of State is entitled to maintain a Code which treats 17 year-olds in the same way as adults and thus to deny them any special protection.

Treatment of a 17 Year-old as a Child

30. The overriding principle governing the treatment of 17 year-old detainees, if they were regarded as children, would be that their best interests would be a primary consideration. The Secretary of State did emphasise the safeguards in place for all detainees, but she did not contend that they provided as good a system of protection as that which is provided for those younger than 'adults'. She did not contend that the provisions relating to the detention of 17 year-olds met their best interests. She is entitled to take the view, she submits, that it is unnecessary to afford a 17 year-old detainee such protection as would be provided, if their best interests were a primary consideration.

31. It is instructive to consider how those who indisputably fall within the category of a child are treated within the domestic criminal justice system. Since the Children Act 1908, the criminal justice system has acknowledged that young offenders should receive different treatment from adults.

32. Following the Criminal Justice Act 1991, save in respect of detention and cautions, the criminal justice system, through the youth justice provisions of the Crime and Disorder Act 1998 (the 1998 Act), has introduced a coherent youth justice system with the aim of preventing offending: this is applicable to all children and young people under the age of 18 (s.117(1) 1998 Act). The principal aim of the youth justice system is to prevent offending by children and young persons (s.37(1) 1998 Act). All persons and bodies carrying out functions in relation to the youth justice system have an obligation to have regard to that aim (s.37(2)). To that end, local provision must be made for youth justice services, youth offending teams and the Youth Justice Board (ss.38-41 1998 Act). Those under the age of 18 are afforded treatment consistent with their youth in the sphere of legal representation (ss.98(5) and (6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012), for the purposes of funding under the Legal Services Commission 2010 Standard Crime Contract and under the Criminal Procedure Rules.

33. Sentencing and remand legislation distinguishes between those under the age of 18 and those who are older. Imprisonment is prohibited for those under 18; they may only be detained (s.89, Powers of Criminal Courts (Sentencing) Act 2000). Youth Rehabilitation Orders, Detention and Training Orders, Detention at Her Majesty's

pleasure, and provisions in relation to grave crimes under s.91 of the Powers of Criminal Courts (Sentencing) Act 2000, and enhanced sentences for public protection under the Criminal Justice Act 2003, as amended, all make provision for those under 18. The Rehabilitation of Offenders Act 1974 provides that the period in which a conviction will become spent in the case of a person under 18 is half of that prescribed for an adult over 18 (s.5(2) as amended by the Criminal Justice Act 1991). For the purposes of remand, 17 year-olds are treated in the same way as others under the age of 18 under s.91(6) of LASPO.

34. Placements and regimes within the secure estate are under the responsibility of the Youth Justice Board in respect of all detainees under the age of 18. Those under the age of 18 are to be placed in specialist youth detention accommodation. The prison service instruction governing the regime for young people (PSI 08/2012) defines children as those under the age of 18, and warns that "every care should be taken to ensure that both the conditions of custody and regime activities promote their well-being and healthy growth". Investigations within prison provide that they must not be interviewed unless they are accompanied by a responsible adult (Prison Service Order 1300 3C.8.1). The Parole Board has adopted a policy which requires oral hearings for children under the age of 18.

35. The Code for Crown Prosecutors 2013 requires the prosecutor to treat children and young persons differently from adults and consider their best interests and welfare. This policy applies to all suspects under the age of 18 and the Crown Prosecution Service recognises that the principal aim of the youth justice system is to prevent offending by children and young people. It acknowledges that prosecutors must have regard to the obligations arising under the United Nations Convention on the Rights of the Child 1989.

36. These domestic provisions within the criminal justice system reflect the fact that since 1 January 1970 the age of majority in England and Wales was lowered from 21 to 18 (s.1, Family Law Reform Act 1969). Recognition of the need to safeguard and promote the welfare of those under the age of 18 finds statutory force in s.11 of the Children Act 2004. A child is defined as a person under the age of 18 (s.65(1)), although by s.9 it may include those up to the age of 20 who have been looked after by a local authority after reaching the age of 16, or with a learning disability (s.65(1)). Section 11 imposes duties on a number of bodies. Of significance in the instant case is the fact that it includes the Chief Office of Police for a police area in England (s.11(1)(h)). On those bodies is imposed a duty to make arrangements for ensuring that:-

> "their functions are discharged having regard to the need to safeguard and promote the welfare of children…" (s.11(2)(a))

Objectives designed to improve the well-being of children include the contribution made by them to society and social and economic well-being (s.10(2)(d)(e)). These are fortified by the statutory guidance made pursuant to s.11(4). The general

objective is to ensure that children have "optimum life chances" and enter adulthood successfully.

37. Bringing those aged 17 within the scope of the welfare obligation under s.11 of the Children Act 2004, whilst treating them as adults under PACE Code C, creates, at first sight, an uncomfortable dissonance between the definition of a child under the 2004 Act and under PACE and Code C. The statutory guidance made pursuant to s.11(4), which was then in force, sought to retain harmony. The police service has a responsibility to promote and safeguard the welfare of children (including those aged 17) by preventing offending against them, and ensuring that investigations are conducted in the best interests of the child in the criminal justice system (6.6), but paragraph 6.18 provides that a person *under* 17 "is required to be afforded special care, including the provision of an appropriate adult whilst in custody".

International Law and the Child

38. The impetus driving the United Kingdom to afford special statutory protection to those under 18 is the United Nations Declaration on the Rights of the Child 1959 and the Convention on the Rights of the Child 1989 ("UNCRC"). One of the key principles of the United Nations Declaration is that a child is to enjoy special protection. The preamble to the UNCRC speaks of entitlement to special care and assistance for a child. The UNCRC is the most widely ratified human rights treaty in the world. All save two states have ratified it. The United Kingdom signed on 19 April 1990 and ratified it on 16 December 1991. For the purposes of the instant application, what is of most significance is not so much what it provides but whom it protects. Article 1 of the UNCRC defines a child as a person aged under 18 unless, under the law applicable to the child, majority is attained earlier. The age of majority in the United Kingdom is 18. It was reduced to 18 from 21 on 1 January 1970, pursuant to s.1 of the Family Law Reform Act 1969. That line was drawn in s.65(1) of the Children Act 2004, to which I have already referred, and s.105 (1) of the Children Act 1989.

39. The guiding principle for safeguarding and promoting the welfare of children is described in Article 3(1) of the UNCRC:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be of primary consideration."

40. Article 5 requires respect for the rights and responsibilities of parents to provide appropriate guidance and direction on the exercise of their children's rights under the Convention. By Article 9:-

> "1. States parties shall ensure that a child shall not be separated from his parents against their will…(save where separation is necessary for the best interests of the child).

> …
>
> 4. Where such separation results from any action initiated by a State party, such as the detention…of the child, that State party shall, upon request, provide the parents…or, if appropriate, another member of the family, with the essential information concerning the whereabouts of the absent member of the family."

41. The right of children to express their views freely is enshrined in Article 12. Article 37(c) requires that:-

> "every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall have the right to maintain contact with his family,…save in exceptional circumstances."

42. Article 40 affords children under 18 accused of breaking the law a range of minimal procedural rights including, under Article 40.2(b), guarantees which emphasise the important role of the parent:-

> "…to be informed promptly and directly of the charges against him or her and, if appropriate, through his or her parents or legal guardians and to have legal or other appropriate assistance…"

The guarantee under 40.3 requires States Parties procedures specifically applicable to children alleged to have infringed the penal law.

43. The Secretary of State correctly points out that these provisions do not dictate how States, in their discretion, should secure adequate protection for 17 year-old detainees. General Comment of the UN Committee on the Rights of the Child No 10 draws attention to the discretion of States Parties. For example, there is no specific requirement for an appropriate adult in every case. But the significance of all of the relevant International Conventions are that they reveal a broad consensus that those aged 17 should be regarded as children, who must be treated differently from adults and sheltered by special protection designed to meet their best interests.

44. In the past, the executive has explained how the UNCRC has underpinned implementation in England (*Department for Children, Schools and Families, the UNCRC: How Legislation Underpins Implementation in England, March 2010*). This document points out that international treaties are not automatically incorporated into United Kingdom law and that the United Kingdom will not ratify a treaty "unless the government is satisfied that domestic law and practice means that it can comply" (paragraph 1.2). The document refers to the European Convention on Human Rights

and s.11 of the Children Act 2004 (paragraph 8.171-8.173). Unfortunately, this policy document reveals that, certainly in 2010, the government believed that special provisions were in place in relation to juveniles, that is, all those under 18, whilst at a police station. It says:

> "8.178 Code of Practice C…sets out the procedures that police officers should follow in relation to detention, treatment and questioning. The Code of Practice includes provisions specifically applicable to juveniles (*under 18s*). In particular, a juvenile must be provided with an appropriate adult, whilst at the police station, who will be present during any police interview." (my emphasis)

45. This error is contained in a document prepared by government to give further information to the Joint Committee on Human Rights as to the extent to which UNCRC rights are not already protected by the law (paragraph 1). It is designed to show how the rights and obligations set out in the UNCRC are protected in England "through a substantial body of legislation and by putting the UNCRC at the heart of policies for children and young people" (paragraphs 1.3-1.7). It is of some significance that in 2010 the government believed that included within the scope of special protection were detainees who were aged 17.

46. The failure of the United Kingdom to extend protection to 17 year-olds in detention has not escaped the attention of the United Nations Committee on the Rights of the Child. In its concluding observations on 4 October 2002 the Committee drew attention to "children belonging to the most vulnerable groups, one of which is 16-18 years-olds". In 2008 (2008 CRC/C.GBR/CO/4) it noted that the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the area of juvenile justice (paragraph 26). In General Comment no. 10 (207) 25 April 2007, the Committee recommended that States Parties which limit the applicability of their Juvenile Justice Rules to children under the age of 16 or lower years, or which allow, by way of exception, that 16 or 17 year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their Juvenile Justice Rules to all persons under the age of 18 years (paragraph 38).

47. There can, accordingly, be no question but that the treatment of 17 year-olds as adults when arrested and detained, under Code C, is inconsistent with the UNCRC and the views of the United Nations Committee of the Rights of the Child.

48. In its Guidance for Legislative Reform on Juvenile Justice, UNICEF and the Children's Legal Centre recognised that:-

> "It is difficult to expect that a child could be heard without the assistance of parents and/or legal representative. The child's ability to communicate effectively is often restricted both physically and psychologically." (page 30)

49. As the Guidance points out, a lawyer may not be trained in juvenile law, or may be "over familiar" with the enforcement official. The assistance which parents can afford a child, faced with the intimidating experience of being in detention or questioned, is recognised in Rule 15.2 of the Beijing Rules which provides that:-

> "The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to tend them in the interest of the juvenile (subject to exclusion where necessary in the interests of the juvenile)."

50. In Council of Europe Guidelines on "child friendly justice" (2010), police are required to respect the personal rights and dignity of all children, and have regard to their vulnerability (Guideline 27). Children should be given the opportunity to contact their parents and, save in exceptional circumstances, the parents should be informed of the child's presence in the police station and given the reason why the child has been taken into custody (Guidelines 28 and 29). 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.

Domestic Opinions and Jurisprudence as to the Need for Special Protection for 17 Year-olds in Custody

51. It is not only international law and international expert opinion which advocate special protection for 17 year-olds in detention. There is a substantial body of domestic opinion as to the need not to treat such detainees as adults.

52. The joint reports of HM Inspectorates of Prisons and Constabulary as to inspections of police custody repeatedly comment that appropriate adults should be available to support, without undue delay, juveniles aged 17 in custody, including out-of-hours (see, e.g., *Report on Wandsworth on 15-18 March 2010, page 5 and 5.11,* and *Report on Waltham Forest, 2.17, January-February 2012*). In the latter, the report acknowledged that the failure to provide an appropriate adult met the current requirements of PACE but suggested that in all other United Kingdom law and international law 17 year-olds are treated as juveniles. The Joint Inspectorate believed in 2012 that the United Kingdom Government was committed to bringing PACE into line as soon as a legislative slot was available. The Secretary of State now disagrees, for reasons to which I shall shortly turn. The report, *Who is Looking Out for the Children?* to which I referred earlier, recommends that the Home Office should adopt within PACE 1984 the definition of a child as outlined in the Children Act 2004 (Recommendation 9). It points out how crucial the role of an appropriate adult is:

> "When an arrested child or young person finds themselves in police custody, the only independent person solely there for their welfare, with an opportunity to effect change, is the AA (appropriate adult). That role, therefore, is crucial." (2.3)

53. It continues:

> "2.13 PACE, however, uses the term 'juvenile' rather than using child, young person or young adult, creating an inconsistency in both terminology and treatment. Following their arrest and detention, 17 year olds are not offered AAs, their parents/guardian do not need to be notified they are in police detention, and they may decline legal representation without recourse to anyone else…..
>
> 2.14 Curiously, the YJB *National standards* require the police to advise the YOT within 24 hours of all children and young people who are charged with an offence, and this requirement includes 17 year olds.
>
> 2.15 As a result, within the criminal justice system, the only place that a 17 year old is treated as an adult is in a police station".

54. The report recalls that the Justice Green Paper "*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*", of December 2010, proposed to remove the anomaly whereby in terms of remand arrangements, 17 year-olds were treated as adults. There was "wide support for this idea". It also records that at that stage the government's response was to treat all children under 18 in the same way for remand purposes. It quotes NACRO as to the importance of an appropriate adult:-

> "Having this one particular relationship to support the detainee through what may be a somewhat puzzling, confusing and threatening experience should not be underestimated." (*Nacro 2004 Youth Crime Briefing*)

55. Concern about the anomalous position of 17 year-olds detained in police custody is expressed by the Chief Executive of the National Appropriate Adult Network (NAAN), Elizabeth Pritchard, and by the Children's Commissioner appointed by s.1 of the Children Act 2004 with the function of promoting the interests of children in England. Those aged 17, given the definition of children under the 2004 Act, come within the scope of her responsibilities. When the former Secretary of State for Northern Ireland announced the change in legislation in Northern Ireland to extend the Youth Justice System to 17 year-olds by s.63 of the Justice (Northern Ireland) Act 2002, including the provisions of PACE and the treatment of 17 year-olds in police detention, one of the reasons given was to comply with the UNCRC.

56. Added to the voices of those who seek to align the approach of the criminal justice system in England and Wales to that of Northern Ireland are the parents of those who have been so closely affected by the treatment of their 17 year-olds in judgment. Apart from the mother of this claimant, other parents have joined the ranks of those who see no legitimate basis for treating 17 year-olds as adults. It would not be fair if

this court dealt in detail with the disturbing histories which prompt their support for this application. I need only record that no one outside the Home Department, be they expert or not, has joined in the Secretary of State's opinion that "there are reasonable policy arguments in support of each position" and that "on balance" she should not impose the requirement that an appropriate adult attend in respect of all 17 year-olds by means of an amendment of Code C (see paragraph 4 of the statement of Andrew Alexander, Head of Police Powers of the Police Transparency Unit, dated 29 November 2012).

57. In *R v G* [2003] UKHL 50 [2004] 1 AC 1034 Lord Steyn acknowledged the special position of children in the criminal justice system:

> "[53] Ignoring the special position of children in the criminal justice system is not acceptable in the modern civil society. In 1990 the United Kingdom ratified the Convention on the Rights of the Child (Cm 1976) which entered into force in January 1992. Article 40(1) provides 'States parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. This provision imposes both procedural and substantive obligations on the State parties to protect the special position of children in the criminal justice system…it is true that the Convention became binding on the United Kingdom after *R v Caldwell* was decided. But the House cannot ignore the norm created by the Convention. This factor on its own justified a reappraisal of *R v Caldwell*."

58. Although the children charged with arson in that case were younger, the Convention, which Lord Steyn believed created a norm, identifies those who are under 18 as children. The underlying principle is that the criminal justice system should take account of a defendant's age, level of maturity, and intellectual and emotional capacity. It is only by doing so that the system can redress the imbalance which is the inevitable result where a child or young person is confronted by the power of criminal justice:

> "The question is what, if anything, the court needs to do to ensure that the defendant is not at a substantial disadvantage compared with the prosecution and any other defendants: see *Delcourt v Belgium* [1971] EHRR 355, paragraph 28."

(see Baroness Hale in *R (D) v Camberwell Green Youth Court* [2005] UKHL 4 [2005] 1WLR 393, paragraphs 58-61 citing *V v United Kingdom* [1999] 30 EHRR 121, 179 paragraph 86).

There can be no doubt as to that imbalance and as to the intimidating effect of a young person's first experience of the criminal justice system when taken into custody for interrogation.

59. In *Regina (R) v Durham Constabulary* [2005] UKHL21 [2005] 1 WLR 1184 the House of Lords considered whether it was compatible with Article 6 of the ECHR to give a warning to a 15 year-old suspected of sexual offences without the consent of his stepfather. The claim was dismissed with reluctance by Baroness Hale who said:-

> "It is in everyone's interest that children should be brought up to be decent law-abiding members of society. Both national and international law recognise that the criminal justice system is part of that process of bringing them up. The straightforward retributive response which is proper in the case of an adult offender is modified to meet the needs of the individual child."[24]

60. Baroness Hale cited s.44(1) of the Children and Young Persons Act 1933 and Rule 5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") 1985 in support of the proposition that the first objective of juvenile justice is the promotion of the well-being of the juvenile, whether in the family courts or the criminal justice system [25].

61. In *McGowan (Procurator Fiscal, Edinburgh) v B* [2011] UKSC 54 [2011] 1 WLR 3121, Lord Dyson deployed the European Court of Human Rights' emphasis on "the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings" (paragraph 69 citing *Panovitz v Cyprus* [2008] 27 BHRC 464). *Panovitz*, to which I shall return, was 17 when questioned without either a lawyer or his guardian.

62. The vulnerability of an accused minor and the imbalance of power to which he was subjected was acknowledged not only by Lord Dyson in *McGowan* but in relation to applications for parole by a 15 year-old in which the Board was enjoined by McCombe J to be particularly scrupulous in observing obligations of fairness informed by reference to the UNCRC and the Beijing Rules (*R (K) v the Parole Board* [2006] EWHC 2413, paragraph 30).

63. That there is a constitutional duty owed by the state not to place obstacles in the way of access to justice is now well settled. It is inherent in the rule of law (see Laws LJ's analysis between paragraphs 34-38 in *R (on the Application of The Children's Rights Alliance for England (CRAE)) v Secretary of State for Justice* [2013] EWCA Civ 34). As the Howard League put it so trenchantly, the role of a parent or an appropriate adult is critical because it provides a gateway to a young person's access to justice. It submits that the failure to ensure the presence of a parent or other appropriate adult impedes the access of a young person to justice because he cannot effectively make

his voice heard whilst in police detention or in police interview in the absence of such an appropriate adult. Attendance of a parent, as well as a lawyer, is best calculated to making his voice effective when he seeks to make his voice heard during criminal detention and interrogation.

64. The Secretary of State's position is that there is no imbalance between a 17 year-old and the criminal justice system such as to require, for example, a parent to be informed or the assistance of an appropriate adult. The question, she suggests, is not whether a civilised justice system should afford a juvenile and a child special protection, but rather whether a 17 year-old ought to fall within the scope of that assistance.

The Secretary of State's Reasons

65. The Secretary of State advances five reasons for not amending the Code. They are amplified in a statement from Mr Alexander, Head of Police Powers at the Police Transparency Unit at the Home Office. The first is that "ordinarily" 17 year-olds will be entitled on request to have a person interested in their welfare informed of their whereabouts. This reason does not face the essential objection to treating 17 year-olds as adults. Adults "ordinarily" will be entitled, on request, to have a person they nominate informed of their whereabouts. Code C treats both 17 year-olds and adults the same. This means that in relation to both 17 year-olds and adults the right to have one person informed, to receive visits and to make telephone calls (5.1, 5.4 and 5.6), may be delayed in the circumstances identified in Annex B to the Code. To argue that 17 year-olds have the same rights as adults when in detention, and more restricted rights than those under 16, does not meet the objection at all. The question is whether 17 year old detainees should be afforded greater protection than adults. It is not answered by merely drawing attention to the safeguards in existence for all adults. It merely assumes that there is no imbalance.

66. The second reason advanced is that the police are not prevented by reason of Code C from identifying a person responsible for the welfare of the 17 year-old and informing such a person of the arrest and detention "if this is considered to be appropriate and necessary in a particular case" (paragraph 19). That is true. But there is nothing whatever in Code C to suggest that 17 year-olds should be treated differently from adults. In this respect, the First and Second Defendant appear to adopt a different approach, or at least, since they deny it, a different emphasis. The Secretary of State states that the Code <u>does not prohibit</u> (her underlining) a police officer from treating a 17 year old as a juvenile. The police state that the bald fact of a detainee being 17 would be most unlikely to lead a custody officer to provide additional support or assistance. Only the appearance of vulnerability would lead to such assistance. But the same is true for any adult. Again the point does not answer the challenge as to why no distinction is to be drawn between an adult and a 17 year old detainee. There is nothing in the Code which suggests that the police should be more astute in providing assistance for a 17 year-old than in the case of any adult.

67. The third argument relates specifically to the requirement in the case of anyone under the age of 17 to inform, as soon as practicable, the appropriate adult of the grounds for detention and ask that adult to come to the police station to see the detainee (paragraph 3.15). The Secretary of State takes the view that it is neither necessary nor appropriate for an appropriate adult to be present every time a 17 year-old is arrested.

68. She points out that all detainees have access to a solicitor, who would, if they were not acting in that capacity, be capable of constituting an appropriate adult and who have professional obligations to provide their services in a manner reflecting the particular needs of younger clients (paragraph 21). The suggestion that a solicitor or legal executive can replace an appropriate adult does scant justice to the function of an appropriate adult in relation to children and juveniles in detention, as identified by HMI Constabulary and Prisons (quoted above at paragraph 52). The essential function of an appropriate adult is to furnish to the young detainee such assistance as will make good the imbalance which, as Baroness Hale recognised, is the inevitable result when a child or young person is confronted with criminal justice.

69. The function of an appropriate adult, as opposed to a solicitor or legal executive, can be readily appreciated by reference to the facts of the instant application. The claimant appears not to have thought it necessary for him to obtain the services of a lawyer. There is no record of the reason why he chose not to do so, although he now says that he did not believe a lawyer would be independent. That is beside the point. An appropriate adult would have been able to explain to the claimant why it was necessary that he should receive legal representation. The appropriate adult will usually be somebody the young person knows and trusts, often their parent. It is difficult to think of an occasion where the need to obtain advice and help from someone who is familiar and trusted is more vital than the very first occasion of detention in a police station on suspicion of an offence. The duty solicitor or legal executive, wholly unknown to the young person, is hardly a substitute.

70. The fourth reason advanced is that waiting for the attendance of an appropriate adult might increase the length of time spent in custody by 17 year-olds. It is accepted that that might not be very long and NAAN suggest that appropriate adults should arrive within two hours, whereas the largest private sector supplier claims that it would be within 40 minutes. It is argued that whilst such delay might be justified in the case of "very young children who clearly need assistance from an appropriate adult" such delay and increased time in custody "is more difficult to justify" (paragraph 23). But the argument is predicated on the Secretary of State's view that a 17 year-old does not need or merit the kind of assistance and support acknowledged to be necessary in the case of younger detainees. Her view is that the rights of a 17 year-old should be neither greater nor less than those of an adult. If that is accepted, of course greater delay is unjustifiable. But the argument does not advance any reason why a 17 year-old should not be given greater protection than an adult, in the context of a criminal justice system which, in general, adopts the opposite stance. Accordingly, it does not grapple with the complaint that, when in detention, 17 year-olds should not be treated as adults.

71. The fifth argument is that the mandatory attendance of an appropriate adult every time a 17 year-old is arrested is likely to require increased provision of appropriate adults and impose "at least a significant additional cost on the public purse". This argument is, at least in length, more substantial than the others which are advanced. It is estimated that there are annually in England and Wales 75,000 arrests. It is said that there would very likely be a large increase in the demand for the services of appropriate adults, estimated in the region of some 55%. No basis for that percentage is given. It assumes a very large proportion of appropriate adults will not be the parents or other relative of the detainee, but rather someone who has to be provided by local authorities discharging their responsibility through youth offending teams. It is estimated an additional 1,258 appropriate adults would be required to meet the demand. Training costs are estimated. Costs of salaries and travel, together with average times of attendance, are calculated, and a figure is given for attendance of "some £19.1m per year".

72. The Secretary of State admits that some caution is needed in relation to these figures. Thus she describes them as being "for indicative purposes only": they form a broad estimate of the costs likely to be involved. It is not clear to me what "indicative" means, since all estimates are designed to indicate and some indicate more than others. These estimates are challenged. In particular, Elizabeth Pritchard, Chief Executive of NAAN, refers to the use by over half of their members of trade-trained volunteers. In her second statement the majority of the 75 member groups say that they would extend their services to 17 year-olds. Milton Keynes and Somerset Youth Offending Teams offer their services to 17 year-olds, although the service is underused, and the Greater Manchester Police Association offers the service to all 17 year-olds if a young person asks for an appropriate adult. Derbyshire Appropriate Adult Service sends appropriate adults to all 17 year-olds and the police call them in all cases.

73. Confidence in reliance on cost is somewhat dented by the policy document disclosed at the last minute before the hearing. It speaks of a fear that government might be accused of putting financial savings "ahead of the welfare of children". "While cost may be the main restricting factor, press office does not propose to use it in our top line response should we receive media calls as it may increase the risk outlined above". The document points out that the costs rely upon "a number of assumptions that are not capable of rigorous testing, and as such we recommend that you do not present them to the Joint Committee on Human Rights". I suppose it renews faith in our democratic institutions that while it was feared that the figures would not stand the forensic scrutiny of a Parliamentary Committee they can at least be offered to the court.

74. Although a number of substantial assumptions are made, it must be accepted that there will be significant increased costs. The report prepared for the Department of Health and the Home Office by NAAN dated November 2010 accepts that extending the automatic right to an appropriate adult to 17 year-olds would have significant resource implications (3.3).

Conclusion on Rationality

75. The need to include 17 year-olds within the scope of those afforded special protection in custody seems almost unanswerable. Certainly, whilst accepting that the arguments are evenly balanced, the Secretary of State has never advanced any detailed response to the Criminal Justice Joint Inspection Recommendations of December 2011.

76. Behind the Secretary of State's arguments lies the inescapable truth that the line must be drawn somewhere between adults and those younger detainees who require special protection. There will be 16 year-olds far more sophisticated and less vulnerable than 18 year-olds, and vice versa. There will be 17 year-olds far better able to face detention and questioning than those much older. There is justification for the view that to treat a 17 year-old in the same way as a 15 year-old in detention may be over-protective. But the essential difficulty in the Secretary of State's arguments is that, while there may be justification for distinguishing between 17 year-old detainees and those who are younger, that provides no adequate reason for failing to distinguish between 17 year-old detainees and adults. All the more so where in most other respects, in compliance with international norms, the criminal and family justice systems distinguish between adults and 17 year-olds to whom they apply the principle that their best interests must be a primary consideration. The Secretary of State does not seek to justify the anomaly; she merely says that she does not need to in the light of Parliament's persistence in treating 17 year-old detainees as adults.

77. I suspect that that is, in the end, the answer. Where Parliament has failed to make the distinction between 17 year-old detainees and adults, it is difficult to say that the Secretary of State's failure to revise the Code is irrational. To do so would tend to suggest that the court takes the same view of the legislation. But that is not an end of the matter. Parliament has also imposed the duty on the Secretary of State under section 6(1) of the Human Rights Act 1998 not to maintain a Code which is incompatible with a Convention right. To invoke the Act is constitutional, to challenge the legislation for incoherence is not. For reasons which follow, I need not reach any concluded view on irrationality.

Article 8

78. The Secretary of State's reasons for declining to amend Code C and her defence of her treatment of 17 year-old detainees in custody as adults contain no reference to the UNCRC which brings within the scope of its provisions those who are under 18. The reason may be that the Secretary of State takes the view that as an unincorporated international treaty, the UNCRC does not form part of English law. The principle that English courts have no jurisdiction to interpret or apply an international treaty is invoked in the instant application (see *R v Lyons* [2003] 1 AC 976 at paragraph 27).

79. The Secretary of State asserts that Article 8 of the European Convention of Human Rights has no application and, in any event, treatment of 17 year-olds as adults in

detention is not disproportionate. The submission that Article 8 is not engaged is surprising. The wording alone of Article 8(1) suggests to the contrary:-

> "(1) Everyone has the right to respect for his private and family life…"

The proposition that included within the scope of private life and family life is the right to establish, develop and maintain relationships and in particular the relationship of family is well-established (*Niemietz v Germany* [1992] 16 EHRR 97 paragraph 29, *Botta v Italy* [1998] 26 EHRR 241) even within the context of prison, *Messina v Italy No. 2* App. No. 25498/94, 28 September 2000, and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532 paragraph 23.

80. But, after all, perhaps it is not wholly surprising that the Secretary of State's riposte is so vigorous in criticising the claimant for failing "to advance any credible case as to why Article 8 is engaged". For, once it is accepted that Article 8 is engaged, the Secretary of State cannot resist the application of the principles contained in the UNCRC. It should be recalled that the Home Department, over 11 years ago, accepted that:-

> "Where children in custody are concerned the provisions of the Convention (UNCRC) are available to inform the content of ECHR Article 8 (*The Queen on the Application of SR v Nottingham Magistrates' Court* [2001] EWHC Admin 802 paragraph 65)".

81. If more recent authority is required for the proposition that if Article 8 is engaged then it must be interpreted in harmony with the general principles of international law including Article 3.1 of the UNCRC, it is to be found in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 and in *HH v Deputy Prosecutor of the Italian Republic* [2012] 3 WLR 90. In both cases, the Supreme Court was unanimous that the principle that the best interests of the child were a primary consideration in an expulsion case and in an extradition case, even if they differed as to precisely how that principle was to be applied. The deployment of Article 3.1 of the UNCRC in the interpretation and application of Article 8 is derived from *Neulinger v Switzerland* [2010] 54 EHRR 1087 paragraph 31. Six years before, in *R (R) v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369 paragraph 26, Baroness Hale said:

> "The Beijing Rules are not binding on member States, but the same principle is reflected in the United Nations Convention on the Rights of the Child 1989 ('UNCRC'), which has been ratified by all but two of the member States of the United Nations. This is not only binding in international law; it is reflected in the interpretation and application by the European Court of Human Rights of the rights guaranteed by the European Convention: see, for example, *V v United Kingdom* [1999] 30 EHRR 121; to that extent at least, therefore, it must

> be taken into account in the interpretation and application of those rights in our national law."

In *ZH* she said:

> "23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in Article 3.1 of the UNCRC: (which she then cites)
>
> This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law."

82. She continues by explaining how that principle is to be applied by reference to two Australian cases (*Minister of Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273, 292 and *Wan v Minister for Immigration and Multicultural Affairs* [2001] 107 FCR 133):

> "This does not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first."[32]

Baroness Hale then applied that approach to the assessment of proportionality under Article 8.2, in asking "what is encompassed in the 'best interests of the child' in the context of an expulsion case?"

83. In *HH* Baroness Hale recalled the Coram Children's Legal Centre's references to the wider public interest and benefit to society in promoting the best interests of its children, "a country's most valuable asset for the future" (paragraph 25).

84. The importance of this approach in the instant application is that once it is acknowledged that Article 8 is engaged and that it must be interpreted in harmony with the UNCRC it follows that those who are 17 fall within the definition of children whose best interests must be a primary consideration. To afford a 17 year-old detainee no more than the rights and protections afforded to an adult is not consistent with the principle that Article 8 is to be interpreted in harmony with the UNCRC.

85. It is difficult to imagine a more striking case where the rights of both child and parent under Article 8 are engaged than when a child is in custody on suspicion of committing a serious offence and needs help from someone with whom he is familiar and whom he trusts, in redressing the imbalance between child and authority. The

wish of a 17 year-old in trouble to seek the support of a parent and of a parent to be available to give that help must surely lie at the heart of family life which, quite apart from Article 8, the government seeks to maintain and encourage.

86. Once it is accepted that Article 8 is engaged then treatment of a 17 year-old as an adult seems to me to be not capable of justification. The Secretary of State contends that the failure to acknowledge a right for an appropriate adult to be informed or to be present is in accordance with the law and pursues the legitimate aim of the prevention of disorder and crime. She denies that it is disproportionate. But the arguments she advances in resisting the allegation that it is disproportionate are a repetition of the arguments I have already identified. They are founded on the proposition that a 17 year-old does not need any consideration or protection different from those afforded to an adult. But the Secretary of State cannot so contend once it is recognised that under the UNCRC and therefore under Article 8, 17 year-olds must not be treated as adults. On the contrary, their treatment in detention must look to their best interests as a primary consideration.

87. Nowhere in her responses, nor in the evidence given on her behalf, does the Secretary of State contend that the failure to afford a 17 year-old the protection of an appropriate adult is in the best interests of the 17 year-old as a primary consideration. She simply denies the application of that principle. It is contended, on her behalf, that any requirement to provide an appropriate adult would offend the *Ullah* principle (*R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [20]). But Strasbourg jurisprudence provides ample authority as to the need to redress the imbalance between those under 18 and the criminal justice system and as to the obligation to redress the disadvantage of youth or inexperience (*Neulinger and Panovitz* are obvious examples, but all the cases in Strasbourg (particularly *Pischalnikov*) to which Lord Hope drew attention in *McGowan* [27]-[36] and [47] make good this point). This case is miles away from the positive obligation asserted in the *CRAE* case to provide information to former trainees as to their rights allegedly breached when they were younger; this case concerns making good a disadvantage.

88. Were she to acknowledge that the principle that their best interests must be a primary consideration applies to 17 year-olds, she would be required at least to amend Code C so as to distinguish between 17 year-olds and adults and make clear that that principle must be applied. Once that principle is acknowledged, there may be, as the UNCRC itself recognises, circumstances in which the best interests of a 17 year-old are not served by informing the parent or permitting the parent to visit. For example, there may be reasonable grounds for believing that the parent was involved in the crime so that the best interests of the child would be better served by obtaining the assistance of a different appropriate adult.

89. I conclude that it is inconsistent with the rights of the claimant and his mother, enshrined in Article 8, for the Secretary of State to treat 17 year-olds as adults when in detention. To do so disregards the definition of a child in the UNCRC, in all the other international instruments to which the Strasbourg Court and the Supreme Court have referred, and the preponderance of legislation affecting children and justice

which include within their scope those who are under 18. The Secretary of State's failure to amend Code C is in breach of her obligation under the Human Rights Act 1998, and unlawful.

Article 6

90. In the light of my conclusion as to the proper interpretation of Article 8, the claimant does not need to deploy Article 6 as a medium by which the principles central to the UNCRC may be applied in domestic law. But consideration of the rights enshrined in Article 6, demonstrate the rationale for treating 17 year-old detainees in a manner which is different from the treatment of adults.

91. Article 6 provides:

> "1. In the determination of…any criminal charge against him, everyone is entitled to a fair…hearing…by a…tribunal."

Article 6(3)(a) provides:-

> "Everyone charged with a criminal offence has the following minimum rights:
>
> (a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him ;"

The Secretary of State and the second defendant contend that Article 6 has no application in circumstances such as these where the claimant has not been charged with any offence. In *R (R) v Durham Constabulary* (q.v.supra) Lord Bingham expressed doubt as to whether the concession that Article 6 applied before an accused was formally charged was correct [11]. His analysis was based on *Attorney-General No. 2 of 2001* [2003] UKHL 68 [26]-[29]. The case concerned a 15 year-old who was given a warning in respect of his admitted indecent assault without seeking or obtaining his stepfather's consent. Once a firm decision had been made not to prosecute, the criminal charge ceased to exist [12]. Since the warning did not involve the determination of a criminal charge against him, the defendant's fair trial rights were not engaged [19]. But Lord Bingham did acknowledge:-

> "For good and understandable reasons, the protection given to criminal defendants by Article 6 covers not only the trial itself but extends back to the preparatory and preliminary processes preceding trial and forwards to sentence and appeal. But the primary focus of the right is the trial itself, because that is the stage at which guilt is decided with the possibility of condemnation and punishment. I find it hard to see how a criminal charge can be held to endure once a decision has been

> made that rules out the possibility of any trial, or condemnation, or punishment." [12]

In the instant case the determination of a criminal charge had by no means been ruled out. The early exchanges between police and detainee are an important part of the preparatory and preliminary process. After all, Article 6(3)(a) envisages, in its obligation to inform a detainee promptly of the accusation, that that obligation will be fulfilled at an early stage of detention.

92. The decision of the first section of the European Court of Human Rights in *Panovitz v Cyprus* (Application No. 4268/04) 11 December [2008] 27 BHRC 464 is authority for that proposition. The accused was 17. The Court said:-

> "67. The court notes that the applicant as 17 years old at the material time. In its case law on Article 6 the court has held that when criminal charges are brought against a child, it is essential that he be 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 (see *T v The United Kingdom* [GC No 24724/94] 16 December 1999 paragraph 84). The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition (see *mutatis mutandis T v The United Kingdom* cited above, paragraph 85) and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her…it means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police…(*ibid.*)."

93. Even though I need not decide whether Article 6 is engaged, both *Durham Constabulary* and *Panovitz* explain the proper approach of the criminal justice system to children. Within the scope of special protection which a criminal justice system ought to provide come those who have not yet reached the age of 18. The focus for 17 year olds, as s.37 of the Crime and Disorder Act 1998 recognises, should be on prevention and diversion, which exemplify the welfare-based approach to juvenile offending (see Baroness Hale at paragraphs 28-30 of *Durham Constabulary*). If 17 year-olds are treated as adults, the police retain the right, as in this case, to refuse contact between such a 17 year-old detainee and his parent or appropriate adult. This is hardly a promising introduction for a 17 year-old to the criminal justice system. It merely reinforces the 17 year-old's vulnerability in the face of an intimidating

criminal justice system. It undermines the very purpose the youth criminal justice system is designed to achieve.

94. This case demonstrates how vulnerable a 17 year-old may be. Treated as an adult, he receives no explanation as to how important it is to obtain the assistance of a lawyer. Many 17 year-olds do not believe they need any guidance at all. They demonstrate all the youthful arrogance of which many parents are aware. All the more need, then, for help and assistance from someone with whom they are familiar. If, at the heart of any policy in relation to 17 year-olds, lie the objectives of reinforcing strength of family ties, and development into a responsible adult with the assistance of a responsible parent, it is hard to see what Code C, in its treatment of 17 year-olds as adults, achieves other than to undermine such objectives.

The Second Defendant

95. In the light of my conclusion there is no warrant for any separate consideration of the case against the second defendant. It is important to underline that in these proceedings the court does not have to decide that there were grounds for delaying contact with the claimant's mother. The case against the second defendant is that the police ought not to have treated the 17 year-old claimant as an adult but ought to have exercised a discretion to allow his mother to be informed of his arrest and whereabouts. It is said that the second defendant was in breach of its duty under s.11 of the Children Act 2004. The application does not probe the particular justification for the inspector delaying contact with the claimant's mother for so long. Nor does it criticise the attitude of the police officers when the claimant's mother did finally find out where the claimant was.

96. The claim against the second defendant has at least the merit that it underlines the difficult position in which the second defendant was placed. Its defence relies upon the plain wording of Code C, the relevant statutory provisions and the Guidance which preserves the distinction in relation to 17 year-olds issued under s.11(4) of the 2004 Act. The police, understandably, want clear rules. They reject the suggestion that appears to have been made by the Secretary of State that they have a discretion, and in the case of 17 year-olds, might more readily exercise it to obtain the assistance of an appropriate adult.

97. If, as I have concluded, 17 year old detainees are not to be treated as adults, then, provided their best interests are taken into account as a primary concern, it might be open to draw a distinction between 17 year-olds and those who are younger. But the Code and Guidance would have to make clear what special provisions are to be made for the assistance and support of 17 year-olds, if it is thought practicable to put in place less protective measures than, say, for 15 year-old detainees. The clearer the lines of guidance are made, the better for everybody. But as I have tried to make clear, wherever lines are drawn, it is unlawful and unacceptable to treat 17 year-old detainees in the same way as adults. The second defendant is not to be blamed, in this application, for following the letter of Code C. The fault lies in failing to distinguish

between adults and 17 year-olds when detained. This is not to say that the treatment of this 17 year-old and of his mother is not a matter of concern. But the concern arises from the way the Code treats 17 year-olds and should not be resolved by any separate relief being granted against the second defendant.

Conclusion and Remedy

98. I conclude that the Secretary of State acted in a way which was incompatible with Article 8 of the Convention in failing to revise Code C so as to distinguish between the treatment of an adult detainee and a detainee under the age of 18. Article 8, read with UNCRC, requires a 17 year-old in detention to be treated in conformity with the principle that his best interests were a primary consideration.

99. It will be a matter for her consideration and, of course, for those who have to put the criminal justice system into practice, such as the police, to ponder the practicality of distinguishing between 17 year-old detainees and those who are younger. But that is not a matter which was debated in this court or on which this court need reach any conclusion. For the reasons I have given, in my view, the present Code is unlawful and needs to distinguish between 17 year-old detainees and adults. We shall consider written submissions as to the form of relief in the light of our judgment.

Mr Justice Kenneth Parker:

100. I agree.

Annex 1

Children and Young Persons Act 1933

Section 34

(2) Where a child or young person is in police detention, such steps as are practicable shall be taken to ascertain the identity of a person responsible for his welfare.

(3) If it is practicable to ascertain the identity of a person responsible for the welfare of the child or young person, that person shall be informed, unless it is not practicable to do so—

(a) that the child or young person has been arrested;

(b) why he has been arrested; and

(c) where he is being detained.

(4) Where information falls to be given under subsection (3) above, it shall be given as soon as it is practicable to do so.

Criminal Justice Act 1991

Section 68, Schedule 8:

1. (1) Section 31 of the 1933 Act shall be renumbered as subsection (1) of that section and after that provision as so renumbered there shall be inserted the following subsection –

(2) In this section and section 34 of this Act, "young person" means a person who has attained the age of fourteen and is under the age of seventeen years.

Police and Criminal Evidence Act 1984

Section 37(15)

In this Part of this Act—

"arrested juvenile" means a person arrested with or without a warrant who appears to be under the age of 17;

"endorsed for bail" means endorsed with a direction for bail in accordance with section 117(2) of the Magistrates' Courts Act 1980.

Section 56 - Right to have someone informed when arrested

(1) Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there.

(2) Delay is only permitted—

(a) in the case of a person who is in police detention for an indictable offence; and

(b) if an officer of at least the rank of inspector authorises it.

…

(5) Subject to sub-section (5A) below an officer may only authorise delay where he has reasonable grounds for believing that telling the named person of the arrest -

(a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or

(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or

(c) will hinder the recovery of any property obtained as a result of such an offence.

Section 66 - Codes of practice

The Secretary of State shall issue codes of practice in connection with -

(a) the exercise by police officers of statutory powers -

(i) to search a person without first arresting him;

(ii) to search a vehicle without making an arrest; or

(iii) to arrest a person;

(b) the detention, treatment, questioning and identification of persons by police officers;

(c) searches of premises by police officers; and

(d) the seizure of property found by police officers on persons or premises.

67 - Codes of practice—supplementary

…

(2) The Secretary of State may at any time revise the whole or any part of a code.

(6) The power conferred by subsection (5) is exercisable by statutory instrument.

(7) An order bringing a code into operation may not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

(7A) An order bringing a revision of a code into operation must be laid before Parliament if the order has been made without a draft having been so laid and approved by a resolution of each House.

PACE - Code C (2012 revision)

3. Initial action

(a) Detained persons – normal procedure

3.1 When a person is brought to a police station under arrest or arrested at the station having gone there voluntarily, the custody officer must make sure the person is told clearly about the following continuing rights which may be exercised at any stage during the period in custody:

(i) the right to have someone informed of their arrest as in *section 5*;

(ii) the right to consult privately with a solicitor and that free independent legal advice is available;
(iii) the right to consult these Codes of Practice. See *Note 3D*

…

3.5 The custody officer shall:

(a) ask the detainee, whether at this time, they:

(i) would like legal advice, see *paragraph 6.5*;

(iii) want someone informed of their detention, see *section 5*;

(b) ask the detainee to sign the custody record to confirm their decisions in respect of a);

(c) determine whether the detainee:

(iii) is, or might be, in need of medical treatment or attention, see *section 9*;

(iv) requires:

- an appropriate adult;
- help to check documentation;
- an interpreter;

(d) record the decision in respect of (c).

…

3.17 If the appropriate adult is:

- already at the police station, the provisions of *paragraphs 3.1* to *3.5* must be complied with in the appropriate adult's presence;

- not at the station when these provisions are complied with, they must be complied with again in the presence of the appropriate adult when they arrive.

3.18 The detainee shall be advised that:

- the duties of the appropriate adult include giving advice and assistance;
- they can consult privately with the appropriate adult at any time.

5. Right not to be held incommunicado

(a) Action

5.1 Subject to paragraph 5.7B, any person arrested and held in custody at a police station or other premises may, on request, have one person known to them or likely to take an interest in their welfare informed at public expense of their whereabouts as soon as practicable. If the person cannot be contacted the detainee may choose up to two alternatives. If they cannot be contacted, the person in charge of detention or the investigation has discretion to allow further attempts until the information has been conveyed. See *Notes 5C* and *5D* 5.2

5.2 The exercise of the above right in respect of each person nominated may be delayed only in accordance with *Annex B.*

5.3 The above right may be exercised each time a detainee is taken to another police station.

5.4 If the detainee agrees, they may at the custody officer's discretion, receive visits from friends, family or others likely to take an interest in their welfare, or in whose welfare the detainee has an interest. See *Note 5B*

5.5 If a friend, relative or person with an interest in the detainee's welfare enquires about their whereabouts, this information shall be given if the suspect agrees and *Annex B* does not apply. See *Note 5D*

5.6 The detainee shall be given writing materials, on request, and allowed to telephone one person for a reasonable time, see *Notes 5A* and *5E*. Either or both these privileges may be denied or delayed if an officer of inspector rank or above considers sending a letter or making a telephone call may result in any of the consequences in:

(a) *Annex B paragraphs 1* and *2* and the person is detained in connection with an indictable offence;

(b) *Not used*

Nothing in this paragraph permits the restriction or denial of the rights in *paragraphs 5.1* and *6.1*.

5.7 Before any letter or message is sent, or telephone call made, the detainee shall be informed that what they say in any letter, call or message (other than in a communication to a solicitor) may be read or listened to and may be given in evidence. A telephone call may be terminated if it is being abused. The costs can be at public expense at the custody officer's discretion.

5.7A Any delay or denial of the rights in this section should be proportionate and should last no longer than necessary.

5.7B In the case of a person in police custody for specific purposes and periods in accordance with a direction under the Crime (Sentences) Act 1997, Schedule 1 (productions from prison etc.), the exercise of the rights in this section shall be subject to any additional conditions specified in the direction for the purpose of regulating the detainees' contact and communication with others whilst in police custody. See *Note 5F*

(b) Documentation

5.8 A record must be kept of any:

(a) request made under this section and the action taken;

(b) letters, messages or telephone calls made or received or visit received;

(c) refusal by the detainee to have information about them given to an outside enquirer.

The detainee must be asked to countersign the record accordingly and any refusal recorded.

ANNEX B – DELAY IN NOTIFYING ARREST OR ALLOWING ACCESS TO LEGAL ADVICE

A Persons detained under PACE

1. The exercise of the rights in *Section 5* or *Section 6*, or both, may be delayed if the person is in police detention, as in PACE, section 118(2), in connection with an indictable offence, has not yet been charged with an offence and an officer of superintendent rank or above, or inspector rank or above only for the rights in *Section 5*, has reasonable grounds for believing their exercise will:

(i) lead to:

- interference with, or harm to, evidence connected with an indictable offence; or
- interference with, or physical harm to, other people; or

(ii) lead to alerting other people suspected of having committed an indictable offence but not yet arrested for it; or

(iii) hinder the recovery of property obtained in consequence of the commission of such an offence.

Crime and Disorder Act 1998

117 - General interpretation

(1) In this Act—

- "child" means a person under the age of 14;
- "young person" means a person who has attained the age of 14 and is under the age of 18;
- "youth offending team" means a team established under section 39 above.

37 - Aim of the youth justice system.

(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.

(2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim.

Children Act 2004

Section 10 - Co-operation to improve well-being

(1) Each local authority in England must make arrangements to promote co-operation between -

(a) the authority;

(b) each of the authority's relevant partners; and

(c) such other persons or bodies as the authority consider appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area.

(2) The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to—

(a) physical and mental health and emotional well-being;

(b) protection from harm and neglect;

(c) education, training and recreation;

(d) the contribution made by them to society;

(e) social and economic well-being.

(3) In making arrangements under this section a local authority in England must have regard to the importance of parents and other persons caring for children in improving the well-being of children.

11. Arrangements to safeguard and promote welfare

(1) This section applies to each of the following –

…

(h) the local policing body and chief officer of police for a police area in England;

4) Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.

65. Interpretation
(1) In this Act—

- "child" means, subject to section 9, a person under the age of eighteen (and "children" is to be construed accordingly);

Annex 2

Much of the substantial material with which the court was provided came as a result of the submissions of the two interveners. A single judge, who it was not intended should sit on the application, gave permission for Coram Children's League Centre and the Howard League to intervene in writing. Despite an application seeking directions by the Secretary of State, no directions as to timing or the sequence of events which should be followed were obtained from that judge. The result was that lengthy written submissions from both were sent to the court at the same time as the first defendant's response. The first defendant's counsel had no reasonable opportunity to consider them in depth before the application started. No adjournment was sought, but it placed the first defendant under some difficulty. The court ordered both interveners to produce a summary of their submissions and provide the authorities and materials on which they rely. A huge bundle of authorities and other materials then appeared on the second day.

Counsel for the Secretary of State was too courteous to complain and skilfully dealt with the points which arose. But he should not have been placed under that sort of pressure. The interventions should have arrived at a proper time to be incorporated, insofar as the claimant wished, in the claimant's submissions and at a time when the defendants could properly respond. Many of the important arguments were not contained in the claimant's submissions but rather emerged, if one delved into the interstices, within the intervener's submissions.

All of this could have been avoided if a timetable had been set which required the interventions to be served at a time when the defendants could properly respond and the claimant decide which of the arguments within those interventions he wished to deploy. This application cried out for directions to be obtained, either in writing or at a case management

hearing well before the hearing of the application and, if at all possible, by one of the judges who was going to hear it.