

# A child's right to veto in England and Russia – another welfare ploy?

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*In the context of the history of the Adoption and Children Act 2002, this article contrasts the approach of English legislation and case-law with the Family Code of the Russian Federation in relation to a child's right to veto decisions made about his future. Referring to empirical research conducted in Russia, it concludes that there is considerable merit in requiring the child's consent.*

## INTRODUCTION

The Adoption of Children (Scotland) Act 1930 contained a provision, now in section 12(8)<sup>3</sup> of the Adoption (Scotland) Act 1978, requiring the agreement of children aged 12 or over to their adoption.<sup>4</sup> The Adoption Act 1976, applying to England and Wales,<sup>5</sup> and the Adoption (Northern Ireland) Order 1987<sup>6</sup> do not include such a requirement and neither does the intended replacement for the 1976 Act, the Adoption and Children Act 2002, despite many years of consultation and debate as to its content. At the time of the enactment of the Children Act 1989, an Interdepartmental Committee was set up to research issues and formulate proposals on reforming the adoption law.<sup>7</sup> Since then the issues which have been most contentious have been those focusing on parents' rights, the nature of the welfare test, the eligibility requirements for adopters,<sup>8</sup> contact with birth parents, case management and the child's 'right' to know his origins. Only briefly did the UK Government propose that a provision for the consent of a child over 12 years to his adoption be included in legislation.

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<sup>1</sup> I am very grateful to the Deans of the English and Law Departments and also to the Director of the Samara branch of the Moscow City Pedagogical University (Filimonova Ljubov Nikolaevna, Serebrjakova Tatjana Aleksandrovna, and Kozlovskaya Galina Efimovna), who gained for me the permissions required and made the necessary appointments. Their help and hospitality cannot be overstated.

<sup>2</sup> Acted as interpreter.

<sup>3</sup> As amended by Age of Legal Capacity (Scotland) Act 1991, s 2(3)(a). Section 2(3)(b) similarly amends s 18(8) in relation to freeing a child for adoption.

<sup>4</sup> This is one of several exceptions in Scottish law to the legal incapacity of children under 16 years of age. For example, the child of 12 years or over also has the legal capacity to make a will (Age of Legal Capacity (Scotland) Act 1991, s 2(2)). See J. Thompson, *Family Law in Scotland* (Butterworths, 3rd edn, 1996), chapter 9. See also *Legal Capacity and Responsibility of Minors and Pupils*, Scottish Law Commission Memorandum No 65 (HMSO, 1985), and E. Clive, 'Children's Rights in Scottish Civil Law', in K. Murray and J. E. Wilkinson, *Children's Rights in a Scottish Context* (National Children's Bureau, 1987).

<sup>5</sup> But with some provisions applicable to the whole of the UK: see Adoption Act 1976, s 72.

<sup>6</sup> See, for a detailed comparison of adoption law in Northern Ireland and the Republic of Ireland, K. O'Halloran, 'Adoption in the Two Jurisdictions of Ireland – A Case Study of Changes in the Balance between Public and Private Law' [2001] IFL 43. This notes that less weight is placed on the wishes of the mature child in the Republic of Ireland than in the UK.

<sup>7</sup> The Committee, set up under the lead of the Department of Health, produced four Discussion Papers (*The Nature and Effects of Adoption* (No 1, 1990), *Agreement and Freeing* (No 2, 1991), *The Adoption Process* (No 3, 1991) and *Intercountry Adoption* (No 4, 1992)), three Background Papers (*International Perspectives* (No 1, 1990), *Review of Research Relating to Adoption* (No 2, 1990) and *Intercountry Adoption* (No 3, 1992)) and a Consultation Document by 1992: see N. Lowe and G. Douglas, *Bromley's Family Law* (Butterworths, 9th edn, 1998), at pp 612–613. Many more documents have been produced since: see below.

<sup>8</sup> Indeed, Tim Loughton, MP, at the end of the debate on Third Reading of the Bill expressed his regret that the question of who should be allowed to adopt had been so prominent an issue: 'Most of us ... would agree that it is a great pity that the media have focused only on that aspect of the Bill' (*Hansard*, HC, col 102 (20 May 2002)).

Such a provision would, unusually for English family law,<sup>9</sup> have given the older child a right to veto an outcome proposed by adults.

As this article will show, English law, although not always Scottish law, shows a degree of ambivalence over the extent to which children are consulted over their future. This is most clearly shown in the law on fostering and adoption but also becomes evident in other areas such as the case-law on children's surnames. In the Russian Federation, in contrast, the law very clearly gives children powers of veto in these areas of decision making. The first part of the article will, then, review the development of the Adoption and Children Act 2002, before contrasting the approach of the Family Code of the Russian Federation 1995 with that of the Children Act 1989. The second part of the article will use the findings of recent empirical research conducted in Russia to explore the significance of professional ideas and practice for issues of children's rights and welfare in adoption and fostering decisions.

### THE ADOPTION AND CHILDREN ACT 2002

The early policy proposals referred to the possibility of requiring the child's consent to adoption. In 1990, a Background Paper had noted the jurisdictions where the agreement of the older child was required<sup>10</sup> and, in 1991, the third Discussion Paper, observing that the older child had definite views that he would want put forward, had discussed the issue of representation but not consent.<sup>11</sup> However, the following year, the *Review of Adoption Law* stated, 'We consider that a child of sufficient age and understanding to form such views should not be adopted if he or she does not agree to the adoption' and recommended that 12 be the minimum age for such consent.<sup>12</sup> The review was careful to add:

'We do not consider that the need for the child's agreement should in any way detract from the importance of parental agreement ... Nor would we wish to create the impression that the necessity for the child's agreement placed responsibility exclusively upon the child.'<sup>13</sup>

The White Paper of 1993<sup>14</sup> endorsed these proposals and, subsequently, clause 41(7) of the draft Adoption Bill, which was appended to the Consultation Paper issued in 1996,<sup>15</sup> proposed legislation to that effect. Under the draft clause 41, an adoption order could not be made unless the child 'freely and with full understanding of what is involved, consents unconditionally'.<sup>16</sup> The 'Notes' appended to the Bill added that the child's consent need not be in writing but could be conveyed to the court by the guardian ad litem. Since then, however, the issue of the child's consent – or veto – has been conspicuous by its absence from official policy documents

<sup>9</sup> Case-law has established that even the 'Gillick-competent' child cannot veto medical treatment: the consent of a parent or the direction of a court can override the child's refusal to consent: see, for example, J. Herring, *Family Law* (Longman, 2001), at pp 358–366.

<sup>10</sup> *International Perspectives*, Background Paper Number 1 (Department of Health, 1990), at paras 116–120.

<sup>11</sup> Interdepartmental Review of Adoption Law, *The Adoption Process*, Discussion Paper 3 (Department of Health, 1991), at para 201. For a discussion of these Papers, see C. Bridge, 'Reforming the Adoption Process: Interdepartmental Reviews 2 and 3' (1992) 4(2) *Journal of Child Law* 72.

<sup>12</sup> *Review of Adoption Law*, Report to Ministers of an Interdepartmental Working Group (Department of Health and Welsh Office, 1992), at para 9.5. Paragraph 12.9 recommended that the court could only dispense with this agreement if the child was incapable of giving or withholding consent.

<sup>13</sup> *Ibid*, at para 9.6.

<sup>14</sup> *Adoption: The Future*, Cm 2288 (HMSO, 1993).

<sup>15</sup> *Adoption – A Service for Children* (Department of Health and Welsh Office, 1996). Interestingly, in New South Wales, Australia, the Law Reform Commission in its Report (1997) *Review of the Adoption of Children Act 1965 (NSW)* was more radical. It proposed that the current law be extended from the situation whereby the consent of a child of 12–17 years is required if he has been brought up by the applicants for at least five years, to one where the consent of a child of that age is the only consent required in most circumstances.

<sup>16</sup> Clause 41(7)(a); or (b) 'is incapable of giving such consent'.

and from academic critique<sup>17</sup> (although it has been an issue in case-law<sup>18</sup>) and, as noted, is not in the Adoption and Children Act 2002.<sup>19</sup>

This lack of comment on the absence of the consent requirement is intriguing.<sup>20</sup> The White Paper of December 2000<sup>21</sup> referred to the participation of children in decision making only in the context of social work planning:

‘Children have a right to have their views listened to, recorded and acted upon, subject to their age and understanding, in the process of planning and making decisions about their future.’<sup>22</sup>

That is consistent with the priorities of the White Paper, as outlined in the Department of Health Press Release which stressed that the ‘new approach’ to adoption ‘aims to put the needs of children at the heart of the adoption process and speed up the time it takes for children to find new families’.<sup>23</sup> The focus is on ensuring more efficient procedures and practice to find permanent homes for ‘looked after’ children and it can be seen as a response to concerns about the extent and manner in which social workers investigate or record the views of the potential adoptee.<sup>24</sup> Wider issues about children’s rights and voices appear to have been lost. So, while the ‘Explanatory Notes’ to the 2001 Adoption and Children Bill state at paragraph 4 that ‘The Bill builds on and incorporates the proposals to update adoption legislation set out in the draft Bill published for consultation in 1996’, the ‘Conditions for making adoption orders’ no longer include the requirement of the older child’s consent.<sup>25</sup>

Those giving evidence to the Select Committees in 2001–2002 have, however, highlighted the importance of the views of the child. British Agencies for Adoption and Fostering (BAAF), noting that the 1996 Draft Bill had included a requirement for the consent of the child, expressed its ‘misgivings’ about giving the child’s consent such importance: ‘For some children the pain of having “signed away” their birth family might be too much to bear’.<sup>26</sup> Instead, they argued for ‘something stronger than the phrase in the checklist in clause 1’ – the

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<sup>17</sup> For recent academic critique see, for example, C. Barton, ‘Adoption and Children Bill 2001 – Don’t let them out of your sight’ [2001] Fam Law 431; E. Cooke, ‘Dispensing with Parental Consent to Adoption’ [1997] CFLQ 259; S. Harris-Short, ‘The Adoption and Children Bill – a fast track to failure?’ [2001] CFLQ 405; S. Mahmood ‘2001 Adoption and Children Bill – Update’ [2002] Fam Law 439; and G. Perrot, ‘Adoption Proceedings – A New Approach’ [2001] Fam Law 810.

<sup>18</sup> In *Re M (Adoption or Residence Order)* [1998] 1 FLR 570 the court made a residence order, rather than an adoption order, in view of the objection of the 11-year-old girl: see *Bromley’s Family Law*, op cit, n 7, at p 635 n 2 and at pp 646–647. The reasoning of judges on appeal was that the mother was not unreasonably withholding consent to adoption because she was entitled to take into account her daughter’s wishes.

<sup>19</sup> This Bill was first introduced in March 2001, was referred to a Select Committee which held three public hearings and received evidence, but fell in May 2001 when Parliament was dissolved for the General Election. The Bill was reintroduced into Parliament on 19 October 2001 and, after the Second Reading in the House of Commons, was again referred to a Special Standing Committee, sitting November 2001–January 2002, to provide an opportunity for interested organisations to express views. The Bill received Royal Assent on 7 November 2002 (as Chapter 38 of Statutes 2002). The Government intends that the main provisions will come into force in 2004.

<sup>20</sup> As N. Lowe and M. Murch have similarly since commented, ‘Interestingly, however, no such provision was contained in the 2001 Adoption and Children Bill, introduced on 15 March 2001’ (‘Children’s Participation in the Family Justice System – translating principles into practice’ [2001] CFLQ 137, at n 19).

<sup>21</sup> *Adoption – A New Approach*, Cm 5017 (2000). This document was preceded by the *Prime Minister’s Review: Adoption* (Cabinet Office, 2000).

<sup>22</sup> *Ibid*, at para 5.16.

<sup>23</sup> Press Release 2000/0753.

<sup>24</sup> See, for example, J. Selwyn, ‘Ascertaining children’s wishes and feelings in relation to adoption’ (1996) 20(3) *Adoption and Fostering* 14.

<sup>25</sup> The conditions are in s 47 of the Adoption and Children Act 2002.

<sup>26</sup> BAAF Memorandum of Evidence, House of Commons Select Committee, 27 April 2001 ([www.baaf.org.uk](http://www.baaf.org.uk)), at para 10.2. These misgivings, held by so influential a body, might account for governmental ‘cold feet’ over the veto after 1996.

requirement to 'have regard to' the child's wishes and feelings<sup>27</sup> – and further proposed that the adoption agency and the court should be required to explain how they had taken the child's wishes into account.<sup>28</sup> The National Association of Guardians ad Litem and Reporting Officers (NAGALRO) expressed a similar concern: 'Though the Bill recommends the use of the welfare checklist as one of the main tests before making an adoption order, we are concerned that the child's voice is notable for its absence in the wording of the Bill'.<sup>29</sup>

The British Association of Social Workers (BASW), however, expressed concern that there was no longer any provision for the child to consent to adoption. It argued that the child should be a party to the proceedings and that 'a child of sufficient understanding should have the right to refuse consent to adoption'. It proposed that the child should have a corresponding right 'to refrain from giving or withholding consent' and should be able to express any other views or wishes in connection with the application and to have them taken into account.<sup>30</sup> Notwithstanding these and other submissions to the Select and Special Standing Committees, the veto was not reintroduced.

The parliamentary debates were, then, conducted almost wholly within a welfare discourse of child protection. Jacqui Smith (Minister of State, Department of Health) said, when summing up the Bill for the vote on the Third Reading in the Commons, 'The fundamental change that it makes, which is welcomed on both sides of the House and by stakeholders, is that it puts the needs of the child at the centre of the adoption process'<sup>31</sup> and those needs appear not to include a determining voice. It is difficult not to conclude that, once again, images of vulnerable children who need the protection of Parliament – 'innocent victims of a system which has failed to meet their needs'<sup>32</sup> – have sabotaged efforts to give children greater control over their lives.<sup>33</sup>

The ability of the child to have a voice and influence the adoption decision will, then, continue to operate only via the requirement – imposed by Adoption Act 1976, section 6, long before it became part of the welfare checklist in section 1 of the Children Act 1989 or Article 3(3) of the Children (Northern Ireland) Order 1995 – that the wishes and feelings of the child<sup>34</sup> will be sought and taken into consideration, to the extent that adults believe it to be appropriate. The legal situation in Russia is somewhat different.

#### THE RUSSIAN FAMILY CODE

The new Family Code of the Russian Federation<sup>35</sup> was adopted by the State Duma in December 1995 and came into force on 1 March 1996, although amendments were made in 1997 and 1998. The Code must be read against the Federal Law on Acts of Civil Status 1997 and any Family Codes enacted by republics within the Federation. Although a new Code, many of the elements had been introduced in the late Soviet and early post-Soviet era and the UN Convention on the Rights of the Child 1989 (UNCRC) had previously been ratified by the

<sup>27</sup> Op cit, n 26, explaining that the consultation exercise with children and young people on the draft Adoption Standards 'shows that children feel strongly about having their views respected'.

<sup>28</sup> Ibid, at para 10.4.

<sup>29</sup> NAGALRO Memorandum, Appendix 6 to Minutes of Evidence of the Select Committee (House of Commons, 2001), at para 1.

<sup>30</sup> BASW Memorandum, Appendix 19 to Minutes of Evidence of the Select Committee (House of Commons, 2001), at para 26.

<sup>31</sup> *Hansard*, HC, col 98 (20 May 2002).

<sup>32</sup> Alan Milburn, Health Secretary, in statement to the House of Commons, 21 December 2000 ([www.doh.gov.uk/adoption/whitepaper/pressrelease.htm](http://www.doh.gov.uk/adoption/whitepaper/pressrelease.htm)).

<sup>33</sup> As Sandra Gidley, MP commented: 'For the most part, people have spoken with one voice. That is simply because they are thinking of the child first' (*Hansard*, HC, col 106 (20 May 2002)). A similar view of the child as a vulnerable victim was evident in the parliamentary debates on Part II (divorce law) of the Family Law Act 1996: see C. Piper 'Divorce Reform and the Image of the Child' (1996) 23(3) *Journal of Law and Society* 364.

<sup>34</sup> Adoption and Children Act 2002, s 1(4)(a).

<sup>35</sup> See W. Butler (Editor and Translator), *Russian Family Law* (Simmonds and Hill Publishers Ltd, 1998). All quotations from the Code in this article will be taken from this translation.

USSR, coming into force in 1990.<sup>36</sup> There having been extensive consultation with other jurisdictions, the new Code aimed to be fully compliant with the UNCRC. Indeed, Article 6 of the Code states:

‘If other rules have been established by an international treaty of the Russian Federation than those which have been provided for by family legislation, the rules of the international treaty shall apply.’

In particular, the Code gives the child of 10 years old and above the right to veto certain decisions relating to his upbringing.<sup>37</sup> Article 57 specifies the seven instances in the Code where, if parents fail to agree or where they have no relevant rights, the local authority (the trusteeship and guardianship agencies) or the court ‘may adopt a decision only with the consent of the child who has attained ten years of age’.

These instances are the following:

- Article 59(4): ‘A change of name and/or surname of a child who has attained ten years of age may be made only with its (sic) consent’,
- Article 72(4): ‘Restoration in parental rights [in effect, the discharge of a care order] with respect to a child who has attained ten years of age shall be possible only with his consent’,
- Article 132(1): ‘In order to adopt a child which has attained ten years of age, its consent shall be necessary’,
- Article 134(4): ‘The surname, forename, and patronymic of an adopted child which has attained the age of ten years may be changed only with its consent’,
- Article 136(2): the consent of the child over ten is required before adoptive parents can register themselves as the parents in the book of birth registrations,
- Article 143(3): the consent of a child over ten is required for a change of name when an adoption is ‘vacated’ [when the adoptive parents lose parental rights because of their mistreatment of the child: Article 141],
- Article 154(3): ‘A child (or children) who have attained the age of ten years of age may be transferred to a foster family only with its consent’.

There appears to be only one exception to the child’s right to veto the decisions referred to in Articles 132(1), 134(4) and 136(2). No consent is necessary when, before the adoption application is filed, ‘the child resided in the family of the adoptive parent and considers it to be its parent’ (Article 132(2)). This exception – or any other potential exception – has not been the subject of comment by the Supreme Court of the Russian Federation.<sup>38</sup>

These specific rights to consent are in addition to the general requirement that the wishes of the child are ascertained and considered. As in the Children Act 1989, this requirement is subject to the best interests of the child, but the Russian version is in the language of rights:

‘A child shall have a right to express its opinion when deciding any question in the family affecting its interests, and also to be heard in the course of any judicial or administrative

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<sup>36</sup> Op cit, n 35, at pp xxiii–xxiv. The Russian Federation became party to the UNCRC in December 1991, as the successor of the USSR. For a discussion of Russia and international children’s rights see B. Bowring, ‘Children of Russia – victims of crisis, beneficiaries of international law’ [1999] CFLQ 125, at pp 127–129.

<sup>37</sup> Children did not have such extensive rights before the Code of 1996. According to S. A. Najdionova (Family Services Director), the previous practice was that adults were able to make decisions on the basis of best interests. J. Harwin’s review of Soviet child protection policy and proposed reforms would support this view of a paternalistic system: J. Harwin, *Children of the Russian State 1917–1995* (Avebury, 1996). However, she notes that the new provisions built upon reforms enacted earlier: see pp 183–185.

<sup>38</sup> Anecdotal evidence from family lawyers in Samara would suggest there has not been litigation over this exception. There is no case-law as such: if a case is referred to the Supreme Court which seems to suggest there is a ‘gap’ in the Code, the judiciary can refer the issue to the Duma (legislative branch) to consider amending the Code (personal communication with Rodionov Leonid Aleksandrovich, Adviser of the Russian Federation of 2nd category on legal issues, Ministry of Finance of the Russian Federation, Samara Region).

examination. Taking account of the opinion of a child who has attained ten years of age shall be obligatory except for instances when this is contrary to its interests.’ (Article 57)

This ‘right’ is strengthened, in relation to an alleged violation of a child’s rights or abuse of parental rights by a parent, because ‘the child shall have the right autonomously to have recourse for their defence to a trusteeship and guardianship agency, and upon attaining the age of 14 years, to a court’.<sup>39</sup> Furthermore, the Code conveys expectations that parents will consult with their children when making decisions about their upbringing. Article 65(2) states:

‘All questions affecting the nurturing and education of children shall be decided by the parents by the mutual consent thereof, proceeding from the interests of the children and taking into account the opinion of the children.’

This right is reiterated specifically in relation to education in Article 63(2).<sup>40</sup>

### THE CHILDREN ACT 1989 APPROACH

English family law appears not to have gone so far down the autonomy rights route adopted by Russian law. The court ‘shall have regard to’ the child’s wishes and feelings ‘in the light of his age and understanding’<sup>41</sup> and may put great weight on the child’s views.<sup>42</sup> However, there are judicial pronouncements which reveal a deep anxiety at the prospect of children sharing in decision making as such. Holman J, for example, was concerned that children should not be asked to give their consent to a change of name:<sup>43</sup>

‘But in the present case the solicitor included provision for each child consecutively to sign their consent to the change of name and each child duly did so ... E’s [five years old] writing is very nice for her age, yet to see her childish “signature” is to my mind eloquent testimony of how inappropriate it is for her *or any of these children* to have been signing a document of this kind.’<sup>44</sup> (emphasis added)

In that case, E’s siblings were aged 9 and nearly 12. In *Re B*, another change of name case, the children were aged 12, 14 and 16 and the welfare officer’s report included the following: ‘The children’s views are quite clear in this matter. They want to be called H’.<sup>45</sup> At first instance the judge had argued that, ‘while ... it may be true that the children will in fact insist on being called H, for me to allow this application would be to give the court’s approval to a process I do not believe is in their best interests’.<sup>46</sup> In the Court of Appeal, Wilson J concurred, notwithstanding his statement that ‘orders nowadays which run flatly counter to the wishes of normal children aged 16, 14 and 12 are virtually unknown to family law’.<sup>47</sup> He distinguished this case, however, on the basis that a legal change of name would further weaken the father/child link and lessen further the chances of re-establishing the direct contact which was assumed to be an overriding ‘good’.

Furthermore, the welfare checklist in the Children Act 1989 applies – in relation to private law proceedings – only to contested applications, and the law relating to England, Wales and

<sup>39</sup> Article 56(2).

<sup>40</sup> ‘Parents shall have the right, taking into account the opinions of children, to choose the educational institution and forms of study of children until the children receive a basic general education.’

<sup>41</sup> Children Act 1989, s 1(3)(a).

<sup>42</sup> In *Re S (Contact: Children’s Views)* [2002] EWHC 540 (Fam), [2002] 1 FLR 1156, for example, Tyrer J was concerned to find out the wishes of the children (aged 12, 14 and 16) and not to make an order totally against those wishes: ‘These children are not, in the end, children. V and JO in particular are young adults’ (at p 1169F).

<sup>43</sup> Only the signature of a child aged 16 or over is required on a deed of name change.

<sup>44</sup> *Re PC (Change of Surname)* [1997] 2 FLR 730, at p 733.

<sup>45</sup> *Re B (Change of Surname)* [1996] 1 FLR 791, at p 793.

<sup>46</sup> *Ibid*, at p 794.

<sup>47</sup> *Ibid*.

Northern Ireland does not impose a duty on parents to take account of the child's opinions when making decisions within the private family about his upbringing. After consultation the (English) Law Commission in its Report said that the concerns about the 'dangers of giving [the child's views] too much recognition' 'all point towards including the child's views as part of a statutory checklist', the application of which would be limited.<sup>48</sup> The Commission argued that, 'If parents have agreed on where the child will live and made their arrangements accordingly, it is no more practicable to try to alter these to accord with the child's views than it is to impose the views of the court'.<sup>49</sup>

The Scottish Law Commission has argued somewhat differently:

'The question as we saw it was whether a parent or other person exercising parental rights should be under a similar obligation to ascertain and have regard to the child's wishes and feelings as a local authority was in relation to a child in its care ... There are great attractions in such an approach. It emphasises that the child is a person in his or her own right and his or her views are entitled to respect and consideration ... On consultation there was a majority support for a provision requiring parents in reaching any major decision relating to a child, to ascertain the child's wishes and feelings.'<sup>50</sup>

Subsequently, section 6(1) of the Children (Scotland) Act 1995 imposed such a duty on parents and presumes that children over the age of 12 years are of sufficient age and maturity to form a view, as does section 6(2) of the Adoption (Scotland) Act 1978.

In contrast to Scottish law, English children are given no similar rights. Indeed, they do not currently become parties to parental disputes nor are they given the right to attend court in public law proceedings.<sup>51</sup> For example, the child who is the subject of an application for a secure accommodation order or a care/supervision order has a right to representation, but there is no right to attend court and case-law has stressed that there may be welfare grounds for not doing so.<sup>52</sup> Further, while children can make an application for leave to apply for a section 8 order,<sup>53</sup> and the case-law suggests that children aged 14 or above are usually considered sufficiently mature to obtain leave,<sup>54</sup> the court may decide not to give leave even if the child is deemed to be of sufficient understanding.<sup>55</sup> As we have seen, the Adoption and Children Act 2002 abandoned any attempt to enact an age-specific presumption of competence and so is not out of line with this approach. Indeed, parliamentary debates have stressed the similarity of approach with the Children Act 1989.<sup>56</sup>

<sup>48</sup> *Review of Child Law: Guardianship and Custody*, Law Com No 172 (HMSO, 1988), at paras 3.23–3.24.

<sup>49</sup> *Ibid*, at para 3.23.

<sup>50</sup> *Report on Family Law*, Scottish Law Commission Report No 135 (SLC, 1992), at paras 62–64. See, J. Roche, 'Children and Divorce: A Private Affair?', in S. Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate, 1999).

<sup>51</sup> For a review of the legal rights to be heard and represented of children in Scotland see A. Cleland, 'Children's Involvement in Legal decisions: futile gesture or process for change?', paper presented at the Socio-Legal Studies Annual Conference, Aberystwyth, April 2002.

<sup>52</sup> For example, in *Re W (Secure Accommodation Order: Attendance at Court)* [1994] 2 FLR 1092, Ewbank J stressed that the child is not entitled to be present in court during applications for a secure accommodation order under s 25 of the Children Act 1989. In this case, as in those where children have been refused attendance in care proceedings, the reason given for excluding him was that to hear the evidence would be harmful to him.

<sup>53</sup> Children Act 1989: such orders can be residence, contact, specific issue or prohibited steps orders.

<sup>54</sup> Indeed, a child as young as nine years old has been given leave: *Re S (Contact: Application by Sibling)* [1998] 2 FLR 897.

<sup>55</sup> *Re H (Residence Order: Child's Application for Leave)* [2000] 1 FLR 780 where Johnson J decided that the son's wishes would be put forward adequately on behalf of the father: 'I would wish to assure S that the judge ultimately deciding where he shall live will take full and, indeed, generous account of his wishes, but I see no advantage to the court or advantage to S himself in being legally represented' (at p 783F).

<sup>56</sup> To quote participants in the Third Reading debate on 20 May 2002: 'In bringing adoption into line with the Children Act 1989 and making the needs of the child paramount, the Bill is extremely welcome' (Meg Munn, MP, *Hansard*, HC, col 105; 'The Bill brings adoption together with the Children Act' (Mr Dawson MP, *Hansard*, HC, col 112).

The Children Act 1989 is underpinned by the paramouncy principle. While this is the strongest form of the welfare principle where the child's best interests are the overriding influence on outcome, it is also 'adult-centred'.<sup>57</sup> It mandates a determination by adults of the child's best interests; and, where this principle operates, a child's right to self-determination becomes a legal and practical complication. However, the reasons why the English family justice system shies away from requiring the child to give consent to various outcomes are more complex than this. First, there are professional concerns that to give the child the right to declare a preferred outcome would put a psychological burden on the child.<sup>58</sup> Secondly, 'Historically, in our culture children are not used to being listened to'.<sup>59</sup> There are echoes of the child who should be seen but not heard and there is a consequent lack of professional expertise to listen to children.<sup>60</sup> Both of these reasons are justified by professionals, as well as parliamentarians, working with a notion of the child as vulnerable, dependent and in need of adult protection.<sup>61</sup>

### THE RESEARCH

There would, then, appear to be differences of approach in English and Russian legislation, but simply to compare the wording of legislation is an inconclusive exercise. The crucial question, as socio-legal studies have emphasised, is whether the different balance in the welfare/rights approaches to child law leads to different practice and outcomes. We are aware that in England and Wales the ascertaining of the child's wishes and feelings may sometimes be more honoured in the breach than the observance.<sup>62</sup> Is, then, the consent that is required from the child, in those instances specified by the Russian Federation, gained in ways that uphold the child's full autonomy or, in practice, is it inferred or forced?

To find answers to this question, a small exploratory study was conducted in Samara, a large and relatively prosperous city and region in the Russian Federation. 'Only' one sixth of its population is below the poverty line, in comparison with the average for the Federation of one third<sup>63</sup> and the city, situated on the Volga River, is one of the major centres after Moscow and St Petersburg.

The base for the research was the Samara campus of the Moscow City Pedagogical University, where one of us was a visiting lecturer.<sup>64</sup> The research arose out of a link between the Centre for the Study of Law, the Child and the Family at Brunel University and the interdisciplinary research project entitled 'People's Rights' at Samara. The aim of the research

<sup>57</sup> N. Lowe and M. Murch, *op cit*, n 20, at p 137. See also, M. Freeman, 'The Next Children's Act' [1998] *Fam Law* 341, where he argues that the next piece of legislation should be called the Children's Act because 'The Children Act is "about" children ... a Children Act still oozes the flavour of children as object, rather than subject, problem rather than social participant' (at p 342).

<sup>58</sup> See, for example, B. Cantwell and S. Scott, 'Children's Wishes, Children's Burdens' (1995) 17(3) *Journal of Social Welfare and Family Law* 377; A. James and W. Hay, *Court Welfare in Action* (Harvester Wheatsheaf, 1993); and *Review of Child Law: Guardianship and Custody*, Law Com No 172 (HMSO, 1988).

<sup>59</sup> *Op cit*, n 20, at p 143.

<sup>60</sup> See, for research findings and reviews: J. Masson and M. Winn Oakley, *Out of Hearing. Representing Children in Care Proceedings* (John Wiley and Sons, 1999); B. Neale and C. Smart, *Good to Talk?* (Young Voice, 2001); and A. O'Quigley, *Listening to children's views and representing their best interests – a summary of current research* (Joseph Rowntree Foundation, 1999). See also references in n 62 below.

<sup>61</sup> S. Day Sclater and C. Piper, 'Social Exclusion and the Welfare of the Child' (2001) 28(3) *Journal of Law and Society* 409. This article argues that adults project their vulnerabilities onto children through the operation of the welfare principle.

<sup>62</sup> C. Piper, 'Ascertaining the wishes and feelings of the child: a requirement honoured largely in the breach?' [1997] *Fam Law* 796; and G. Douglas and M. Murch, 'Taking account of children's needs in divorce – a study of family solicitors' responses to new policy and practice initiatives' [2002] *CFLQ* 57.

<sup>63</sup> Personal communication of the human rights representative for Samara. In Russia, as in the UK, children suffer disproportionately from poverty: B. Bowring cites sources indicating upwards of half the child population to be in the 'zone of social risk' (*op cit*, n 36, at p 127). He also points out that conscription to the Russian army in 1996 revealed an astonishing rise in those released from their obligation, on the ground of their health, to one third of young men called up.

<sup>64</sup> Christine Piper. Artem Miakishev is an English graduate of Samara State Pedagogical University.



was to explore the implementation of the new Code in relation to specific issues, of which two are relevant to this article: first, the extent to which the concept of children's autonomy rights influenced social work practice; and secondly, whether Russian child protection professionals operate with a particular image of the child.

The methodology was simple, albeit less than perfect because of the constraints of time and language: to interview a small number of key personnel in Family Services and Adoption in the Samara administration, using an interview checklist of issues to be covered. The interviews, on average lasting one hour each, took place in May 2002. They were conducted by us jointly, with care taken to seek clarification of meaning, and were recorded manually, the two of us subsequently comparing our understandings of the data collected. The five interview sessions were conducted with the Chair of the Family Support Services for Samara,<sup>65</sup> the Vice-President (formerly Director) of the Adoption Centre for Samara Region,<sup>66</sup> the Associate Director<sup>67</sup> and four specialist colleagues of the Centre for Adolescence for Samara, the Chief Representative from Samara Region on the Federation's Human Rights Body (formerly the Director of the Department of Justice for Samara region) and two municipal workers (social workers) staffing a local child protection office (one of nine local offices in Samara city). In addition, we attended, and spoke at the reception to mark the tenth anniversary of the Family Support Committee<sup>68</sup> and were able to talk to various professionals and foster parents. What we were seeking was information about the practice policies they were following, recognising that we would be unable to establish the extent to which scarce resources might be affecting the implementation of practice.<sup>69</sup>

### **CONSENT AND PROFESSIONAL STRATEGIES**

The people we interviewed included those responsible for formulating practice guidance and those responsible for implementing it. One might anticipate different explanations of how social workers and child psychiatrists cope with the situation where the child's wishes do not align with their preferred outcome and the child might veto their care plans. The responses of interviewees did, indeed, fall into two strategies, although they did not align with an administrator/front-line worker division. The approaches explained to us were either to follow the child's wishes and not pursue the plan preferred by professionals or to 'persuade' the child towards the preferred outcome. How did they justify each of these very different practices?

The Vice-President of Fostering and Adoption Services explained that all children – whether above or below 10 years of age – are given a trial period in a foster or prospective adoption placement before a psychologist or social worker asks the child whether he wishes to stay there. She admitted that some children do refuse to consent to staying in a foster placement or to adoption by the prospective adopters and gave, as an example, the 5-year-old boy who had recently rejected a foster placement at the end of the first week. Although the social workers saw no particular problem, they withdrew the child who later went to another placement which was successful. When we asked the former Director why her social workers so readily concurred with the wishes of even very young children, we were pointed to the damage that doing otherwise would inflict on the relationship of the foster parents and social worker with the child. In the long run it was, they believed, more effective practice, in terms of successful placements, to give the child a determining voice.

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<sup>65</sup> Naidienova Svetlana Anatolievna. The official function of her organisation is 'The Protection of Motherhood, Family and Childhood'.

<sup>66</sup> Tamara Grigorjevna Bogdanova.

<sup>67</sup> Krivona Tatiana Ergemievna.

<sup>68</sup> Before the establishment of this Committee, there were a number of uncoordinated – and so less effective – committees of, *inter alia*, Healthcare, Social Development and Education which dealt with children issues. See J. Harwin, *op cit*, n 37, for the reforms under Gorbachev and Yeltsin which encouraged such a reorganisation of family support and child protection.

<sup>69</sup> We are grateful to an anonymous referee who stressed this issue and pointed out that interviewees may be reluctant to refer to it. For a discussion of the problems of implementing children's rights in Russia see O. Khazova, 'The UNCRC and Russian Family Law', in M. Freeman (ed), *Children's Rights: A Comparative Perspective* (Dartmouth Press, 1996).

A similar strategy was adopted by the specialists working in the residential Centre for Adolescence where highly disturbed children stayed for a maximum of 6 months. Their hope was that the parents, whose parental rights have been limited or removed, would also be rehabilitated and the children could return home but, in practice, the Centre formulates and often has to implement alternative care plans. One influential factor appeared to be pragmatic: because of the high rate of absconding from the Centre there was a consequent need not to alienate children or frighten them into leaving precipitously. They said that some children returned to living on the streets, others ran away to take food to their families: there were nine 'missing' children at the time of the interview. At the same time, they clearly endorsed the right of a child of 10 years old or above to express views which could be determinative. They said the requirement caused them no problem and that they did always ask children what they wanted. They were quite adamant that they would not let a child live somewhere he did not like and that they would not put a child in a placement where the other children were unhappy with the arrangement. In other words, their policy goes further than the law requires: each foster child in a foster family has to give written consent to the new placement.

However, those working at this Centre also pointed out that they would 'work with' children whose veto of a foster placement was based on their wish to stay in an institution. They similarly talked in terms of 'persuasion' when arguing – in response to a prompt – that they were not 'burdening' the child by implementing these decision-making rights. They explained they did not always ask directly – but through different means got the answer they wanted. They were particularly concerned not to put the child in a decision-making role in court, especially when the child is asked to give evidence against parents on an application for deprivation of parental rights – the equivalent of an application under section 31 of the Children Act 1989. The court can demand the attendance of a child over 10 years old but these professionals always resisted such demands and said that it was rare for attendance to occur.<sup>70</sup>

The head of the Family Support Services also talked in terms of psychologists working with children to persuade them that the proposed plan was in their best interests. She explained that the opinion of the child is taken into account but that the child's view might not always prevail because she believed the guiding principle in professional and judicial practice was best interests and 'the 10-year-old can't make a good decision'. If it 'is not possible' to follow the child's wishes, then they explain carefully to him why they cannot and seek to persuade. Nevertheless, she pointed out that they do try first of all to match professional outcomes with the child's wishes in order to encourage the child to be law-abiding. The reasoning seemed to be that if children became disaffected with Family Services because their opinions were discounted, they would be more likely to be generally opposed to authority.

The interview with the two social workers in a local child protection office widened the scope of discussion considerably. It became clear that they conceptualised children's rights mainly in terms of rights to protection but,<sup>71</sup> at the same time, they pointed out that in practice (the context being contact with parents) they take the age of seven to be the minimum age for taking determinative account of children's views. Their reasoning was based on the assumption that parents tend not to listen to children under seven years but do take account of the views of children above that age. In relation to contact, they also pointed out that if a child wanted to have contact with a grandparent<sup>72</sup> against the wishes of his mother they would appoint a psychologist for the mother in the hope that she could then be persuaded that it was good for the child to see his grandmother.

The social workers introduced a further context for the operation of a veto in regulations, ensuring that the local authority monitored the sale or purchase of all dwellings in which

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<sup>70</sup> They gave as an example the case of a 12-year-old girl who was asked to give evidence at the hearing of an application to remove her mother's rights. Although the girl consented to the care plan (which was eventually implemented) by which she would live with her aunt as a foster placement, she did not want to hurt her mother by testifying. The social workers supported her in this refusal.

<sup>71</sup> For example, when asked whether they thought the Family Code gave children more rights, they replied that it did because there were more rights to protection.

<sup>72</sup> A right of the child under Art 55 of the Family Code.

children (will) live.<sup>73</sup> Not only the local authority but also, in practice, the child involved, must give permission for a house to be sold before the sale can be legally registered.

## CONCLUSIONS

We do not claim that the results of this research have any general application even in one city in the Russian Federation. The interviews did, however, reveal a range of views about the role of the child's wishes in decision making and, in particular, the legal requirements for consent, held not only by the directors of services but also by social workers and psychiatrists working at other levels of the child protection and family support services in Samara. These views are, at least in relation to the administrators, very considered views. The region and city have reorganised their systems of child and family support over a decade and against a backdrop of very considerable economic difficulties.<sup>74</sup> Those responsible for these changes have made themselves familiar with practice in other jurisdictions, notably the UK,<sup>75</sup> and wish to emulate the best practice of these.

Nevertheless, interviewees seemed to accord more importance and respect to children in their own right than might be found in the images of children underpinning much of English family law. One might see this as the persistence of communist ideology in its valorisation of children. As Bowring notes, 'The Soviet Union prided itself on the care and concern lavished upon children'<sup>76</sup> and one of our interviewees expressed regret at the demise of the Marxist emphasis on children as the state's foundation.<sup>77</sup> Conversely, it has been argued that the collapse of the Soviet Union has provoked a new discourse in relation to children – that of international rights.<sup>78</sup> Indeed, our interviewees talked of children's rights in relation to quite robust images of children who could be involved in decision making.

However, to move our argument in a circular fashion, the ways in which our interviewees justified their endorsement of the child's views, and even their veto, are familiar to those working in and with the family justice system in the UK. First, there is the concern that, if respect is not accorded to young people's choices, then they will, in turn, not respect the law, either in relation to the decision in question or more generally. Again, this can be justified as a continuation of Soviet policy towards the socialisation of children 'to take their place as unquestioning model citizens',<sup>79</sup> but such sentiments can also be found in English case-law. To quote again from the recent decision in *Re S (Contact)*, the fourth reason the judge gave for not making an order in relation to the 16 year old was this:

'I do not consider the court should make orders in the expectation that they are not going to be respected or obeyed. Into the national curriculum at the moment has come the concept of and the element of citizenship. It is not right for me to make orders that I do not expect to be obeyed with young adults and the need for respect for the law.'<sup>80</sup>

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<sup>73</sup> These regulations were prompted by the sale of property, after the establishment of the Russian Federation made that possible, which rendered children homeless. If parents want to register the sale of property and they have a child in the family, the sale will not be registered without permission from a local Child Protection Office after they have seen relevant documentation and conducted any necessary investigations. The child is also asked to give his consent to move to a different location. However, regardless of the wishes of the child, if the living conditions at a new location would be worse, the sale of the property is not allowed.

<sup>74</sup> For good accounts of the economic and social difficulties in Russia in the 1990s see, for example, N. Manning, O. Shkaratan and N. Tikhonova, *Work and Welfare in the New Russia* (Ashgate, 2000); and S. White, *Russia's New Politics* (Cambridge University Press, 2000).

<sup>75</sup> For example, the Chair of the Family Support Services had visited an English social services department.

<sup>76</sup> Op cit, n 36, at pp 127.

<sup>77</sup> The Samaran representative to the Human Rights Commission.

<sup>78</sup> B. Bowring, op cit, n 36, at p 128.

<sup>79</sup> Ibid.

<sup>80</sup> Op cit, n 42, at p 1171C, per Tyrer J.

In relation to the younger children where an order might be enforced, the judge said 'it would be a pyrrhic victory indeed because, whatever they were ordered to do, if they did it they would do it with bad grace and with a counter-productive result'.<sup>81</sup>

This latter quotation also introduces a further reason given by our interviewees for implementing the child's wishes: that the child's preferred outcome will be less trouble to implement and be more successful. As Tyrer J asked rhetorically in the case above, 'What would be the quality of what is being asked of them by me to do if I order them to do it?'.<sup>82</sup> Similarly, in *Re B*, Wilson J said, 'there is no point (indeed it is only a recipe for further damaging conflict) in the court ordering children of that age [12–16] to reside in a home where they will refuse to reside or to have contact with a parent with whom they refuse to have contact'.<sup>83</sup>

These above reasons for supporting or 'going along with' the child's wishes can be classified as those driven by the needs of the state, by social worker and judicial pragmatism or by a belief that the child's welfare is best served by implementing the child's wishes. The remaining explanations proffered in interviews – to justify practice when the assessment of the child's best interests by the social worker or psychologist ultimately prevails – are squarely within a welfare discourse. None of our interviewees countenanced side-stepping the child's opposition, but they did talk of 'working with him', by referring him for counselling or to a psychologist, and 'persuading' him to adopt the preferred outcome of the professionals.<sup>84</sup> In other words, the imbalance of resources, skill and power between the young person and the professional working with him will eventually lead to 'agreement' on a professionally preferred outcome.

It would then appear that, despite an apparently more positive image of the child as rights holder, adult perceptions of the child's welfare, or of society's welfare, still 'win'. This prompts the question whether there is any point in giving children rights to consent or to express influential views if this exploratory research suggests that rights will often be 'neutralised' to serve welfare ends. We would contend there is a point in giving rights, including allowing a veto in relation to adoption, for three main reasons.

First, to affirm the child as a current rights holder, whose views must be respected, is a very powerful technique which enhances both the child's welfare and his autonomy. It accords the child caught up in the child protection or family services structures the dignity and respect that such a status gives. At the very least, this shows that the child is 'worth' the state using resources to persuade him otherwise. This approach echoes the stance of the Scottish Law Commission in relation to the proposed duty on parents to ascertain the child's views, 'and give due consideration to them ... as an important declaration of principle'.<sup>85</sup>

Secondly, it affirms the child as a future rights bearer and gives the child experience of using rights. This could be seen as a 'prophylactic' for an independent future and as a necessity in a civilised society. There are strong psychological grounds for allowing the child to participate in a decision-making process. Personal and social identities are developed in the process of making choices and experiencing the consequences of choices made. Even with vulnerable children, the process also promotes the development of life skills and the ability to take responsibility. This is particularly important, given that the children for whom these consent requirements operate are those who may be at a disadvantage through parental divorce, death, or abandonment. For children 'at risk', an encouragement of this future ability to make reasoned choices about legal and practical issues will greatly benefit them.

Thirdly, providing more rights in this area will help produce a modified image of the child and, perhaps, more helpful paradigms of practice relating to children's participation in decision making. Lowe and Murch have outlined four different paradigms,<sup>86</sup> two of which ('the child as

<sup>81</sup> Op cit, n 42, at p 1170F.

<sup>82</sup> Ibid, at p 1169G.

<sup>83</sup> *Re B*, n 45, at pp 794–795.

<sup>84</sup> We think it would be unhelpful to see this as re-enforcing stereotypes of Soviet therapeutic treatment of deviants held by the western democracies.

<sup>85</sup> *Report on Family Law*, op cit, n 50, at para 64.

<sup>86</sup> N. Lowe and M. Murch, op cit, n 20, at pp 146–147.

social actor' and 'the community mental health approach') cut across the traditional welfare/rights dichotomy and seem to have relevance to the practice we were told about in Russia. They allow for a less paternalistic but still child-focused approach, while seeking to take what children say at face value. This is not simply an academic, theoretical issue. Currently in the UK, the legislation relating to children and young people reveals a variety of often conflicting images of children, many of which do not operate to their benefit.<sup>87</sup> More positive and less polarised ideas of what children are and can do are necessary precursors to law and practice which is less adult-centred and in the context of which 'the children themselves will indicate how they want to participate, if the adults have the courage and confidence to listen'.<sup>88</sup>

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<sup>87</sup> See, for example, the differing images of childhood portrayed by the authors in J. Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001); C. Piper, 'Who are these "youths"? Language in the Service of Policy' (2001) 1(2) *Youth Justice* 30.

<sup>88</sup> H. Bretherton, "'Because it's me the decisions are about" – Children's experiences of private law proceedings' [2002] *Fam Law* 450.