
Copyright:

© Jordan Publishing Ltd 2014.

Link to article:

http://heinonline.org/HOL/Page?handle=hein.journals/chilflq26&id=78&collection=journals&index=

Date deposited:

16/10/2015

Embargo release date:

01 January 2016

This work is licensed under a Creative Commons Attribution-NonCommercial 3.0 Unported License
Bright lines and best interests: children, age and rights in police detention: R (HC) v Secretary of State for the Home Department

Kathryn Hollingsworth

Key words: police detention, age, children’s rights, PACE, appropriate adults, best interest

Abstract

This commentary examines the decision in R (HC) v Secretary of State for the Home Department that the exclusion of 17 year olds from the special protections conferred on all other children whilst in police detention was unlawful. It sets out the protections afforded to children whilst detained by the police, and considers in particular the Court’s focus on the parent-child relationship and thus the use of Article 8 to give effect to the child’s youth justice rights.

Over the course of the last century a separate and distinct youth justice system has become firmly embedded within the law of England and Wales. An essential aspect of the system of criminal justice for minors is the provision of a range of measures designed to accommodate better the particular needs and capabilities of children, part of the purpose of which is to secure more effective protection of their rights. Typically in many jurisdictions (including England and Wales) differential treatment for juveniles includes a separate and more informal (youth) court, a range of sentences distinct from those available to adults (for example, intensive fostering or restorative conferences), stricter thresholds for the imposition of a custodial sentence or secure remand, and special protections whilst in police custody. It was

---

1 The legislative origins of the English youth justice system date back to the creation of the juvenile court (now youth court) in the Children Act 1908. However, even before 1908 separate means of dealing with children in conflict with the law had already emerged. On the history of youth justice in England and Wales see A. Morris, H. Giller, E. Szwed, and H. Geach, Justice for Children (The Macmillan Press Ltd, 1980) and W. Cavenagh, Juvenile Courts, the Child and the Law (Penguin Books, 1967).

2 These relate to criminal justice processes: much larger issues of justice and rights arise in relation to holding children criminally responsible against the same standards as adults.

3 For an overview of children’s rights in youth justice see A. Bainham and S. Gilmore, Children: The Modern Law (Jordans, 4th edn, 2013), chap 15. There are some notable exceptions to the differential treatment approach,
this last issue that was the subject of the judicial review in *R (on the application of HC) v Secretary of State for the Home Department*, where the exclusion of 17 year olds from the protection afforded by the conferral of special rights to all other children who are detained, questioned and arrested by the police was challenged by HC.

Age boundaries in the youth justice system are a well-trodden academic territory, but it is ordinarily the threshold for criminal responsibility, the lower age boundary, that is the focus of critique. This commentary explores instead when the protections afforded to young people in the criminal justice system end. It examines the nature of the protections afforded to children whilst detained by the police, and what the decision in *HC* suggests about the way the law perceives children and their rights in youth justice. The commentary begins with a brief overview of the rights that are available to children in police custody and the recent changes to the upper age boundary in other parts of the youth justice system, before turning to the facts and the legal issues in *HC*. The discussion then focuses on three issues concerning best interests and rights, drawing on available empirical evidence to explore the presumptions, outcome and reasoning in the decision.

1. CONTEXTUAL BACKGROUND

1.1 The necessity of special protections for children in police custody

---

4 *2013* EWHC 982 (Admin). Hereafter ‘HC’.

Criminal punishment constitutes one of the most coercive powers of the state, and a range of rights therefore exists to ensure that such power is exercised legally, proportionally and only against those guilty of a legal wrongdoing. Rights have particular importance during police detention where the risk of coercion, false confession, and maltreatment are at their greatest.\(^6\) A range of rights - legal and constitutional, many of which are contained in the Police and Criminal Evidence Act 1984 and its accompanying Code C - therefore exist to redress the power imbalance between the police and the individual suspected of committing a criminal offence. These rights include (inter alia) the right to legal advice, to inform another person of his/her arrest and whereabouts, to have interviews tape-recorded, and to be released if charges are not brought within a certain time period.

The need for a robust set of pre-trial rights is even more important in the case of children, given their age, life experience, and developmental (im)maturity.\(^7\) Children are ‘potentially the most vulnerable of the vulnerable, and the least able to represent their own best interests, control their behaviour and communicate their needs.’\(^8\) This has a dual impact on their experiences at the police station. First, being arrested can be a ‘frightening and confusing experience’\(^9\) for children, and the associated processes such as strip searching, overnight detention in police cells, and the giving of intimate samples can be especially

\(^6\) As highlighted by the miscarriages of justice (including the Guildford Four, the Birmingham Six and the Cardiff Three) that subsequently led to the 1981 *Royal Commission on Criminal Procedure (The Philips Commission)* and the introduction of the Police and Criminal Evidence Act 1984.


intimidating and distressing. There is a clear risk that the child’s emotional and physical wellbeing – her welfare - will be detrimentally affected. Secondly, children are less able to enjoy the rights _qua_ suspect: rights that facilitate effective participation and protect against wrongful conviction. Empirical research from both the USA and England and Wales has shown that amongst juveniles there is a low level of understanding of their ‘due process’ rights. In England and Wales, Hazel et al reported in 2009 that young people lacked clarity in understanding their rights in the police station, and supervising officers also reported this to be the case. This is especially problematic in terms of the right to legal advice. Young suspects are less likely than adults to be told that they are entitled to legal advice, and are less likely to request that advice. In part, this is because children do not always recognise the importance of receiving legal advice and may misunderstand the role of the duty solicitor, believing – as HC did - that she or he is a ‘police lawyer’ and therefore not independent.

The absence of a lawyer compounds the difficulties children face in police questioning, which is experienced by them as intimidating and confusing, and Hine cites research that suggests that young people ‘learn that it is easiest to go along with the adult view than to resist’; a finding supported by Hazel et al. Combined with the pressure of ‘societal expectation of youthful obedience to authority’, it is apparent that children are more

---

10 See for example, The Howard League for Penal Reform, _The Overnight Detention of Children in Police Custody 2010-11_ (2011).
12 Hazel et al, above n 7.
14 As in _HC_, see para [7]. Skinns (ibid) also suggests this is because the charges are less serious.
15 Hazel et al, above n 7.
17 Above n 7.
18 Feld, above n 11 at p 115.
susceptible than adults to making self-incriminatory statements, false confessions, and to admit to behaviour without fully understanding the consequences of doing so.

1.2. Protections for detained children in English law

In English law, there are three principal ways in which these factors are taken into account during police detention, and which differentiate the rights available to adults and the rights available to children. First, under section 34(2) of the Children and Young Persons Act 1933, the child has a right to have the person who is responsible for his welfare to be notified of his arrest, and told why he has been arrested and where he is being held. This right is replicated in PACE Code of Practice C, and goes beyond the rights of all suspects not to be held incommunicado which can be restricted in some circumstances. Secondly, Code C also requires that an appropriate adult be provided to all juveniles to provide advice and assistance, to facilitate communication, and to ensure that the she is being treated properly.

---

19 See for example, R v Stratford Youth Court ex parte DPP [2001] EWHC 615 (Admin) that people under 18 ‘may be prone to providing information that is unreliable, misleading or self-incriminating’. These potential problems are more acute since the Criminal Justice and Public Order Act 1994 limited the right to silence (on the right to silence and legal advice see Murray v United Kingdom [1996] 22 EHRR 29, para [66]), meaning that ‘potentially disoriented and confused people from the vulnerable groups will be under greater pressure to answer questions they may not fully understand’. B. Littlechild, ‘Reassessing the Role of the ”Appropriate Adult”’ [1995] Criminal Law Review 540 at p 544. See also D. Dixon, ‘Juvenile Suspects and the Police and Criminal Evidence Act’ in D. Freestone (ed) Children and the Law: Essays in Honour of Professor H.K Bevan (Hull University Press, 1990) at p 116 on the susceptibility of juveniles to false confessions. This is also recognised in Code C though there the tone is slightly different (it says that children are also more ‘prone in certain circumstances to provide [emphasis added] information that may be unreliable, misleading or self-incriminating’– Code C, paragraph 11C).

20 For example, that doing so might lead to a final warning (as was) and the negative consequences resulting from that. See for example, R (on the application of R) v Durham Constabulary [2005] UKHL 21, [2005] 1 WLR 1184.

21 I am using the male pronoun for simplicity and because the applicant in the case was male.

22 Section 34(9) of the 1933 Act describes this as the child’s right, not the right of the parent or guardian. This is in line with Article 40(2)(b) of the UNCRC which requires that a child’s parents are ‘…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…’ and also the broader principle in Article 9 which requires that where a child is separated from her parents as a result of detention, imprisonment etc the state party shall on request provide information about whereabouts of the absent member of the family (parent or child) unless the provision of information would be detrimental to the wellbeing of the child.


24 See s 56 of PACE and Code C, para [3.1] and para [5], and the discussion below.

25 Annex B of the Code, and s 56(2) PACE, for example, if it will alert a co-suspect or hamper evidence-gathering.
and fairly.\textsuperscript{26} The appropriate adult must be present throughout the child’s detention, including when she is informed of her rights, questioned,\textsuperscript{27} strip searched,\textsuperscript{28} gives samples\textsuperscript{29}, is charged\textsuperscript{30} or issued with a caution.\textsuperscript{31} As well as assisting the child in understanding the criminal justice processes, appropriate adults can also be crucial in ensuring that children receive legal advice.\textsuperscript{32} Thirdly, where a child is detained after charge, the custody officer must arrange for her to be placed in the care of the local authority, unless for any juvenile it is impracticable to do so, or, ‘in the case of a juvenile of at least 12 years old, no secure accommodation is available and other accommodation would not be adequate to protect the public from serious harm from that juvenile’.\textsuperscript{33} This duty is contained in both section 38(6) of PACE 1984 and Code of Practice C, and although the wording differs in the two provisions (PACE refers to moving the child to local authority accommodation and Code C refers to the child being in the care of the local authority) in both cases the child is deemed ‘looked after’ by virtue of the definition in the Children Act 1989.

Significantly, until the HC decision, all three protections – the parental notification duty, the appropriate adult duty, and the local authority accommodation duty – applied only to children under the age of 17 by virtue of the attributed meaning to ‘juvenile’ under Code C, the interpretation of an ‘arrested juvenile’ in section 37(15) of PACE 1984, and the definition of a ‘young person’ in some sections of the Children and Young Persons Act

\textsuperscript{26} Para [3.18] and [11.17] of Code C.
\textsuperscript{27} The Code states that when the child is being questioned, the appropriate adult should not only observe the proceedings, but should also advise the young person, observe whether the interview is being conducted properly and fairly, and facilitate communication with the person being interviewed. See the discussion below.
\textsuperscript{28} Annex A, Code C PACE.
\textsuperscript{29} For example see s 63B PACE 1984 and Code C, para [17.7].
\textsuperscript{30} Code C, para [16.6].
\textsuperscript{31} Code C, para [11.15] and [10.12].
\textsuperscript{32} Pierpoint noted that in 73 per cent of cases in her survey, the appropriate adult requested legal representation for the young suspect. H. Pierpoint, ‘A Survey of Volunteer Appropriate Adult Services in England and Wales’ (2004) 4 Youth Justice: An International Journal 32 at p 39.
\textsuperscript{33} Code C, para [16.7].
As such, prior to the legal challenge brought by HC, 17 year olds were excluded from the special protections afforded to all other children detained in police custody.

1. 3. Recent developments in youth justice: reforming age-based anomalies

That 17 year olds have been excluded from the protections afforded to other children is a result of the alterations to the upper age limit of youth justice, which - as with the lower threshold of criminal liability for children - has shifted over the past 100 years, partly reflecting changing societal constructions of childhood. During much of the 20th century, legislation that provided for special criminal justice measures for minors – such as the jurisdiction of the (then) juvenile court - applied to those aged between the minimum age of criminal responsibility35 and 16 (inclusive).36 All other persons, including those aged 17, were classed as adults for the purposes of criminal justice. In 1991, the Criminal Justice Act amended most existing youth justice-related legislation so that the definition of a ‘juvenile’ and a ‘young person’ included 17 year olds,37 thus securing alignment with the definition of a child in the Children Act 1989,38 the UN Convention on the Rights of the Child (UNCRC),39 and the Family Law Reform Act 1969.40 Subsequent reforms, most significantly those

34 For most provisions of the Children and Young Persons Act 1933, a young person is one up to the age of 18 but s 34 was excluded from the effect of the amending legislation in 1991: see Commencement No 3 Order) 1992 (SI 1992/331). See below.
35 The minimum age of criminal responsibility in England and Wales has been 10 since the Children and Young Persons Act 1963 but prior to this it was 8, and before that 7.
36 For example, the Children and Young Persons Act 1933 defined ‘children and young persons’ as those aged 16 and below; and the definition of an ‘arrested juvenile’ under ss 37-39 of the Police and Criminal Evidence Act 1984 is a person under 17.
38 Section 105(1).
39 Article 1.
40 Section 1 of which had reduced the age of majority from 21 to 18.
collectively referred to as the ‘new youth justice’, further entrenched 18 as the upper age boundary of the youth justice system.

However, until 2012 there were two exceptions to the otherwise consistent age demarcation between childhood and adulthood in criminal justice: 17 year olds were treated as adults (1) when in police detention (as described above) and (2) for remand purposes. These anomalies were partially remedied by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which introduced a new system of secure remand for children. As well as introducing tighter remand conditions and attributing looked-after status to remanded children, LASPO extended the remand system for children to all persons up to the age of 18. During the passage of the Act through Parliament, the Government informed the House of Lords that it would also keep under review the possibility of extending to 17 year olds the child-specific protections available to other minors in police detention. However, four months later in July 2012 the then Minister for Police and Criminal Justice, Nick Herbert, announced by way of a response to a Parliamentary Written Question that, having ‘considered the benefits, risks, and costs’ the Government had concluded that at this time it was not ‘appropriate’ to amend the law; 17 year olds would continue to be treated as

41 B. Goldson. The New Youth Justice (Russell House Publishing Ltd, 2000). See in particular the Crime and Disorder Act 1998, the Youth Justice and Criminal Evidence Act 1999, and the Powers of the Criminal Courts (Sentencing) Act 2000. The ‘new youth justice’ included a new principal aim for the youth justice system (prevention of offending), a range of special sentences, a distinct system of diversion, and a range of institutional reforms including the establishment of the youth justice board and youth offender teams; all of which applied to children up to the age of 18.
42 See especially, Crime and Disorder Act 1998, s 117.
44 Sections 98 and 99 LASPO.
45 Specifically, s 104 LASPO provides that such children will be ‘treated’ as looked-after.
46 Section 91(6). See further, K. Hollingsworth, ‘Youth Justice Reform in the Big Society’ (2012) 34(2) Journal of Social Welfare and Family Law 245 at pp 250ff. The Bail Act 1976 has also been amended so that the definition of a young person now includes 17 year olds except in relation to s 3(7) (requirement that consenting parents ensure compliance of the child with the surety) which does not extend to 17 year olds.
47 The Government’s assurance was made in response to an amendment tabled by Lord Beecham which would have required the Secretary of State to review within three years the use of appropriate adults in the youth cautioning process, and whether it should extend to 17 year olds. The amendment was withdrawn in light of the Government’s statement that it would be kept under review. See Hansard 15 February 2012, Amendment 185A moved by Lord Beecham (col 882).
adults within PACE.\textsuperscript{48} The announcement meant that the status quo was maintained and it was this backtracking by the Coalition Government that prompted the legal challenge in HC.

\section*{2. THE FACTS IN HC}

The case centred on the arrest and detention of HC, a 17 year-old boy who had never been in trouble with the police before but who, on 19th April 2012, was arrested on suspicion of robbery and detained at Battersea Police Station. HC had requested that his mother be informed of his arrest under section 56 PACE,\textsuperscript{49} but his request was denied pursuant to section 56(5); that doing so could hinder the recovery of property obtained in the commission of the offence.\textsuperscript{50} HC’s mother only became aware of his arrest four and a half hours later when his grandmother’s house (where HC lived during the week) was searched. HC was bailed at 4am - 11 and a half hours after arriving at the police station - and bail was eventually cancelled and no charges brought when HC’s oyster card record showed that he could not have committed the robbery.\textsuperscript{51}

The key issue in the case concerned the obligations owed to 17 year olds under Code C of the Police and Criminal Evidence Act 1984.\textsuperscript{52} Three claims were made in the proceedings; one against the Secretary of State for the Home Department and two against the Commissioner of Police for the Metropolis. The claim against the Home Secretary was that her failure to exercise her discretion was irrational under the common law principles of

\textsuperscript{48} Nick Herbert MP, answer to written question on 16th July 2012, Hansard Col 549W. No reference was made in the question or the answer to the provisions of the Children and Young Persons Act 1933 that also provides special protections for children.
\textsuperscript{49} Above, text at nn 22 and 24.
\textsuperscript{50} See HC para [8].
\textsuperscript{51} An oyster card is an electronic payment card used on public transport throughout London.
\textsuperscript{52} The provisions in the Children and Young Persons Act 1933 and PACE 1984 (the Act itself, not the Codes) were not the focus of the challenge; rather it was the discretionary powers of the Home Secretary that were the object of concern. The validity of primary legislation cannot, of course, be questioned by a court, but its compatibility with the ECHR could have been considered under ss 3 and 4 of the Human Rights Act 1998.
judicial review and it contravened Article 6 and Article 8 of the ECHR (see below). The basis of the challenge to the Commissioner of Police was two-fold. First, it was argued that the failure by the police to contact HC’s parents was a breach of the duty under section 11 of the Children Act 2004 to have regard to the need to safeguard and promote the welfare of children. It was further claimed that the police had fallen foul of Article 9(4) UNCRC, a provision that requires ‘essential information’ to be given to parents where the state has acted in a way that separates them from their child. The second element of the claim was that the Commissioner applied a blanket policy regarding the (non-) provision of appropriate adult support to 17 year-olds and that this constituted a fetter of discretion and hence was unlawful. However the primary challenge – and that upon which the judgment of Lord Justice Moses was based - was against the Home Secretary for failing to exercise her power to amend Code C to extend the special protections to 17 year olds.

In light of the decision on the claim against the Home Secretary (see below), it was held by the Court that the claims against the Commissioner of Police did not warrant separate consideration and that the Commissioner was not to be blamed for following the letter of Code C; it was the Code itself, and the Home Secretary’s failure to amend it, that was the principal object of concern. No relief was therefore granted against the Commissioner for the Police, in recognition, perhaps, that the purpose of the challenge was strategic: to secure the amendment of PACE.

3. THE LEGAL ISSUES

The central question in the case was the legality of treating 17 year olds as adults when arrested, questioned and detained in police custody, and specifically the exclusion from the provisions within PACE Code C. The Home Secretary has the power to amend the PACE
Codes of Practice (with the approval of both House of Parliament) and in HC she accepted that she could exercise her discretion to alter the Code in order to bring 17 year olds within the definition of juveniles for the purpose of the child-specific protections, even if the equivalent statutory provisions did not so extend. However, the Secretary of State did not accept that she was legally obliged to make such amendments.

There were two principal, interlinking strands to the claimant’s argument. The first centred on establishing that children as a class ought to be treated differently from adults when in police detention: that the power imbalance between children and the police, and children’s vulnerability and lower levels of capacity, necessitate the additional support provided under PACE Code C. The Court drew extensively on dicta from previous cases (including V v United Kingdom, R (on the application of R) v Durham Constabulary, Camberwell Green and McGowan) that have consistently emphasised over the course of 15 years the need for children to be given extra protection throughout criminal justice processes. For the High Court in HC, these authorities meant that the requirement for special treatment for children was beyond doubt.

The second aspect of the argument – and the crux of the case - was that the Home Secretary was wrong to define a child for these purposes as a person under 17 years old. The

---

53 These two strands were merged in the judgment. The claimant’s arguments were supported by evidence presented to the court by the parents of two 17 year-old boys who had committed suicide after being arrested, and by the Howard League for Penal Reform and the Coram Children’s Centre who both submitted interventions.

54 Above n 3 (un-adapted proceedings in the Crown court can breach Article 6 ECHR if the child’s ability to participate effectively is restricted).

55 Above n 20 (consent was not required prior to the issuing of a final warning even though it is required for an adult caution).

56 R (on the application of D) v Camberwell Green Youth Court [2005] UKHL 4, [2005] 1 WLR 393 (the availability of special measures to vulnerable witnesses under the Youth Justice and Criminal Evidence Act 1999, which do not extend to child defendants, does not create an inequality of arms sufficient to breach Article 6 ECHR).

57 Above n 7 (recognition of the special requirements for children regarding legal representation).

difficulty with defining any age boundary, as pointed out by Lord Justice Moses, is that empirically there will be some 17 year olds who are ‘far better able to face detention and questioning than those much older’: age provides no definite answer as to capacity, vulnerability or power; although it is, of course, one indicator (and one which is particularly strong the younger the child is). Nonetheless, throughout domestic and international law a child is defined as a person under the age of 18. Domestically, most legislation relating to youth justice (as explained above), as well as other key children law provisions (including the Children Acts 1989 and 2004), treats as a child a person under 18. Similarly, in the international context, Article 1 of the UN Convention on the Rights of the Child defines a child as a person under the age of 18. A case was therefore made on the grounds of intra – and extra – jurisdictional consistency; an argument further supported by non-judicial domestic opinion including from HM Inspectorates of Prisons and Constabulary, the Children’s Commissioner, and the National Appropriate Adult Network. Undoubtedly, the evidence provided to the court in support of (1) giving children special protection in police detention, and (2) bringing 17 year olds within the definition of a child, was considerable.

In response to the claimant’s arguments, and counter to most of the evidence presented to the Court, the Home Secretary put forward five reasons for not extending the child-specific PACE protections to 17 year olds. These reasons were mostly founded on two assertions: (i) that amendments to PACE were unnecessary because of the existence of other rights available more widely to suspected offenders and (ii) the special protections could, in most circumstances, be provided to a 17 year old on a discretionary basis in any event. For

59 Unless the law grants majority at an earlier age. The claimant’s argued that the fact that English law confers certain responsibilities on the child at earlier ages does not change the fact that 18 is the age of majority and hence the protections of the UNCRC should apply to all up to the age of 18. This must be right or else it would negate the purpose of the UNCRC if a state could simply legislate on an ad hoc basis to remove the rights of the child in specific contexts by purportedly ‘granting’ majority.

60 A term used by Barry Goldson in the context of the minimum age of criminal responsibility: B. Goldson, ’Counterblast: “Difficult to Understand or to Defend”: A Reasoned Case for Raising the Age of Criminal Responsibility’ (2009) 48 The Howard Journal of Criminal Justice 514.
example, it was argued that a 17 year old would ordinarily be able to have the person responsible for her welfare informed of her arrest (under section 56 PACE); that there was nothing to prevent the police from contacting such a person if they felt the child was vulnerable and needed additional support (and nor were the police prohibited from exercising their discretion to appoint an appropriate adult), the provision of an appropriate adult would lengthen the time the child was in custody which, though acceptable for very young children who ‘clearly need assistance from an appropriate adults’, was not acceptable for an older child; and a solicitor was sufficient to protect the child’s interests. These arguments were given short shrift by Lord Justice Moses for failing to address what he saw as the key point: ‘the question is whether 17 year old detainees should be afforded greater protection than adults’; it is not, he said, ‘answered by merely drawing attention to the safeguards in existence for all adults’. The Home Secretary failed to address the power imbalance between the police and children that arises on account of age, and why therefore, the Code should provide for extra protection for 17 year olds just as it does for all other children. Of the five arguments put forward by the Home Secretary only one – the increased financial cost

---

61 In some authorities, for example Milton Keynes and Somerset, Derbyshire and Greater Manchester, 17 year olds had been (automatically) offered appropriate adult support; others only exercised the discretion if the child was deemed to fall within the criteria of mentally disordered or vulnerable and thus entitled to an appropriate adult under para [3.15] of Code C (for example, see the comments made by Jacqui Cheer, the acting Chief Constable of Cleveland Police on the practice in her Authority, made at a Howard League event on Children and Policing on 10th December 2012, Aston University, Birmingham; and also the Metropolitan Police who the claimants argued applied a blanket policy not to provide 17 year olds with an appropriate adult). The claimant pointed out that nowhere in PACE or in the accompanying guidance does the Home Secretary make clear that the police can do so for someone who is not a juvenile. Certainly, the extent to which this discretion existed in relation also to appropriate adult provision was not exercised by the Metropolitan police nor by many other forces.


63 Para [65].
of appropriate adult support⁶⁴ - was accepted by Lord Justice Moses: though even here, not without criticism.⁶⁵

The court concluded, therefore, that the Secretary of State ‘stands alone in thinking there are good reasons for distinguishing between 17 year olds and others’ and had failed to provide any reason that was sufficient to rebut the ‘substantial body of domestic opinion as to the need not to treat [17 year olds] as adults’⁶⁶ and explain ‘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’.⁶⁷ Nonetheless, this was not sufficient to allow the Court to reach a conclusion that the decision was irrational under the common law principles of judicial review – the first ground of claim brought against the Secretary of State. As noted above, the Criminal Justice Act 1991 amended much of the earlier criminal justice legislation so that a juvenile was defined as a person under the age of 18, thus extending to 17 year olds many of the child-specific protections previously available only to those aged 16 and under. However, the Criminal Justice Act 1991 (Commencement Order No 3 Order) 1992 (SI 1992/331) left the definition of a young person for the purposes of section 34 of the Children and Young Persons Act (and thus the requirement that the person responsible for the child’s welfare be informed of her arrest) as a person under 17,⁶⁸ and section 37(15) of the Police and Criminal Evidence Act (PACE) 1984 similarly provides that an ‘arrested juvenile’ is one

---

⁶⁴ The Secretary of State estimated that the additional cost would be £19.1 million but these estimates were disputed by the National Appropriate Adult Network (NAAN) because some services already provide 17 year olds with appropriate adult support, and much would be provided by the parent or carer of the child (thus resulting in no increased cost) or by the volunteers members of NAAN.

⁶⁵ Not least because of the existence of a Home Office document which said 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’. This prompted the scathing response from Lord Justice Moses that: ‘I suppose it renews faith in our democratic institutions that while it was feared that the figures would not stand forensic scrutiny of a Parliamentary Committee they can at least be offered to the court’: at para [73].

⁶⁶ At para [51] and [52], where it was noted that inspections of police custody ‘repeatedly comment that appropriate adults should be available to support, within undue delay, juveniles aged 17 in custody’. See also the Joint Inspection, above n 8 at paras [2.13]ff.

⁶⁷ Para [70]. Lord Justice Moses was highly critical of the Home Secretary noting that ‘. . . no one outside of 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’: para [56].

⁶⁸ An amendment to s 31 of the 1933 Act also proposed in sched 8 to like effect was not brought into force.
who ‘appears to be under the age of 17’. The exclusion of these provisions was not, therefore, a matter of mere oversight by Parliament. As noted in the judgment, 17 year olds have continued to be distinguished from other children in post-1991 legislation, including in the Crime and Disorder Act 1998,\textsuperscript{69} the Criminal Justice and Court Services Act 2000, the Criminal Justice Act 2003 and even more recently in LASPO.\textsuperscript{70} These provisions, said Lord Justice Moses, made ‘... 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 treated as adults’.\textsuperscript{71} Thus, Code C of PACE and the definition of a juvenile therein was not, in itself, ultra vires the parent legislation (not a claim that was in any event made) and nor, therefore, was the court willing to conclude that the Home Secretary had acted irrationally; to do so would ‘tend to suggest that the court takes the same view of the legislation’. Constitutionally, this would be an unacceptable position for a UK court to take of a democratically elected legislature.\textsuperscript{72}

However, HC was successful on the second ground: that his Article 8 right to respect for his family and private life was unlawfully restricted. In reaching this decision Lord Justice Moses drew on the Supreme Court decision in \textit{ZH (Tanzania) v Secretary of state for the Home Department}\textsuperscript{73} and held that in determining the application of Article 8, and particularly the proportionality balance required by Article 8(2), the court must interpret the

\textsuperscript{69} An argument was made by HC that it was possible to read the Crime and Disorder Act 1998 in a way that extended appropriate adult support to 17 year olds if the obligation on local authorities to provide youth justice services, including ‘the provision of persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by the police officers’ is read alongside the definition of a ‘children and young people’ who, in the Act, are those under 18.

\textsuperscript{70} In relation to youth cautions and youth conditional cautions under s 66A-H and s 3(7) of the Bail Act, preserved by sched 11 of LASPO.

\textsuperscript{71} Para [18].

\textsuperscript{72} The court did not explicitly say it was not irrational however. On the approach of the courts to irrationality and elected legislatures in the devolution context, see \textit{AXA General Insurance Ltd v HM Advocate} [2011] UKSC 46, [2011] 1 AC 868.

\textsuperscript{73} [2011] UKSC 4; [2011] 2 AC 166
rights in line with the UNCRC; thus, the child’s best interests must be a primary consideration. Therefore, if HC’s Article 8 right was found to be engaged then, given the definition of a child in Article 1 of UNCRC is a person under the age of 18, the best interests of 17 year olds becomes a primary consideration in considering how the right applies in the context of police detention. The court held that 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 the child and authority’. Once accepted, it became impossible to justify the treatment of a 17 year old as an adult because doing so fails to demonstrate that the child’s best interests have been treated as a primary consideration.

Given that HC was successful on Article 8 grounds, the court did not consider it necessary to decide on the Article 6 argument. Nonetheless, it was clear from Lord Justice Moses’ obiter dicta comments that compliance with Article 6 requires a youth justice system that provides all children with special protection during pre-charge questioning and detention. The argument put forward by the Secretary of State - that Article 6 only applies from the point at which a person is charged and therefore not during the earlier stages of questioning – was not accepted by the Lord Justice Moses. In coming to this conclusion, he drew on Lord Bingham’s reasoning in *R (on the application of R) v Durham Constabulary*. Although Lord Bingham had expressed some doubt as to whether Article 6 applied prior to charge, he nonetheless emphasised the importance of the right to a fair trial during the preliminary and preparatory investigations. It was this dicta, along with that in the later European Court of

---

74 Para [85].
75 Above n 20.
76 See below n 93 and surrounding text.
Human Rights decision in *Panovitz v Cyprus*, that Lord Justice Moses used to dismiss the Secretary of State’s argument. This approach is also supported by the decision in *Salduz v Turkey* that Article 6 becomes necessary at the point when a person is a suspect and is interrogated by the police. Although this leaves doubt about whether Article 6 applies outside of police custody, it is consistent with the claim that it applies throughout the pre-charge processes within the police station. Lord Justice Moses went on to point to cases such as *V v United Kingdom* to demonstrate that Article 6 must be adapted for children in order to take account of their age, vulnerabilities and capacities. Therefore, although the Court did not decide on Article 6, it seems that a failure to provide all children with special treatment at the pre-trial stage could constitute a breach of the fair trial requirements as well as Article 8.

The Home Secretary decided not to appeal the decision and instead the Home Office has revised Codes C and H so that the parental notification and appropriate adult duties apply to 17 year olds. However, and contrary to the spirit of the decision according to some children’s rights campaigners, the Government has resisted extending the overnight detention provisions (the local authority accommodation duty) to 17 year olds, claiming that this would require alterations to primary legislation.

4. DISCUSSION

---

77 (Application No. 4268/04) 11 December [2008] 27 BHRC 464, at para [67]: ‘the right of an accused minor to effective participation in his or her criminal trial requires that he be dealt 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 sympathies of the court towards the applicant’s claim were evident from the outset of the judgment when Lord Justice Moses noted the irony that HC was prohibited under the Civil Procedure Rules\textsuperscript{81} from bringing the legal challenge \textit{without} the assistance of his mother (or that of another adult) and yet was ‘denied the unqualified right to her help when arrested.’\textsuperscript{82} The outcome was, therefore, not surprising and once the relevance of the UN Convention was established (through the vehicle of the ECHR), with its definition of a child in Article 1, it was almost impossible to argue that 17 year olds should be treated as adults. The decision and the reasoning provide robust support for the principle that children in the criminal justice system require additional support and that this should extend until 18, the age of majority.

One particularly interesting aspect of the case was the choice by the court to find for HC only on the basis of Article 8 ECHR and not also (or instead) on Article 6 ECHR grounds; some of the possible consequences of doing so are discussed here. However, it should be noted that throughout the reasoning the values of Article 6 infused the discussion of Article 8 (specifically relating to the best interests of children) and of course, there were strong obiter comments on Article 6 as well. What follows should not, therefore, be taken to suggest that the Court was not alive to the importance of the child’s Article 6 rights; clearly these were of utmost concern.

\textit{Prioritising Children’s rights}

Article 8 fulfilled two main purposes in the judgment: the first was to emphasise the role of parents\textsuperscript{83} when children are in conflict with the law (see below) and the second was to provide the vehicle to elevate the relevance of the child’s best interests. Lord Justice Moses

\textsuperscript{81} CPR 21.1(2)(b) and 22.2(2): see para [5].
\textsuperscript{82} Para [2].
\textsuperscript{83} I use ‘parents’ to capture all of those people who are ‘responsible for the child’s welfare’ as per the provisions in the Code.
emphasised early on in the judgment that ‘the overriding principle governing the treatment of 17 year olds detainees, if they were regarded as children, would be that their best interests would be a primary consideration’. Given there is no general statutory duty on the Home Secretary to consider the best interests of children in her actions and decision-making, the court relied on jurisprudential developments – most notably the Supreme Court’s decision in ZH (Tanzania) – in order to apply Article 3 of the UNCRC (that the best interests of children is a primary consideration) to the proportionality balancing test under Article 8 ECHR. Thus, Article 8 provided the legal mechanism for the court to emphasise the child’s status qua child (her best interests and her identity and relationship vis-à-vis her parents/family), rather than as suspect (her fair trial rights and her identity and relationship vis-à-vis the state).

This has not been the approach taken in other, earlier, leading cases concerning the rights of children in criminal justice processes. In V v United Kingdom for example, decided by the European Court of Human Rights in 1999, the child’s status as offender was prominent, and the child’s welfare was relevant to the extent that it impacted upon the child’s ability to participate effectively in her trial, but was not a primary concern of the Court per se. The difference can be seen in how the respective Courts relied on different provisions of the UN Convention. In V, the European Court of Human Rights primarily used Article 40 UNCRC (the rights which specifically protect the child who is suspected or accused of infringing the law) to interpret Article 6 ECHR and made little reference to Article 3 UNCRC, the best interests provision. In contrast, in HC, the High Court relied on Articles 3, 84

Para [30].
85 Neither s 11 of the Children Act 2004 (which places a duty on various public authorities to have regard to the need to safeguard and promote the welfare of children in the exercise of their duties) nor section 44(1) of the Children & Young Persons Act 1933 (which requires courts to have regard to the child’s welfare) apply to the Home Secretary. The similar obligation in section 55 of the Borders and Citizenship Act 2009 does extend to the Secretary of State but only in relation to immigration, asylum or nationality.
86 See also, in the criminal justice context Rule 5 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).
87 Above n 3.
5 and 9 UNCRC to establish the centrality of the parental role, and where Article 40 was cited it was principally in relation to Article 40(2)(b); the provision that requires that parents be told of their child’s arrest. Of course, the difference in emphasis between HC and V regarding Articles 6 and 8 ECHR and the best interests of the child, could be explained by the centrality of Article 6 to the trial process and the ambiguity that sometimes emerges in judicial statements regarding its applicability to proceedings that occur pre-charge. Further, being detained and questioned by the police marks the threshold of the criminal law: the transition for children from the private sphere to the public sphere of criminal justice. And at least one of the duties in HC – the parental notification duty – has little direct relevance to Article 6. Nonetheless, the overwhelming tone of the reasoning in HC was strongly focused on the child qua child, with great emphasis placed on the child-parent relationship. Although this may be a case where the court was choosing to focus on the parents’ rights as well as the child, it may also be indicative of a wider shift towards a less punitive, more child-focused youth justice system: a shift that is also evident in (some) legislative and policy developments.

The criminal justice system is a long way from being compatible with the UN CRC but the influence of the Convention is surely being felt in the growing emphasis placed on the child qua child as a primary status in youth justice, countering the ‘adultification’ of children that has been dominant since the late 1990s.

**Article 8, Article 6 and Appropriate Adults**

---

88 Article 5 protects the rights and responsibilities of parents towards their children and Article 9 provides that parents and child should not be separated except in limited, defined circumstances.

89 See below at n 93 and surrounding text.

90 See for example, the extension of looked after status to children on remand, a more flexible system of diversion and a huge drop in the rates of custodial sentences for the under 18s (see K. Hollingsworth, (2012) above n 46). This should not be overstated though and the proposed reforms to anti-social behaviour for example, alter little. For a critique of the latter, see K. J. Brown, ‘Replacing the ASBO with the injunction to prevent nuisance and annoyance: a plea for legislative scrutiny and amendment’ [2013] Criminal Law Review 623.

Relying on Article 8 for the parental notification duty was undoubtedly necessary; it was the relationship between the parent and the child, and the more general restriction of the child’s right to a private life, which was key to establishing the obligation. But the same is not true of the appropriate adult duty. At least one way to view the role of the appropriate adult is as a mechanism to protect the child’s rights as suspect to help prevent wrongful conviction. To the extent that Article 6 includes the right to an appropriate adult, it too should be interpreted in line with the UN Convention on the Rights of the Child so that it extends to all children.\textsuperscript{92}

Using Article 6 as the primary mechanism to do this could, therefore, have achieved the same outcome.

That the case was not so decided may be indicative of the uncertain status of Article 6 in the pre-charge context.\textsuperscript{93} It may also represent reluctance on the part of the Court to specify the exact content of Article 6 for children being questioned and detained by the Police. Although the judgment was replete with explanations of what was in the child’s best interests when detained by the police, including parental notification and appropriate adult support to mitigate vulnerability, it was a \textit{procedural} argument (that the best interests of children must demonstrably have been treated as a primary consideration) rather than the \textit{substance} (what is in the best interest of children) that formed the basis of the reasoning.\textsuperscript{94}

The Court thus used the concept of best interests primarily as a marker for differential treatment of children and adults in the criminal justice system rather than as the basis for specific protections.

The Court’s reliance on Article 8 and the best interests requirement, rather than Article 6, means that future compatibility with the decision requires only that children up to

\textsuperscript{92} In particular, Articles 3, 12 and 40. See for example, the concurring opinion of Mr N Bratza in \textit{V v United Kingdom} above n 3 at p 37.

\textsuperscript{93} See above, n 20 at para [11] and the discussion in \textit{HC} at para [91]. Nb Lord Bingham’s comments on the doubtful application of Article 6 pre-charge were obiter only.

\textsuperscript{94} See for example, para [97].
the age of 18 be treated differently from adults; this would be sufficient to demonstrate that their best interests have been accounted for. The way is therefore open for the Government to differentiate between the support that older and younger children receive, provided even older children are treated differently from adults.\(^95\) This means that the rights currently afforded to older children to mitigate their lack of power, capacity and increased vulnerability in the criminal processes, could be diminished and, provided there was still a difference with adults, it would not necessarily fall foul – strictly speaking – with the letter (if not the spirit) of this judgment. Had the Court focused its reasoning on the demands of Article 6 then the content of the rights would have to be more clearly articulated and any attempt – in secondary or primary legislation – to diminish those rights would risk being struck down or being the subject of a declaration of compatibility – at least whilst the Human Rights Act remains on the statute books.\(^96\)

*Parents as Appropriate Adults*

One of the few shortcomings with the decision was the presumption made by the Court that parents are best placed to fulfil the role of appropriate adult.\(^97\) Whether the decision to use Article 8 shaped the Court’s description of the role of appropriate adult, or whether the Court’s view of the role of the appropriate adult determined the focus on Article 8 is unclear. Regardless, some caution should be exercised before basing the requirement for an appropriate adult on the presumption that it is parents who should fulfil the role.

In Code C of PACE, three different categories of persons are authorised to act as an appropriate adult for juveniles: (a) the parent or guardian of the suspected child, (b) a social worker, or (c) failing these, a person aged 18 or over who is not a police officer or employed

\(^{95}\) This possibility was explicitly left open by Lord Justice Moses, at Para [97].

\(^{96}\) If the Conservative party is elected as a majority Government in 2015 they have pledged to repeal the HRA. See [http://www.theguardian.com/law/2013/sep/30/conservatives-scrap-human-rights-act](http://www.theguardian.com/law/2013/sep/30/conservatives-scrap-human-rights-act) (last accessed 20th December 2013).

\(^{97}\) See para [69]; also, for example, see paras [63] and [94].
by the police. Littlechild has suggested that the ordering in the Code is preferential and was derived from the prioritisation of the parent as appropriate adult in the 1981 Royal Commission for Criminal Procedure Report. Furthermore, at the time he was writing – 1998 - this also reflected police practice. More recently, the YJB also stated that the parent/carer is the preferred choice for appropriate adult, and only if the parent is unavailable should the YOT provide an alternative. In contrast, in 2008, the Government’s review of PACE recommended the complete professionalization of the service and that parents and guardians should no longer be able to act in that capacity. There are a number of reasons why the view of the 2008 Labour Government is to be preferred over that of the Court in HC.

First, not all children have parents who are able or willing to act as an appropriate adult and there is some evidence that the use of parents as appropriate adults has declined over the last 15 years since the establishment of a co-ordinated volunteer appropriate adult service and the inclusion in the Crime and Disorder Act 1998 of a duty on local authorities to ensure the provision of persons to act as appropriate adults. In Bucke and Brown’s 1997 study, parents acted as appropriate adult in 59 per cent of cases, other relatives in 8 per cent of cases, social workers in 23 per cent of cases, with ‘others’ in 5 per cent, a member of the

98 Section 63B(5A)(10). Solicitors who are present at the police station qua solicitor are also specifically prohibited from acting as an appropriate adult Code C para 1F. See R. G. Parry, ‘Protecting the Juvenile Suspect: What Exactly Is the Appropriate Adult Supposed to Do?’ (2006) 18 Child and Family Law Quarterly 373 at p 389 and Littlechild, above n 19 at p 541 on the difference between the role of the lawyer and the appropriate adult.  
99 Above n 6 - the second strand of the underpinning rationale for appropriate adults was that it protects parental rights to be informed and be present when their child is questioned: see B. Littlechild, ‘Appropriate Adult Services’ (1998) Childright 8.  
100 YJB, National Standards for Youth Justice 2004 (Youth Justice Board, 2004) at paras [2.3] and [2.7].  
appropriate adult panel in 1 per cent and 4 per cent unknown.\textsuperscript{104} In contrast, in 2004 Pierpoint found that YOT members were used 54 per cent of the time, and volunteers 23 per cent. Presumably parents or relatives were used in most of the remaining cases.\textsuperscript{105} These figures, although not necessarily reflective of national practice, suggest that the presumptions underpinning the decision in HC - that parents do act as appropriate adults -may not reflect the experiences of many children in police detention. A disproportionate number of children in the criminal justice system are also within the care system, or may be living apart from their parents,\textsuperscript{106} or may not enjoy the supportive type of relationship that Lord Justice Moses envisages.\textsuperscript{107} Moreover, the child may not want his parents informed, for example, if the offence of which he is accused is one which causes him to feel particular shame, or where disclosing to the parents alerts them to his involvement in other behaviour, for example sexual activity) that they do not know their child is involved in.

Secondly, it is not only the prevalence or otherwise of parents acting as appropriate adults which may cause us to question the desirability of using Article 8 as the basis for appropriate adult provision; there is also evidence to suggest that parents are not always best placed to fulfil the role. This depends, of course, on what the proper role of the appropriate adult is. Code C states that the role includes the provision of ‘advice and assistance’\textsuperscript{108} and that during interview appropriate adults ‘are not expected to act simply as an observer; and the purpose of their presence is to: advise the person being interviewed; observe whether the interview is being conducted properly and fairly; facilitate communication with the person

\textsuperscript{105} Pierpoint, above n 32 at p 36. Pierpoint’s study was conducted after the introduction of the requirement on local authorities to provide appropriate adult services under the CDA. On the capabilities required of an appropriate adult, see J. Williams, ‘The Inappropriate Adult’, (2000) 22 \textit{Journal of Social Welfare and Family Law} 43 at p 51.
\textsuperscript{106} Note 1B in Code C says: ‘If a juvenile’s parent is estranged from the juvenile, they should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to their presence’.
\textsuperscript{107} The only time Moses LJ suggested it may not be in the child’s best interest for the parent to be informed (and thus act as appropriate adult) was where the parent was also involved in offending.
\textsuperscript{108} See Code C, 2013, para [3.18].
being interviewed’. But commentators have been critical of the role as set out in the Code, arguing that it is ambiguous. Pierpoint for example, notes that it is unclear whether the ‘appropriate adult should advise the child on the grounds of welfare and/or legal rights’; ‘properly and fairly’ is not defined; and finally, it is uncertain whether the appropriate adult should facilitate communication to aid the child’s understanding or as part of a wider crime control agenda to assist the police. The role is thus seen to inconsistently contain ‘elements of due process, crime control, welfare and crime prevention’. Successive governments have justified the role of appropriate adults as a means to secure better evidence and to provide the support to children to ‘explain, face up to and take responsibility for their behaviour’. If this is a legitimate role for the appropriate adult, then parents may well be in the best position to fulfil it, especially given the wider parental ‘responsibilisation’ duties that have become especially prominent in the youth justice context since 1998. There is some evidence that Lord Justice Moses at least partially supports this version of the role of appropriate adult. However, as evident elsewhere in judgment - and supported from a principled and policy perspective - the appropriate adult should protect the child’s interests, not the State’s: the question then is which interests of the child’s? If it is

112 Pierpoint (2011), above n 101. On the difficulties for appropriate adults themselves on the lack of clarity in the role see the results of Pierpoint’s study, reported in 2011
113 Pierpoint (2011) above n 101, citing her earlier work.
114 Home Office, Youth Justice: The Statutory Principal Aim of Preventing Offending by Children and Young People (Home Office, 1998) at para [15.4].
116 See at para [94]: Lord Justice Moses stated that ‘[m]any 17 year olds do not believe they need any guidance at all. They demonstrate all the youthful arrogance of which may 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’
117 See the 2011 Joint Inspection, above n 8.
welfare-based interests, parents may be best placed to fulfil the role. However, if the appropriate adult’s role is to help protect the child’s legal rights *qua* suspect and to shield him from the coercive force of the state then parents may be far less suitable. There are at least three reasons for this. First, empirical research suggests that parents are unlikely to intervene in police interviews and instead often take a passive role. There is a danger that such passivity fails adequately to protect the child against (potentially) aggressive, confusing or coercive police questioning. However, this may be a problem common to all appropriate adults, including those independently appointed by the local authority. The difference, however, is that appointed appropriate adults can be better trained to more assertively protect children’s rights, whereas parents cannot. Secondly, the young person may view his parent as an authority figure, with whom he is unable to confide or seek reassurance; and not the supportive figure that Lord Justice Moses envisages. In *R v Blake* it was held that the appropriate adult cannot be a person with whom the young person has no empathy, and the appropriate adult must be able to develop a rapport with the young person, but such a rapport does not necessarily exist between a child and his parent. Furthermore, parents have conflicting roles when in the police station which may serve to diminish their ability to protect the interests of the child. Evans’ research provides examples of parents ‘siding’ with the police and being less than supportive of their child, due to the pre-existing

---

118 The PACE code specifically in para [3.15] recognises that AA ‘may or may not be’ the person responsible for welfare’.  
119 For an analysis of Article 6 and the appropriate adult, see Pierpoint (2000), above n 102.  
120 Evans found that in 74.8 per cent of cases, parents remained passive (R. Evans, *The Conduct of Police Interviews with Juveniles* (HMSO, 1993)). Bucke and Brown, above n 104 suggest that the lack of guidance about the role of the appropriate adult contributes to the likelihood that the appropriate adult will take a passive role.  
121 Joint Inspection (2011), above n 8.  
122 As per Mann LJ [1989] 1 WLR 432.  
123 See also Dixon, above n 19 and C. Palmer and M. Hart *A Pace in the Right Direction?* (University of Sheffield, 1996). Bucke and Brown, above n 104 found that only 26 per cent of family members were co-operative/supportive towards the suspect compared with 49 per cent who were co-operative/supportive towards the police.  
124 Evans, above n 120 and Littlechild, above n 19. Also see the examples given by Bucke and Brown, above n 104 at p 11 and the discussion in Williams, above n 105 at p 53. On the role of parents as appropriate adult, see *R v Blake* [1989] 1 WLR 432 and *R v Jefferson and Others* [1994] All ER 270.
relationship with the child and their own emotional reaction to the child’s suspected involvement in offending behaviour.

There are also potential negative consequences for parents who *do* fulfil the role of appropriate adult in a way that better protects the child’s legal rights. For example, where the parent intervenes and insists on legal representation for the child, or advises the child to remain silent until a legal advisor is present, research has suggested that the police may perceive the parent as ‘uncooperative’ and not acting ‘responsibly’ towards the child.\(^{125}\) Where this is noted on the police file, it could influence later contact between the YOT and the family. This possible conflict has been heightened by the increased emphasis on parental responsibility since 1998, and it is not inconceivable that a YOT officer could use information relating to the parent’s demeanour and ‘cooperation’ at the police station to inform the recommendation (or otherwise) of a parenting order should the child be charged and appear before a court. Parents are thus placed in a difficult position and are expected to act ‘responsibly’ towards their child (i.e. go along with the police) whilst also providing a pivotal role in protecting the child’s rights at the police station.\(^{126}\) It is for these reasons that a number of commentators have argued that volunteers are to be preferred over both parents.\(^{127}\)

Therefore, in contrast to the prevailing view in *HC*, local authority appointments or volunteers rather than parents may be better placed to act as appropriate adults because they are more likely to have received specific training, they will be independent of the police, they

---

\(^{125}\) For example, Lee found that parents who actively fulfilled the appropriate adult role and who were prepared to interrupt the police were recorded as ‘uncooperative’ on the police file: M Lee, ‘Pre-Court Diversion and Youth Justice’ in L. Noaks, M. Levi and M. Maguire, (eds) *Contemporary Issues in Criminology*, (Cardiff University Press, 1995) at p 317.

\(^{126}\) Williams, above n 110 at 919, ‘The Act [the CDA] confuses the desire to reinforce parental responsibility and the transient role of the appropriate adult’.

\(^{127}\) Williams, above n 110 at p 919, Pierpoint (2004), above n 32, and ‘Reconstructing the Role of the Appropriate Adult in England and Wales’ (2006) 6 *Criminology and Criminal Justice* 219 and Parry, above n 98. Numerous commentators had earlier highlighted the difficulties for parents and social workers acting as appropriate adults. For example, see Dixon, above n 19.
can provide the child with information about other services, and research shows they are more likely to take a child-centred approach (based either on due process or welfare), rather than a crime control approach.\textsuperscript{128} The allocation of a volunteer or local authority appointed appropriate adult need not exclude the presence of parents during the processes:\textsuperscript{129} Parry notes that parents retain a ‘moral obligation’ to be present during questioning even if they do not act as an appropriate adult.\textsuperscript{130} Indeed, as noted above, parents are better placed in many instances to protect the \textit{needs} of the child, particularly given the poor information flow between YOTs and appropriate adults which mean that non-parent appropriate adults can be ill-prepared to fulfil any welfare function that may be expected of them.\textsuperscript{131} Having a parent \textit{and} an appropriate adult present, as suggested by the last Government in 2008,\textsuperscript{132} may be the best way to secure the child’s welfare \textit{and} his criminal justice rights.

The above is not, therefore, meant to undermine the importance of the parent-child relationship or the desirability of parents being present when children are detained and questioned by the police, where this is in the child’s best interests.\textsuperscript{133} But given the limitations that face parents in fulfilling some aspects of the appropriate adult role, then the two functions (protecting the child’s best interests and protecting her rights to a fair trial) and the ECHR rights upon which they are based (Articles 8 and 6 respectively) should be decoupled. That is, a better outcome in HC would have been for the court to clearly articulate that the proper basis for \textit{appropriate adult} support is Article 6 not Article 8.

\textsuperscript{128} Compared to parents, for example (Pierpoint (2006) ibid). However, as Pierpoint notes, even though volunteers may attempt to take a welfare approach, they are still operating within an overall crime control and managerialist framework.

\textsuperscript{129} See also 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)’.

\textsuperscript{130} Parry, above n 98.

\textsuperscript{131} See Joint Inspection (2011) above n 8 at p 8.

\textsuperscript{132} Above n 101.

\textsuperscript{133} And indeed, parents will be required to provide appropriate consent at various stages such as taking fingerprints. See Code D, para [2.12].
Concluding comments

The decision in HC has been widely welcomed and has helped to fill a lacuna in the law in relation to the protection of 17 year olds in the criminal justice system. As noted above, the Government have revised Code C in order to reflect the outcome in HC. However, the revisions have been subject to considerable criticism from children’s rights organisations for making only the minimum changes necessary to secure compliance with the decision. The Government has neither committed to amending the underpinning primary legislation nor have they extended the local authority accommodation duty to 17 year olds. The failure to do so is unfortunate.\textsuperscript{134}

Nonetheless, the decision has resulted in some important changes in the PACE codes of practice and draws a clear bright-line between the rights of all children and the rights of adults in criminal justice processes. However, the reasoning in HC leaves the rights of children in the police station attached to their status as child, and to the parent-child relationship. Although this is likely to protect the child’s welfare, it may provide a less secure basis for securing the child’s rights as suspect. It also creates a legal fallacy that is not borne out by the empirical evidence in terms of who acts as appropriate adult and who acts best as appropriate adult. The decision could have been strengthened even further with a greater focus on Article 6 and precisely what this right requires for children arrested, detained and questioned by the Police.

\textsuperscript{134} Though this duty is rarely met even to those children to whom it is currently owed: see the findings of the Joint Inspection (above n 8 at p 9) where in two-thirds of the cases they reviewed where a child was charged and denied bail, no local authority accommodation was requested; and also the FOI request made by the Howard League: http://d19ylo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Publications/Overnight_detention_of_children_in_police_cells_2011.pdf