(at [4]; see also *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] I.C.R. 704), on the basis that age is not an unchanging or acquired attribute. Rather, age changes over time since it is a universal and temporal phenomenon. While this assumption is reasonable and well-recognised, the court concluded from this assumption that younger and older workers would benefit from the same laws over time, reducing the discriminatory impact of age-specific employment measures. However, there is increasing recognition that younger and older workers are unlikely to be subject to the same provisions over the course of their working lives as laws continue to change and evolve. Further, the same laws may affect generations differently due to the historical and cultural differences between age groups. By failing to engage with these critiques, the *Seldon* judgment relies on unstable assumptions that may serve to undermine the Court's reasoning.

The *Seldon* case suggests that employers will be able to justify an EJRA fairly readily, seeming to indicate that default retirement ages will remain a feature of UK employment law. However, anecdotal evidence appears to indicate that some employers are abandoning fixed retirement ages, instead dealing with employees on a case-by-case basis. Given the limited guidance provided by the *Seldon* judgment regarding when a fixed retirement age will be proportionate, it remains to be seen whether employers are willing to take the risk of continuing to rely on fixed retirement ages. The *Seldon* judgment leaves the law in an uncertain and ambiguous state, probably requiring further judicial intervention to resolve the Court's unfinished business.

ALYSIA BLACKHAM

## PARAMOUNTCY AND THE ECHR: A CONFLICT RESOLVED?

FOR over a decade now, questions have been raised as to the compatibility of the paramountcy of children's interests under the Children Act 1989 and the Adoption and Children Act 2002, as interpreted by the English courts, and the requirements of article 8 of the European Convention on Human Rights (ECHR).

As many commentators have argued, the approach to decision-making, the method of reasoning and potentially the result are fundamentally different under these laws. The English law requires the judge to start from the premise that the child's welfare will be the "sole consideration" and thus will determine the outcome (*J v C* [1970] A.C. 688), and consider the rights of other parties only as far as they contribute to promoting the child's best interests. On the other hand,

article 8 requires the judge first to evaluate the rights of the applicant (be that parent or child) to respect for family and private life, and then determine whether the infringement of this right has been in accordance with the law, pursued a legitimate aim, and was necessary in a democratic society.

While the English courts have defended the compatibility of the paramountcy principle using a misleadingly selective quote from the *Johansen v Norway* ((Application no. 17383/90) (1997) 23 E.H.R.R. 33) for a long time the European Court of Human Rights (ECtHR) did not engage in the debate, and had not ruled on the compatibility of the two legal schemes. That is, until the case of *YC v United Kingdom* ((Application no. 4547/10) [2012] E.C.H.R. 433) decided in March 2012.

The facts of this dispute are, sadly, like so many adoption cases that come before the courts. It involved a child, born in 2001, who was accommodated by the Local Authority in 2008 following several years of alcohol-fuelled violence between his parents, culminating in his injury during a dispute.

At the hearing for a full care order, the mother claimed that she had separated from the father, and requested an assessment of herself as a sole carer. While the Family Proceedings Court ordered the assessment, this was overruled by the County Court on appeal, on the ground that it would never have been able to provide sufficient evidence to justify the refusal of the care order or a decision to return the child, particularly given the real risk that the separation of the parents would not be maintained. The judge found that the only effect of postponing the care order would be to delay and jeopardise the process of finding an adoptive family for the child.

The mother complained to the ECtHR that this refusal violated her rights under the ECHR. The court accepted that there had been a serious interference with the mother's right to respect for family life under article 8, and went on to consider whether this interference was justified.

In doing so, the court found that the decision was in accordance with the law, and pursued the legitimate aim of protecting the best interests of the child. The only question that remained was whether it was "necessary in a democratic society" (i.e., in light of the case as a whole), whether the reasons adduced to justify the interference were "relevant and sufficient", and proportionate to the aim pursued.

In undertaking this analysis, the court reiterated that in cases concerning adoption, the best interests of the child are paramount. Furthermore, without any extensive evaluation, it held that "the considerations listed in section 1 of the 2002 Act … broadly reflect the various elements inherent in assessing the necessity under article 8 of

a measure placing a child for adoption" (at [35]). In light of this, and the margin of appreciation given to states, the court found that there had been no interference with the mother's Convention rights.

While this easy acceptance of the compatibility of English law with an article 8 analysis may disappoint some authors, this decision reflects the changing attitude of the ECtHR towards children's rights in public law, and shows that paramountcy, in the English sense, may not be so alien to the ECtHR as it once was.

There is nothing new in the ECtHR's use of the language of paramountcy in relation to children's rights, although its invocation in a case concerning English law causes significant confusion. However, on a closer reading of previous cases, it becomes clear that the ECtHR has traditionally used "paramount" to indicate "of particular importance" in balancing various rights, rather than the "sole consideration" and overriding guiding principle as in English law (e.g. *Kearns v France* (Application no. 35991/04) (2010) 50 E.H.R.R. 33).

Nevertheless, the court's jurisprudence has come a long way from the seminal public law case of *Johansen v Norway* in 1996. In that case a balancing process was undertaken, weighing the proportionality of the interference with parental rights against the protection of the child's interests, with these described as being able, "depending on their nature and seriousness", to override parental rights. In more recent child protection and adoption cases the court has been evolving away from the balancing process. In particular, in *R and H v United Kingdom* the ECtHR held that, "[i]f it is in the child's interests to be adopted, and if the chances of a successful adoption would be maximised by [the relevant order], then the interests of the biological parents must inevitably give way to that of the child", (Application no. 35348/06) (2012) 54 E.H.R.R. 2 at [77]). This decision, coupled with that of *YC v United Kingdom*, shows that the ECtHR is placing increasingly greater weight on children's rights in this area. Where a substantive decision is made on the alternative care of a child, the court no longer undertakes a vigorous analysis of the proportionality of a measure, nor conducts a strict balancing process, but instead treats the interference with parental rights as justified if it the measure has been deemed in the child's best interests.

This accords with the court's second claim, that the elements inherent in establishing "necessity" under article 8 are broadly reflected in section 1 of the Adoption and Children Act 2002. Where a section 1 analysis has deemed that the child's best interests require adoption, as in *R and H* and *YC*, this has been viewed as sufficient to override parental rights, without any further substantive analysis as to their content or weight by the ECtHR. While this also reflects the margin of appreciation given to domestic authorities in making such

determinations, it is nonetheless a significant step towards greater recognition of the decisive nature of children's interests under the ECHR.

However, caution must be exercised in reading too much into this decision. While it is true that as far as it relates to the substantive analysis of whether an adoption should be made, the English and ECtHR approaches have moved substantially closer together, it does not reflect the situation in all children's rights cases. In particular, cases that concern the procedural rights of parents to be adequately involved in the decision-making process or private family law disputes (both of which dominate the majority of complaints under article 8) remain unaffected by this decision and still retain the traditional "of particular importance" approach to children's rights. It appears that although the ECtHR has been happy to sideline parental rights when dealing with abuse and neglect of children and the need for alternative care, it is less likely to do so in questions relating to, for example, contact, residence and relocation (see *Neulinger and Shuruk v Switzerland* (Application no. 41615/07) (2012) 54 E.H.R.R. 31). It is in these areas that the differences in approach to decision-making between the English courts and the ECtHR are most prominent, and the contrasting starting points for judicial reasoning of greatest importance. This issue has yet to be grappled with by the ECtHR, or to any real effect by the English courts, and the academic objections to the compatibility of the different approaches remain in this context as cogent as ever.

Nevertheless, *YC v the United Kingdom* has importance for the increasing weight placed by the ECtHR on children's rights in public law cases. The European rulings now comply more fully with the requirement under the United Nations Convention on the Rights of the Child that where adoption is concerned, the child's interests should be paramount, rather than simply primary. The debate may not be over concerning paramountcy and the ECHR, but in relation to public law adoption cases at least, a reconciliation may be approaching.

CLAIRE SIMMONDS

## WHAT IS "INTELLECTUAL PROPERTY"?

THERE has been a dramatic, though largely unnoticed, shift in the function of the concept of intellectual property over the last forty or so years. In 1981, when Professor Cornish authored the first edition of his pioneering textbook on intellectual property, he spent a little time explaining that "intellectual property" was a category of distinct laws (copyright, patents, trade marks, designs etc.) that had developed somewhat by analogy with the general legal rules of property in