

SECTION 17

PROTECTION OF FAMILIES AND CHILDREN

Section 17

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 17?

You will need to consider s. 17 in assessing legislation, a policy or a program where it:

- affects the ability to form and maintain close or enduring personal relationships;
- recognises or fails to give legal recognition to close or enduring personal relationships;
- regulates the obligations of people towards each other as part of a family;
- regulates the obligations of parents and guardians towards children;
- provides for the separation and removal of children from parents or guardians or other adults responsible for their care;
- regulates family contact of prisoners or others in involuntary state care;
- regulates access to children removed from the family;
- creates a regime for giving children access to information about biological parents when the child has been adopted or born using artificial means such as sperm or egg donation;
- enables intervention orders to be granted between family members;

- deals with the division of estates on intestacy;
- affects the welfare of children within the family or in the care of public authorities, including in police detention.

DISCUSSION

Section 17 provides for protection of families and children.

Section 17(1): Protection of families

Meaning of 'family'

In international human rights law, 'family' is given a broad interpretation and includes a range of types of family.

As previously mentioned in the discussion on s. 13 (the right to privacy and reputation, including the right not to have one's family unlawfully or arbitrarily interfered with), the approach of the UN Human Rights Committee regarding 'family' is not to provide a definitive list of who is, or is not, included in the term, but to provide general guidance on the definition. Thus, the UN Human Rights Committee says:

'Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 [reflected in s. 13 of the Charter], this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.'¹³⁵

Similar considerations apply to articles 23 and 24 of the ICCPR, upon which s. 17 of the Charter is partly modelled. The meaning of 'family' in the ICCPR has evolved in the case law of the UN Human Rights Committee to reflect social developments that have occurred since the ICCPR commenced.¹³⁶ For example, the UN Committee has said that family is not confined by marriage.¹³⁷ A family may take various forms under this section and should be defined broadly. The question is likely to be whether there are sufficiently close and permanent personal relationships to constitute a family.

Scope

The Charter provides that families are to be protected by society and the state.

This provision is related to the right to privacy in s. 13 which prohibits (among other things) a public authority from unlawfully or arbitrarily interfering with a person's family.

The UN Human Rights Committee has interpreted the equivalent ICCPR provision to require countries to adopt legislative, administrative and other measures to protect families. In other words, protection refers at least to legal protection but may also extend beyond this to other forms of protection. There may be a rights violation if the absence of accommodation or financial support is in itself used to justify taking children from their families.¹³⁸

This right has commonly arisen in a number of contexts.

Removal of children from a family unit

Legislative provisions that provide for a child to be removed from a family unit will need to be considered in light of s. 17(1) but also s. 17(2) and s. 13 of the Charter.

While family unity is an important Charter value, in this context, as in others, different rights may overlap or conflict. Section 17(1) might be qualified by the right to protection in s. 17(2) (for example, when children are removed from a situation of family violence).

Public authorities should ensure that there are adequate procedural safeguards in place to ensure that any decision to remove a child from a family unit is both lawful and not arbitrary. The meaning of these terms is discussed in the discussion on s. 13 in these Charter Guidelines. For example, in the United Kingdom, social workers who have concerns about family welfare are required to inform parents in a clear and timely way of their concerns and to give parents the opportunity to make representations about any actions that may affect family unity (such as the removal of a child or the making of a negative report about the family).¹³⁹ Refer to the section on Measures to Achieve Compliance (on page 112) for more information.

135 *Human Rights Committee, General Comment 16* (Thirty-second session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [5].

136 *International Covenant on Civil and Political Rights*, opened for signature, ratification and accession (all ways in which a state can agree to be bound by a convention in international law) on 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

137 *Hendriks v. Netherlands*, Human Rights Committee, Communication No. 201/1985, UN Doc. CCPR/C/33/D/201/1985 (12 August 1988).

138 *Anufrijeva v. Southwark* [2004] QB 1124.

139 *Re C* [2002] EWCH (Fam) 1379.

Incarceration of parents

Sections 17(1) and 17(2) may also be engaged by the incarceration of a parent. Consideration needs to be given to ways of allowing the family relationship to continue within the prison context which may, in the case of infants, extend to being allowed to stay with their mothers in prison.¹⁴⁰ This will also be relevant in the context of an interstate transfer of a prisoner who is a parent.

Identity of a biological parent

The right to family life may extend to a person knowing the identity of his or her biological parent, for example, in situations where he or she has been adopted or born as a result of sperm or egg donation, but this right to know the identity of a biological parent must be weighed against privacy rights.¹⁴¹

Residency and family unity

Another key area in which this right has arisen in international law is residency rights and family unity. This should not arise under the Charter, however, as migration law is a matter of Commonwealth law.

Section 17(2): Protection of children

Section 17(2) recognises that children are entitled to special protection. It is premised on the recognition of children's vulnerability because of their age. A child is defined in s. 3 as being a person under 18 years of age.

Under the Charter, children are entitled to the enjoyment of all of the rights, as human beings (except where there is an eligibility criterion that they do not satisfy, for example the right to vote, under s. 18(2)). Section 17(2) is one of a few provisions in the Charter that grant special rights to children as opposed to children and adults generally. The Charter also confers special rights on children in ss. 23 and 25(3).

Scope

The UN Human Rights Committee has interpreted the equivalent ICCPR provision (article 24) to require countries to adopt special measures to protect children, in addition to the measures that are required to protect children and adults generally under the ICCPR. The best interests of the child should be taken into account as an important consideration in all actions affecting a child.

The purpose of the measures, according to the committee, is 'intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant'.¹⁴² In other words, public authorities should first seek to ensure that children's human rights outlined in the Charter are protected. This may require consideration of social or economic circumstances. For example, when examining a report from Canada, the UN Human Rights Committee noted its concern with the way in which the National Child Benefit Supplement for low-income families had been implemented in some Canadian provinces. It was concerned that some children were being unfairly denied benefits under the scheme. The committee noted that the equivalent ICCPR right (article 24) may be invoked in this situation because '... the very high poverty rate among single mothers leaves their children without the protection they are entitled to under the Covenant'.¹⁴³

Note that the obligations imposed under s. 17(2) must be carried out without discrimination.

¹⁴⁰ *R (on the application of P&Q) v. Secretary of State* [2001] EWCA Civ. 1151; *R (on the application of L) [2001] 1 FLR 406.*

¹⁴¹ *Re T (a child)* [2001] 2 FLR 1190.

¹⁴² *UN Human Rights Committee, General Comment 17, Article 24* (Thirty-fifth session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 144 (2003) [3].

¹⁴³ *UN Human Rights Committee, Concluding Observations on Canada* (1999) UN Doc. CCPR/C/79/Add.105 [20].

REASONABLE LIMITS AND SECTION 17

As with all of the human rights protected in the Charter, the rights protected in s. 17 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

There are a number of legitimate interventions in families presently provided for in legislation; for example, laws protecting women from domestic violence or protecting against child abuse. These forms of family intervention may impose reasonable limits on the rights in s. 17 in accordance with the requirements of s. 7. The specific legislation will nonetheless need to be vetted for compliance with the Charter under these Charter Guidelines.

KEY POINTS TO REMEMBER

- Section 17 provides for protection of families and children.
- In international human rights law, 'family' is given a broad interpretation and includes a range of types of family.
- The scope of what is meant by 'protection' is unclear. It will require any removal of a child from a family unit to be carried out only where it is lawful and where it is not arbitrary. You will need to carefully consider ss. 7 and 13 in addition to s. 17 if you are reviewing legislation, a policy or a program that may provide for removal.
- The Charter recognises that children are entitled to special protection because of their vulnerability as minors. As human beings, they are also entitled to the enjoyment of all of the other human rights in the Charter unless they do not meet an eligibility criterion.
- Under s. 17(2), public authorities should seek to ensure that all of the human rights in the Charter are protected for children. This should be done without discrimination.
- Section 17 is subject to general limitations imposed under s. 7.

MEASURES TO IMPROVE COMPLIANCE

- If you are reviewing legislation or developing a policy or program that provides for the removal of a person (including a child) from a family unit by a public authority, you will need to carefully consider ss. 7, 13 and 17 of the Charter. You should seek to ensure that a removal of a person from a family unit is not arbitrary or unlawful.
- Where the policy or legislation involves children, consider whether it adequately takes into account the best interests of the child as an important consideration.
- Where legislation provides for children to be subject to differential treatment compared to adults (for example, where an Act expressly excludes children from its operation), examine the purpose of the provision. Ensure that the provisions are to protect the child and do not interfere with children's rights under the Charter.
- Ensure that processes that will have a significant impact on children and families are fair and transparent and that there is scope within the processes for a child's interests to be represented.

RELATED RIGHTS AND FREEDOMS

Section 17 is very closely related to the right to privacy and reputation in s. 13. You should consult s. 13, which prohibits arbitrary and unlawful interferences with the family, if an issue is raised under s. 17.

More generally, the rights under s. 17 are closely related to the following additional rights protected in the Charter (especially in the context of the detention of children):

- the right to protection from torture, and cruel, inhuman or degrading treatment (s. 10);
- the right to liberty and security (s. 21);
- the right to humane treatment when deprived of liberty (s. 22).

HISTORY OF THE SECTION

Section 17(1) is modelled on article 23(1) of the ICCPR. Paragraphs (2), (3) and (4) of article 23 were intentionally omitted from the Charter. This is apparent from the report of the Human Rights Consultation Committee.¹⁴⁴

Section 17(2) is modelled on article 24(1) of the ICCPR. Paragraphs (2) and (3) of article 24 were intentionally omitted. This is also apparent from the report of the Human Rights Consultation Committee.¹⁴⁵

Similar rights exist in comparative law. Refer to Appendix H for further information.

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4. *R (on the application of P&Q) v. Secretary of State* [2001] EWCA Civ. 1151.
5. *Re C* [2002] EWCH (Fam) 1379.
6. *Re T (a child)* [2001] 2 FLR 1190.
7. *Singh v. Entry Clearance Officer New Delhi* [2005] QB 608.

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8. *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

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9. *Hendriks v. Netherlands*, Human Rights Committee, Communication No. 201/1985, UN Doc CCPR/C/33/D/201/1985 (12 August 1988).
10. *Hopu and Bessert v. France*, Human Rights Committee, Communication No. 549/93, UN Doc CCPR/C/60/D/549/1993 (29 December 1997).

Other Sources

11. *UN Human Rights Committee, General Comment 17*, Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 144 (2003).

¹⁴⁴ Human Rights Consultation Committee (Victoria), *Rights, Responsibility and Respect* (2005) 45.

¹⁴⁵ *Ibid.*