

PART 08

- The Impact of Human Rights

'Rarely. Article 8 of the Convention? very rarely I'm a bit allergic to international law. But no, It happened to me in a case but very rarely because I think French law is good enough to protect, so I admit I don't think about it. I admit I don't think about it.'
(FRIL4)

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A number of international and regional mechanisms recognise the need to ensure that post separation visitation and custody, where domestic violence is present, is subject to thorough prior risk assessment and that the wishes and feelings of children are heard when family courts decide what outcome represents the best interests of the child. There has also been a substantial degree of concern and engagement on the nexus between custody and access cases, violence against women and children and a widespread acknowledgement of the abuse of the concept of parental alienation and related concepts. This engagement has resulted in a substantial body of recommendations, case law and positive obligations in this regard.

In its General Recommendation No. 33 of 2015 on women's access to justice, the Committee on the Elimination of Discrimination Against Women (the Committee) recognized that stereotypes and gender prejudices in the judicial system impede access to justice and may particularly affect women, victims and survivors of violence;⁴²² under Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), States have an obligation to ensure that gender stereotyping is addressed and dealt with adequately. The Committee has also made it clear that it is the state's responsibility to "appropriately address the consideration of the specific needs of women and children in determining child custody in cases involving gender-based violence in the domestic sphere,"⁴²³ by adopting "measures to ensure that domestic violence is a factor to be systematically considered in child custody decision."⁴²⁴ Moreover, in 2014, the Committee recommended that any history of domestic violence and abuse must be considered when determining visitation schedules to ensure that these do not endanger women or children.⁴²⁵ More recently on Italy⁴²⁶ whilst noting 'the decision by the

Supreme Court calling into question the validity of the so-called "parental alienation syndrome" theory and its repudiation by the Italian Psychology Society and the Ministry of Health, the Committee stated that it was 'concerned that.. the concept continues to be used as the basis of psychological reports by experts in child custody proceedings.' Most importantly, the Committee has consistently recognised the implications of such practices for the human rights of women and children victims of violence and the need to prioritise those over the rights of perpetrators in such proceedings. In its 2017 update to General Recommendation 19 of 1991, the Committee expressly included this issue, stating that "[P]erpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interest of the child."⁴²⁷

Regional human treaties have also specifically addressed this issue. Article 31 and Article 45 of the Istanbul Convention require judicial authorities to not issue contact orders without taking into account incidents of violence against the non-abusive carer as much as against the child itself and to impose sanctions which are 'effective, proportionate and dissuasive.' In its monitoring activity to date, GREVIO has described at length and brought to light state parties' strengths and weaknesses in the implementation of these articles with regard to victims of domestic abuse and decisions made on custody and visitation, and in particular, the widespread use of 'parental alienation' as a means of minimising evidence of domestic abuse.⁴²⁸ Furthermore, the European Convention on Human Rights has recognised that domestic violence and the impact of it

upon both women and children comes within the scope of Articles 2,3, 8 and 14 of the Convention.⁴²⁹ It has also held that labelling mothers as 'uncooperative parents' or threatening them with liability for child abduction for refusing to allow contact between their children and a father, where that father is a perpetrator of violence was a breach of their rights to family life under Article 8 of the Convention.⁴²⁹

Such issues also directly concern the rights of children. Article 12 of the United Nations Convention on the Rights of the Child provides for the child who is capable of forming his or her own views the right to express those views freely in all matters affecting them and for their views being given due weight in accordance with their age and maturity. It also provides that for this purpose, the child shall be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Article 19 provides that the right for the child should be protected from all forms of physical or mental violence, injury, abuse, or maltreatment, including sexual abuse, while in the care of parents. Where it occurs, the failure to address intimate partner violence and violence against children in custody rights and visitation decisions is a form of violence against women and their children and a violation of the human rights to life and security that could amount to torture. It also violates the best interest of the child legal standard.

⁴²² CEDAW/C/GC/33.

⁴²³ CEDAW/C/CRI/CO/7, para. 43(a).

⁴²⁴ CEDAW/C/FIN/CO/7, 39(c).

⁴²⁵ Gonzalez Carreño versus Spain (2014)

⁴²⁶ Concluding observations on seventh periodic report of Italy (CEDAW/C/ITA/7 paras 51 and 52.

⁴²⁷ See Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based

violence against women, updating general recommendation No. 19, 40(b), U.N. Doc. CEDAW/C/GC/35 (2017).

⁴²⁸ See the Focus section of the 3rd General Report on GREVIO's Activities, January – December 2021 available at: 3rd General Report on GREVIO's activities - Istanbul Convention Action against violence against women and domestic violence (coe.int)

⁴²⁹ *Opuz v. Turkey*, judgment of 9th June 2009, paragraph 132; *Kurt v Austria* ECHR 15th June 2021.

I, M and Others v Italy, application no. 25426/20) ECHR 10th November 2022.

Specific Human Rights Claims are Unnecessary

There was a general consensus amongst stakeholders across all groups and jurisdictions that human rights were relevant and helpful.⁴³¹ However, they were viewed as more of a background context: 'it's inculcated in everything I do in the family law court'. (UKIJ6), rather than as specific rights claims: 'We never go so far as to say ah well, this is one of the human rights of the European Convention on Human Rights or this kind of thing, not at all. You don't have to go beyond that for the magistrate to understand that it's part of the woman's right, the parent's right, the father's right' (FRIL1). According to a number of professional stakeholders,⁴³² human rights are always part of the judicial process and kept in mind as 'Every court would take that into account, because of the right to family life, and the right for a fair trial, so it's always going to be considered. Although I don't think it's specifically documented on every, on every order, but I'm sure that, you know, that is going to be part and parcel of, of, of each case that's taken into account' UKIL8. Similarly, UKIO3 commented: 'I think if you unpicked what we were writing, you could, you could draw out the Articles, but I don't think we, we're as good as the court at specifically identifying where we've addressed human rights.'

A large number of stakeholders across the jurisdictions, however, acknowledged that the rights of survivors were rarely argued for specifically by lawyers in their arguments, even though these rights were clearly relevant.⁴³³ Where human rights arguments were made, they

were only in the most serious cases⁴³⁴ or raised specifically by litigants in person in England and Wales (UKIJ4, UKIL4 and UKIJ5). There was evidence from some stakeholders that human rights are being cited in judgements⁴³⁵ and particularly the rights of children in Spain (SPIJ1 and SPIL9). However, others felt that human rights did not need to spelt out to the court as everyone involved was aware of their applicability: 'they are cited by default, they are cited because it looks good in a lawsuit. This is my personal opinion, but there is no need to say that everyone has parents, everyone has siblings, everyone has nieces and nephews, everyone has children, everyone has a partner. There are things that fall under their own weight and then there are articles of the law that can take into account certain realities and foresee certain consequences'(SPIL6).

In England and Wales there was a general view amongst professional stakeholders that human rights law was reflective of good practice that was sufficiently provided for in domestic legislation: 'I think, it's not about claiming them, but it's rather about whether they are the most helpful argument to run, because, so they underlie everything we're doing anyway, as does the welfare best practice from the Children Act..' (UKIL5). As a result, there seemed to be a general consensus amongst professional stakeholders that human rights law did not have any real impact⁴³⁶ with UKIJ1 unsure that the Human Rights Act 'adds very much at all.' He went on to say that 'if they

repealed the HRA tomorrow, would it make any difference to the substantive children law? No, it wouldn't.' This sentiment was echoed by UKIL4: 'It (the HRA) doesn't necessarily add much to the debate, because from my perspective, the Children Act is pretty comprehensive in dealing with that, and the Practice Directions and things like that, the Article 8 is well respected within what the Children Act is putting forwards.'

FRIL4 had similar views when asked if they cited human rights law: 'Rarely. Article 8 of the Convention? very rarely I'm a bit allergic to international law. But no, it happened to me in a case but very rarely because I think French law is good enough to protect, so I admit I don't think about it. I admit I don't think about it.' SPIL11 summed up their view as: 'Domestic law is more than enough.' Views such as these may of course be well founded, if domestic law regularly incorporates developments in international human rights law and legal professionals receive regular updates and training. However, our findings in relation to the quality and regularity of such training, set out above does not indicate that this is the case.

Another explanation for the antipathy towards human rights law could also be due to a lack of knowledge on its applicability. The comments of two very experienced lawyers who considered themselves specialists in family law provide an example of the poor level of knowledge amongst some legal practitioners. When asked if they used the HRA in their family law practice,

⁴³⁰ I.M. and Others v Italy 10th November 2022, see also Bevaquca v Bulgaria 12th June 2008.

⁴³¹ UKIJ2, UKIJ4, UKIJ5, UKIJ6, UKIJ7, UKIL5, UKIL8, UKIO1, UKIO3, UKIO5, UKIO8, UKIO9, ITIJ1, ITIL10, SPIJ1, SPIJ3, SPIJ6, SPIL5, SPIL6, UKIO3 and UKIO5, for example, commented how they are implicitly always there, even if not directly.

⁴³² BIJ5, UKIJ8, UKIL2, UKIO2, UKIO6, FRIL10, FRIL6, ITIJ1, ITIJ3, ITIJ5, ITIJ8, ITIL10, ITIL3, ITIL4, ITIL5, ITIL7, ITIO1.

⁴³³ BIJ2, BIL1, BIL12, BIL6, UKFG2C, UKFG2A, UKIJ2, UKIJ3, UKIJ4, UKIJ5, UKIJ6, UKIJ7, UKIL3, UKIL4, UKIL5, UKIL7, UKIL8, UKIO3, UKIO5, UKIO7, UKIO9, FRIJ1, FRIL1, FRIL4, FRIL7, FRIL8, FRIL9, ITIJ2, ITIJ3, ITIJ4, ITIL1, ITIL3, ITIL5, ITIL6, ITIL7, ITIL8, ITIL9, SPFG3C, SPIJ1, SPIJ5, SPIL1, SPIL10, SPIL11, SPIL3, SPIL4, SPIL5, SPIL9 SPIO1, SPIO3, SPIO7.

⁴³⁴ BIJ4, BIL1, BIL10, BIL6, BIL9 UKIL2, UKIL4,

UKIL7.

⁴³⁵ UKIJ4, UKIJ5, UKIJ6, UKIJ9, FRIL2 and FRIL3.

⁴³⁶ UKIL1, UKIL4, UKIL7, UKIO9, FRIL4, ITIJ2, ITIL7, SPIJ1, SPIJ3, SPIJ5, SPIL11, SPIL2, SPIL3, SPIL1.

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both were unaware of the courts duty under section 6 of the HRA as a public authority and that it therefore applied to private law proceedings: 'What's the obligation of the state when mum and dad disagree about contact and mum says there was domestic violence in the relationship? I mean, I, in my public law work, Article 8 figures all the time. The proportionality of what's proposed and so on. And I suppose if you see the court as the state actor, the proportionality of what the court is proposing might be something that one could deploy in relation to respective orders, but there's no duty on the state to protect individual mothers or fathers from domestic, from domestic abuse' (UKIL2). UKIL3 stated that 'they're not relevant. The state isn't intervening' and that they only came up in her public law work.

No. Well, it's not the states intervening. It's the, these are private individuals. So, they're not, the Article 8 isn't invoked.'

Other legal professionals pointed to a varying lack of knowledge on human rights law amongst the judiciary, which, depending upon which level of court they were before, rendered human rights arguments largely pointless: 'You wouldn't make it [reference human rights] in front of magistrates because they wouldn't understand. It would go completely over their heads. Most district judges wouldn't be interested. Circuit judges would take an interest in it. But. You know, the only, the only arguments I think you would, the only types of cases you would get traction with an Article 8 argument, are cases where we're talking about,

severing contact between a, you know, a parent, normally a dad, and the kids, or, or, where/well (not sure), we're only going to do indirect contact' (UKIL1).

Human Rights Arguments Are More Helpful to Fathers

When human rights were acknowledged as being specifically relevant in family law it was usually in relation to men's rights or fathers' rights, which is consistent with the literature set out above. In Bosnia & Herzegovina emphasis was placed in the need to respect and protect the rights of the 'accused' (BIJ2, BIL2). Moreover, according to BIL2, 'They are called especially when defending the perpetrator. All the rights in criminal proceedings that he has, the right to life, the right to freedom, everything that you deny him because of the relationship with the victim, he has the

right to fight for his rights'. Examples of perpetrators using human rights as part of their case strategy were provided by survivors: in the case of BFG1B her abuser complained about his human rights to refuse an assessment.

Stakeholders UKIL1, UKIL2 and UKIL4 considered that there is more use made of article 8 by those representing the father in a hearing, which UKIL4 described is an 'exhausting' practice. Similarly, psychologists and social workers in Spain shared their concerns about men's or the fathers' rights, the

importance of the presumption of innocence and ensuring a fair trial that does not favour mothers (SPIO1, SPIO4, SPIO6, SPIO7). For example, SPIO4 reflected: 'We see cases here where you say where the rights of this man are being left. The person denounced in terms of gender violence, as a human being. Where does that leave him?' while SPIO1 said: 'I think that men are unprotected [laughs] compared to women' when asked about the relevance of human rights.

Usage and Reference of Specific Articles of the European Convention on Human Rights

Despite the lack of specificity of human rights claims in family law proceedings, there was nonetheless a good knowledge of the applicability of article 2 to cases involving domestic abuse in Bosnia & Herzegovina, where it was referred to by five judges and two lawyers. Bosnia & Herzegovina⁴³⁷ was the country where it was mentioned the most, even if only to point out how they are rarely part of the hearings, 'Right to life, is that what you mean? We have and directly refer to human rights conventions, it is directly incorporated into our first system, the right to life, the right of children, we have and we always refer to it'. Unfortunately, it was the opposite in England and Wales, with only two references. UKIL4 stated that they would not plead them, and UKIO7 seemingly unaware of their applicability: 'I can't ever think of human rights being linked with, with domestic abuse. It should be, should be, you know, right to, right to live, (small laugh). In Spain the right to life was understood as relevant and basic, forming part of the domestic legislation, which did not therefore require a direct reference at court: '[it] is implicit.... If you, for example, say no with a protection order, because there is a risk to the life or liberty of this person, it already refers to that, doesn't it? Or if, for example, you say no, it is because there are indications of the commission of a crime of injury in the area of violence against women. Well, then it is implicit that the woman's right to life has been affected, right?' (SPIJ3).

Article 3, was mentioned only 15 times in total across the jurisdictions and

stakeholder groups and mainly in recognition of the right rather than something that was addressed or applicable in court proceedings. 'I haven't. I'm finding it difficult to think of an example when I might. I mean, I guess Articles 2 and 3 could potentially be relevant, but I can't see that it would be necessary, particularly, to plead them, especially not in the kinds of cases that we're dealing with day-to-day. Perhaps if you were taking something to the Court of Appeal, then you might add a human rights argument onto an argument, for the child arrangements orders. But in terms of the day-to-day practice, it's not something I would plead'(UKIL4).

'I am here to protect the victim, which is a right that has the right to life, to physical integrity, to moral integrity. No? of course they are there, they are always there. That is the basis. But I don't see it as if it were something that is a standard bearer, in other words, we cannot be standard bearers in the fight for human rights. I don't see that kind of discourse or that kind of impulse that you see in certain actions, either from the social services, from, from, from, from the equality departments, either at a local level or at an autonomous level, that discourse is not there, it's not there. Obviously, this is what I am telling you, that at the end of the day all the resolutions have their ultimate basis in a constitution. A Constitution that declares that of course, that declares that the 49th Convention on Human Rights is part of our legal system' (SPIL11).

Although Article 6 was not referred to very often, it was clearly regarded as fundamental to procedural justice and as a result, needed to be properly protected (UKIJ4, UKIL7, UKIO6) with a need to balance the right to fair trial of both the accused and the rights of the victim (ITIJ4).

Article 8 was the most mentioned of all the articles that were explicitly talked about by the participants in this research,⁴³⁸ with 117 mentions overall. It was predominantly viewed as the right of a parent to see their child: 'It cannot be cancelled because it is the parent's right to have contact. (though it can be supervised and restricted)' (BIJ10).

'So in terms of human rights, we know, we always kind of consider that this child should have a relationship with their parent. And that's where you know, parental alienation, I think that again, we consider that, that sometimes there's absolutely no reason why this child has not seen the parent. And that's when we say it's emotionally abusive, because, you know that child, that parent should be in that child's life'(UK101).

'The question of parenting needs to be discussed in another field because the child's right to have a balanced relationship with both parents remains. If the Father a is convicted of ill-treatment, there are ways, however - see protected meetings - to maintain the relationship if functional' (ITIL9).

⁴³⁷ BIJ1, BIJ10, BIJ5, BIJ6, BIJ7, BIL11, BIL3.

⁴³⁸ (BIJ10, BIJ2, BIL1, BIL12, BIO7,). BIJ10, BIJ6, BIJ8, BIL8, UKIJ1, UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ7, UKIJ8, UKIJ9, UKIL1, UKIL2, UKIL3, UKIL4, UKIL5, UKIL7, UKIL8, UKIO1, UKIO2, UKIO3, UKIO4, UKIO5, UKIO7, UKIO8, FRIJ1, FRIL2, FRIL4, ITIJ8,

ITIL9, ITIO1, SPFG1F, SPFG1C, SPFG1E, SPFG1D, SPIJ1, SPIJ2, SPIJ4, SPIL1, SPIL12, SPIL3, SPIL4, SPIL5, SPIL7, SPIO1, SPIO3, SPIO4.

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'I am establishing a suspension of a visiting regime. Likewise, I am affecting a fundamental right, such as the right to family life. We are always touching everything; we are touching the essence of the family. [...] it is very sad, very sad, very sad when you see that there will be no filial paternal bond, because it is impossible, because you can no longer work with that child, because so much time has passed, the issue has become so entrenched' (SPIJ1). Some stakeholders regarded it as the most important right (SPIL12 and FRIJ1). Survivors, however, particularly in Spain (SPFG1F, SPFG1C, SPFG1E, SPFG1D), felt that this interpretation of the right was mainly used for the benefit of fathers: 'Is the child who has the right to have a relationship with their father and what they want to be saying is that is the father who has the right to have these visitations with his son'(SPFG1E). This was corroborated by UKIL1 who admitted that they had indeed instrumentalized article 8 in this manner: 'Article 8 arguments on both sides of the coin. I have employed, to be honest, more Article 8 arguments if I'm

for the person who, they're trying to prevent contact with. So if I'm for the dad, in that sense. You know, you're thinking about Article 8 in the sense of whether you're trying to stop the contact with this person and that engages their Article 8 right and the child's Article 8 right.'

The use of article 8 from the point of view of parents rather than children was also noted and criticised by some stakeholders (BIL12, UKIJ4, UKIL3, UKIO2, UKIO4). 'You very often get an absent parent saying, I have a right, to see my child. And I respond by agreeing, that, you do have a right, but if, but the right but the child has rights too, to be able to have a family life free of risk of harm, and harm. And where there is a conflict between the child's rights and the parent's rights, the child's right must prevail'(UKIJ4). This was also underlined by a large number of survivorss who felt that the rights of their children had been forgotten and not considered in the legal proceedings same as theirs:⁴³⁹ 'It is true that the rights of parents are important, but they should never, never, never, never,

never be above the rights of children' (SPIL2).

Finally, Article 14 was the least referenced in the entire fieldwork, with only 4 mentions (UKIJ3, TIL10, SPIL3, SPIL8), and, again only as part of a list of rights that survivors possessed but that were not ever claimed directly in court: 'Well, of course. Conceivably, there are. If you think about Article 14, potentially. But have I ever had a case whereby something, something like that's been argued, no, I haven't. Certainly not sitting as a judge'(UKIJ3).

Human Rights in Theory But Not In Practice

Perhaps unsurprisingly, a good number of survivors felt that human rights law was not implemented in practice (SPFG1A) or respected (SPFG2E, SPFG1A, SPFG2D, SPFG3B) and (SPFG3E) 'It seems to me an important thing to emphasise: the Istanbul Convention is never applied. Because this fact that violence is systematically excluded from civil law is something that goes directly against the Istanbul Convention but in a way that is very declared' ITFG3B This sentiment was echoed by professional stakeholders such as ITIL1, ITIL7, SPIL11 and SPIO6

all of whom felt that there is no respect for human rights at court even if they were briefly quoted at court (SPIJ1): 'It is true that we mention the right of minors in the lawsuit itself, but I think it is a standard request, that is to say, a request that you slip into the lawsuit but that is not argued and that I think is not generally taken into account' (SPIL7).

Indeed this mechanical citation of human rights furthered a perception that human rights law had little or no impact on decision making:⁴⁴⁰ 'they

closed the proceedings without giving me the right to make my final submissions, without giving me the right to express my views through translators. the right of protection, the right to family'(FRFG1A).

Survivors also raised their experiences of a negative attitude from professional stakeholders to any attempts made to arguments made on their behalf on human rights grounds. 'If a litigant-in-person writes their own position statement, and they've got, you know, they put Article 8 or Article 6, the judge

⁴³⁹ UKFG1A, UKFG2B, UKFG4C, ITFG1B, ITFG1A, ITFG1B, ITFG2A, ITFG3D, SPFG1A, SPFG1C, SPFG1B, SPFG1E, SPFG2C, SPFG2E and SPFG2D.

⁴⁴⁰ UKFG1A, UKFG2A, UKFG4C, FRFG2A, FRFG1A, ITFG1B, ITFG2A, ITFG3D, SPFG1A, SPFG2C, SPFG2D.

says, Article 8 or Article 6, what do you know about it? You know, we deal with, you know, the real things in this court.... a judge will turn their nose if you mention them' (UKIL7). In some cases judges pretended not to hear when human rights and the Istanbul Convention was raised in relation to their cases in court (ITFG1B and ITFG1A). UKFG4C's attempt to raise her human rights with her solicitor and Cafcass officer was 'just brushed under the carpet.' The exception appeared to be Italy, where a number of survivors

gave example of their lawyers specifically referencing the Istanbul Convention and human rights in their cases to good effect (ITFG1A, ITFG3C, ITFG3A). ITFG1B shared how her lawyer referencing the Istanbul Convention actually helped in her case: 'Then the judge wrote in one of the last orders that mediation is not possible, precisely out of respect for the convention. So by naming it so much, we got the ban on mediation.'

Summary

There was a general consensus amongst stakeholders across all groups and jurisdictions that human rights were relevant and helpful. However, they were viewed as more of a background context.

A large number of stakeholders across the jurisdictions, however, acknowledged that the rights of survivors were rarely argued for specifically by lawyers in their arguments, even though these rights were clearly relevant. In England and Wales there was a general view amongst professional stakeholders that human rights law was reflective of good practice that was sufficiently provided for in domestic legislation. As a result, there seemed to be a general consensus amongst professional stakeholders that human rights law did not have any real impact. Views such as these may of course be well founded, if domestic law regularly incorporates developments in international human rights law and legal professionals receive regular updates and training. However, our findings in relation to the quality and regularity of such training, set out above does not indicate that this is the case.

Another explanation for the antipathy towards human rights law could also be due to a lack of knowledge on its applicability, which was evident in some interviews. Other legal professionals pointed to a varying lack of knowledge on human rights law amongst the judiciary, which, depending upon which level of court they were before, rendered human rights arguments, largely pointless. When human rights were acknowledged as being specifically relevant in family law it was usually in relation to men's rights or fathers' rights, which is consistent with the literature set out above.

In terms of the specific human rights that were mentioned by stakeholders, Article 8 was, unsurprisingly, the most commonly encountered. Articles 2, 3 and 14 were the least mentioned as was Article 6, although there seemed to be a clear commitment to the idea of fairness as a fundamental right for both parties, particularly that of fathers. It was also clear from comments made by survivors that there was a good understanding of the applicability of human rights law, even if expressed in colloquial terms.

Survivors also raised their experiences of a negative attitude from professional stakeholders to any attempts made to arguments made on their behalf on human rights grounds. Perhaps unsurprisingly, therefore, a good number of survivors felt that human rights law was not implemented in practice. It was difficult not to conclude that human rights law had had little effect in the everyday practice of the family courts across the jurisdictions.