CHILDREN BELOW THE AGE OF CRIMINAL RESPONSIBILITY IN ENGLAND AND WALES: MEASURES, RIGHTS, PROCEDURE, PARTICIPATION

National Report for AIMJF´s Comparative and Collaborative Research.

Niños por debajo de la edad de responsabilidad penal en Inglaterra y País de Gales: medidas, derechos, procedimiento, participación

Informe nacional para la investigación comparativa y colaborativa de la AIMJF

Enfants n'ayant pas atteint l'âge de la responsabilité pénale en Angleterre et Pays de Galles : mesures, droits, procédure, participation

Rapport national pour la recherche comparative et collaborative de l´AIMJF

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Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on children below the age of criminal responsibility. The article explains the applicable measures and the procedure adopted, the child's rights and his or her participation in the Protective and Justice System in England and Wales

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre niños por debajo de la edad de responsabilidad penal. El artículo explica las medidas aplicables, el procedimiento adoptado, los derechos del niño y su participación en el sistema de protección y de justicia en Inglaterra y País de Gales

Résumé : Le document fait partie d´une recherche collaborative organisée par l´Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur

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les enfants n'ayant pas atteint l'âge de la responsabilité pénale. L´article explique les mesures passibles d'application et la procédure adoptée, les droits des enfants et leur participation dans le système de protection et de justice en Angleterre et Pays de Galles.

Introduction

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of measures, procedure, rights and participation of children below the minimum age of criminal responsibility.

This national report is based on a questionnaire prepared by AIMJF.

QUESTIONNAIRE:

1. general information

1.1. What is the minimum age of criminal responsibility in your country (the **age of criminal responsibility** is the age below which a child is deemed incapable of having committed a criminal offence, it can also be referred as **age of accountability**, **age of responsibility**, and **age of liability for children and it is different of the age when a person becomes an adult)**?

HHJ GB: 1.1

Section 50 of the Child and Young Persons Act 1933 provides: *"It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence."*

This means that no child shall be held criminally responsible for any actions committed whilst they were under the age of 10.

1.2. Is there more than one minimum age of criminal responsibility? Which one? Is it possible to apply the 'doli incapax rule' in your country (possibility of demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible)?

HHJ GB: 1.2

There are no variations in the minimum age of criminal responsibility.

There was, previously in this jurisdiction under the common law, a rebuttable presumption that a person aged under 14 was incapable of committing a crime. This presumption, often termed *doli incapax*, required the prosecution to establish not only that the accused had committed the offence but also that they knew what they had done was seriously wrong rather than merely naughty. The presumption of *doli incapax* was abolished by section 34 of the Crime and Disorder Act 1998 for all offences committed on or after 30th November 1998. In *R v JTB* [2009] 1 AC 1310, the House of Lords ruled that section 34 abolished both the presumption and the defence of *doli incapax*. It is therefore not open to the defence to argue that a child defendant had not understood that what had been done was seriously wrong.

The test for whether a defendant is incapable of understanding that their behaviour was an offence, such that it provides a defence to the charge, is the same for an adult as for a child. It is found in the defence of insanity. It relies on medical evidence and can arise only from *"a defect of reason from a disease of the mind"* (*M'Nagthen's Case* (1843) 10 Cl.&F. 200), rather than from the age or maturity of the defendant.

2. age assessment

2.1. In case of application of the 'doli incapax rule', how is this assessment made? Is there a specific methodology for this evaluation? A protocol on how to evaluate? Who assesses the child? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

HHJ GB: 2.1

As noted above, *doli incapax* no longer features in the law of England & Wales.

2.2. In case of necessity of age assessment (due to a lack of birth registration), how is this assessment made? Is there a procedure? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

HHJ GB: 2.2

Determining the age of a child defendant is very important, given that there are important age thresholds that may impact on the jurisdiction of the criminal courts as a whole, on the jurisdiction of different courts and on the sentencing options available to deal with any convicted child defendant.

There are a number of legislative provisions which are relevant to the question of age assessment, most notably in crime:

- Section 99(1), Children and Young Persons Act 1933.
- Section 150(4), Magistrates' Courts Act 1980.
- Section 117(3), Crime and Disorder Act 1998.
- Section 405, Sentencing Code (Sentencing Act 2020).

Although the wording of each provision differs a little, in essence they all provide for the same process Wherever the age of a child defendant needs to be determined, the court is required to make due inquiry as to the age of that person and, for that purpose, shall take such available evidence as may be forthcoming.

The authorities provide for the following principles:

(1) If there is any real doubt about the defendant's age, the court should adjourn the matter to allow it to be more satisfactorily determined: *R v Steed* (1990) 12 Cr.App.R. (S);

(2) The court itself does not have the resources to conduct its own investigations; such investigations should be conducted by one or both sides: *R v L(C); R v N(HV); R v N(TH); R v T(HD)* [2013] 2 Cr.Appr.R. 23;

(3) The age assessment itself is always a matter for the court; a judge is not bound by any position adopted by or agreed between the parties: *R v Adnan Abdushahur Mohammed* [2021] EWCA Crim 1375;

(4) It is recognised that age determination is difficult to do with certainty; anthropometric measures do not accurately predict the age of an individual: *B v The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689 (Admin) – hereafter *Merton*;

(5) The assessment may be difficult but is not complex. Resolution does not require anything approaching a trial and judicialisation is to be avoided: *Merton*

(6) Except in clear cases, age cannot be determined solely on the basis of appearance: *Merton*;

(7) The court should seek to elicit the general background of the child defendant, including their family circumstances and history, educational background and activities in the previous few years: *Merton;*
(8) Ethnic and cultural information may be important: *Merton;*
(9) The child defendant's own credibility may need to be tested and assessed. Prior statements by them as to their own age may be important: *Merton*;
(10) There should be no assumptions*: Merton*;
(11) The court must be provided with all the available evidence: *R v L(C); R v N(HV); R v N(TH); R v T(HD)*;
(12) If at the end of the assessment, the question remains in doubt, the defendant should be presumed to be a child: *R v L(C); R v N(HV); R v N(TH); R v T(HD)*;
(13) Reasons should be given by the court: *Merton.*

At the end of the assessment, the court will "deem" the defendant to be of a particular age or within a certain age group.

Potential evidence at the age assessment (which is called a "deeming hearing") may include:

- Oral evidence from the defendant and/or his family and/or associates;
- Official documentation (birth certificates, passports, ID cards etc) ;
- Input from the youth offending team/youth justice service (which has primary responsibility for coordinating the provision of youth justice services in the local area and will attend at any court hearing involving a child defendant);
- Input from other agencies which may have had involvement with the defendant and their family.

Any child defendant (or presumed child defendant) will be entitled to free legal representation throughout criminal proceedings. They are deemed to have such limited financial resources that they are entitled to legal aid.

In short, the child will be heard in this procedure and will be able to challenge any assertion that they are of a different age to that which they claim. However, once the court has "deemed" the child of a particular age, then that assessment can only be challenged if new evidence emerges.

3. police intervention

3.1. In case a child under the minimum age of criminal responsibility commits an act considered as a crime, is he/she brought to a police station? Is it mandatory to do so? If not, in which situations is it necessary to be brought to the police station?

3.2. In case the child is brought to the police station, what is expected from the police to do? What are the legal guarantees for the child in this context? Is it possible, in any circumstance, that the child be imprisoned,

even for a very short time? In this case, how long is it possible for the child to be deprived of liberty?

HHJ GB: 3.1 & 3.2

The principal legislation providing for the powers of the police in England & Wales is the Police and Criminal Evidence Act 1984, together with the Codes of Practice issued by the Secretary of State pursuant to that Act.

This legislation provides for police powers such as the power to stop and search, the power to seize property, the power to arrest, the power to detain, the power to question. This legislation provides for such powers in relation to ALL persons of whatever age. There are some limitations that apply to "arrested juveniles" but an "arrested juvenile" is defined as a person arrested who appears to be under the age of 18. There is no lower age limit specified. Thus, on the face of it, the police have the power to stop, to search, to arrest, even to detain and to question a child under the age of 10, even though such a child cannot be charged with a criminal offence.

However, since the power to arrest a person is dependent on them either having committed an offence, or being about to commit an offence, and since a child under the age of 10 is conclusively presumed incapable of committing an offence, the power to arrest does not arise. Nor does the power to detain a child under 10. A child under the age of 10 cannot be detained at a police station.

In practice, police dealing with a child under the age of 10 who appears to have broken the criminal law are likely to approach the situation as a welfare issue. A police officer has the power, under section 46 of the Children Act 1989, to remove any child (under the age of 18) to suitable accommodation if they have reasonable cause to believe that the child would otherwise be likely to suffer significant harm. This is referred to as having been taken into police protection. The legislation requires the police officer, amongst other things, to inform the local authority within whose area the child was found of the steps that have been, and are proposed to be, taken with respect of the child and the reasons for taking them; to give details to the local authority within whose area the child is ordinarily resident of the place at which the child is being accommodated; and to take such steps as are reasonably practicable to inform the child's parents or those with parental responsibility for the child of the steps taken. No child may be kept in police protection for more than 72 hours but there is a requirement that the child be released from police protection as soon as their case is inquired into by a designated officer, unless there is still reasonable cause to believe that the child would be likely to suffer significant harm if released. This process might involve bringing a child to a police station temporarily but they will not be accommodated there; they will be accommodated by a local authority.

Any time that a child under 10 might spend at a police station will be part of a safeguarding process leading either to their return home or into the care of the local authority.

A child under 10 cannot be imprisoned, even for a short term. As a matter of law, only a person aged 21 and over can be made subject to imprisonment in England & Wales. Those aged 18 to 20 inclusive can be made subject to detention in a young offender institution. Those aged 10 to 17 can be made subject to a number of forms of youth detention. Those aged under 10 cannot be detained in any manner that might be considered to be like prison.

It should, though, be noted that, pursuant to section 25 of the Children Act 1989, a child who is being looked after by a local authority may be placed in secure accommodation that restricts their liberty if (a) the child has a history of absconding, is likely to abscond from any other type of accommodation and if they abscond are likely to suffer significant harm; or (b) the child is likely to injure themselves or any other person if not kept in secure accommodation. Such a restriction on liberty requires an order of the Family Court. Furthermore, the High Court (Family Division) is able to make 'deprivation of liberty orders', outside the statutory scheme of the Children Act 1989. These orders place restrictions on a child's liberty beyond what would normally be expected for a child of the same age. Others who continue to sit in the Family Court and/or the Family Division of the High Court would be better placed to comment on these orders, but I have no experience of any such orders being imposed on children under the age of 10 and I would be very surprised if such orders had been made in relation to children so young.

4. measures

4.1. In case a child below the minimum age of criminal responsibility has committed an act considered as a crime, is it possible to impose any kind of measure? Which one?

HHJ GB: 4.1

If a child under 10 commits an act that would have constituted a criminal offence if they had been aged 10 or over, court proceedings may follow but these will be conducted by the Family Court rather than a criminal court.

First, if the police consider that a child brought into police protection under section 46 of the Children Act 1989 continues to require protection beyond the 72 hours permitted, then an application may be made by the local authority to the Family Court for an emergency protection order, under section 44 of the Children Act 1989. Such an order removes the child to local authority accommodation.

Secondly, in the longer term, if a child under 10 is continuing to commit acts that break the criminal law, the local authority may seek a care order from the Family Court placing the child in the care of the local authority, pursuant to section 31 of the Children Act 1989. A care order can be made where a child is suffering or is likely to suffer significant harm attributable (*inter alia*) to the child being beyond parental control.

The Family Court also has the power, pursuant to section 11 of the Crime and Disorder Act 1998, to make a 'child safety order' where (a) a child under 10 has committed an act which, if they had been aged 10 or over, would have constituted an offence, (b) an order is considered necessary for the purpose of preventing the commission of further such acts by the child; and (c) the child has acted in a manner that caused, or was likely to cause, harassment, alarm or distress to other people outside their household. A child safety order places the child under the supervision of a local authority social worker or member of the youth offending team for a period up to 12 months. A child safety order will require the child to comply with such requirements as are specified; those requirements will be those the court considers desirable in the interests of (a) securing that the child receives appropriate care, protection and support and is subject to proper control; or (b) preventing any repetition of the kind of behaviour which led to the child safety order being made.

Before making a child safety order, the Family Court shall obtain and consider information about the child's family circumstances and the impact of such an order on those circumstances. If a child fails to comply with any requirement in a child safety order, there is no sanction save that the court may vary the order by cancelling any provision or inserting a new provision.

4.2. Is it possible to impose an out-of-home placement (such as alternative care, in institution or foster family; in health facilities, for instance)? in which circumstances? For how long?

HHJ GB: 4.2

As noted above, a local authority may seek to apply to the Family Court for a care order, pursuant to section 31 of the Children Act 1989. Care orders are frequently made for children of all ages, including those under the age of 10.

A child may be placed away from the home during the course of proceedings (by way of an interim care order, pursuant to section 38 of the Children Act 1989) and/or at the conclusion of proceedings (by way of a final care order, pursuant to section 31 of the Children Act 1989).

Removal of a child from a parent or parents requires an order of the Family Court. It will only be ordered as an interim measure (without the consent of the parent(s)) if the child's safety demands separation. Such placement, if not made to wider family members, may be to a residential placement such as a children's home or to a foster family.

A final care order, made by the Family Court, may sanction a care plan that places the child permanently away from the home of their parents. That care plan may be for long-term foster care or for placement in a residential placement such as a children's home. The care plan may be for adoption of the child (which requires further orders under the Adoption and Children Act 2002).

Placement away from the home for a child subject to care proceedings may be for a very short period of time or may be for longer. Placement away from the home at the end of proceedings may, again, be for a short period of time or for longer. The future length of the placement may be unknown. Placement for adoption will be expected to be a permanent placement away from the home.

There are provisions within the Children Act 1989 and the Adoption and Children Act 2002 for parents and others to apply to discharge care and adoption orders.

Wherever the Family Court is determining any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration (s.1, Children Act 1989). Wherever the Family Court is making a decision relating to the adoption of a child, the child's welfare throughout their life must be the court's paramount consideration (s.1, Adoption and Children Act 2002).

Others who continue to sit in the Family Court would be better placed to comment further on these matters.

5. procedure

5.1. Who imposes such measures?
5.2. Is there a legal procedure for the determination of these measures? What is the nature of these procedures? Can you describe it shortly?
5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?

HHJ GB: 5
On the assumption that this question relates to children under the age of criminal responsibility and therefore under the age of 10, others who continue to sit in the Family Court would be better placed to comment further on these matters.

6. assessment

6.1. Is there any kind of assessment of the child for the imposition of such measures (on vulnerabilities, risk, rights violations)? Who assesses the child? Is there a protocol or guideline on how to assess the child? Can you please share it?

HHJ GB: 6
On the assumption that this question relates to children under the age of criminal responsibility and therefore under the age of 10, others who continue to sit in the Family Court would be better placed to comment further on these matters.

7. legal and procedural guarantees

7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?
7.2. Does the child have the right to refuse any of these measures? Or to challenge in court any of these measures?
7.3. What happens if the child does not fulfill the obligations inherent to these measures?

HHJ GB: 7
On the assumption that this question relates to children under the age of criminal responsibility and therefore under the age of 10, others who continue to sit in the Family Court would be better placed to comment further on these matters.

8. the role of the justice system

8.1. Is it possible in your country that the justice system gets involved in these situations? In which situation (vg. to impose the measure or to review it, in case of resistance by the child or his/her family, or to impose some child protection order)? For what purpose? Which branch of the justice system is involved (youth court, family court, child protection court, criminal court…)?
8.2.. In case of involvement of the justice system, can you briefly describe the procedure?
8.3.. What are the rights of the child in this procedure? Does the child have the right to legal assistance? The right to appeal against any kind of decision?

HHJ GB: 8
There will be no involvement of the Youth Court or any other criminal court in dealing with children under the age of 10 who appear to have broken the criminal law. If judicial intervention is required, that will take place in the Family Court.

Others who continue to sit in the Family Court would be better placed to comment further on these matters.

9. assistance or support

9.1. Besides the measures imposed to children, are there other kind of assistance available on a voluntary basis (social, psychological, medical)?

HHJ GB: 9

On the assumption that this question relates to children under the age of criminal responsibility and therefore under the age of 10, others who continue to sit in the Family Court would be better placed to comment further on these matters.

10. child participation

10.1. Is the child heard in this procedure? By whom? At which stage of the procedure?
10.2. Is the child heard more than once in this procedure? How many times?
10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you please share it?

HHJ GB: 10
On the assumption that this question relates to children under the age of criminal responsibility and therefore under the age of 10, others who continue to sit in the Family Court would be better placed to comment further on these matters.

11. legal implications

11.1. Is there any record of legal infringement committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into consideration?

HHJ GB: 11.1
It is likely that the police will keep some sort of record where they have had involvement with a child under the age of 10 who appears to have broken the criminal law. More pertinently, it would be expected that a local authority's social services would keep records of their interventions with any such children.

Such records may feed into future decisions made by local authorities and the Family Court. But any record that is kept of a child under the age of 10, who may have committed an act which would otherwise break the criminal law, would have no relevance to any future criminal proceedings involving that same child once they are above the age of criminal responsibility. Any court would regard such evidence of "bad behaviour" by a child under 10 to be irrelevant to the determination of a criminal charge once that child is legally capable of committing a criminal offence.

11.2. In case of damages, what kind of rights and remedies does the victim have regarding the child and the family? Besides financial reparation, does the victim have the possibility to have a say on the measures applied to the child?

HHJ GB: 11.2

This is not an area on which I am able to comment. This may be a matter better dealt with by a judge of the civil courts.

12. reforms in progress

12.1. Are there ongoing reforms on this subject?

HHJ GB: 12

This is a broad question. In terms of raising the age of criminal responsibility in this jurisdiction, I am unaware of any current plans to reform this.

There have, in the past, been efforts to raise the age of criminal responsibility from 10 to 12. The last one of which I am aware was in 2022. These efforts have been by way of Private Members Bills introduced in Parliament by individual MPs or Lords. Without the support of the government of the day, these Bills have been doomed to failure.