

Race and culture in family law

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In 2020, the world witnessed the escalation of events concerning racial and cultural matters such as the killing of George Floyd by a policeman, the highly publicised trial of Derek Chauvin, the killing of Breonna Taylor and the recent creation of the Black Lives Matter movement.

The legal profession in the UK has also not escaped scrutiny in the context of race and culture and these issues have become an increasingly difficult conversation, there is the highly anticipated Executive committee of the Northern Circuit race panel report concerning the investigation into racial barriers to ethnic minorities into the bar, the increase of ethnic minority children into the care system and increased migration. All of these issues have thrown the spotlight onto matters concerning race and culture within the family legal system.

Family law practitioners are moving into a formative era whereby the importance of race, culture and ethnicity in our profession is coming into greater focus and informing decision making both professionally and personally.

This piece will address how issues of race and culture may impact upon family law cases and hopefully provide some guidance to lawyers as to how to improve their practice by discussing:

- What a looked after child is ('LAC') and the statistics as it relates to looked after children in England with a specific emphasis on the data for ethnic minority children in the care system.
- A discussion as to why there is an overrepresentation of ethnic minority children in the care system.
- A discussion of how differences in culture impacts upon parenting styles and techniques, family functioning and child development.
- The differences between individualist and collectivist cultures.
- How family lawyers can ensure that cultural and ethnic issues are addressed whilst also upholding legal principles.

Looked after children

A child is looked after by a local authority and therefore known as a looked after child if he or she:

- is provided with accommodation, for a continuous period of more than 24 hours (Children Act 1989, ss 20 and 21);
- is subject to a care order (Children Act 1989, s 31); or
- is subject to a placement order (Adoption and Children Act 2002, s 21)

General Statistics of LAC children (for the year ending 31 March 2020)¹

In the context of race and culture with regards to the population of looked after children in England, it is important to consider firstly more general statistics:

- The number of children looked after in England was up 2% to 80,080.
- The number of children becoming looked after during the year was down 3% to 30,970.
- the number of children ceasing to be looked after during the year is similar to 2019 at 29,590.
- Adoptions have dropped: children ceasing to be looked after during the year due to adoption fell by 4% to 3,440 – this continues the drop seen last year and is down from a peak of 5,360 in 2015.
- 56% of all LAC children are male and 44% are female.
- In respect to age groups, the largest age group at 10–15 years at 39% of all LAC children. 24% are 16 and over, 18% are 5–9 years, 13% are 1–4 years and 5% are under 1 year. Over the last 5 years the average age of LAC has been steadily increasing.

Ethnicity data for LAC children (for the year ending 31 March 2020)²

Considering more specifically ethnicity, the statistics are as follows:

- The majority of LAC are of white ethnicity (74%).
 - 10% are of mixed ethnicity.
 - 8% are of black or black British ethnicity.
 - 4% are Asian or Asian British; and
 - 4% are other ethnic groups.
- Since 2015, the proportion of LAC is of white ethnicity, but this has decreased steadily from 77% to the current 74%. It is likely this slight change is due to the broadly non-white make up of unaccompanied asylum-seeking children ('UASC'), a group which has recently grown in number.

Why are these figures important for family law practitioners to consider?

To answer this question, the starting point is to ask whether or not there is an overrepresentation of ethnic minority children within the care system and if so, why? These questions, take one back to the statistics. The demographic ethnic profile of the United Kingdom is taken from the 2011 census data (the 2021 census data is still being analysed and is unpublished):³

- According to the 2011 Census, the total population of England and Wales was 56.1m, and 86.0% of the population was white.
- People from Asian ethnic groups made up the second largest percentage of the population (at 7.5%), followed by black ethnic groups (at 3.3%), mixed/multiple ethnic groups (at 2.2%) and other ethnic groups (at 1.0%).
- Among the specific ethnic groups, people from the white British ethnic group made up the largest percentage of the population (at 80.5%), followed by other white (4.4%) and Indian (2.5%).
- From 2001 to 2011, the percentage of the population of England and Wales that was white British decreased from 87.4% to 80.5%, while the other white group saw the largest increase in their share of the population, from 2.6% to 4.4%; and
- The percentage of the population from a

1 Department of education statistics 2020
<https://explore-education-statistics.service.gov.uk/find-statistics/children-looked-after-in-england-including-adoptions/2020#releaseHeadlines-summary>

2 Department of education statistics 2020
<https://explore-education-statistics.service.gov.uk/find-statistics/children-looked-after-in-england-including-adoptions/2020#releaseHeadlines-summary>

3 <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest>

black African background doubled from 0.9% in 2001 to 1.8% in 2011.

By comparing the data, it can be surmised (albeit that the data will be updated soon) that as 86% of the general population is white ethnicity and that white British looked after children comprise only 74% of the overall LAC population, there is a clear overrepresentation of ethnic minority children in the care system.

The second question as to why there is an overrepresentation of ethnic minority children in the care system is harder to answer. This article does not intend to discover all of the reasons for this, but is an attempt to simply provide some helpful guidance for lawyers to think about when they come across cases with a cultural or racial element.

One purported reason could be the experience of ethnic minority parents within family proceedings. Anecdotal evidence gathered from ethnic minority barristers at 18 St John Street Chambers in June 2021 in relation to challenges experienced for non-white families in the care system included reasons such as:

- Ethnic minority parents involved in public law care proceedings struggling to verbalise their case effectively due to having to utilise interpreters and documents taking an inordinate amount of time to be translated thus impacting on the timescales for parents to prepare their cases.
- The potential for unconscious bias by all levels of the court system, Judiciary and legal representatives impacting on decision making.
- A lack of support services for ethnic minority parents to educate parents as to the standards and expectations of parenting in the UK thus not helping to avoid the need for public law proceedings in the first instance and differences in parenting culturally and;

- The likelihood that many ethnic minority parents will be economically disadvantaged thus more likely to suffer from poverty and the resultant by-product of not always being able to meet their children needs.

The government is well aware of the disparities in relation to the over-representation of ethnic minority looked after children in the care system and the subsequent life outcomes for those children post-care. The research entitled *Life after care: the experiences of children from different ethnic groups*⁴ written by Ravinder Barn, Linda Andrew and Nadia Mantovani and commissioned by the Joseph Roundtree Foundation was presented to the House of Commons Associate Parliamentary Group for Children and Young People In and Leaving Care in September 2004. This was the first study to explore the post-care experiences of young people from a range of ethnic minority backgrounds. The study examined data collected from 261 young people, and explored a number of key areas including education, employment and training, housing and homelessness, crime and delinquency, identity, and preparation and after care support. The report stated:

‘The over-representation of minority ethnic young people in the care system (particularly those of African Caribbean and mixed parentage background) and the likelihood of these youngsters spending lengthy periods in care has been reported by empirical research studies for some time, and is now evident from the official government statistics (Bebbington and Miles, 1989; Rowe et al, 1989; Barn, 1993, 2005; Barn et al., 1997). Moreover, minority ethnic young people are disproportionately represented among those leaving care between the ages of 16 and 18’

More recent research conducted by Paul Bywaters, a Professor at the University of Huddersfield in 2018, some 16 years after the 2004 Joseph Roundtree research,

4 https://www.researchgate.net/publication/267209600_Life_after_care_-_the_experiences_of_children_from_different_ethnic_groups

unearthed similar worrying trends in relation to ethnic related inequalities in the care system.⁵ The 2018 study found that found white British children are more than 10 times more likely than Asian/Indian children to be in care. Meanwhile black Caribbean children are 20 times more likely to be in the care system. The disparities were partially explained by different exposures to high levels of socio-economic deprivation as three quarters of children from Bangladeshi, Pakistani, Caribbean and African backgrounds live in the most disadvantaged 40% of neighbourhoods, however Bywaters indicates that significant inequalities still remain even when financial factors are not present and the author urged that understanding why these inequalities exist must become a priority for the government. Bywater stated:

‘Two things strike me – first, the extent of deprivation that many black and ethnic minority groups experience and second, big disparities between Pakistani, Bangladeshi and Indian children, and between those from African and Caribbean backgrounds, as well as differences with white children.’

The welfare checklist

When the Family Court is making decisions about a child’s life, the court’s primary concern is the welfare of the child. The court must consider the ‘welfare checklist’ enshrined within the Children Act 1989 which includes s 1(3)(d) ie ‘his age, sex, background and any characteristics of his which the court considers relevant’. A child’s religious, cultural or racial background are therefore relevant factors to the court when making decisions about a child’s life.

The Family Court through its decisions has made it clear that the child’s welfare is the key deciding factor over and above any issues concerning race and culture and this is apparent from the decisions in the case of *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573. In this case, an Orthodox Jewish child was

being fostered by a catholic family and the court decided that religion and cultural heritage should give way to welfare. More recently, there has been the case of *Re P (a child) (circumcision: child in care); M v F and others* [2021] EWHC 1616 (Fam) which involved an application by Muslim parents for their child in Local Authority care to be circumcised. This ultimately led to a finely balanced decision of the Family Court to not allow the circumcision of the child, albeit that this was particularly in circumstances when the parents were not having contact with the child.

These decisions demonstrate that whilst religion, culture and race are important factors to the court when it carries out its balancing act in the decision-making process, they are not the determining factor.

How culture impacts upon parenting styles and techniques, family functioning and child development.

Is it ever right for the court to take into account the cultural context of parenting?

In the case of *Re A (A child: Wardship: Fact finding: Domestic Violence)* [2015] EWHC 1598 (Fam), Pauffley J accepted that at times different cultural approaches to physical chastisement may be highlighted and whilst not excusing such behaviour as appropriate given UK laws and standards, at times a cultural allowance might be given. At para [67] of the judgment, Pauffley J said:

‘I do not believe there was punitively harsh treatment of A of the kind that would merit the term physical abuse. Proper allowance must be made for what is, almost certainly, a different cultural context. Within many communities newly arrived in this country, children are slapped and hit for misbehaviour in a way which at first excites the interest of child protection professionals.’

⁵ <https://www.communitycare.co.uk/2018/12/17/care-system-ethnic-inequalities-must-addressed-ensure-children-get-services-need-study-argues/>

It may therefore be appropriate at times for the court to scrutinise a parent's behaviours prior to or within proceedings under the lens of cultural/racial variations and family law practitioners, can in the appropriate circumstances, draw the court's attention to a cultural allowance.

The main differences between cultures as it relates to parenting and family proceedings

In writing this article, I consulted with consultant clinical psychologist Dr Iyabo Fatimilehin and clinical psychologist Dr Aneela Pilkington who classify culture as essentially a framework of shared activities and shared meanings by a group of individuals; beliefs, values and practices. They state that the essential differences between individualist (western) and collectivist cultures (non-western) directly impact upon a child's experience of being parented and family practitioners should be aware of this difference when conducting family law cases. For example, in collectivist cultures, children may be parented to undertake the tasks which are traditionally not encouraged in western (individual) cultures, this is in addition to the following differences (this list is not exhaustive).

Common features of collectivist cultures as it relates to parenting:

- collectivist children are taught to provide sibling caregiving, feeding, taking younger siblings to school, playing with them;
- to be obedient to parents;
- have more authoritarian parenting styles;
- emphasis on the social responsibilities;
- physical chastisement as a more accepted discipline style;
- religious obligations;
- parents in some collectivist cultures do not play with their children and their main function as parent is to provide food, shelter, discipline, a family, ensure the survival of their child/ren in societies where there is no welfare state;

- physical displays of affection are not always overt and obvious;
- if migration has been a feature of the parent's journey there may be additional factors of experiences of racism, language barriers, grief, adverse poverty and loss of status.

Common features of individualist cultures as it relates to parenting:

- children are taught to question concepts and be curious;
- authoritative parenting styles;
- physical chastisement is less accepted;
- physical displays of affection may be demonstrated overtly;
- playing with children is encouraged;
- personal choice and freedom is encouraged.

Practitioners should also take account of issues that may be raised by local authorities in a child's contact/family time with a parent. What may be described as a parenting deficit may simply be a cultural difference in parenting. There are also positives in ethnic minority parenting styles that can be overlooked by professionals eg such as mothers plaiting their daughters' hair during supervised contact sessions or taking lengthy contact time for the provision of culturally appropriate food to be made and eaten. These parenting instances might be a meaningful bonding experience from parent to child within that particular culture that professionals simply do not take account of or are not aware of.

Consultant clinical psychologist Dr Iyabo Fatimilehin and clinical psychologist Dr Aneela Pilkington, specifically advise that when family law practitioners are involved in cases where ethnic minority parents or children have psychological testing undertaken, practitioners should always ensure that the psychologist should not expect the parent to submit to psychometric testing as part of the overall assessment. The reason for this is because the standardised

static data used in psychometric testing is essentially biased against ethnic parents.⁶

That bias is as follows:

- Construct bias – *the construct measured is not identical across cultural groups* eg. the concept of intelligence is measured differently by different cultures.
- Method bias – *the method of administration has different implications across cultures* eg British based psychometric tests are often via multiple choice questions with answers and responses being compared to a normative testing group. If the normative testing group is made up of mainly white British persons, the comparative analysis for other races and cultures may be unfair.
- Item bias – *items have different meanings across cultures.*

How can family law practitioners create the balance of ensuring that cultural and ethnic issues are addressed whilst also upholding legal principles?

Drawing all of these strands together, when representing parents from other cultures or races – practitioners should remember:

- Ethnic minority parents may have experienced racism which is likely to have an effect on their functioning and ability to build positive relationships with persons from other cultures.
- Issues that may be raised by local authorities in a child's contact/family time with a parent may need to be seen in a cultural context. What may be described a parenting deficit may be the cultural difference in parenting.

- Migration of parents from other cultures and countries has a significant impact on family functioning.
- Documents must be translated expeditiously.
- Interpreters must be used during assessments.
- It is important to be mindful of the overrepresentation of ethnic minority children in care.
- Expert psychological assessments for ethnic minority parents should not include psychometric testing.
- They must pay attention to differences in individual and collectivist cultures and how they impact on parenting styles
- It is important to ensure that professionals make reasonable cultural adjustments when offering support and assessments to ethnic minority parents.

Conclusion

Family practitioners who are aware of the primary differences between cultures are better equipped to advise appropriately and represent ethnic minority parents in proceedings and ultimately to ensure that those parents European Convention on Human Rights are upheld by the Family Courts, specifically Art 6 – right to a fair trial, Art 8 – right to respect for private and family life and Art 9 – freedom of thought, conscience and religion. They can ensure that other professionals such as local authorities who undertake assessments in family proceedings or those that provide support can better ensure that reasonable adjustments are made taking into account the ethnic minority family experiences of living in micro-cultures within the UK.

⁶ Consultant Clinical Psychologist Dr Iyabo Fatimilehin and Clinical Psychologist Dr Aneela Pilkington – Just Psychology CIC 2021