Neutral Citation Number: [2019] EWCA 9 (Civ)

Case No: C1/2017/3017

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Ouseley
[2017] EWHC 1694 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2019

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE MOYLAN
and
LORD JUSTICE SINGH

- -

Between:

The Queen on the application of AB (by his Mother and Litigation Friend CD)	**Appellant**
- and -	
Secretary of State for Justice	**Respondent**
Youth Justice Board	**Interested Party**
Equality and Human Rights Commission	**Intervener**

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Mr Dan Squires QC and Ms Ayesha Christie (instructed by **The Howard League for Penal Reform**) for the **Appellant**
Mr Tom Weisselberg QC and Ms Sarah Hannett (instructed by **the Government Legal Department**) for the **Respondent and the Interested Party**
Ms Caoilfhionn Gallagher QC and Mr Adam Wagner (instructed by the **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 7-8 November 2018

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Approved Judgment

Lord Burnett of Maldon CJ, Moylan LJ and Singh LJ:

Introduction

1. This is the judgment of the Court. The appeal and underlying claim concern AB's treatment in Feltham Young Offenders' Institution ("YOI") in 2016 and 2017 when he was 15 years old.

2. There are two matters before us. The first is an appeal by AB against the decision of Ouseley J dated 4 July 2017 in so far as it was averse to him and relates to those parts of his claim for judicial review that were dismissed. The principal complaint is against the decision that there was no breach of the appellant's rights under article 3 of the European Convention on Human Rights ("ECHR"). Ouseley J granted AB permission to appeal on 20 October 2017.

3. The second is a cross-appeal by the Secretary of State. On 27 March 2018 Singh LJ granted permission for that cross-appeal to be brought against that part of the decision of Ouseley J in which he held that article 8 ECHR was engaged in this case. That was the subject of a concession made by the Secretary of State before Ouseley J, on the basis of earlier decisions of the High Court. He reserved the right to argue the contrary at an appellate level. Ouseley J went on to hold that there was a breach of article 8 but only in respect of the requirement that any interference with article 8 rights must be in accordance with law. He granted a declaration to that effect.

4. Ouseley J made a number of findings in AB's favour.

5. First, the Secretary of State had failed to comply with Rule 49 of the Young Offender Institution Rules (SI 2000 No. 3371) ("the Rules") pertaining to procedural oversight of the "removal from association" of AB in Feltham, YOI. Ouseley J held that there had been a breach of rule 49, which governs the circumstances in which a person can be the subject of removal from association with other inmates. The process for such removal and the further process of regular reviews of that decision did not take place, in breach of the Rules. This was acknowledged by the Secretary of State and an apology was made for it.

6. Secondly, Ouseley J held that the Secretary of State had failed to comply with rules 3(1), 37(1), 38 and 41 of the Rules, pertaining to AB's education. In particular, Ouseley J (again reflecting concessions made by the Secretary of State) held that there had been breaches of the provisions in the Rules relating to compulsory education for a child such as AB, who was aged 15 at the time and was therefore of compulsory school age.

7. So far as article 3 is concerned, Ouseley J rejected the submission that the treatment of AB at Feltham YOI between 10 December 2016 and 2 February 2017 (a period which was described before him as "Phase 1") was sufficiently severe in all the circumstances of the case to cross the high threshold which is required before treatment can be regarded as being inhuman or degrading.

8. Before this Court, Mr Dan Squires QC, who appeared on behalf of the appellant, submits that the Judge erred in a number of respects in reaching the conclusion that there was no breach of article 3. He also submits that the Judge erred in not finding that there was a breach of article 8 on its substantive merits.

9. On behalf of the Secretary of State, Mr Tom Weisselberg QC submits that the acknowledged breaches of the Rules do not lead to the conclusion that there was also a breach of article 3. He further submits that Ouseley J was correct in rejecting the argument that there was a breach of article 3 (or a substantive breach of article 8, if it were engaged at all). On the cross-appeal, Mr Weisselberg submits that in fact article 8 is not engaged in this case.

10. This Court has also been assisted by written and oral submissions made by the Equality and Human Rights Commission ("EHRC"), which has intervened in these proceedings. At the hearing before us submissions for the EHRC were made by Ms Caoilfhionn Gallagher QC, who in broad terms supported the submissions made on behalf of the Appellant.

11. At the outset we should make clear what this appeal is *not* about. At [18] Ouseley J declined the request made by Mr Squires on behalf of AB "to make some unspecified but broader declaration about the policies which it is asserted Feltham YOI, and perhaps other YOIs pursue in relation to segregation and which the Claimant says is unlawful. The Grounds seek no such relief." No appeal has been made to this Court against that part of Ouseley J's decision.

12. Still less is the current appeal concerned with broader questions of the management of YOIs and the treatment of children and young people in them. We are aware from the background materials which are before the Court, for example reports by Her Majesty's Chief Inspector of Prisons, that concerns have been expressed about such matters. However, we stress that those are not the subject of this appeal. What this appeal concerns is the specific facts of AB's case and whether there has been a breach of article 3 and/or article 8 ECHR on those facts.

Factual background

13. The following summary is taken from [3] - [10] in the judgment of Ouseley J and, where appropriate, the underlying evidence, which this Court has also seen.

14. AB was born on 4 March 2001. He was placed on the child protection register aged six months, due to a "likelihood of emotional abuse", and again when six years old. He witnessed domestic violence between his parents when very young. In early 2007, when AB was five, AB's father, who suffers from schizophrenia, as well as drug and alcohol problems, assaulted AB's mother and took AB hostage in the family home. He then took an overdose in front of AB and collapsed when the police attempted to enter. AB also saw an uncle die from a drug overdose.

15. Since AB's parents could not care for him, from the age of seven he has been in a succession of residential placements, which all broke down. A full Care Order was made in August 2015, when AB was 14.

16. AB has learning difficulties and has had a Statement of Special Educational Needs ("SEN") since 2007, amended twice, most recently in 2015.

17. AB has been "known to the police" since he was 10. In June 2015, when he was 14, he received a Detention and Training Order ("DTO"). He was placed at Medway Secure

Training Centre. There, AB suffered abuse at the hands of officers. AB was released on licence on 23 December 2015.

18. In April 2016, aged 15, AB received another 12 month DTO, for criminal damage and common assault (he had fought with other pupils, pushed a teacher and kicked a football at a ceiling and windows, causing damage), and for a sexual assault he committed when he was aged 13. He was placed at HMYOI Cookham Wood. AB was detained there until 12 October 2016, when he was again released on licence.

19. On 22 November 2016, AB pleaded guilty to two common assaults on prison officers committed at Cookham Wood (he had bitten an officer while restrained and punched another as part of a planned revenge attack for being "disrespected"). Other incidents took place at Cookham Wood, including three assaults on officers. Sometimes he would try to resist restraint, and would bite and spit at officers. He also committed offences, soon after his release on licence, at the care home at which he was placed by the local authority.

20. AB was sentenced on 13 January 2017. He received another 12 month DTO. The pre-sentence report prepared for the hearing on 13 January 2017 concluded that AB's risk of dangerousness was "high", as was his risk of causing serious harm. Even under 24 hour supervision, care and support, he still managed to offend. He also had a history of setting fires, had overly sexualised behaviour and had been found preparing weapons.

21. In the meantime, on 10 December 2016, AB had been sent to Feltham YOI. On arrival at Feltham, AB was immediately placed in "single unlock" (meaning he could not leave his cell when any other detainees were out of their cells), apart from some time in "three-officer unlock", which involved three officers being present whenever he left his room.

22. Before Ouseley J it was contended on AB's behalf that there had been a breach of his article 3 rights by reference to three phases of detention at Feltham YOI. Phase 1 lasted from 10 December 2016 to 2 February 2017. Phase 2 lasted from 2 February to 16 February 2017 and Phase 3 was the period from 16 February to 2 March 2017. It was acknowledged that, if the argument did not succeed in relation to Phase 1, it could not succeed in relation to Phases 2 and 3. Before this Court Mr Squires no longer contended that there was a breach of article 3 after the end of Phase 1, on 2 February 2017. The focus of his submissions before us was on that period of 55 days from 10 December 2016 to 2 February 2017.

Material provisions of the ECHR

23. The relevant rights in the ECHR are set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

24. Article 3 of the ECHR (headed "Prohibition of torture") states:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

25. In the present case it is not suggested that AB was subjected to torture. It is submitted, however, that his treatment in Phase 1 amounted to inhuman or degrading treatment.

26. Article 8 ECHR (headed "Right to respect for private and family life") states:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

Material provisions in the Rules

27. As we have mentioned, the relevant Rules are contained in the Young Offender Institution Rules 2000 (SI 2000 No. 3371).

28. Rule 3(1) provides that:

> "The aim of a Young Offender Institution shall be to help offenders to prepare for their return to the outside community."

29. Para. (2) provides that that aim shall be achieved, in particular, by:

> "(a) Providing a programme of activities, including education, training and work designed to assist offenders to acquire or develop personal responsibility, self-discipline, physical fitness, interests and skills and to obtain suitable employment after release; …"

30. Rule 37(1) provides that:

> "An inmate shall be occupied in a programme of activities provided in accordance with Rule 3 which shall include education, training courses, work and physical education."

31. Rule 38 provides for education. In particular para. (2) provides that:

> "In the case of an inmate of compulsory school age, arrangements shall be made for his participation in education or training course for at least 15 hours a week within the normal working week."

32. Rule 49 governs removal from association. So far as material it provides:

> "(1) Where it appears desirable, for the maintenance of good order or discipline ["GOOD"] or in his own interests, that an inmate should not associate with other inmates, either generally

> or for particular purposes, the governor may arrange for the inmate's removal from association for up to 72 hours.
>
> (2) Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal for up to 14 days.
>
> (2A) Such authority may be renewed for subsequent periods of up to 14 days.
>
> (2B) But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the inmate was removed under paragraph (1).
>
> (2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State.
>
> …"

33. It will be apparent that rule 49 regulates "removal from association" of young offenders, permitting this to be arranged by the governor for up to 72 hours, or for 14 days if the arrangement is made in writing. However, a Prison Service Order, PSO 1700, imposes stricter requirements for those who are aged 15 or 16. Removal from association for longer than 72 hours requires reviews to be undertaken by the Segregation Review Board. Once a young person has been removed for a continuous period of 21 days, and at intervals of 21 days thereafter, the authorisations required by rule 49(2B) and (2C) are given by the Deputy Director of Custody. A National Offender Management Service ("NOMS") Director must review continuous segregation after 90 days.

34. It will also be apparent that rule 3 requires the YOI to provide education and training for young persons, with at least 15 hours of education per week required for a child of compulsory school age.

35. At [14] and [33] of his judgment, Ouseley J noted that the Secretary of State conceded that both these aspects of the Rules had been breached in relation to AB's first phase at Feltham of 55 days (and potentially thereafter too), and made declarations to that effect.

The judgment of Ouseley J

36. Ouseley J held that whether the treatment in question reaches the minimum level envisaged by article 3 depends on all the facts, citing the judgment of Singh J (as he then was) in *R (Dennehy) v Secretary of State for Justice* [2016] EWHC 1219 (Admin), in which he had sought to summarise the relevant jurisprudence of the Strasbourg Court.

37. Accordingly, Ouseley J made a number of factual findings relevant to this analysis at [38] – [69]. For present purposes, those were as follows:

    (1) AB often had to be moved out of the various Units in Feltham, including frequent returns to the Induction Unit, because his behaviour (including the

making of racist remarks, mentioned at [44]), made integration impossible [45], [52] and [56]. Various threats of assault were made towards officers.

(2) Though lacking the frequency required by the procedural Rules, Multi-Disciplinary Meetings ("MDMs"), partly concerned with reviewing the treatment of AB, did take place. They began on 24 January 2017 and continued thereafter: [48]. At those meetings, staff discussed AB's behaviour and ways for him to move forward in shorter and longer terms. There were then subsequent MDMs on 15 February 2017 [52] and 19 April 2017 [63].

(3) The first Deputy Director of Custody ("DDC") review was on 2 February 2017. This authorised AB's removal from association until 24 February 2017, and the decision was "solely based on a desire to keep him safe from harm from others": [49].

(4) AB was, at various points, both permitted, [50], and not permitted, [52], to exercise in the gym. Often, the lack of gym time was attributable to a lack of resources, [52].

38. Ouseley J then turned to the case law concerning segregation in prisons, between [84] and [93]. While there was no Strasbourg or UK Supreme Court authority directly concerning removal from association of *children*, [84], he saw no reason to adopt a different approach from that taken in relation to adults, [111]. He derived the following principles from the case law:

(1) At [85], he found that the purpose and reasons for the treatment are relevant in assessing whether inhuman or degrading treatment is made out, citing *Ramirez-Sanchez v France* (2007) 45 EHRR 49, at [118]. The measures taken had to be necessary to attain the legitimate aim being pursued.

(2) At [86], Ouseley J cited the "decisive" factors to be considered when analysing whether a prisoner's article 3 rights had been breached, outlined in *Ahmad v United Kingdom* (2013) EHRR 1, at [178], and cited by Singh J in *Dennehy*, at [100]. They include:

a) the presence of premeditation;

b) the intention to break the individual's resistance or will;

c) the intention to humiliate or debase, or the implementation of a measure causing fear, anguish or feelings of inferiority;

d) the absence of specific justification for the measure;

e) the arbitrary punitive nature of the measure;

f) the length of time for which the measure was imposed;

g) any degree of distress or hardship exceeding the levels unavoidable within the detention context.

(3) Ouseley J also accepted that the age of the person under consideration is relevant, citing *Ramirez-Sanchez*, at [118].

(4) Ouseley J considered that *Ahmad* also stands for the proposition that, at least in the adult context, no specific minimum period of segregation would, in itself, constitute a breach of article 3, at [87]. The Court in *Ahmad* (discussed at [88] of Ouseley J's judgment) stated, at [210], that no precise rules could be set down; rather, the question whether the threshold conditions of article 3 had been met depended on "the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned" [209]. In order to avoid arbitrariness, attention must be paid to the purpose of the restriction applied to the prisoner [211] and the procedural safeguards in place [212]. Similar considerations have been outlined in domestic authority, for example in *R (Bourgass and Hussain) v Secretary of State for Justice* [2015] UKSC 54; [2016] AC 384, also emphasising the consequences for the prisoner.

(5) At [92], Ouseley J cited Munby J's judgment in *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin); [2003] 1 FLR 484, that articles 3 and 8 impose positive obligations on the state to treat vulnerable individuals like children with respect, involving a balance of their interests against those of the community, but always treating the interests of the child as a primary consideration.

39. Before Ouseley J, Mr Squires also relied on various medical and penological reports, from both international and domestic sources, discussed between [93] and [107]. From these he sought to derive the proposition that there is now a firm consensus that prolonged solitary confinement for young offenders amounts to inhuman and degrading treatment and should be absolutely prohibited. This was primarily attributable to the harmful psychological impact such treatment could have. Importantly (for later purposes), at [106], Ouseley J noted that one such report, drafted by Human Rights Watch and the American Civil Liberties Union, stated that the writers were not aware of any studies which looked specifically at the effect of prolonged solitary confinement upon adolescents.

40. Drawing these threads together, Ouseley J set out his views on article 3 between [108] and [140]. His conclusions can be summarised as follows.

41. Contrary to Mr Squires' contention, there is no bright line rule that "prolonged solitary confinement" lasting more than 15 days in itself breaches article 3, [109]. There were various reasons for this.

(1) As adumbrated above, the case law indicates that a fact-sensitive approach, taking account of all the circumstances, including the purpose of the segregation, is required in an article 3 analysis, [110].

(2) Mr Squires placed too much weight on non-ECHR international materials. Neither the UN Convention on the Rights of the Child ("UNCRC") nor the UN Convention Against Torture ("UNCAT") is incorporated into domestic law, meaning that they can constitute no more than an interpretative aid in relation to article 3. Further, nothing in the wording of those Conventions adds anything

of any content to article 3, lacking any specific provision on the topic of segregation of young people [112].

(3) In that light, no real weight should be accorded to General Comment No. 10 of the UN Committee on the Rights of the Child ("the Committee"), which is concerned with the application of the UNCRC. The High Court, when required to consider how to apply one Convention (the ECHR), need not give weight to the views of another body, the Committee, on how they applied a different treaty. That would not really be an exercise of interpretation at all [113].

(4) Focus on the question of whether "removal from association" constituted "solitary confinement" within the international definitions of the latter distracted from what mattered in this case. References to the Istanbul Statement at the International Psychological Trauma Symposium at [114], or to the decision in *Bourgass* at [116], regarding these definitional questions distract from the fundamental substantive question of whether article 3 has been breached on the facts, irrespective of labels.

(5) At [118] to [122], various pieces of medical and penological evidence were considered and their utility questioned by Ouseley J.

(6) Turning to the facts at [124] to [139], and drawing in particular on the principles outlined in *Ahmad*, Ouseley found that article 3 was not breached. Nothing was done intending to humiliate or degrade AB; nor was any of the treatment intended as punishment (it was intended to protect both AB and others). This protective purpose meant that the treatment always had a considered and proper justification. AB always had proper medical care and contact with his solicitors. Finally, some procedural oversight took place, albeit with a frequency insufficient to satisfy the Rules.

(7) Importantly, Ouseley J said, AB was never kept in "total solitary confinement". The assessment of this, Ouseley J accepted, encompasses both quantitative and qualitative components. The number of hours he was allowed to leave his cell varied each week, and he had limited forms of social contact, through the gym and occasional table tennis matches with an officer.

(8) Lastly, Ouseley J rejected Mr Squires' submissions as to the harm caused to AB. There was no evidence of a worsening of AB's mental health problems. At its highest, the evidence only showed a "latent risk" of such. Even then, there was little evidence of this, and in any event, the Secretary of State had not had fair notice of a "latent risk" rather than "actual harm" argument, given that this was advanced late in the proceedings.

42. Accordingly, Ouseley J concluded, article 3 was not breached [139].

43. Turning to article 8, Ouseley J noted that Mr Weisselberg had conceded that, in light of *R (Syed) v Secretary of State for Justice* [2017] EWHC 727 (Admin); [2017] 4 WLR 101[1], article 8 was engaged in this case, [141]. Further, it followed that article 8 had been breached, since Mr Weisselberg additionally conceded that the interference had

[1] The appeal in this case is listed for hearing in the Court of Appeal on 13 February 2019.

not been "in accordance with the law", as required by article 8(2), [141]. Accordingly, Ouseley J issued a declaration for the purpose of awarding "just satisfaction", [146].

44. However, Ouseley J nonetheless went on to consider the questions of legitimate aim, necessity and proportionality. He found that there was a legitimate aim: the protection of AB himself from other inmates; and the protection of other inmates and staff from AB. Further, it was not necessary, as part of the proportionality examination, for the Secretary of State to show that all other methods had been exhausted. Options were relatively limited in cases as difficult as AB's, and the meetings such as the MDMs had rejected alternative forms of detention for sound reasons.

Grounds of Appeal

45. The Appellant's four Grounds of Appeal as originally formulated and then developed in written submissions, were as follows.

Ground 1

46. The first ground is that Ouseley J erred in according no weight to the UK's international law obligations to prohibit the (prolonged) solitary confinement of children.

47. Mr Squires begins with international legal materials. In respect of "hard international law", the UNCRC article 37(a) prohibits inhuman or degrading treatment of children.

48. General Comment No. 10 of the Committee, interpreting this provision, states that solitary confinement of children breaches article 37 and cannot be justified. Although that General Comment refers to solitary confinement as a "disciplinary measure" only, the Committee's Report on the UK of 12 July 2016 makes clear that solitary confinement of children is prohibited in all circumstances.

49. This position is reinforced, submits Mr Squires, by reference to "soft international law" materials, such as rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty; the UN Special Rapporteur on Torture's report of 5 August 2011; and reports by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment ("CPT"). These also make clear, submits Mr Squires, that solitary confinement of children constitutes inhuman or degrading treatment.

50. Mr Squires then contends that Ouseley J's approach to the ECHR was flawed. His argument can be broadly summarised in five parts.

    (1) Ouseley J was wrong to hold that the approach required under the ECHR did not admit of the application of hard-edged rules, preferring a fact-sensitive approach. There are numerous examples in which the Strasbourg Court and domestic courts have drawn hard-edged rules in article 3 detention cases:

        a) In *Ahmad* the Strasbourg Court said that "complete sensory isolation" was absolutely prohibited under article 3.

        b) In *Vinter v UK* (2016) 63 EHRR 1 that Court held that whole life sentences with no possibility of review whatsoever were prohibited under article 3.

c) In *Mursic v Croatia* (2017) 65 EHRR 1, the Court found that the detainee's personal space falling below 3sqm raises a strong presumption that Article 3 has been breached. This presumption is not rebuttable by reference to "all the facts"; only those reductions in cell space which were "short, occasional and minor" could rebut that presumption.

d) In *R (C (A Minor)) v Secretary of State for Justice* [2008] EWCA Civ 882; [2009] QB 657, the Court of Appeal found that physical restraint of children detained in Secure Training Centres to maintain good order and discipline amounted to *prima facie* inhuman or degrading treatment.

(2) Ouseley J placed insufficient weight on the hard international legal materials concerning solitary confinement of children. Rather than (as he said) the role of the UNCRC in domestic law being limited to the "resolution of ambiguities" in the ECHR, *all* members of the UK Supreme Court held in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1149 that the relevant international treaties should inform the interpretation of the ECHR without requiring any ambiguity therein (*per* Lord Reed at [83] to [84], Lord Carnwath at [110], [116] to [119], [130], Lord Hughes at [137], Lady Hale at [217] to [222], and Lord Kerr at [259] to [260].)

(3) Numerous authorities from the Strasbourg Court, such as *Neulinger v Switzerland* (2010) 54 EHRR 1087, at [131], quoted approvingly by Lady Hale in *ZH (Tanzania) v SSHD* [2011] UKSC 4; [2011] 2 AC 166, at [21], and *Demir v Turkey* (2009) 48 EHRR 54, state that the ECHR must be interpreted in harmony with international law. Further, the UNCRC *must* be taken into account when interpreting ECHR rights applicable to children, *per* Lady Hale in *R (R) v Durham Constabulary* [2005] UKHL 21; [2005] 1 WLR 1184, at [26].

(4) Ouseley J made an error of law in considering that the views of the Committee on the UNCRC were not persuasive. That was contrary to the views of Lord Carnwath and Lord Hughes in *SG* ([105] to [108] and [150] to [153]), as endorsed by the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250.

(5) Ouseley J's analysis that regarding soft international law materials as persuasive would undermine the function of the High Court was flawed, being contrary to the views of the Strasbourg Court as exhibited in many judgments, including *Gafgen v Germany* (2011) 52 EHRR 1.

Ground 2

51. The second ground of appeal is that Ouseley J erred in according no weight to the medical and penological evidence of the impacts of solitary confinement on children, particularly those with pre-existing mental health problems. Mr Squires submits that what can be derived from the relevant materials is the proposition that there is a clear consensus of medical and penological opinion that children should never be placed in "prolonged solitary confinement".

52. He submits that Ouseley J's analysis of that evidence was flawed. Where expert evidence reflects a professional consensus, and is unopposed by evidence to the contrary, weight should be given to it by the court: *Kiyutin v Russia* (2011) 53 EHRR 26, at [67]. Ouseley J's refusal of this was justified by four reasons, each of which (submits Mr Squires) betrays an error of law.

(1) First, he criticised Dr Kraus' report as treating the effects of solitary confinement as having the same impact on all children. But the expert evidence is clear: there *is* a substantial risk to *all* children.

(2) Secondly, Ouseley J's concern that the "serious latent risk" argument had not been advanced with fair notice to the Secretary of State was misplaced. The case for AB has always been that the harm may not have already been caused, but there is potential that lasting and serious harm may eventuate.

(3) Thirdly, Ouseley J's view that latent harm was not established was flawed. It is hard to see how latent harm could be established beyond identifying a "significantly" increased risk, as Drs Hales and Adshead said in their expert report.

(4) Fourthly, it does not undermine the function of the High Court to treat the views of experts as persuasive, and proper weight should be given to those views.

Ground 3

53. The third ground is that if, contrary to grounds 1 and 2, prolonged solitary confinement of a child is capable of justification, then the Secretary of State needed to show that it pursued a legitimate aim, was strictly necessary, and was not imposed arbitrarily. Ouseley J erred in this regard, examining these questions in relation to "removal from association", but not specifically by reference to "solitary confinement". Mr Squires submits that Ouseley J wrongly treated those two concepts as being the same.

54. Had Ouseley J directed himself properly, submits Mr Squires, he would have been bound to conclude that the solitary confinement was not justified, for four reasons. First, the Secretary of State adduced no evidence that holding AB in solitary confinement was justified. Nor was a legitimate aim proffered. Secondly, removing AB from association is permitted by YOI rules, but holding him in solitary confinement is not. If the treatment is unlawful, one cannot say it pursues a legitimate aim and is justified. Thirdly, given the severity and potential consequences of the treatment, it could only be justified as an unavoidable and exceptional measure. Yet 25% of the boys at Feltham were held in solitary confinement, and this only came as a result of under-staffing. Fourthly, there were no procedural safeguards followed for the first 55 days, meaning the decision-making was arbitrary.

Ground 4

55. The fourth ground is that, in considering whether AB's treatment was "necessary" under article 8, Ouseley J again wrongly conflated "removal from association" with "solitary confinement". Ouseley J accepted that article 8 was engaged, but, submits Mr Squires, he only considered the question of justification under article 8(2) in relation to "removal from association", not "solitary confinement". This meant, submits Mr

Squires, that he committed the same error of law as above. For the above reasons, if he had considered the matter appropriately, he would not have found a legitimate aim, or necessity and proportionality to have been made out.

The Appellant's submissions at the hearing

56. As the oral arguments unfolded before this Court, the original grounds of appeal were refined to some extent. On behalf of the appellant, Mr Squires QC in essence now makes the following four submissions.

57. First, in what Mr Squires acknowledged was his most "ambitious" submission, he submits that the law on article 3 has reached the stage where it should be held by this Court that the "solitary confinement" of any child is inhuman or degrading treatment, contrary to article 3; alternatively, that what he describes as "prolonged" solitary confinement (in other words more than 15 days) is inherently in breach of article 3. For this purpose, he defines "solitary confinement" as being confinement in a cell for more than 22 hours in a day and there being minimal meaningful contact with other human beings. Mr Squires submits that the law has reached the point at which a "bright line" rule to this effect exists and this Court should say so.

58. Secondly, if the first submission is rejected, Mr Squires submits that at the very least this Court should state that there is a presumption of a breach of article 3 in such circumstances. Although that presumption could then be rebutted, Mr Squires submits that this would only be possible if there was a strong legitimate reason for imposing a regime of solitary confinement on a child and this was shown to be strictly necessary or compelling.

59. Thirdly, even if his first two submissions are rejected, Mr Squires submits that, on the facts of the present case, there was a breach of article 3. In summary, Mr Squires submits that for a period of 55 days, between 10 December 2016 and 2 February 2017, AB was essentially confined to his cell for more than 22 hours per day with little meaningful contact with other human beings; with no education provided to him; and with no opportunity to engage in physical exercise. At most all he could do in his cell was watch television.

60. Fourthly, if the argument based on article 3 is rejected, Mr Squires submits that there was a substantive breach of article 8. He relies upon the same arguments and factors that support the article 3 claim. If they are not sufficiently severe to succeed under article 3, the solitary confinement imposed on AB was not shown to be for a legitimate aim or necessary for article 8 purposes.

The Equality and Human Rights Commission's Submissions

61. The submissions for the EHRC supported those made on behalf of the appellant.

62. At the hearing before us Ms Gallagher focussed in particular on the so-called "mirror principle" and urged us, despite that normal principle, to go further than the European Court of Human Rights has gone to date in its interpretation of article 3. The mirror principle is the principle that, when interpreting the rights in the ECHR, domestic courts

should seek to "mirror" the jurisprudence of the Strasbourg Court rather than to go beyond it.

63. Ms Gallagher submits that that principle has evolved since the decision of the House of Lords in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, which is usually taken to be the genesis of the mirror principle. In *Ullah*, at [20] Lord Bingham of Cornhill said:

> "In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para. 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

64. Subsequently, in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153, at [106], Lord Brown of Eaton-under-Heywood commented on that passage in *Ullah* as follows:

> "I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more.' There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in Strasbourg. …" (emphasis in original)

65. Before us Ms Gallagher placed particular reliance on the approach recommended by Lord Mance JSC in *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2018] 2 WLR 895. At [153] he said:

> "there are however cases where the English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority. If the existence or otherwise of a Convention right is unclear, then it may be appropriate for domestic courts to make up their minds whether the Convention rights should or should not be understood to embrace it".

66. Ms Gallagher also emphasised the point that lack of resources cannot justify a breach of ECHR rights, in particular the rights in article 3. Ms Gallagher submits that it was clear in Ouseley J's judgment that the lack of education, gym sessions and open air exercise during the relevant period were attributable to a lack of resources. She submits that this cannot serve as a justification within an article 3 enquiry. She cites *Lopez Ostra v Spain* (1994) 20 EHRR 277 in favour of the proposition that a lack of resources can never be a justification for inhuman and degrading treatment. She also submits that this is relevant in relation to article 8, owing to the existence of a positive duty to take reasonable measures to secure the rights in that article.

The Respondent's submissions

67. On behalf of the Secretary of State Mr Weisselberg submits that Ouseley J's judgment was essentially correct in the material respects. In summary he responds to the four grounds of appeal as follows:

(1) On ground 1, the judge rightly held that whether article 3 had been breached was a question that turned on all the facts of a particular case. The judge was right to conclude that the UNCRC, UNCAT and soft law materials did not assist in the interpretation of the ECHR.

(2) Ground 2: the Judge was right to reject the medical evidence for the reasons he gave.

(3) Ground 3: the Judge considered all the circumstances of AB's removal from association, including time spent in and out of his cell. He was well aware of the facts as to what AB was or was not doing during Phase 1 and did not think that all that had occurred was that AB was removed from association. Putting the label "solitary confinement" on those circumstances would not have affected the decision reached.

(4) Ground 4: this ground, which arises under article 8 (if it is engaged, which the Secretary of State denies) is unarguable for essentially the same reasons as advanced in respect of Ground 3.

Discussion and Analysis

68. We are unable to accept any of the different ways in which Mr Squires has put the case on behalf of the appellant. In our judgment there is no bright line rule to the effect for which he contended. Nor is there any presumption to that effect. Indeed, we would observe that, even on Mr Squires' own formulation, the rules for which he contends would not in truth be bright lines at all. It might be a bright line to say that a child cannot be kept in his or her cell for more than 22 hours a day. However, as soon as one includes the criterion of whether contact with other people was "minimal" or "meaningful" or not, that immediately calls for an assessment or evaluation to be made.

That necessarily requires a close examination of the facts of the particular case and a judgement to be made.

69. Furthermore, on the facts of this particular case, we have come to the conclusion that detailed consideration of what exactly was happening at Feltham from 10 December 2016 to 2 February 2017 shows that the level of severity required by article 3 was not crossed. We will return to review the facts in more detail later.

70. We have also come to the conclusion that there was a legitimate aim for any interference with article 8 rights and it was necessary and proportionate, essentially for reasons of the safety of others (both inmates and members of staff) and for the safety of AB himself, who was being threatened by other inmates in response to his very challenging and abusive behaviour.

71. Mr Squires eschewed any suggestion that the rules for which he contends can be found in customary international law. If those rules exist at all, they must therefore be found in treaty law; in other words in the correct interpretation of article 3 of the ECHR.

72. We will consider each of the main sources of both "hard" and "soft" international law on which reliance has been placed in support of this appeal. In our view, they do not have the legal effect contended for. We are unable to find anything in the materials relied upon to displace the interpretation that has to date been given to article 3, in cases such as *Ahmad* and *Dennehy*: in other words that article 3 calls for a highly fact-sensitive enquiry into all the circumstances of a case such as this in order to see whether the high threshold contained in it has been crossed. We do not consider that there are any "bright lines" or presumptions in this context.

The UN Convention on the Rights of the Child 1989

73. Article 37 of the UN Convention on the Rights of the Child 1989 provides, so far as material:

> "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. …
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. …"

74. With respect to the Appellant's arguments, this adds nothing material to what is to be found in article 3 of the ECHR.

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

75. This Convention has been ratified by the UK although not incorporated into domestic law. It is unnecessary to refer to its provisions in detail since it contains nothing material that is not to be found in article 3 of the ECHR.

General Comment No. 10 of the UNCRC

76. General Comment No. 10 of the UNCRC was issued on 25 April 2007 following the 44th session of the Committee on the Rights of the Child meeting in Geneva in January-February 2007. The comment related to "children's rights in juvenile justice." Mr Squires placed particular emphasis on part of what was set out at [89]:

> "Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of Article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned; …"

77. In our view, it is clear on the wording of that recommendation that it relates to disciplinary measures. It is in that context that it makes reference to "solitary confinement". This is also made clear by the words which immediately follow "or any other punishment". In our view, that recommendation has no relevance to the present case, where AB was not confined to his cell for any reason to do with punishment or discipline. It was done for his protection and for the protection of others.

The Istanbul Statement on the use and effects of solitary confinement

78. This Statement was adopted on 9 December 2007 at the International Psychological Trauma Symposium in Istanbul. The participants in the task group were listed at the end of the Statement. They included psychiatrists, psychologists and representatives of human rights organisations. They also included Manfred Nowak, Special Rapporteur on Torture at the UN. However, so far as we are aware, the symposium had no specific legal status.

79. The purpose of the Statement was set out as follows:

> "Recent years have seen an increase in the use of strict and often prolonged solitary confinement practices in prison systems in various jurisdictions across the world. This may take the form of a disproportionate disciplinary measure, or increasingly, the creation of whole prisons based upon a model of strict isolation of prisoners. While acknowledging that in exceptional cases the use of solitary confinement may be necessary, we consider this a very problematic and worrying development. We therefore consider it timely to address this issue with an expert statement on the use and effects of solitary confinement."

80. The Statement contained the following definition of solitary confinement:

> "Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic."

81. The section on the effects of solitary confinement contained the following passage:

> "It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one-third and as many as 90% of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and sycosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.
>
> Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and wellbeing."

82. Under the heading "Policy implications" the Statement said:

> "The use of solitary confinement should be absolutely prohibited in the following circumstances:
>
> - For death row and life-sentenced prisoners by virtue of their sentence.
> - For mentally ill prisoners.
> - For children under the age of 18."

83. In our view, this was a recommendation for future action by States, not a statement of current legal principle. Such a prohibition could, for example, come from legislative action and would not necessarily require any particular interpretation to be given to a norm of international law such as that contained in article 3 of the ECHR.

Note by the Secretary-General to the General Assembly of 5 August 2011

84. Mr Squires also cites a note by the Secretary-General of the UN to the General Assembly dated 5 August 2011, which was an interim report prepared by the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. Section III concerned solitary confinement. At [25] it was noted that:

> "There is no universally agreed upon definition of solitary confinement."

However, it went on to refer to the Istanbul Statement, which we have cited earlier.

85. [26] stated that solitary confinement is also known as "segregation", "isolation", "separation", "cellular", "lock down", "Supermax", "the hole" or "Secure Housing Unit (SHU)" but noted that all these terms "can involve different factors." For the purposes of that report (and we would observe not generally):

> "… The Special Rapporteur defines solitary confinement as the physical and social isolation of individuals who are confined to their cells for 22-24 hours a day. Of particular concern to the Special Rapporteur is prolonged solitary confinement, which he defines as any period of solitary confinement in excess of 15 days. He is aware of the arbitrary nature of the effort to establish a moment in time when an already harmful regime becomes prolonged and therefore unacceptably painful. He concludes that 15 days is the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point, accordingly to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible."

86. We also observe that, at [27] under the heading "legal framework", the report stated:

> "International and regional human rights bodies have taken different approaches to address the underlying conditions of social and physical isolation of detainees, and whether such practices constitute torture or cruel, inhuman or degrading treatment or punishment …"

87. Mr Squires relies on [66] of the report:

> "United Nations Treaty bodies consistently recommend that juvenile offenders, children or minors should not be subjected to solitary confinement … Juveniles are often held in solitary confinement either as a disciplinary measure, or to separate them from the adult inmate population, as international human rights law prohibits the intermingling of juvenile and adult prison populations. Regrettably, solitary confinement as a form of punishment of juvenile detainees has been prevalent in States such as Jamaica …, Paraguay … and Papua New Guinea …"

88. Mr Squires places emphasis on [86], which is to be found in the list of recommendations made in the report:

> "States should abolish the use of solitary confinement for juveniles and persons with mental disabilities. Regarding disciplinary measures for juveniles, the Special Rapporteur recommends that States should take other measures that do not involve the use of solitary confinement. …"

89. Once more, this document contains recommendations for future action and does not purport to, or have the effect of, setting out an interpretation of current law.

The 6th Annual Report of the UK's National Preventive Mechanism

90. The definition of "solitary confinement" in the Istanbul Statement was also used in the 6th Annual Report of the UK's National Preventive Mechanism (2014-15), at p.21.

91. At p.34 the report stated:

> "Children should not be isolated as a punishment, and should never be held in conditions that amount to solitary confinement."

92. Again, this is a recommendation for future action by States, not a statement of current law.

The Response to the 5th Periodic Report of the UK of the UN Committee on the Rights of the Child

93. Mr Squires also places reliance on the report of the UNCRC dated 12 July 2016, which set out its concluding observations on the 5th Periodic Report of the UK under the Convention on the Rights of the Child. In particular he places emphasis on what was said at [78] to [79], which appeared in a section of the report headed "Administration of Juvenile Justice".

94. At [78(g)] said:

> "Segregation, including solitary confinement, is sometimes used for children in custody including in Young Offenders' Institutions."

95. [79] stated that, with reference to its General Comment No. 10 (2007), the Committee recommended the UK to bring its juvenile justice system fully into line with the Convention on the Rights of a Child and other relevant standards. In particular the Committee recommended that the UK should:

> "…
>
> (f) Immediately remove all children from solitary confinement, prohibit the use of solitary confinement in all circumstances and regularly inspect the use of segregation and isolation in child detention facilities."

96. Once again, that is a recommendation for future action, not a statement of current law.

Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment dated 19 April 2017

97. Mr Squires also places reliance on the report to the Government of the UK following its visit to this country of the CPT dated 19 April 2017, which followed its visit from 30 March to 12 April 2016.

98. At [91] the CPT stated:

> "The situation was particularly bleak for the 43 juveniles on the main accommodation wings who, for various reasons, could not take part in education or activities. The majority of these juveniles were offered around three and a half hours to exercise, associate and eat communally. However, a large minority were placed on a so-called 'separation' list by management, as far as the delegation could ascertain, for reasons of repeated violence or for their own protection from gang or personal rivalries. This was denoted by a vivid pink sign stuck on the cell door that read 'do not unlock'. In effect, this meant that the juvenile was not unlocked other than for 30 minutes for a solitary period of exercise and for meal times – when he was accompanied to pick up his food, which he ate alone in his cell. These juveniles were locked up alone in their cells for 23 and a half hours per day, with only a television for company.
>
> The delegation interviewed one juvenile who spent 23.5 hours a day lying on his bed, under his covers, blankly looking at a TV screen, talking and meeting no one. It also met a 15-year-old who had been held in these conditions for several weeks and he had no information about how much longer he would be held under such a restricted regime. They were effectively being held in conditions of solitary confinement. <u>In the CPT's view, holding juvenile inmates in such conditions amounts to inhuman and degrading treatment</u>." (underlining in original)

99. Two observations can be made about that passage. First, it is an expression of view about one, perhaps more than one, specific case on its facts. It does not purport to set out a statement of general principle, still less any bright lines or presumptions.

100. Secondly, when that passage is read in its full context, it is clear that the CPT itself recognised that it was making recommendations for the future and that they would not necessarily have immediate effect. This is clear from [98], where the CPT said:

> "The CPT wishes to stress that any form of isolation may have a considerably detrimental effect on the physical and/or mental well-being of juveniles. In this regard, the Committee observes an increasing trend at the international level to promote the abolition of solitary confinement as a *disciplinary sanction* in respect of juveniles. Particular reference should be made to the

United Nations Standard Minimum Rules on the Treatment of Prisoners (Nelson Mandela Rules) which have recently been revised by a unanimous resolution of the General Assembly and which explicitly stipulate in Rule 45(1) that solitary confinement shall not be imposed on juveniles. The CPT fully endorses the approach. The CPT considers that the current YOI Rules concerning cellular confinement of up to seven days as a disciplinary punishment discipline should be amended and brought in line with the above precepts.

The CPT also considers that juvenile inmates should never be placed in conditions akin to solitary confinement for the purposes of *GOOD* (i.e. 'removal of association' to the segregation unit), as regulated by YOI Rules. There may be occasions when particular juveniles may need to be managed separately for short periods, but this should involve providing the juvenile inmate concerned with additional support from staff and ensuring access to purposeful activities, including physical exercise and education.

More generally, juveniles who require management under GOOD should in fact be placed in small staff-intensive units, where their behaviour can be better managed and they can be gradually reintegrated into the main inmate population.

The CPT recommends that the United Kingdom authorities take urgent steps to ensure that the YOI Rules are amended to reflect the increasing trend at the international level to promote the abolition of solitary confinement as a disciplinary sanction in respect of juveniles.

It also recommends that juveniles should not be placed in segregation for the purposes of GOOD and should instead be placed in small staff-intensive units.

More generally, until such a time as the above two recommendations are fully implemented, the authorities should ensure that the separation, removal from association, cellular confinement or segregation of juveniles – in whatever form it takes – should be applied only as a means of last resort, and that the juveniles concerned should continue to be granted access to education, physical exercise and possibilities of association." (Italics and bold in original)

Standard Minimum Rules for the Treatment of Prisoners

101. On 17 December 2015 the General Assembly of the UN adopted Resolution 70/175 on Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules.

102. Rule 44 provides:

> "For the purpose of these Rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."

103. Rule 45 provides:

> "1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
>
> 2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement in similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply."

104. A footnote to that provision cross-refers to Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (Resolution 45/113, Annex).

105. Rule 67 of the 1990 Rules provides:

> "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited."

106. We observe that this paragraph appears in a section which has the heading "Disciplinary Procedures." It is clear both from its context and from its express language that it uses the term "solitary confinement" in the sense of a punishment or disciplinary measure. It does not refer, for example, to its use for the purpose of protecting the child or for the protection of others.

107. In the light of the above analysis, it is unnecessary to address each of the specific criticisms made by Mr Squires of the judgment of Ouseley J. In our view, it is clear, (even accepting for the sake of the argument that the hard and soft international

materials relied upon have relevance to the interpretation of article 3 of the ECHR) that they do not have the legal effect for which Mr Squires contends.

108. For the same reason it is unnecessary to address in detail Ms Gallagher's suggestion that this Court should be willing to go further than the Strasbourg Court has gone to date (and so depart from the mirror principle). In truth, in our view, there is nothing in the international materials cited either to require or to justify any departure from what the Strasbourg Court has so far said in its interpretation of article 3 in the context of detention of prisoners.

109. We will next apply the principles which are to be found in the jurisprudence on article 3 to the facts of this particular case.

110. We are very conscious that this case concerns a child. Children are, of course, different from adults. As has often been said, the interests of a child are a primary consideration. In this particular case it is important to look at the circumstances from the perspective of a child. Accordingly, what might otherwise not be a breach of article 3 and/or article 8 could well be in the particular circumstances of a child. Nevertheless, in our view, close attention still has to be paid to the full set of circumstances of each child.

111. That is an exercise that Ouseley J rightly performed. Having looked closely at the facts we have come to the same conclusion as he did. We certainly cannot say that his conclusion was wrong. It is clear that a great deal was happening between 10 December 2016 and 2 February 2017, despite the many difficulties that AB presented to the authorities at Feltham. It is not the case that AB was simply left to languish, isolated, in his cell.

Application of principles to facts of this case

112. We take this factual account from the witness statement of AB and also the witness statement of the Governor of Feltham YOI (Mr Knight) and its exhibits.

113. AB describes in his witness statement what his "single unlock" regime looked like. He was woken up when officers opened his door with his breakfast. Typically, before 9am he was then taken to collect his medication, which took between 10 and 20 minutes. He then got 30 minutes out on the landing, a shower and a phone call (if his parents did not answer, he was sometimes allowed out of the cell to try them again later), or exercise, but all on his own. He was then "banged up" for the rest of the day.

114. Lunch and dinner were brought to his cell, and he ate them alone. In the evenings, he could hear others around him having association.

115. On 11 December 2016, AB was visited by the Chaplain, who engaged AB in a brief conversation through the door of the cell. On the same day, AB played table tennis with an officer out of his cell. He did this on four occasions in the period to the end of January, including on 30 and 31 December 2016.

116. In terms of social services, an initial assessment was made on 12 December 2016, with the aim of making contact with a community social worker. No concerns were raised

at this time: he was eating and sleeping well, although he was not yet receiving all of his required medication.

117. The Governor states that AB was immediately added to the Risk Management Meeting agenda after the above social work assessment.

118. On 14 December 2016, an educational assessment was carried out regarding AB, but he was not allocated an educational pathway (i.e. a group with which a detainee can attend all lessons). It was not until the MDM of 24 January 2016 that the YOI realised that AB had not been provided with education packs. These were provided thereafter. It was also on 14 December 2016 that AB had his gym induction. A note drawn up on 13 December 2016 stated that AB would be discussed in a risk management meeting the following day, 14 December 2016.

119. On 15 December 2016, a unit manager witnessed AB and another young person (as it was put) have a negative verbal exchange. The Unit Manager spoke to him about his shouting out of his door at other detainees and repeatedly pressing his bell. They had a sensible discussion in which it was explained to AB that he was on three officer unlock due to his behaviour at Cookham Wood, and that his behaviour at Feltham would decide how his risk to officers was assessed. Later that day, AB's caseworker introduced himself and answered some of AB's questions.

120. On 16 December 2016, AB (at his request) saw a member of the Community Mental Health Team, discussing short term goals and his behaviour.

121. On 18 December 2016, AB was seen shouting out racial abuse at other young persons, including threats to urinate and defecate on other boys' copies of the Quran. This behaviour led to the belief in Governor Knight that AB had created a risk to himself, due to the possible reaction from the other boys. This was affirmed by a documentary record, which states that AB was placed on single lock since his safety would be compromised otherwise.

122. On 20 December 2016, AB's safeguard induction was completed, involving AB identifying those whom he knew in Feltham and where he came from.

123. The case notes record that, over the Christmas period, AB refused to go for his medication on one occasion (21 December 2016), and spent one morning ringing his bell (22 December 2016). On 25 December 2016, AB had some Christmas time out, although he complained that he was not allowed to call his brother.

124. On 29 December 2016, a social work welfare check was completed. Another welfare check was undertaken on 30 December. This involved the social worker informing AB about education, including the information that the education team would be providing him with work booklets.

125. The Governor states in his witness statement, at [5], that, at this time, AB's history of violence and fears for his safety at the hands of other detainees justified the regime in place. The removal from association was not a "planned situation but rather an evolving response to our assessments of the risks to [AB], to staff and other young people". He continues:

> "I realise that there were regrettable delays in getting him access to education and also a broader regime. At the initial stage of his time at Feltham, our main focus was on addressing his behaviour in a positive way and although his behaviour could have been managed by moving him to our segregation unit we decided that engagement with him in normal location was likely to be more successful".

126. On 1 January 2017, the Personal Officer introduced himself to AB and set some personal objectives for him.

127. On 3 January 2017, AB was moved to Heron Unit. He had not been moved earlier because non-essential moves had been halted during an outbreak of norovirus at the YOI. Although the move was intended to reintegrate AB with different young people, within hours, he was heard to have told a racist joke to the unit. He was then moved back to the induction unit on 11 January 2017, since he and others in Heron Unit were in a negative cycle of abuse involving shouting at each other from their cells. Other incidents of his shouting out from his cell are recorded throughout his time in Heron, for example on 15 January.

128. On 10 January 2017, AB's case worker came for a visit, and he also had a substance issue assessment the next day. Welfare checks continued on 17 January and 19 January.

129. Governor Knight states that, on 12 January 2017, AB claimed that he would "rape the families" of other boys because he was "boss on the wing". Case notes around this time recorded AB's behaviour as worsening, with him having no ability to understand the rules.

130. 13 January 2017 was the date on which AB was sentenced.

131. AB was visited by his supervisor on 17 January 2017, and the parties had a conversation regarding AB's release date, during which AB was taken to have made veiled threats.

132. In light of AB's behaviour, an "adjudication" led to AB being given "7 x days losses", including the loss of his television. He subsequently misused his bell repeatedly and continued to shout abuse out of his cell.

133. On 19 January 2017, AB was moved to Eagle unit for the purpose of giving him a new start and for integration, but because of his continuing behaviour, he was considered to be at risk of harm from other young people if he came into contact with them. The Governor spoke to his social worker and to Barnardo's about AB's time out of his cell. Those individuals and other staff then had further conversations with AB about his behaviour.

134. On that same day, the Howard League emailed the Youth Justice Board ("YJB") expressing concerns about AB's isolation.

135. A member of the YJB visited Feltham on 20 January 2017 asking for a multi-disciplinary meeting. The YJB visit involved a discussion of AB's needs, including psychological support in light of his sexual offending, and a discussion of whether he could be taken back to Cookham Wood.

136. AB was visited on 23 January 2017 in order to discuss the authorisation of his home telephone numbers for the purpose of his calls.

137. The first MDM took place on 24 January 2017. On any view, at that meeting the authorities were clearly taking AB's situation very seriously; yet that date falls within the period of which complaint is made (Phase 1, which Mr Squires submits ended on 2 February). AB and various staff members/support workers were present at the meeting. The YJB wanted to look at moving AB back to Cookham Wood. Various interventions and programmes were discussed, as well as discussion of the short-term goals AB would need to achieve in order to come off single unlock. Indeed, it was agreed in the meeting that the "focus" was on getting AB off single unlock. It was agreed that AB's return to Cookham Wood would not be in his best interests, since he had begun to make progress at Feltham. It was noted that AB should have been getting gym provision, even in light of the difficulties of his single unlock. Similarly, education packs should have been provided. The Governor notes that a bespoke educational package had been difficult to deliver, due to the inability to leave AB alone with women. AB's social worker and Barnardo's also visited that day to discuss a safeguarding referral. On the same day the Howard League sent a letter before claim challenging AB's solitary confinement and the lack of educational provision.

138. On 2 February 2017, AB received the first input from Kinetic (life skills training) for one hour. This provision continued for six weeks. He would be out of his cell but on his own, with a male worker.

139. On 31 January 2017, he was given a warning for rudeness, abuse and misuse of his cell bell. But the case notes record that he was settling in well on Eagle Unit and beginning to develop positive relationships with staff. It was also noted at this stage that he was being seen by the mental health team.

140. The Deputy Director of Custody at NOMS requested a psychological assessment of AB on 3 February 2017. This was undertaken on 13 February 2017. Ms Anderson, a trainee psychologist, undertook this assessment, and concluded that AB's safety and security were compromised due to his attitudes and behaviour. Various measures were suggested, including interventions and meetings with chaplains and others. He should also be, it was suggested, referred to CMHT for therapeutic assessments concerning trauma and sexual behaviour.

141. The Deputy Director reviewed AB's removal from association on 3 February 2017, authorising its continuation on the basis of a desire to keep AB safe from harm from others, with AB's own behaviour driving the situation. The DDC Review states that, initially, AB's single unlock was seen as a period in which to assess his behaviour and to allow him to integrate, with knowledge of his previous behaviour at Cookham Wood. His shouting of racist abuse put his safety at risk. It was also noted that AB was receiving support from his caseworker, social worker and unit staff.

142. In the light of that detailed review of the facts of what was actually happening at Feltham between 10 December 2016 and 2 February 2017, we repeat that we are unable to conclude that the judge was wrong in his assessment that there was no breach of article 3 on the facts of this case. On the contrary we agree with that assessment.

143. It will also be apparent from our review of the facts that the reasons why AB was treated as he was were essentially for the protection of others and for his own protection.

144. The resources which are reasonably available to the authorities in such a case are not irrelevant. It is one thing to say that, where otherwise there would be a breach of article 3, that cannot be justified by reference to lack of resources, for example if a person were confined to their cell not to protect others but simply because there were no prison officers to facilitate unlock. However, the enquiry called for under article 3, particularly when positive obligations are relied upon, can properly take account of the resources reasonably available. By way of example, in this case, there were good objective reasons why AB could not be left alone with a female teacher. The availability of resources in that context would not necessarily be impermissible.

145. An analogy can be drawn with the positive obligation to protect a person's life under article 2. In that context the Strasbourg Court has held that "such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities": see *Osman v United Kingdom* (2000) 29 EHRR 245, at [116].

146. As we have mentioned earlier, Ms Gallagher cited *Lopez Ostra* for the proposition that lack of resources is irrelevant. That was a case about environmental pollution. The application was brought under both article 3 and article 8. We note that, in fact, the Strasbourg Court found there to be no violation of article 3, finding it unnecessary to set out its reasoning in detail: see [59] and [60]. In relation to article 8, the Court observed (in an entirely orthodox analysis, especially given that what was in issue was a suggested *positive* obligation) that "a fair balance … has to be struck between competing interests of the individual and the community as a whole": see [51].

147. It is accepted on behalf of the Secretary of State that not everything that should have been done during Phase 1 was done. In particular there were breaches of the Rules relating to educational provision and oversight of AB's removal from association.

148. We do have some concerns that there were breaches of various Rules and that no MDM took place until 24 January 2017. However, those considerations do not lead us to conclude that there has been a breach of either article 3 or article 8 on its substantive merits (putting to one side the limited declaration of a breach of article 8 which was made by Ouseley J). Like Ouseley J, we have reached the conclusion that the admitted breaches of the Rules did not lead to a breach of article 3 or of article 8, if that article was engaged.

149. We therefore turn to the Secretary of State's cross-appeal on the question whether article 8 was engaged in this case.

<u>The cross-appeal by the Secretary of State</u>

150. The Secretary of State contends that AB's removal from association did not engage his rights under article 8 of the ECHR, and accordingly cross-appeals against paragraph 2 of the Order made by Ouseley J.

151. The Secretary of State's concession before Ouseley J that article 8 was engaged followed the decision of Lewis J in *R (Syed) v Secretary of State for Justice* [2017] EWHC 727 (Admin), [2017] 4 WLR 101. The Judge there held that article 8 was

engaged by the placement of a prisoner in a Managing Challenging Behaviour Unit ("MCB Unit").

152. The Secretary of State submits that: (i) article 8 of the ECHR is not generally or necessarily engaged where a prisoner is removed from association under Rule 49; (ii) in any event, on the facts of this case article 8 was not engaged.

153. On (i), Mr Weisselberg developed his argument in the following four steps.

(1) First, the loss of the right to associate is an inevitable consequence of a sentence of imprisonment and, secondly, that restriction on the right to associate is a normal result of prison life, and it does not follow from this that article 8 is engaged.

(2) If removal from association has a serious impact on a prisoner's mental health, protection may be provided by article 3. But, for article 8 purposes, segregation under rule 49 is not complete isolation. Prisoners can interact with others in a limited manner, and a flexible approach is taken to how they are held in isolation.

(3) Segregation only engages article 8 where it has some impact on an individual's mental health, as article 8's definition of private life stretches only to "physical and psychological integrity of a person" and a respect for personal autonomy.

(4) In *Dennehy*, Singh J was wrong to hold that he was bound by the decisions in *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 AC 148 or *Shahid v Scottish Ministers* [2015] UKSC 58; [2016] AC 429 to conclude that article 8 was engaged. In *Shahid*, this point was not argued but was a simple concession. Moreover, *Munjaz* was concerned with the very different area (in terms of policy reasons) of detention for mental health purposes, and, in any event, the majority of the Committee did not find that article 8(1) was engaged, with Lord Hope of Craighead saying this expressly, and Lord Bingham of Cornhill only addressing the question of justification under article 8(2).

154. On (ii), Mr Weisselberg submits that, in any event, article 8 was not engaged on the facts of this case. First, removal from association was monitored by professionals throughout the period of segregation, reviewed on a weekly basis, with no evidence that the removal had an adverse impact on AB's health. Secondly, the removal from association was partial, limited, and for a comparatively short period of time.

155. We do not accept those submissions for the Secretary of State. For essentially the same reasons as Singh J gave in the case of *Dennehy* we would hold that article 8 can in principle be applicable in cases of this type, in particular because removal from association with others constitutes an interference with the right to respect for private life as interpreted by the Strasbourg Court and by domestic courts. It therefore needs to be justified under article 8(2).

156. On behalf of the Secretary of State Mr Weisselberg submits that Singh J was wrong in *Dennehy*. In particular Mr Weisselberg repeats the submission which was made in the High Court before Singh J in *Dennehy* to the effect that courts below the level of the Supreme Court are bound by the decision of the House of Lords in *Munjaz*. He submits

that that proposition is unaffected by the subsequent decision of the European Court of Human Rights in *Munjaz v United Kingdom* [2012] 1 MHLR 351.

157. Mr Weisselberg submits, as he did in *Dennehy*, that this Court (like the High Court) is bound by the decision of the House of Lords in *Munjaz* in accordance with the principle enunciated by the House of Lords in *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465.

158. We do not agree. We would respectfully endorse the analysis of Singh J in *Dennehy* between [133] and [151]. In particular we agree with his analysis of the various speeches in the House of Lords in *Munjaz*. It is unnecessary to lengthen this judgment further by repeating it in detail here.

159. Furthermore, we adopt his conclusion at [150]:

> "The issue is one which has been recently considered by the Supreme Court [in *Shahid*]. Although … the point was the subject of concession, nevertheless Lord Reed expressly endorsed that concession and stated that it reflected the approach taken by the European Court in *Munjaz*. Furthermore, Lord Reed went on to deal at length with the question of justification under article 8(2). He would not have needed to do so if he not been of the opinion that article 8(1) was in principle applicable to seclusion of prisoners."

160. Furthermore, we consider that on the facts of the present case there was clearly an interference with AB's rights under article 8. He was prevented from associating with others at Feltham in a way which would have been permitted if he had not been subject to the special regime which was regarded as being necessary in the unusual circumstances of his case.

161. However, for the reasons we have set out earlier when considering AB's appeal, we have reached the conclusion that the interference with his article 8 rights would have been justified under para. (2) of that article, since it was necessary and proportionate. Accordingly, it would have been lawful had it not been for the fact that it was not in accordance with the law.

Conclusion

162. For the reasons developed in this judgment we dismiss both the appeal by AB and the cross-appeal by the Secretary of State.