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Secure Childcare and the Convention on the Rights of Persons with Disabilities: Illuminating the Applicable Rights Framework

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Abstract

Case law illustrates both the complexity of the regimes in England and Wales whereby children may be deprived of their liberty for welfare reasons and the inadequacy of provision to meet complex needs, which has led to a significant use of the power of the High Court to order a Deprivation of Liberty in unsuitable places. Calls have been made for legislative reform and less use of detention. Assuming human rights compliance will be a feature of a new framework, this article examines how the Convention on the Rights of Persons with Disabilities (CRPD), as illuminated by the comments of its expert Treaty Body, the Committee on the Rights of Persons with Disabilities (CRPD Committee), provides useful material as to the contents of a suitable legislative framework. Also outlined is how the CRPD has value under the rights framework most often referenced in the UK, the European Convention on Human Rights (ECHR).

Keywords: children; detention; England and Wales; Human Rights; reform

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1. Introduction

This article encourages consideration of the Convention on the Rights of Persons with Disabilities 2006 (CRPD) when assessing the propriety of secure children's homes in England and Wales—both their existence and their operation in practice—and in designing a replacement regime. The premises for this are that, first, as developed in Part3, a significant proportion of the children so accommodated will have one or more conditions or traits that can properly be considered to be a disability within the terms of the CRPD; and, secondly, as developed in Part IV, the CRPD can be used to illustrate the meaning of human rights standards applicable in domestic law, primarily through the Human Rights Act 1998 and its quasi-incorporation of the European Convention on Human Rights (1950) (ECHR) into UK law.

Welfare-based detention of children involves various overlapping regimes: the complexity of this is described in Part 2, together with a case study of a judge-ordered detention in an unsuitable place because there was no alternative: *Re MK: Deprivation of Liberty and Tier 4 Beds* (2024). Also noted is the call by the Children's Commissioner for England for less use of detention and a new clear statutory framework. This leads to Part 3: assuming that any new framework should be human rights compliant, there is discussion of how the CRPD, as illuminated by general comments and observations to states from its

expert Treaty Body, the Committee on the Rights of Persons with Disabilities (CRPD Committee), provides useful material as to what should be in a suitable legislative framework.

2. The Complexity of and Need for Reform to the Regimes for Secure Childcare in England

In the November 2024 report, *Children with complex needs who are deprived of liberty*, the Children's Commissioner for England enumerated the routes whereby children might lose their liberty (Children's Commissioner for England 2024, pp. 13–15):

(i) Under the Children Act 1989, section 25 of which precludes the use of "secure accommodation" (i.e., placements "provided for the purpose of restricting liberty") unless a court makes an order, the criteria for which are that the child in question is being looked after by a local authority and either is "likely to abscond" from other types of accommodation (and has a "history of absconding") and "likely to suffer significant harm", or "is likely to injure himself or other persons" if not placed in secure accommodation. On 31 March 2024, 72 children were held in one of the 14 Secure Children's Homes for these welfare-based reasons. (For Wales, there is a separate regime, arising under s119 Social Services and Well-being (Wales) Act 2014.)

(ii) Under criminal justice provisions, namely:

(a) the Legal Aid, Sentencing, and Punishment of Offenders Act 2012, Chapter 3 of which allows children in criminal proceedings to be remanded to local authority accommodation or youth detention accommodation (which, under section 102 of the Act can be a secure children's home, but also a secure training centre, young offender institution, or secure college: the final three types of place are provided under section 43 of the Prison Act 1952); and

(b) the sentencing provisions of the Powers of Criminal Courts (Sentencing) Act 2000 (now set out in Chapter 2 of Part 10 of the Sentencing Act 2020).

The report noted that during 2023–2024, an average of 430 children were detained in one of four young offenders institutions, one secure training centre, one secure school, and in secure children's homes. In the latter, on 31 March 2024, there were 84 children held for youth justice reasons, 12 more than were there under the welfare provisions of the Children Act.

(iii) Under the Mental Health Act 1983, which allows detention for assessment and treatment (short-term) or treatment (longer-term) under both civil and criminal provisions, which have no minimum age limit. The report referred to 963 detentions of children in 2023–2024. (This figure appears to come from official statistics from the NHS (NHS 2024) which, for the period 1 April 2023 to 31 March 2024, records 274 detentions of children aged 15 or under and 689 detentions of those aged 16–17. However, this may be an understatement, as Table 6 of the data tables in the statistics note that during the period, 440 children aged 15 and under were detained once, 44 twice, two three times and one four times; and 891 children aged 16 and 17 were detained once, 132 twice, 41 three times and 10 four times. This suggests that 487 children aged 15 and under were detained at some point during the year and 1074 children aged 16 or 17 were detained.)

(iv) Detention under Deprivation of Liberty Orders by the Court of Protection under the Mental Capacity Act 2005: section 2(5) of the 2005 Act indicates that it generally does not apply to those under 16. However, the Deprivation of Liberty Safeguards regime (DoLS) under Schedule A1 to the 2005 Act, which allows a professional check on detention in hospital or care home settings for those without capacity, does not apply to those under 18 (see para. 13 of Schedule A1); hence, a court order is required: the report records 156 such orders in 2023. (The delayed plan to replace the DoLS regime with Liberty Protection Safeguards, which will apply to those 16 or over so as to remove the need to involve the Court of Protection, is not discussed in this article).

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(v) Detention on the order of the High Court (known as a Deprivation of Liberty order); this inherent jurisdiction, and the fact that it is not displaced by the statutory regimes, has been confirmed by the Supreme Court in *Re D* (2019) and *Re T* (2021). The report referred to 1368 such orders being made in 2023.

From these materials, it is evident that loss of liberty for children is much more significant under the mental health and welfare provisions of the Mental Health Act 1983, Mental Capacity Act 2005, and inherent powers of the High Court than under the Children Act 1989 or even the criminal justice system.

This description, however, does not capture the complexity and unsatisfactory nature of what might occur. In *Re MK: Deprivation of Liberty and Tier 4 Beds* (2024), a 17-year-old subject to a care order was diagnosed to have an emerging emotionally unstable personality disorder: she had multiple hospital admissions, including under the 1983 Act, and acts suggesting suicidal ideation caused doctors to believe there was more of a determination to die than a "cry for help". Two psychiatrists and an approved mental health professional considered MK needed detention in a psychiatric hospital under the 1983 Act. However, the National Health Service has a distinct process for admission to its Child and Adolescent Mental Health Services (CAMHS) (described in *Blackpool Borough Council v HT and Others* 2022). Its experts considered that the likely adverse effects of in-patient placement (including interaction with other children expressing suicidal ideation) outweighed its benefits and did not provide the safe and stable environment MK required. However, the local authority had access only to rented accommodation with carers; the alternative was an unlocked general paediatric ward, which was not secure.

Lieven J found that MK's situation of crisis engaged the duty to protect life under Art 2 of the ECHR, for which the 1983 Act, including a locked ward and segregation, was the best regime. She accepted at para. 33 that there would be adverse effects, noting that it was "nothing short of tragic" that the in-patient psychiatric ward would "increase MK's mental distress" and that a mental health hospital "should not in an ideal world be forced to use [in-patient services] as a containment facility for a suicidal person". However, disagreeing with the NHS gatekeeping doctors, her view was that such a placement was in MK's best interests "unless and until somewhere else is found that can effectively protect MK from a significant risk of killing herself (whether through suicide or misadventure) and meet her therapeutic needs". However, as her judicial powers did not extend to compelling the gatekeeping doctors to provide access to a CAMHS bed, Lieven J made a Deprivation of Liberty order under inherent powers to allow detention on the paediatric ward, even though that was less suitable. Her Ladyship also commented at para. 1 that the case was "yet another judgment concerning the lack of provision, and the inappropriate provision, of accommodation for deeply troubled young people under the age of 18 years".

This provides useful context for the materials set out by the Children's Commissioner. MK seemed to meet the criteria for secure accommodation under the Children Act 1989 and for detention under the Mental Health Act 1983, but resources and the decision-making processes involved meant there was no provision for her. Hence, the context in which the judge decided to make use of an unsatisfactory regime was the inadequacy of provision.

The Children's Commissioner, reporting on interviews with children impacted by Deprivation of Liberty orders, noted their tendency "to have complex needs and histories", often from "trauma and mental health conditions that have not been addressed" (Children's Commissioner for England 2024, p. 8). She called for two key outcomes. First, that "far fewer children … be deprived of their liberty", to be achieved through meeting the "critical need for high quality registered children's homes" with "safe accommodation and therapeutic support" to meet the needs of "children living with trauma and at risk of harm" (Children's Commissioner for England 2024, p. 11). Secondly, for the smaller, residual group for whom a deprivation of liberty is necessary, there should be a "clear leg-

islative and statutory framework", including giving children a stronger voice and providing "greater scrutiny of the effectiveness of the order and the quality of care they are receiving" (Children's Commissioner for England 2024, p. 11).

On the basis that such a fresh regime should be compliant with human rights standards, the most obvious one in England and Wales is the ECHR, given its status in domestic law via the Human Rights Act 1998. However, other rights regimes are binding on the UK in international law, which are discussed next; thereafter, it is explained how these additional standards are relevant, including through the ECHR and the 1998 Act.

3. The Rights Regimes in Play—Including the Convention on the Rights of Persons with Disabilities

The provisions set out in part 2 relate to loss of the right to liberty, but in *MK* it was done to protect the right to life. Other rights might also be in play, either generally or in other factual situations: for example, privacy rights will invariably be affected as a concomitant of any loss of liberty (along with loss of rights to freedom of association and expression). Reviewing these rights more systematically, this section outlines those set out in the ECHR and equivalents in its UN counterpart, the International Covenant on Civil and Political Rights 1966 (ICCPR). In more detail, it outlines those rights in the context of persons with disabilities, as set out in the CRPD, often in a rephrased and supplemented form. Further, it reviews the general statements of the CRPD Committee (through its eight General Comments to date and additional statements) and also uses examples from the many Concluding Observations issued to states (of which there were 145 by the end of 2025) where comments have been made that are relevant to the rights in secure accommodation situations. There is a focus on more recent comments, reflecting the developed thinking of the CRPD Committee, which will be applicable to the UK and to other countries as well.

A. Coverage of the CRPD

As noted above, use of the CRPD is premised on the inclusion within its terms of most children in secure placements. Article 1 indicates that those covered "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". This does not purport to be a complete definition but makes clear that psychiatric and intellectual impairments are covered if they are "long-term" (not transitory). This covers those whose condition means psychiatric services could have a role to play.

In addition, it should cover those with neurodivergence, communication impairments, and significant learning differences because, as the partial definition in the CRPD makes clear, interaction with societal barriers is key. This is reflected in the note in paragraph (e) of the preamble that "disability is an evolving concept" and "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others". This conceptualisation is important in understanding the rights set out in the CRPD and the pivotal role of equality. It also illustrates that those within the terms of the CRPD are those who need assistance to secure equity.

B. Children's Rights Generally

Before considering the individual rights involved in secure accommodation contexts, some general provisions about the rights of children with disabilities should be noted. Article 23(1) of the Convention on the Rights of the Child 1989 (CRC) includes the right of children with disabilities to "a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community". Ar-

ticles 23(2) and (3) require appropriate assistance to the child and their carers, albeit subject to "available resources", and with means testing permitted. This assistance:

> "shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development" (Article 23(3)).

In this context, Article 23(4) requires international cooperation and information exchange in relation to healthcare (including preventive healthcare), rehabilitation, education and vocational services to improve state performance on these matters. In addition, Article 2 requires states to avoid discrimination based on "disability" (and other statuses), and to ensure protection against such discrimination.

Specific language relating to the rights of children in the CRPD is broadly consistent with these provisions of the CRC. Article 7(1) requires states to "ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children" and "take all necessary measures" in that connection; Article 7(2) repeats the general obligation to make "the best interests of the child … a primary consideration" whenever action is taken; and Article 7(3) requires that children be allowed and assisted to express their views, which shall be given "due weight in accordance with their age and maturity, on an equal basis with other children".

With this as background, the specific rights that must be considered in relation to children whose needs are met through the regimes outlined in Part 2 are now considered, starting with the right to life, which is outlined from the perspective of the ECHR before turning to the right as expressed in the CRPD.

C. Protecting the Right to Life in a Non-Discriminatory Fashion

1. The ECHR Case Law

Article 2 of the ECHR requires states to protect the right to life, including from self-harm. In addition to an obligation on the state not to take life save for extreme situations (set out in Article 2(2)), the positive obligations are two-fold (*Fernandes de Oliveira v Portugal* (2019), paras. 104–111):

(i) a regulatory framework (a) to require measures to save lives (including in psychiatric hospitals and other situations where lives are at risk), accompanied by (b) an effective judicial system to determine the cause of any death and secure accountability; and

(ii) an obligation to take reasonable steps to respond where the authorities knew or ought to have known of a real and immediate risk to life, whether from the actions of another or self-harm.

This can also be restated as involving substantive obligations (the regulatory framework and taking positive preventive steps in some circumstances) or procedural obligations. The latter requires an "effective investigation", which entails independence from those involved (relevant to public confidence); adequacy in terms of establishing the facts (which involves securing evidence, including expert evidence, and providing a thorough and objective analysis and not missing an obvious line of inquiry), determining whether lethal force was used, and identifying and if appropriate punishing those involved; accessibility to the family of the victim so as to safeguard their interests; sufficient public scrutiny; and promptness and reasonable expedition (to maintain public confidence in the rule of law and preventing any appearance of collusion) (*Armani Da Silva v UK* (2016), paras. 231–237).

Protection against suicide may be required, relevant factors as to whether there is a duty including a history of mental health problems, the severity of the condition, previous attempts at self-harm, suicidal thoughts and signs of distress. (*Fernandes de Oliveira v Por-*

tugal (2019), para. 115). Breach of Article 2 could arise from an inadequate regulatory framework, its application on the particular facts, or failure to recognise the need for operational measures or take reasonable steps (*Fernandes de Oliveira v Portugal* (2019), paras. 107, 111, and 112). This requires account to be taken of the unpredictability of humans, the difficulty of regulating society, and the need for choices to be made in relation to resources, as well as the need to avoid breaching other rights by taking overly restrictive steps. The finding in *Fernandes de Oliveira v Portugal* (2019), which involved the suicide of an in-patient allowed significant freedom, was that the regulatory framework was fine, including the importance of trust and reflecting modern approaches of following the least restrictive approach, and there was no good reason to suspect a real and immediate risk of suicide; however, the fact that civil proceedings for negligence were not completed 11 years after the death meant that the procedural obligation was breached.

2. Material from the CRPD

Article 6 of the ICCPR also requires that the right to life be protected and that arbitrary loss of life be avoided. Article 10 of the CRPD notes that *all* persons have the inherent right to life and requires that states "take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others". (This includes in the context of humanitarian emergency, which is set out in Article 11; the role of the CRPD in this context has been analysed in Gledhill and Baird 2021).

The CRPD Committee has commented on high rates of suicide amongst people with disabilities, particularly those with psychiatric conditions, and expressly including young people in comments made to Sweden (CRPD Committee—Sweden 2014, para. 29, referencing "deep concern about the increasingly high rate of suicide among persons with disabilities, including boys and girls") and Belgium (CRPD Committee—Belgium 2024, paras. 20 and 21, referencing concern at the lack of information on how many persons with disabilities in the 15–29 age bracket committed suicide, the most frequent cause of death for that age group, and recommending the collation of statistics to assess whether there was a particular problem). An additional problem raised for the Maldives was the increasing suicide rate in the context that "attempted suicide is criminalized, which prevents persons with disabilities from seeking mental health support" (CRPD Committee—Maldives 2025, para. 19(c)).

Given these concerns, the Committee noted the need to take relevant steps, including:

- "all necessary measures to prevent, identify and address situations of risk of suicide in persons with disabilities" (CRPD Committee—Sweden 2014, para. 30; see CRPD Committee—Sweden 2024, para. 23 for commendation that there was "a planned strategy for mental health and suicide prevention, which is going to include a disability perspective", albeit that there remained concerns about deaths in institutions and during arrests, requiring better training of professionals);
- "necessary psychological treatment" (CRPD Committee—Hong Kong 2012, paras. 63 and 64);
- "requisite accessible services, including psychosocial services" (CRPD Committee—Belgium 2024, para. 21, the planning of which would be assisted by the call for statistics noted above);
- a national strategy and targeted measures, in which disabled persons' organisations (DPOs) are involved (CRPD Committee—France 2021, paras. 21 and 22 (with particular concern about those with autism), and CRPD Committee—Republic of Korea (2022) (also mentioning particular concern about those with autism and those with psychosocial disabilities)); and
- "independent investigations of suicides among persons with disabilities and adopt[ing] measures to provide psychosocial support to prevent suicides among persons with disabilities" (CRPD Committee—Kazakhstan 2024, para. 22).

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Whereas the ECHR is limited to what are usually described as civil and political rights, the CRPD also has economic, social, and cultural rights, reflecting the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR). The latter's Article 12 sets out "the right of everyone to the highest attainable standard of physical and mental health". Article 25 of the CRPD is "the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability": this requires equal access to healthcare services. The need to reduce suicide rates has also been raised under this. Accordingly, the UK was asked to "[a]ddress the high suicide rate among persons with disabilities, especially persons with intellectual and/or psychosocial disabilities" (CRPD Committee—UK 2017, paras. 54 and 55, with particular concern about Northern Ireland).

This was also the right used in the second review of Hong Kong, the concern being the "rising rate of suicide in persons with disabilities" (and various specific conditions, including post-traumatic stress disorder, anxiety, and depression), but also "the lack of a comprehensive, long-term mental health strategy". This led to a call for "sufficient funds to develop a multi-year mental health-care plan that includes the establishment of community and human rights-based mental health services and support across Hong Kong, China" (CRPD Committee—Hong Kong 2022, paras. 75 and 76). Similarly, for the second review of Sweden, concern about higher mortality rates for those with disabilities in various settings required suitable measures, including mental health services (CRPD Committee—Sweden 2024, paras. 53 and 54).

Intersectionality has also been raised. Concern at the second review of Australia under Article 10 included levels of "suicidal ideation, particularly within Aboriginal and Torres Strait Islander communities", identified as being "due to, inter alia, lack of support, poverty, and isolation"; this required targeted and culturally appropriate steps, developed with those communities, and including "a comprehensive approach to suicide prevention" in the training of relevant professionals (CRPD Committee—Australia 2019, paras. 19 and 20. Other concerns included the lower life expectancy of persons with disabilities, particularly those with intellectual disabilities and those from Aboriginal and Torres Strait Islander communities, and high death rates in care settings. At the first review of Canada, a concern under Article 5 was intersectional discrimination affecting women and girls, those from indigenous communities as well as migrants, including in relation to access to mental health services: recommendations included "equitable and appropriate" services for those from indigenous communities, "including health services aimed at preventing suicide among indigenous young persons with disabilities" (CRPD Committee—Canada 2017, paras. 13 and 14(e))).

3. The General Principles Under the CRPD

This material from the CRPD Committee is consistent with that arising under Article 2 of the ECHR, but with an important overlay of the need to take a disability perspective (including an awareness of intersectional discrimination). This is central to the point of the CRPD, Article 5 of which requires states to:

(i) recognize equality before the law (which can be found as Article 7 of the Universal Declaration of Human Rights 1948 (UDHR) and Article 26 of the ICCPR, but was not added to the ECHR until Protocol 12 of 2000 (European Convention on Human Rights 2000), the general right to non-discrimination, which goes further than the Article 14 ECHR right to non-discrimination in relation to rights, but which the UK has not ratified or even signed);

(ii) prohibit discrimination on the basis of disability (and provide protection against it); and

(iii) ensure reasonable accommodation as part of eliminating discrimination.

It is also made clear in Article 5 that steps to ensure "de facto equality" are not problematic. The second and third specifics of Article 5 link to definitions in Article 2:

> "Discrimination on the basis of disability" means any distinction, exclusion, or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;
>
> "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms …"

These must be read together: discrimination includes direct discrimination (action having a discriminatory purpose), indirect discrimination (apparently neutral but having a discriminatory effect), and failing to make reasonable accommodation. The aim is substantive equality, namely the same end result in terms of rights being enjoyed; if more has to be done for a person with an impairment, then that is required, subject only to it being disproportionate or unduly burdensome. This means equality is not possible in some situations: but where it is reasonable to provide the relevant accommodation, failure to do so is discriminatory.

For children such as MK, whose condition involves a higher risk of death from self-harming behaviour, reasonable action must be taken to ensure equally high survival prospects as for a child without her challenges. That puts into focus the need for a disability lens. An illustration of this is the recommendation made to Belgium, noted above, that provision be made of "the requisite accessible services, including psychosocial services" (CRPD Committee—Belgium 2024, para. 21). Relevant protective services must be offered in a way that people with disabilities will use them—hear about them, trust them, and make use of them.

Article 9 of the CRPD is a more general right to equal accessibility, including to services provided to the public, with specific reference made to emergency services, which will include crisis interventions. Article 9(2) sets out various elements, "minimum standards and guidelines", which shall be developed, promulgated, and monitored; "training for stakeholders"; "promote … appropriate forms of assistance and support to persons with disabilities to ensure their access to information".

An additional point, reflected in the recommendation to France that DPOs be involved in a national strategy (CRPD Committee—France 2021, paras. 21 and 22; see also CRPD Committee—Republic of Korea 2022, para. 22), is that those affected should be involved in designing and monitoring solutions. Article 4, which sets out general obligations arising under the CRPD, includes a requirement to consult and involve DPOs, including those of children, in relation to anything affecting them (Article 4(3)). The expertise of those affected may well assist something having efficacy, and it is respectful of human dignity to involve those who are affected.

D. Preventing Inhuman and Degrading Treatment

Article 3 of the ECHR contains the absolute prohibition on torture, inhuman and degrading treatment, or punishment. Similarly to the right to life, Article 3 has been interpreted to include a negative element limiting action by state officials, a positive element requiring steps to protect people, and an implicit procedural obligation to determine whether there is state fault in a breach. It can cover injuries to a person: here, there is a sliding scale, with fatal and near-fatal injuries covered by Article 2 (see *Makaratzis v Greece* (2004)), serious injuries covered by Article 3, and lesser injuries covered by Article 8 (see *MS v Croatia* (2013)). Article 3 can also be breached without serious injury, including by

unnecessary force against detainees (see *Bouyid v Belgium* (2015), involving police slapping a youth detainee when that was not made necessary by his actions).

Article 3 also covers poor conditions of detention, including non-therapeutic conditions. For example, preventive detention without any treatment (due to language difficulties) breached Article 3: *Rooman v Belgium* (2019). Similarly, in *Miranda Magro v Portugal* (2024), the Court determined that lengthy detention in a prison hospital pending the finding of a space in a psychiatric clinic, of which there was inadequate provision, breached Article 3 through inadequate treatment for a psychiatric condition: it involved excessive medication rather than anything to improve the underlying condition. At para. 81, the Court reflected on the vulnerability of those with mental health conditions: "… the very nature of the applicant's psychological condition rendered him more vulnerable than the average detainee and that his detention in the conditions described above may have exacerbated to a certain extent his feelings of distress, anguish and fear. In this connection, the Court considers that the failure of the authorities to provide the applicant with appropriate assistance and care has unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety …" The analogy between this and the situation of MK, described above, is obvious.

This approach was applied in *LR v North Macedonia* (2020), involving a child with autism, a mental disability, and a speech disability being placed in an institution for persons with physical disabilities: he would abscond and so was regularly tied to a bed. The Court concluded this safety measure arose from the placement being inadequate and was not shown to be the least intrusive measure available, such that Article 3 was breached.

The equivalent right under the ICCPR is Article 7, which covers torture and cruel, inhuman, and degrading treatment. Additionally, Article 10(1) requires that treatment of detainees involve humanity and respect for dignity, protecting persons from something that might not reach the severity to be degrading. The CRPD reflects this wider coverage. It has three distinct rights:

(i) Article 15 requires "all effective legislative, administrative, judicial, or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman, or degrading treatment or punishment";
(ii) Article 16 requires relevant measures to prevent "all forms of exploitation, violence, and abuse" (with reference also made to gender-based intersectionality), and Article 16(5) references the need for investigations and prosecutions; and
(iii) Article 17 provides for a "right to respect for … physical and mental integrity on an equal basis with others".

In the medical context, Article 15 CRPD includes a prohibition on non-consensual medical or scientific experimentation (as does Article 7 of the ICCPR); and Article 25(d) of the CRPD requires that medical professionals operate on the basis of free and informed consent.

Examples of the consequences of these obligations for children in institutions come from recent concluding observations to Denmark and Finland (though see also CRPD Committee—Sweden 2024 at paras. 33–36). For Denmark, two distinct matters affecting children and adults in "social care and psychiatric institutions" gave rise to concerns under Article 15:

(i) ill-treatment (that was getting worse)—"[t]he prevalence and increasing use of coercion, forced treatment and restrictive practices …, including physical and chemical restraints" (CRPD Committee—Denmark 2024, para. 45(a)); and
(ii) inadequate preventive mechanisms—"[i]nsufficient and ineffective oversight mechanisms …, and a lack of implementation of recommendations from existing oversight mechanisms, including the national preventive mechanism" (ibid, para. 45(b)).

Similarly covering children as well as adults, and referencing social care and psychiatric settings, but arising under Article 16, there were concerns about problematic behav-

iour—"[t]he prevalence of many forms of violence against children and adults with disabilities in institutions, … particularly the prevalence of gender-based violence and the high incidence of sexual violence against women and girls with disabilities" (ibid, para. 47(a))—and about a structural matter—"[t]he inadequate implementation of the legal and policy frameworks to prevent and respond to exploitation, violence, and abuse, including gender-based violence and abuse" (ibid, para. 47(c)).

Concerns raised for Finland under Article 15 were coercive measures against adults and children in various settings, including education settings: the problem was "[t]he prevalence and use of coercion, forced treatment and restrictive measures" (CRPD Committee—Finland 2025, para. 28(a). Oversight, monitoring and complaint mechanisms were "not sufficiently accessible to persons with disabilities, do not provide sufficient legal remedies and are often not well known to persons with disabilities" (ibid, para. 28(b)). Article 16 concerns included "[t]he prevalence of exploitation, violence, and abuse against persons with disabilities in institutions, the community, and the family home, in particular against women and children" (ibid, para. 30(a)); and "[i]nsufficient action to address violence experienced by women and girls with disabilities within plans to address gender-based violence" (ibid, para. 30(b))).

As in relation to the right to life, these points are consistent with ECtHR case law, but they illustrate another advantage of the reporting mechanisms arising under UN human rights treaties. It is not necessary to find individual victims to raise complaints: rather, the Committee can rely directly on information that reveals a collective problem and can raise concerns about the state of the law. They can also be used in complaints by individuals to the ECtHR by indicating factors that could be examined in evidence to support arguments that Article 3 of the ECHR is breached.

The recommendations made to Denmark and Finland reflect the point made in relation to right to life matters that the CRPD Committee can offer advice on what will be rights-compliant. In relation to Article 15 and Denmark, the Committee suggested various actions—"legislative, administrative, and judicial measures"—taken with the participation of DPOs: "prohibit the use of coercion, forced treatment, and restrictive practices", "provide training to all medical and non-medical staff on these measures", and "establish alternative non-coercive, age-appropriate support measures that respect the will, preference, dignity, and rights of persons with disabilities" (CRPD Committee—Denmark 2024, para. 46(a)). As for preventive mechanisms, there was a need for Denmark to "establish robust oversight mechanisms and strengthen existing oversight mechanisms … to ensure regular inspections of places of detention and social care and psychiatric institutions where persons with disabilities are still deprived of their liberty, ensure regular public reporting to Parliament, and establish mechanisms to facilitate prompt implementation of recommendations" (ibid, para. 46(b)). The recommendations to Finland are similar (CRPD Committee—Finland 2025, para. 29).

To resolve the Article 16 concerns, and again involving DPOs, the recommendations made to Denmark were to "[f]urther develop and implement comprehensive and effective action plans on violence prevention and response", which should be CRPD-compliant; examples of what should be included were set out, with reference being made to "law and policy reform and development" that set out "culture-, gender-, and age-specific requirements, responses that address all forms of violence against children and adults with disabilities in all settings, including in institutions, community awareness-raising strategies, access to justice, and the establishment of accessible culture-, gender-, and age-appropriate support and rehabilitation" (CRPD Committee—Denmark 2024, para. 48(a)). In addition, Denmark was to ensure that all places of detention were within "the mandates of monitoring and oversight mechanisms …, including the national preventive mechanism". Similar points were made to Finland (CRPD Committee—Finland 2025, para. 31). By way

of explanation, a national preventive mechanism is a body required under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 2003 (OPCAT): this mention reflects the links between rights mechanisms.

Intersectionality also featured: there was reference made to the Committee's statement on the elimination of gender-based violence against women and girls (dated 25 November 2021), and to the need to involve DPOs for women and girls, including indigenous woman and girls; and in relation to Article 17, there was particular concern about non-consensual sterilisation, contraception, and abortion in relation to woman and girls under guardianship (and a long-standing policy of involuntary birth control in Greenland (CRPD Committee—Denmark 2024, paras. 49–52).

E. Liberty

1. Introducing CRPD Article 14 and the New Paradigm

Whilst suggestions for better monitoring and complaints mechanisms rest on ongoing use of detention, detention itself is problematic in part because it creates vulnerability to abuse. The CRPD may support contentions that human rights standards preclude detention. Whilst Article 5(1)(e) of the ECHR permits detention on the basis of "unsound mind" if that is lawful, and Article 9 of the ICCPR allows any detention that is not "arbitrary", Article 14 of the CRPD sets that there must be a right to liberty "on an equal basis with others", but also that "the existence of a disability shall in no case justify a deprivation of liberty". The former part of the CRPD definition will extend to the wider coverage of the right to liberty as extending beyond traditional imprisonment and covering sufficient control over a person to amount to a loss of liberty (as illustrated by cases such as *Stanev v Bulgaria* (2012)).

As to the prohibition on disability-based detention, the CRPD Committee has interpreted this to cover consequences arising from a disability, including risk to self and others; hence, behavioural problems linked to a disability cannot lead to detention for that reason. This is not without controversy, given that it suggests the end of compulsory psychiatric treatment. Often, this debate occurs by combining Article 14 with Article 12, which emphasises that anyone with impaired mental capacity nevertheless retains the legal capacity to make decisions. The CRPD Committee has noted the "ongoing problem" of institutional detention without consent or with a substitute decision-maker giving consent, commenting that this "constitutes arbitrary deprivation of liberty and violates Articles 12 and 14 of the Convention" and so must stop (CRPD Committee 2014, para. 40).

Its solution is that decision-making cannot be taken away, but the person must be supported to make a decision that reflects their will and preferences—supported decision-making rather than substitute decision-making. Whilst this may often lead to the same outcome, its starting point is to replace the idea of looking after people by taking away their autonomy and instead assisting the equal right to have one's choices respected. The Committee has also linked this to the right to health treatment based on consent, arising under Article 25 of the CRPD (ibid, para. 41). For efforts that seek a middle way that reduces but does not prohibit compulsory treatment, see Nilsson 2021 and Wilson 2021.

Explaining the need for the CRPD, the Handbook for Parliamentarians on the Convention notes that "Persons with disabilities are still primarily viewed as "objects" of welfare or medical treatment rather than "holders" of rights" (High Commissioner for Human Rights et al. 2007, p. 4). Provisions such as Article 12 reflect a paradigm shift, in the form of a new way of thinking about how rights apply in the context of persons with disabilities (Glen 2012); hence, by way of example, the CRPD Committee expressed concern at ongoing substituted decision-making and called on Cyprus to "Allocate adequate human, technical and financial resources to support the transformation from the present paradigm to a new paradigm that is in line with the Convention …" (CRPD Committee—Cyprus 2017, para. 34(b)). This means that the right to do something that is not a reflection

of one's best interests is not lost by reason of disability, including in the context of medical treatment: rather, choices must be respected (also reflected in Article 25).

2. Children and Evolving Capacities, and the Right to be Included in the Community

However, Article 12 does not apply fully to children. Rather, Article 3(h) requires respect for the evolving capacities of children with disabilities and respect for their right to preserve their identities. These "evolving capacities" give not a right to choose but a right to have "due weight" given to their views, turning on "their age and maturity", as set out in Article 7(3) (together with a corresponding right to express views so that they can be taken into account): but the "best interests of the child shall be a primary consideration" (Article 7(2)), setting an objective standard. The CRPD Committee considers that Arts 7 and 12 combine to require states to amend laws "to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children" (CRPD Committee 2014, para. 36). This reflects the CRPD's role as a non-discrimination standard: the need for respect "on an equal basis" connotes the making of reasonable accommodation (including in ensuring the right to express views), given that any failure to make reasonable accommodation for needs arising from any form of disability is within the Article 2 definition of disability discrimination.

As such, Article 14 means that children with disabilities must not be detained in circumstances when those without disabilities would not. Supplementing this is Article 19, which sets out "the equal right of all persons with disabilities to live in the community, with choices equal to others", specifics of which include the equal right to make choices as to place of residence and being "not obliged to live in a particular living arrangement"; "access to a range of in-home, residential, and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community"; and equal access to community services and facilities.

To avoid treating children with disabilities differently from children without disabilities, independent living should be possible at the same age, and community inclusion should always be equal. Two additional rights supplement this:

(i) Article 23 sets out the right to respect for home and the family. This includes, under Article 23(3), "early and comprehensive information, services, and support to children with disabilities and their families", which is expressly designed "to prevent … segregation of children with disabilities" (inter alia). The prospect of family separation is recognised, as long as it is in the best interests of the child and subject to judicial review: Article 23(4). But, echoing Article 14, Article 23(4) concludes with the indication that "In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents". Further, and echoing Article 19, Article 23(5) indicates that where a family cannot offer the relevant care, "every effort" shall be taken "to provide alternative care within the wider family, and failing that, within the community in a family setting".

(ii) Article 24 is the right to education: expressly, this shall involve "an inclusive education system", with no exclusion from "the general education system on the basis of disability". In short, segregated education is impermissible: rather, reasonable accommodation shall be provided to allow every child to participate in the same schools.

3. Comments from the CRPD Committee

It is evident that a range of CRPD rights are relevant to the propriety of detaining children. Not surprisingly, relevant comments by the CRPD Committee have been made in several contexts.

Hence, Article 7, the general provision as to rights for children with disabilities, was the right in play when the CRPD Committee expressed its concern to Finland that "[s]ervices and support for children with disabilities do not always enable them to live

with their families in the community" and they "face barriers in access to healthcare services, including mental health services", which required adequate provision and guaranteed access (plus training of relevant professionals) respectively (CRPD Committee—Finland 2025, paras. 12(b,c) and 13(b,c)). In the case of Belarus, concern about the lack of support within existing structures led to a call for a "national plan with clear targets and a time frame for phasing out the institutionalization of children", replaced by inclusion within the local community (CRPD Committee—Belarus 2024, paras. 13 and 14; to like effect, CRPD Committee—Bahrain 2024, paras. 14 and 15). Concern about various segregated settings in Kazakhstan, including "small-capacity homes", led to a call for "a national comprehensive policy" for equality and inclusion and the end of segregated facilities, to be done with DPOs, including those for children (CRPD Committee—Kazakhstan 2024, paras. 15 and 16).

In the case of Canada, Article 7 was combined with intersectionality, referencing the higher incidence of residential or institutional placement of children from indigenous and racial minority communities from "a lack of support for the families", which required more steps responsive to needs and culturally suitable (CRPD Committee—Canada 2025, paras. 13(c) and 14(c)). This built on earlier concerns that "there are now more indigenous children in the care of Canadian services than there ever were in residential schools" (referencing a historical period of systemic separation of indigenous children from their families; this required a variety of steps, including access to schools, guidelines on best interests and monitoring (CRPD Committee—Canada 2025, paras. 17 and 18).

Some comments under Arts 14 and 19 directly engage with secure children's homes. A specific concern to Denmark under Article 14 was that "Children and adolescents with disabilities can, on welfare grounds, be placed under prison-like conditions in secure residential institutions that also house youth detained for crime-related reasons": recommendations included amending applicable legislation "to ensure that children and adolescents with disabilities cannot be placed in secure residential institutions on welfare grounds" (CRPD Committee—Denmark 2024, paras. 43(b) and 44(b), supplemented by more general recommendations to "[r]epeal all laws and abolish all practices" allowing impairment-based detention and forced treatment, including mental health laws). There was no complaint about detention in the criminal context; the problem was not just mixing criminal justice and welfare detainees, but the very use of detention for welfare reasons. There was a reinforcing suggestion to review the detention of anyone "on the basis of a non-criminal court or administrative order and transfer them to community-based places of residence, freely chosen by them and with access to a range of community-based support services" (CRPD Committee—Denmark 2024, para. 44(d)). Similarly, concern was expressed to Estonia about the detention of "children with "behavioural problems"", who should be deinstitutionalised "as a matter of urgency" (CRPD Committee—Estonia 2021, paras. 27 and 28). There was also more general concern to end mental health detention, including of children (CRPD Committee—Mauritius 2024, paras. 25 and 26), with recommendations including a call to "develop a system of mental health support in the community for children and adults with disabilities" (CRPD Committee—Burkina Faso 2024, paras. 28 and 29).

Showing the link to Article 19 (and some of the comments above under Article 7), concern was expressed to Denmark of "the lack of a comprehensive, multisectoral strategy on deinstitutionalization" and growing use of institutionalisation and "limited access to or withdrawal of personal assistance schemes", which mainly affected certain groups, including young people. The call made was for "multisectoral strategies on deinstitutionalization" (including for children, and the closing of "group homes" and other "institution-like residences"), which should have "specific time frames and the requisite financial resources", and "access to housing alternatives in their communities" that reflect the "will

and preference of those affected", which should apply in all locations, impairments, and levels of support, and be accompanied by support for "education, employment, cultural activities, and social life" (CRPD Committee—Denmark 2024, paras. 55 and 56).

Similarly, whilst welcoming the development of an action plan, the Committee expressed concern to the Ukraine that not only was there no moratorium on new admissions to institutions (which included "family-type orphanages", which were "still institutions and … contrary to the provisions of the Convention"), but also that international funds were being used to construct new institutions (referencing the "rebuilding the Mukachevo Institution for Girls"). A moratorium was recommended, including not transferring people from large institutions "to group homes, as those are still institutions", not rebuilding or refurbishing institutions, with these steps being replaced with a plan to "transition … to developing individualized support for living in the community, including personal assistance and community-based support and networks" (with express mention of boarding schools) (CRPD Committee—Ukraine 2024, paras. 38 and 39). Likewise, Belarus was cautioned about the increasing enrolment of children in institutions, including boarding schools, and recommended instead to provide more "support services, as required, for children with disabilities and their families to ensure full support for children with disabilities in the community" and to redirect resources from institutions—"including small-sized institutions"—to community living, together with a strategy for deinstitutionalisation, with time frames and budgets. (CRPD Committee—Belarus 2024, paras. 37 and 38; see also CRPD Committee—Costa Rica 2024, paras. 33 and 34—concerns included inadequate support for children and persistent institutionalisation, which required a programme "with an adequate budget and human resources, defined timelines, and specific support for them to live in the community").

Reference can also be made to the more detailed recommendations to Azerbaijan: concerns included "the prevalence of segregated settings", including boarding schools, and the lack of community supports. The suggestion was to "devise and implement a deinstitutionalization strategy", including in it "redress for survivors of institutionalization, including individual and collective redress, reparations, and guarantees of non-repetition", and promoting inclusion for adults and children, "including by providing appropriate individualized support, such as personal assistance, peer support networks, and personalized budgets" (CRPD Committee—Azerbaijan 2024, paras. 43 and 44; see also paras. 53 and 54, where it was commented that boarding schools were problematic from the perspective of inclusive education, and it was recommended that enrolment in general schools be ensured).

These comments made to individual states are reflected in the guidance given to states generally in the Committee's General Comment on Article 19. The Committee notes that barriers to implementation—despite some progress—include "institutionalization, including of children and forced treatment in all its forms", "[l]ack of deinstitutionalization strategies and plans and continued investments in institutional care settings", and "[m]isconceptions about the right to living independently within the community" (CRPD Committee 2017, para. 15). Another useful checklist of matters on which evidence can be sought in a particular case arises from the factors cited as illustrative of the misconceptions: legal capacity being denied through "substitute decision-making about living arrangements", and inadequacy in various areas—"social support and protection schemes for ensuring living independently within the community"; "legal frameworks and budget allocations aimed at providing personal assistance and individualized support"; "monitoring mechanisms …, including the participation of representative organizations of persons with disabilities"; and "mainstreaming of disability in general budget allocations".

Defining features of an institution are also given, including "obligatory sharing of assistants" and limited influence over their identity; isolation and segregation from inde-

pendent life within the community; lack of control over day-to-day decisions or routines; and lack of choice about with whom to live (CRPD Committee 2017, para. 16(c)). As such, ""Family-like" institutions are still institutions and are no substitute for care by a family"—"the core" of the right under Article 19 for children "entails a right to grow up in a family" (CRPD Committee 2017, para. 37). The Committee comments also that implementation requires "clear and targeted strategies for deinstitutionalization, with specific time frames and adequate budgets", with "special attention … paid to … children with disabilities currently in institutions" (CRPD Committee 2017, para. 97(g)).

Uncompromising guidelines on deinstitutionalization have been issued:

> "Institutionalization can never be considered as a form of protection of children with disabilities. All forms of institutionalization of children with disabilities—that is, placement in any non-family setting—constitute a form of segregation, are harmful and violate the Convention. Children with disabilities, like all children, have the right to family life and a need to live and to grow up with a family in the community" (CRPD Committee 2022, para. 12).

The Committee comments that "[e]ven short-term placement outside a family can cause great suffering, trauma, and emotional and physical impairments", such that preventing it "must be a priority" (CRPD Committee 2022, para. 46). The Committee endorses the view that "[p]eer support for children and adolescents is essential for full community inclusion" (CRPD Committee 2022, para. 46; see also the endorsement of community-based support including "personal assistance, peer support, supportive caregivers for children in family settings, [and] crisis support" at para. 26). The value of inclusive education in this context is also noted, including because "segregated education … undermines community inclusion and leads to increased pressure to place children in institutional settings" (CRPD Committee 2022, para. 51).

The UK ratified the CRPD with a reservation allowing education of children "outside their local community where more appropriate education provision is available elsewhere", a stance which extends beyond separate provision for those in secure settings: it has been asked by the CRPD Committee to remove this position and embrace—with suitable consultation with DPOs and a proper framework—inclusive education (CRPD Committee—UK 2017, paras. 50–53).

4. Joint Views of the CRPD Committee and the Committee on the Rights of the Child

The CRPD Committee is not a lone voice. A statement together with the Committee on the Rights of the Child endorses the value of "the human rights model of disability" (rather than "medical and charity approaches") in emphasising "inherent dignity" and precluding restricting rights in response to an impairment (Committee on the Rights of the Child and CRPD Committee 2021, para. 1). Concerns expressed include that discriminatory treatment makes children with disabilities "disproportionately vulnerable to violence, … neglect, and abuse, in all settings", including institutions (and with reference made also to violence "in the guise of medical treatment" and exploitation in various forms (Committee on the Rights of the Child and CRPD Committee 2021, para. 7)). Calls made include "clear and targeted strategies for de-institutionalization, with specific time frames and adequate budgets, in order to eliminate all forms of discrimination and segregation of children with disabilities", and reference is made to the need for "inclusive and supportive services for children with disabilities and their families in the community in accordance with article 23 para. 5. of the CRPD and article 23, para. 1 of CRC" (Committee on the Rights of the Child and CRPD Committee 2021, para. 10).

Article 23 CRC, the rights of children with disabilities, has been referenced above. In its General Comment on the rights of children with disabilities, issued at its session in September 2006, just as the CRPD was being completed, the Committee on the Rights of

the Child recorded that, despite a growing "positive focus on persons with disabilities in general and children in particular" (including through the then forthcoming CRPD), rights were not being respected due to "social, cultural, attitudinal, and physical obstacles", which required taking a disability perspective (Committee on the Rights of the Child 2007, paras. 2, 5, and 6).

It urged states to adopt "programmes for de-institutionalization", returning children to their families/extended families, who should be given "the necessary and systematic support/training for including their child back into their home environment" or using foster care (Committee on the Rights of the Child 2007, para. 49). This was in the context of significant concerns: "the high number of children with disabilities placed in institutions"; "institutionalization [being] the preferred placement option in many countries"; "[t]he quality of care provided, whether educational, medical, or rehabilitative, is often much inferior to the standards necessary" (often because standards are not present or not implemented); and institutions being involved with heightened vulnerability to abuse and neglect, and decision-making processes that either do not hear from or give sufficient weight to the views of children, which should be sought (Committee on the Rights of the Child 2007, paras. 47 and 48).

However, the Committee did not exclude institutional placement, albeit "only as a measure of last resort, when it is absolutely necessary and in the best interests of the child", and also not "merely with the goal of limiting the child's liberty or freedom of movement" (Committee on the Rights of the Child 2007, para. 47). It also recommended that large institutions be replaced with "small residential care facilities organized around the rights and needs of the child", subject to suitable standards that are monitored, which is not consistent with the CRPD Committee's views, noted above, that these are a form of unacceptable institutionalisation (Committee on the Rights of the Child 2007, para. 47). This illustrates how the CRPD, certainly as interpreted by the CRPD Committee, represents a step forward in arguments that any proposed solution to meet the needs of a child should not involve an institutional placement.

4. Using These Standards

A foundational principle of interpreting the terms of the ECHR is that rights should be "practical and effective", including from locating implicit rights: see *Airey v Ireland* (1979), in which it was held that civil legal aid was required to secure a fair trial in a civil context even though legal aid is mentioned expressly in Article 6 only for criminal cases, because "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (para. 24).

As an overarching treaty, the ECHR is drafted at a higher level of generality than more specialised treaties such as the CRPD, in which states can agree expressly what might only be implicit in broader treaties. Hence, the CRPD can illustrate what the ECHR means in the context of persons with disabilities. The ECtHR has regularly used the CRPD to interpret the ECHR: for example, in the context of the right to education, the ECtHR has adopted the CRPD concept of discrimination by failing to offer reasonable accommodation as the way to interpret Article 14 ECHR: *Çam v Turkey* (2016).

Confluence is not universal, as can be illustrated by cases relating to voting (*Caamaño Valle v Spain* (2021), though note the powerful dissent from Judge Lemmens, decrying that the ECtHR was not at the forefront in ensuring equal rights in relation to voting) and detention (*Rooman v Belgium* (2019), in which it was accepted that psychiatric detention was permitted, though the Grand Chamber added a new requirement that treatment be offered in order for detention to be lawful). However, the well-known process of updating the impact of the ECHR through the "living instrument" doctrine may bring closer outcomes over time.

In addition, as already noted, the CRPD Committee is more willing to give advice on steps to take for compliance. This arises from the nature of the main supervision mechanism, namely reports on progress leading to advice in the form of the Concluding Observations to individual states and General Comments to all states. In contrast, the ECtHR is limited by its nature as a court to resolving a dispute as to whether a situation is compliant with a legal standard: at most, it occasionally offers guidance under Article 46 ECHR on steps to take to comply with the law it has declared in its judgment (Registry to the European Court of Human Rights 2025). However, as a court assesses evidence, CRPD Committee guidance can be useful in indicating evidential areas to explore in an ECtHR application.

In domestic litigation, there is an additional layer to consider. Under the UK's dualist approach, the two tracks of international and domestic law meet primarily when domestic legislation expressly incorporates an instance of treaty-based international law. The Human Rights Act 1998 almost incorporates some parts of the ECHR: it expressly refers to an enumerated list of Convention rights (section 1 and Schedule 1), requires that effect be given to them through interpreting domestic statutes compatibly with these rights "so far as it is possible to do so" (section 3), and also requires that the views of the European Court of Human Rights (ECtHR) in determining what the rights entail have to be taken "into account" (section 2). The latter permits disagreement between the domestic courts and the ECtHR as to what a right entails: although judicial comity produces deference towards the ECtHR in terms of what rights mean (see, for example, *R (Anderson) v Secretary of State* (2002)), reciprocated by deference to domestic courts in assessing facts and the "margin of appreciation" in balancing rights and interests.

Importantly, this partial incorporation means that a statute that cannot be interpreted in a compliant way is still enforced (though a declaration of incompatibility can be issued under section 7 of the 1998 Act), and under section 19, Ministers can accept that proposed legislation is not compatible but recommend it be passed.

In addition, the Convention on the Rights of the Child 1989 has a limited incorporation into domestic law. First, through the Children Act 2004, which established the office of Children's Commissioner, giving the holder "the function of promoting awareness of the views and interests of children in England" (section 2(1) as enacted). Under sections 5–7, the Commissioner also has functions in relation to matters not devolved to Wales, Scotland, and Northern Ireland; there is also a Children's Commissioner for Wales, established under section 72 of the Care Standards Act 2000, a Commissioner for Children and Young People in Scotland, established under the Commissioner for Children and Young People (Scotland) Act 2003 (Scotland), and a Northern Ireland Commissioner for Children and Young People, established under The Commissioner for Children and Young People (Northern Ireland) Order 2003 (SI 2003 No 439 (NI 11), made under the Northern Ireland Act 2000.

Significant changes through the Children and Families Act 2014 included the Commissioner having the "primary function" of "promoting and protecting the rights of children in England" (s2(1) of the 2004 Act, as amended by section 107 of the 2014 Act), and by adding section 2A to the 2004 Act, the 2014 Act required that the Commissioner:

> "must, in particular, have regard to the United Nations Convention on the Rights of the Child in considering for the purposes of the primary function what constitutes the rights and interests of children (generally or so far as relating to a particular matter)".

The Scottish Parliament has gone further: section 6 of its United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 mandates that public authorities in Scotland act compatibly with that Convention. Given that, as noted above, the Committee on the Rights of the Child and the CRPD Committee agree on much relating to the need to reduce institutionalisation.

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Finally, unincorporated treaties may also be used as an aid to interpretation: but under the *Brind* doctrine, ambiguity is a prerequisite (*R v Home Secretary ex p Brind* (1991), reiterated in *Devolution issues under the Scotland Act 1998* (2022) at para. 87, *R (SC) v Secretary of State for Work and Pensions* (2021) at paras. 77–96 and *A Local Authority v JB* (2021) at para. 120, which applied this to the CRPD; see Gledhill 2014 for brief contrary arguments, resting on the different approach of the common law judges in New Zealand, who do not require ambiguity and presume compliance with international obligations).

In summary, the various standards discussed above can be relevant in domestic law (i) through the *Brind* mechanism if there is ambiguity; (ii) the "have regard" mechanism of the Children and Families Act 2014; (iii) the compatibility requirement of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, and (iv) the use of the interpretive obligation under the Human Rights Act 1998 to the extent that the rights in the ECHR are themselves construed consistently with these UN rights. This represents limited enforceability of the CRPD in domestic law, but influence may still arise through the standards being accepted by policy makers as a good explanation of what is needed to secure equity for those with disabilities.

5. Conclusions

The law relating to those children vulnerable enough to be considered for a secure placement is unnecessarily complex. This seems in part because inadequate provision for needs has led to crisis management through the courts. The obviously unsatisfactory nature of this approach has led to calls for a revised legal regime. If that regime is to be rights-compliant, it is suggested that the CRPD provides useful assistance:

(i) It reminds us that non-discrimination standards require equity in the form of making sure that needs are met, since denial of reasonable accommodation is a form of disability discrimination; this is useful in making the point that inadequate resourcing is not just a matter of political failing but it breaches a foundational human right of non-discrimination (reflected in the powerful opening phrase of Article 1 of the UDHR, "All persons are born free and equal in dignity and rights").

(ii) Commentary under the CRPD provides a useful reminder that institutionalisation is associated with coercion: not just the coercion of detention but further coercive restraint that could well breach other fundamental standards. This is a reality that explains why OPCAT and the National Preventive Mechanisms exist and focus on places of detention. This reminder raises the question of whether institutionalisation is a suitable regime to include, even as a last resort.

(iii) As a specialist treaty with terms agreed by states parties who are also parties to older, overarching treaties, including the ECHR, it allows arguments as to how the living instrument doctrine can lead to interpretations of older treaties to ensure their ongoing relevance. In particular, forms of detention that might have been uncontroversial when the ECHR was drafted in the middle of the Twentieth Century might not be fixed as uncontroversial forever. The CRPD provides rights-based arguments against detention, supported by rights to inclusion in the community, which require community-based alternatives, and powerful comments that detention brings risks and that coercive practices invariably have negative elements that might outweigh their benefits.

(iv) In addition, the CRPD in its terms and in the commentary provided by its specialist body, the CRPD Committee, provides a reminder of important features of human rights compliance that are not express in overarching conventions such as the ECHR, including the involvement of those affected in designing, implementing and monitoring changes; the need for proper planning to implement rights-consistent regimes, which may involve new approaches; and the value of training. These are important matters for con-

sideration in reforming the current regime so that the needs of vulnerable people can be met in a more satisfactory way.

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