ALBA SUMMER CONFERENCE

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THE RELEVANCE OF UNINCORPORATED INTERNATIONAL LAW

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A. UK A 'DUALIST' STATE

JH Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry [1990] 2 AC 418 (the *International Tin Council* case)

- Lord Oliver at pp. 499F-500C (described by Lord Kerr in *SG*, reference below, at [236] as the *"high water mark of the dualist conception of the restriction on the use of international law"*):

> *"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law ... On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law ... That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."*

R (Yam) v. Central Criminal Court [2015] UKSC 76, [2016] AC 771 (issue *"lies within a very narrow compass"*, at [1]: whether Ouseley J had properly exercised the discretionary common law power to refuse to permit disclosure of material deployed in camera, and whether this breached Article 34 ECHR)

- Lord Mance[1] at [35]-[36]:

[1] With whom Lord Neuberger, Baroness Hale, Lord Clarke, Lord Sumption, Lord Reed and Lord Toulson agreed.

> *"The United Kingdom takes a dualist approach to international law. The case does not concern the construction of a statutory right, duty or power which would otherwise be of uncertain scope in a context where it can be seen or presumed that Parliament intended the statute to comply with the United Kingdom's international obligations... It concerns a general discretionary common law power, to be exercised in the light of all circumstances which the common law identifies as relevant. The starting point in this connection is that domestic and international law considerations are separate. In accordance with* R v Secretary of State for the Home Department, Ex p Brind *[1991] 1 AC 696* , R v Lyons *[2003] 1 AC 976 , para 13 and* R (Hurst) v London Northern District Coroner *[2007] 2 AC 189 , para 56, per Lord Brown of Eaton-under-Heywood with whose reasons Lord Bingham of Cornhill and Lord Rodger of Earlsferry agreed at paras 1, 9 and 15, a domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate.*
>
> *…. Neither by reference to the principle of legality, which refers to rights and obligations recognised at a domestic level, nor on any other basis is it possible to limit the domestic court's general discretion by reference to unincorporated international obligations or to require parliamentary authorisation before a court can consider whether it should in particular circumstances exercise such a discretion in a way which will or may prove inconsistent with such obligations…"*

R (SG and Others) v. Secretary of State for Work and Pensions [2015] UKSC 16, [2016] 1 WLR 1449 ('benefit cap' and discrimination against women under Article 14 ECHR read with Article 1, Protocol 1; relevance of UN Convention on the Rights of the Child (UNCRC))

- Lord Carnwath at [115]
- Lord Hughes at [137]
- Note analysis by Lord Kerr at [235] – [246] on the role of unincorporated treaties, identifying at [235] the two dominant principles which have traditionally restricted the use of international treaties in domestic law: non-justiciability (domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law) and no direct effect (such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law)

Pham v. Secretary of State for the Home Department [2015] UKSC 19, [2015] 1 WLR 1591 (re: deprivation of dual UK and Vietnamese national of UK citizenship by reason of alleged involvement in terrorism)

- Lord Mance at [80], on EU law enjoying primacy only because Parliament has willed that outcome:

> *"The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European*

law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act."

B. ESTABLISHED WAYS IN WHICH UNINCORPORATED TREATIES ARE RELEVANT IN DOMESTIC LAW[2]

(i) In interpreting Convention (ECHR) rights

- The European Court of Human Rights (ECtHR) recognises the relevance, when interpreting ECHR rights, of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and including reports and General Comments by the UN Committees tasked with monitoring the implementation of those conventions by State parties.

- As an international treaty, the ECHR should be interpreted in accordance with the Vienna Convention which states that account is to be taken of "*any relevant rules of international law applicable in the relations between the parties*".[3] The ECtHR has regularly cited the Vienna Convention, holding that the Convention "*cannot be interpreted in a vacuum*" and *"should, so far as possible be interpreted in harmony with other rules of international law of which it forms part*."[4]

- In *Neulinger v. Switzerland* (2010) 54 EHRR 1087 the language of the Grand Chamber became firmer: the Convention "*cannot be interpreted in a vacuum but **must** be interpreted in harmony with the general principles of international law*" (emphasis added). Similarly, in *Demir v Turkey* (2009) 48 EHRR 54 it was stated, at [85], that Convention rights "*can and must*" be construed in the light of relevant international law.

[2] Not included in this list is the controversial concept of unincorporated treaties being enforceable via the doctrine of legitimate expectation, as this is not an established way in which they are used; see the discussion by Lord Kerr in *SG* at [243] – [246] which summarises the key cases.
[3] Vienna Convention, art 31(3)(c).
[4] *Al-Adsani v. UK* [2001] 34 EHRR 273, [55]; *Loizidou v. Turkey* [1996] 23 EHRR 513, [43].

- In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 at [21], Baroness Hale at [131] quoted with approval the observation of the Grand Chamber of the ECtHR in *Neulinger v Switzerland* (2010) 54 EHRR 1087 that the Convention "*cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law*" (in *Neulinger*, the Grand Chamber made clear the importance of the 'best interests' principle in Article 3.1 UNCRC in the interpretation of Convention rights, stating that, "*in the Strasbourg case-law, the principle of giving priority to safeguarding the best interests of the child is firmly established").*

- To similar effect, Munby J as he then was said in *R (Howard League for Penal Reform) v. Secretary of State for the Home Department* [2002] EWHC 2497, [2003] 1 FLR 484 (a case concerning the applicability of the Children Act 1989 to children in custody) that the UNCRC (and another then non-binding international law instrument, the Charter of Fundamental Rights of the European Union) can (at [51])

> *"properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention."*

- When considering Convention rights through the prism of the HRA, the Supreme Court has confirmed and reiterated the relevance of specialised international treaties (such as CEDAW and the UNCRC) when interpreting Convention rights protected in our domestic law by the HRA: *SG*, at [83] (Lord Reed, citing *Demir v Turkey*), [142] (Lord Hughes), [213] and [218] (Baroness Hale, citing *Opuz v. Turkey* (2010) 50 EHRR 28 and *Neulinger*).

- *Demir* principle not restricted to Article 8 cases, although much of the caselaw to date has concerned Article 8 ECHR and Article 3.1 UNCRC: see e.g. Lord Hughes in *SG*, [142]: *"the Demir approach is not of course limited to Article 8, as that case itself shows"* (*Demir* was an Article 11 case).

- Given the ECtHR's approach, combined with s. 2(1), Human Rights Act 1998 (HRA), unincorporated international law relevant to interpretation of ECHR rights as a matter of domestic law.

- These international materials may be relevant at different stages of the analysis of ECHR rights, including:
  - when establishing whether there is a *prima facie* breach of a qualified provision, requiring the State to advance justification (e.g. whether Article 8(1) was engaged in *R (HC) v.*

Secretary of State for the Home Department [2013] EWHC 982 (Admin), [2014] 1 WLR 1234; or whether there is *prima facie* sex discrimination arising under Article 14 in a gendered violence case, thus requiring justification, as in *Opuz* and *Eremia v. Moldova* (2014) 58 EHRR 2);

- when considering whether a rule/ practice/ provision is 'in accordance with the law' (e.g. in relation to statutory schemes concerning the disclosure of personal data collected and stored by the State based on bright line rules, there is domestic and Strasbourg authority to the effect that the compatibility of that rule with Article 8, and the adequacy of the safeguards in place, should be assessed under the 'in accordance with the law' test, not merely under the 'necessary in a democratic society' / proportionality head: see e.g. *Malone v. United Kingdom* (1984) 7 EHRR 14, [68]; *Kopp v. Switzerland* (1998) 27 EHRR 91, [72]; *Amann v. Switzerland* (2000) 30 EHRR 843; *MM v. United Kingdom* (Application no. 24029/07, 13th November 2012), [206]-[207]; *R (T) v. Chief Constable of Greater Manchester* [2015] AC 49, Lord Reed at [113]-[114]);
- when considering whether a restriction is proportionate or a fair balance has been struck under the qualified ECHR rights (e.g. assessing fair balance under Article 14 in the benefits cases and the abortion cases);
- when considering the requirements of Articles 2, 3 or 4 (e.g. when considering applications for screening and/ or anonymity for critical witnesses in an inquest: the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions[5] emphasises the need to *"evaluate oral testimony based upon the demeanour and overall credibility of the witness";* that UN instrument is relevant to what Article 2 procedural duty requires: *Nachova v Bulgaria* (2006) 42 EHRR 43 (Grand Chamber), [96], [71]-[74]).

(ii) <u>As an aid to statutory interpretation</u>

- Long-standing principle that legislation is, in the absence of express words to the contrary, presumed to be in accordance with international law: see e.g. *Assange v. Swedish Prosecution Authority* [2012] 2 AC 471, Lord Dyson JSC at [122]: *"there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations."*

- In a case concerning the UNCRC and its application to two regulations dealing with child support, *Smith v Smith* [2006] UKHL 35, [2006] 1 WLR 2024, Baroness Hale stated at [78]:

[5] U.N. Doc. E/ST/CSDHA/12 (1991) III, at D14.

> *"Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child."*

- Cf New Zealand: non-ambiguous legislation may be read down, or additional words added in, for the purpose of consonance with international treaties – e.g. see *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44.

(iii) <u>Development of the common law</u>

- Clear that unincorporated treaties may have a bearing on the development of the common law: *R v. Lyons* [2003] 1 AC 976, Lord Bingham at [13]; and see Lord Hughes in *SG* at [137] ("*international treaty obligations may guide the development of the common law")*.

- Developments of the common law should ordinarily be in harmony with the UK's international obligations: *A v. Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221, Lord Bingham at [27].

- In *R (K) v. Parole Board* [2006] EWHC 2413 (Admin), [2007] Prison LR 103, McCombe J (as he then was) observed at [30] that, *"the common law obligations of fairness towards children may also be informed by reference to the UN Convention on the Rights of the Child and the Beijing Rules, as relied upon by Lord Bingham in <u>Dyer v. Watson</u> [2004] UKPC D1 at paragraph 61."*

C. UNCRC - AN EXAMPLE OF THE RANGE OF WAYS IN WHICH UNINCORPORATED INTERNATIONAL LAW MAY BE RELEVANT IN DOMESTIC LAW

- The UNCRC is the most widely ratified international human rights treaty in history,[6] and it has rightly been described as "*the most comprehensive articulation of the minimum obligations that a state owes to a child*."[7] In *SG*, Lord Kerr at [256] endorsed UNICEF's description of the UNCRC as "*the most complete statement of children's rights ever produced*".

[6] Every state in the world has signed the UNCRC. Every state except the USA has ratified it.
[7] Jason Pobjoy, *The Child in International Refugee Law* (2017), 6.

- Provisions of the UNCRC are enforceable in domestic law or of relevance to the interpretation of domestic law in four broad ways: (i) through the HRA; (ii) (for now) under the European Union's Charter of Fundamental Rights; (iii) under specific statutory provisions of domestic law; and / or (iv) through the common law.

- Much of the focus is on Article 3.1 UNCRC: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*" (the best interests principle).

(i) <u>HRA</u>

- *ZH*: the best interests of the child must be a primary consideration in any decision affecting them, in accordance with Article 3.1 UNCRC: see in particular Baroness Hale at [21]-[26].

- A series of Supreme Court cases since *ZH* have put beyond doubt the importance of the best interests principle and its enforceability in the domestic courts in HRA cases, including: *R (HH and PH) v. Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2012] UKSC 25, [2013] 1 AC 338; *BH and KAS / H v The Lord Advocate and Another (Scotland)* [2012] UKSC 24, [2013] 1 AC 413 (both heard by 7 SC Justices); *Zoumbas v. Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690; *SG*; *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 (and, although it was not argued that any ECHR rights were engaged in that case, *Nzolameso v City of Westminster* [2015] UKSC 22, [2015] PTSR 549 per Baroness Hale at [29]).

- Judgment now awaited in *DA and DS v. Secretary of State for Work and Pensions* (heard by 7 SC Justices 17th – 19th July 2018), concerning the UNCRC and the application of the benefit cap to lone parents with children aged under 2, and their children aged under 2 (DA) and lone parents and their children more generally (DS).

- Note that when considering what the UNCRC requires, the General Comments of the UN Committee on the Rights of the Child are a useful tool and they may be persuasive, depending upon the context. See e.g.

- *HH*, [85]: when considering the meaning of Article 12 UNCRC (ascertaining the views of the child)[8], Baroness Hale highlighted the Committee's General Comment No. 12[9] which describes Article 12 as *"one of the most fundamental values of the Convention"* and states that, "there can be no correct application of Article 3 if the components of Article 12 are not respected." In the absence of any *"obvious machinery"* in extradition cases for ascertaining the affected child's views, this posed a problem.
- In *SG*, Lord Carnwath at [105] – [106] described the Committee's General Comment No. 14 as *"authoritative guidance"* to the meaning of Article 3.1.[10]
- General Comment No. 14 describes the best interests principle as a "*threefold concept*":
  (1) A substantive right held by every child "*to have his or her best interests assessed and taken as a primary consideration when different interests are being considered*". It applies to any decision "*concerning a child, a group of identified or unidentified children or children in general*": [6(a)].
  (2) A "*fundamental, interpretative legal principle*" such that "*[i]f a legal provision is open to more than one reading, the interpretation which most effectively serves the child's best interests should be chosen*": [6(b)].
  (3) A rule of procedure: "*the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned*" and "*must show that the right has been explicitly taken into account*": [6(c)].
- It has also been cited in other cases concerning the UNCRC best interests principle, e.g. *R (WB and B) v. Secretary of State for Justice* [2014] EWHC 1696, [2014] ACD 125 (a case concerning access to a prison Mother and Baby Unit; Laing J considered the General Comment when finding there to be a procedural breach of Article 8 ECHR, along with a breach of the *Tameside* obligation and s. 11, Children Act 2004, all of which imposed a duty on the Defendant to gather relevant and adequate information to inform his decision-making concerning the child's best interests).

[8] Article 12 provides:
"1. States parties shall assure to the child who is capable of expressing his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
"2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
[9] Committee on the Rights of the Child, General Comment No. 12 (2009) on the Right of the Child to be Heard, CRC/C/GC/12, July 2009.
[10] Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29th May 2013.

- The best interests principle is often wrongly described as applying only to decision-making in specific individual cases, such as immigration decision-making in *ZH*, or extradition decision-making in *HH* and *BH*. But it is clear that it also applies to decision-making in the form of general policy-making, such as the design and implementation of large-scale welfare schemes. This is clear from (i) the wording of Article 3(1) itself, which refers expressly to legislative bodies and to *"all actions"*; (ii) the *"authoritative guidance"* from the UN Committee on the Rights of the Child in its General Comment No. 14 (2013), para. 6(c); (iii) the decision of 3 of 5 Justices in the *SG* case that the original benefit cap breached the UNCRC; and (iv) other cases concerning the UNCRC and the HRA, such as *HC* (the Home Secretary's treatment of 17-year-olds as adults, not children, in PACE Code C breached Article 8).

- Although the majority of the cases to date have tended to be focused upon Article 3.1 UNCRC and Article 8:
    - Other UNCRC articles may be directly relevant: e.g. Articles 37 and 40 in the *HC* case (in which there was substantial material from the UN Committee on the Rights of the Child, HMIC, the Children's Commissioner and others criticising the Home Secretary's stance on the particular issue and expressing the view that it violated the requirements of the UNCRC); and
    - The UNCRC may be relevant to the interpretation of other ECHR rights, e.g.
        - Article 14: the Secretary of State's express submission to the contrary in *SG* was rejected by four of the Justices: Lord Carnwath ([113]-[119]); Lord Hughes ([142]-[144]); Baroness Hale ([211]-[218]); and Lord Kerr ([258]-[262]). Lord Reed did not decide the point but his analysis was plainly to the effect that the UNCRC "*can be relevant to questions concerning the rights of children under the Convention*" ([86]). Particular reliance was placed on the decision of the Grand Chamber of the ECtHR in *X v. Austria* (2013) EHRR 405, in which Article 3.1 was invoked in support of a finding that Austrian legislation preventing a same sex partner from adopting and become a joint parent with a birth partner involved unlawful discrimination on grounds of sexual orientation contrary to Article 14: see e.g. Lord Hughes's judgment at [143]-[144]; Baroness Hale PSC's judgment at [222]-[223].
        - Article 6's guarantees must also be read in accordance with the UNCRC – see in particular the general right to a fair and public hearing within a reasonable time under Article 6(1), and the Article 6(3)(a) and (b) guarantees (to be informed promptly, in a language which he understands and in detail, of the charge against him, and to have adequate time and facilities for the preparation of his defence). The ECtHR has made clear that the Art. 6(3)(a) right is context-specific, so where, for example, a charge is serious and the person charged has mental problems and

difficulties understanding the charge, additional steps must be taken beyond simply informing him of the bare charge: *Vaudelle v. France* (2001) 37 EHRR 16. Similarly, the Art. 6(3)(b) right is also relative and context-specific. In analysing the context of child detention in a police station, and police questioning of children, Articles 37 and 40 of the UNCRC are highly relevant. For a child in police custody, in order for Article 6 rights to be 'real and effective' it is essential that the requirements of Article 40 UNCRC are complied with.

(ii) The Charter

- The best interests principle in Article 3.1 is now also contained in the European Union's Charter of Fundamental Rights, which became legally binding with the entry into force of the Lisbon Treaty (1st December 2009). Article 24 provides:

> *"1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
> *2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
> *3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."*

(iii) Statutory Context

- The UNCRC's principles are reflected in a number of statutes, in particular section 11 of the Children Act 2004 (which imposes an obligation on bodies such as local authorities, district councils, Strategic Health Authorities, NHS Trusts and Youth Offending Teams to safeguard and promote the welfare of children)[11]; and s. 55 of the Borders, Citizenship and Immigration Act 2009[12] (which obliges the Secretary of State to make arrangements for ensuring that her immigration, asylum, customs and nationality functions are discharged having regard to the same needs).

[11] Note that the Supreme Court earlier this year in refusing permission to appeal in *R (H and others) v. Ealing London Borough Council*, UKSC 2017/0209, from [2017] EWCA Civ 1127, expressly acknowledged that the interpretation of s. 11 could raise general questions of public importance, but as the issue had become academic in that case (concerning a housing allocation policy, since withdrawn) permission was not granted.
[12] Immigration and nationality functions were at first excused from the duty under s. 11, Children Act 2004 in reflection of the UK Government's general reservation from the UNCRC concerning immigration matters. The reservation was, however, lifted in 2008 paving the way for the enactment of s. 55.

- UNCRC principles are also explicitly referred to in a number of pieces of statutory guidance, and have been for a long period of time. For example, see the *Framework for the Assessment of Children and Families* ('the *Framework Guidance*'), which set out the requirements for assessments by Children's Services departments pursuant to s. 17, Children Act 1989,[13] and its current replacement, *Working Together*.[14]

- Successive Governments have expressly stated that certain statutory provisions are intended to give effect to UNCRC obligations: see e.g. 'The United Nations Convention on the Rights of the Child: How legislation underpins implementation in England,' further information for the Joint Committee on Human Rights, March 2010.[15]

(iv) Common Law

- The UNCRC is also a legitimate tool in the development of the common law, and the courts have on this basis on a number of occasions confirmed the centrality of the UNCRC to interpretative questions of domestic law concerning children, outside the particular context of the HRA or the European Charter: see, for example, *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC 246, [81]; *R (SR) v. Nottingham Magistrates' Court* [2001] EWHC Admin 802, [65]-[67]; *R v. Accrington Youth Court, ex parte Flood* [1998] 1 WLR 156, para. 24 (per Sedley J)*; R(K) v Parole Board*, above.

- Unclear whether any reference will in fact be made to it in the resulting judgment, but this issue arose from the other end of the telescope in a recently argued case, *CN and GN v. Poole Borough Council* (heard 16th – 17th July 2018) where the issue is whether or not a local authority owes a duty of care at common law to a child in its geographical area in relation to the investigation of possible sexual, physical or emotional abuse and neglect and protecting the child from significant harm. Rather than the UNCRC being relied upon in relation to a proposed new departure for the common law, two of the interveners (Article 39 and the Care Leavers'

[13] Guidance issued jointly by the DoH, DfEE and the Home Office, 2000; it states at p. 9 that it reflects the principles of the UNCRC.
[14] HM Government, March 2013. See also *Every Child Matters: Change for Children*, guidance issued to the UK Border Agency on making arrangements to safeguard and promote the welfare of children.
[15] It states that, *"The Government is fully committed to children's rights and the continued implementation of the UNCRC to make the Convention a reality for all children and young people living in the UK. Since ratification of the UNCRC in 1991, implementation of the Convention has been pursued through legislation and policy initiatives, including the Children Act 1989, Children Act 2004, Every Child Matters.... In general, the UK does not incorporate international treaties directly into domestic law. Instead, if any change in the law is needed to enable the UK to comply with a particular treaty, the Government introduces legislation designed to give effect to that treaty. As set out in this document, existing legislation and policies give effect to the rights and obligations in the UNCRC and regard is given to the UNCRC when developing any new legislation or policy."*

Association) have relied the UNCRC and other international materials in a defensive manner, to argue that the previously understood position is correct and there should be no regression.

D. CEDAW AND WOMEN'S RIGHTS – AN EXAMPLE OF THE IMPORTANCE OF THE CONTENT OF THE MATERIAL

- The ECtHR held in *Opuz* (above) that *"when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law…, the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women"* (at [185]); this includes Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW[16]) (at [186]); the CEDAW Committee[17] has reiterated that violence against women, including domestic violence, is a form of discrimination against women (at [187]); and *"it transpires from the above-mentioned rules and decisions that the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional"* ([191]). Thus where any measure produces prejudicial effects for victims of domestic violence as a class, then that will amount to *prima facie* sex discrimination under Article 14, since domestic violence is a gendered form of violence.

- However when relying upon CEDAW and other international law materials the precise content is very relevant. Contrast the materials relied upon in two recent abortion cases: *R (A and B) v. Secretary of State for Health* [2017] 1 WLR 2492 and *Re: Northern Ireland Human Rights Commission v Attorney General of Northern Ireland & Department for Justice* [2018] UKSC 27 (*NIHRC*). In both cases reliance was placed upon a wide range of international materials, including CEDAW, the Istanbul Convention, General Comments from the CEDAW and UNCRC Committees, and (in *NIHRC*) decisions of the UN Human Rights Committee.

- In the *NIHRC* case the Attorney General of Northern Ireland and the Department of Justice minimised the relevance of such international materials, relying heavily upon the words of Lord Wilson in *A and B* at [35] to the effect that *"the conventions and the covenant to which the United Kingdom is party stop short of calling upon national authorities to make abortion*

[16] Article 1: *"... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

[17] Established under Article 17, UN Convention on the Elimination of All Forms of Discrimination against Women (UN Treaty Series vol. 1249, p. 13).

services generally available"; *"the authority of their recommendations is slight";* and, whilst this material *"adds background colour to the inquiry into fair balance under the Convention... the claimants need material of a far more vivid hue to put into the balance against the Secretary of State's resolve to stay loyal to the overall scheme for separate provision of free health services within each of our four countries and to the democratic decision reached in Northern Ireland in respect of abortion services."*

- However, this passage should not be read as applying to abortion in other contexts; still less should it be read as a generally applicable criticism of the use of unincorporated international conventions in other cases. In particular:
  (1) First, *A and B* concerned a very different issue: the question of NHS funding for termination services in England when Northern Irish resident women travel across the Irish Sea. A did not fall into any of the categories under consideration in the *NIHRC* case: she was not pregnant as a result of sexual violence nor was her foetus suffering from a fatal or serious abnormality. Whilst both appeals concerned abortion, the reasoning of Lord Wilson in that case cannot be transposed to the factual situations posed by this appeal nor to the legal questions that arise;
  (2) Second, this passage referred to the particular materials relied upon in *A and B*, and Lord Wilson considered the *"high point"* of those to be Article 12(2), CEDAW ("*granting free services where necessary*") and recommendations by two committees which were not directly on point (referring in general terms to criminalisation and access to safe services). There was no material before the Supreme Court in *A and B* concerning the particular issues arising in the *NIHRC* case: violence against women and the particularly stark circumstances of women pregnant as a result of rape and incest; and women denied abortions in respect of fatally abnormal foetuses. In contrast, in the NIHRC case the Supreme Court had before it extensive material precisely on point, including the CEDAW Committee's new General Recommendation 35 on gender-based violence[18] and two rulings of the HRC to the effect that the denial of abortion to two Irish women in fatal foetal abnormality cases amounted to inhuman and degrading treatment.[19] This is material of a *"more vivid hue"*;

[18] At [18] it states*: "Violations of women's sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."*

[19] *Mellett v. Ireland* (9th June 2016) and *Whelan v. Ireland* (17th March 2017). Consideration was given by the Supreme Court to a range of factors, including the wording of Article 7 ICCPR and its comparison with the requirements of Articles 3 and 8 EHCR and the composition of the HRC: see e.g. [101] – [102] (in these cases "*substantially overlapping groups of distinguished international lawyers have recently considered specific complaints by two Irish women about the circumstances in which they were denied abortions in respect of fatally abnormal foetuses in Ireland, and were compelled to travel abroad to obtain them. In each case, the UNHRC concluded that the prohibition on abortion in Ireland, the shame and stigma associated with the criminalisation*

(3) Third, Lord Wilson's words at [35] must be seen in the context of what follows at [36] of *A and B*: he considered that great weight needed to be given to one particular countervailing factor, namely the risk that an exception to the usual rules concerning NHS funding for non-resident patients would *"precipitate both a substantial level of health tourism into England from within the United Kingdom and from abroad and a near collapse of the edifice of devolved health services."* It is now known that 15 days after judgment was handed down in *A and B* there was a reversal of policy and such an exception was made by the Government, and as a result provision is now in place to fund women travelling from Northern Ireland for terminations in England. The policy underpinning the *"edifice of devolved health services"* appeared to be capable of being cast aside by the executive a fortnight after it had been pressed upon the Court. It was also confirmed by the Secretary of State that, despite the other countervailing factor upon which weight had been placed by the Secretary of State and Lord Wilson (respect for Northern Irish democratic processes) there had been *"no consultations with the Northern Irish Assembly or the representatives of Northern Irish political parties on the provision of abortion services in England and Wales for women ordinarily resident in Northern Ireland".*

E. CRITICISM OF THE DUALIST APPROACH IN RELATION TO HUMAN RIGHTS CONVENTIONS AND POSSIBLE FUTURE DEVELOPMENTS

The 2001 chink

Lewis v. Attorney General of Jamaica [2001] 2 AC 50

- Lord Slynn at p. 84 acknowledged the argument that an exception might be read into the traditional principles of non-justiciability and no direct effect when the treaty in question is a human rights treaty ("*even assuming that that [rule] applies to international treaties dealing with human rights*…").

Subsequent

Re McKerr's Application for Judicial Review [2004] UKHL 12, [2004] 1 WLR 807

- Criticism of the narrowness of approach by the House of Lords in *International Tin Council* summarised by Lord Steyn at [49] – [50] (although *"a comprehensive re-examination must*

of abortion of a fatally ill foetus, the compulsion in such a case to travel abroad from the familiar home environment to have an abortion, the lack of information and assistance in Ireland, before and after such abortion, the fact of having to leave the baby's remains behind and then in Whelan *having them unexpectedly delivered by courier, were all factors combining to lead to a conclusion that article 7 was breached. In each case, the UNHRC also concluded that there was arbitrary or unlawful interference with the complainant's privacy contrary to article 17 of the Covenant.* Mellet *and Whelan represent the conclusions of distinguished lawyers under a different international treaty to the Human Rights Convention. In both cases, the UNHRC received and recorded submissions from the Irish government on A, B and C v Ireland…"*

await another day"): he cited Dame Rosalyn Higgins' critique[20] to the effect that international law is part of the law of the land, and Murray Hunt's argument that human rights treaties enjoy a special status[21], and said:

> *"The rationale of the dualist theory, which underpins the International Tin Council case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future."*

R (SG and Others) v. Secretary of State for Work and Pensions [2015] UKSC 16, [2016] 1 WLR 1449 ('benefit cap' and discrimination against women under Article 14 ECHR read with Article 1, Protocol 1; relevance of UN Convention on the Rights of the Child)

- Lord Kerr at [243] – [253] analysed the commentary concerning the dualist approach (including criticism, at [250] – [251], of a piece by his Philip Sales QC (as he then was) and Joanne Clement in 2008[22]).
- At [254] – [257] he went further:

> *"I consider that the time has now come for the exception to the dualist theory in human rights conventions foreshadowed by Lord Slynn in Lewis and rather more firmly expressed by Lord Steyn in Re McKerr to be openly recognised. This can properly be done in relation to such conventions without espousing the complete abandonment of the theory advocated by some of the commentators referred to above.*
>
> *If Lord Steyn is right, as I believe he is, to characterise the rationale for the dualist theory as a form of protection of the citizen from abuses by the executive, the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the UK's commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?*
>
> *Standards expressed in international treaties or conventions dealing with human rights to which the UK has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to UK citizens domestic law's vindication of the rights that those conventions proclaim. If the government commits itself to a standard of human rights*

[20] "The Relationship between International and Regional Human Rights Norms and Domestic Law", in *Developing Human Rights Jurisprudence* (1993), vol 5, pp. 16–23; see in particular p. 20: *"international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract, but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international instrument, partly because relatively 'new' rights may also be included, and partly because the treaty may involve procedural undertaking for the states parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such-and even were these rights not already secure through a separate domestic historic provenance-they would be part of the common law by virtue of being rules of general international law."*

[21] *Using Human Rights Law in English Courts* (1998), pp. 26–28.

[22] "International Law in Domestic Courts: The Developing Framework" (2008) 124 LQR 388.

protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard. This is particularly so in the case of UNCRC. On its website UNICEF has stated that: "The CRC is the basis of all of UNICEF's work. It is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights treaty in history".

I therefore consider that article 3(1) of UNCRC is directly enforceable in UK domestic law. A primacy of importance ought to have been given to the rights of children in devising the regulations which bring the benefits cap into force..."

CAOILFHIONN GALLAGHER QC

Doughty Street Chambers

21st July 2018