THE COURT ORDERED that (1) no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings and (2) there be liberty to apply.

Trinity Term
[2021] UKSC 28
On appeal from: [2019] EWCA Civ 9

JUDGMENT

R (on the application of AB) (Appellant) *v* Secretary of State for Justice (Respondent)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Sales
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

9 July 2021

Heard on 20 and 21 January 2021

Appellant
Dan Squires QC
Ayesha Christie

(Instructed by The Howard League for Penal Reform)

Respondent
Sir James Eadie QC
Tom Weisselberg QC
Sarah Hannett
Jason Pobjoy
(Instructed by The Government Legal Department)

Intervener
(Equality and Human Rights Commission)
Caoilfhionn Gallagher QC
Adam Wagner
(Instructed by Equality and Human Rights Commission)

LORD REED: (with whom Lord Lloyd-Jones, Lord Sales, Lord Hamblen and Lord Stephens agree)

1. This appeal raises two questions of law. The first is whether the solitary confinement, as counsel for the appellant defines it, of persons under 18 years of age is inherently inhuman and degrading, contrary to article 3 of the European Convention on Human Rights ("the Convention", or "the ECHR"). The second is whether, if the first question is answered in the negative, there is a single and universal test of the compatibility of the solitary confinement, as so defined, of persons under 18 years of age with article 3, namely that there exist "exceptional" circumstances in which such treatment is "strictly necessary".

2. The background to the appeal is the appellant's treatment while he was detained at Feltham Young Offenders' Institution ("YOI") between 10 December 2016 and 2 February 2017, when he was 15 years of age. It should be made clear at the outset, not least in view of article 35(1) of the Convention, that counsel for the appellant does not raise any wider question than those set out in para 1 above as to whether, on the facts of the appellant's case, his treatment violated article 3. There is no challenge to the conclusion reached by the courts below on the facts of the present case, other than that they failed to approach the matter on the basis set out in para 1 above. On the contrary, the primary argument for the appellant implies that it is inappropriate to carry out an assessment based on the facts of individual cases: the solitary confinement, as defined by counsel for the appellant, of a person under the age of 18 is, according to the argument, always and inevitably a breach of article 3 as a rule of law, and a fact-sensitive approach to the question is erroneous. A fortiori, counsel submits, solitary confinement which is "prolonged", as counsel defines that term, is inevitably a breach of article 3. On counsel for the appellant's alternative argument, the only relevant question which arises on the facts is whether the circumstances of the appellant's case were "exceptional" and rendered solitary confinement "strictly necessary".

3. The court has considered whether, notwithstanding the narrow basis on which the appeal is presented, it could appropriately consider the compatibility of the appellant's treatment with article 3 on wider grounds, as counsel for the Equality and Human Rights Commission, which was permitted to intervene in the appeal, invited it to do. It has concluded that it cannot. In the first place, the whole point of counsel for the appellant's first argument is that an approach which takes account of the circumstances of a particular case is erroneous, while the second argument confines the court to deciding whether the circumstances are "exceptional". If this court were to consider whether there was a breach of article 3 on an evaluation of all the circumstances of the case, it would, on counsel's arguments, commit precisely the same error of which the lower courts stand accused. Secondly, it would not be

fair to the Secretary of State, who has come to the hearing prepared to address the two specific questions of law raised in the appeal, and not any wider issues. Thirdly, it would undermine the court's procedural rules, which are designed to identify the questions that are to be argued well in advance of the hearing, and to ensure that all parties have adequate notice of the arguments to be advanced.

The background facts

4. There is no challenge to the findings of fact made by the courts below. The following summary is based on the judgment of the Court of Appeal (Lord Burnett of Maldon CJ, Moylan and Singh LJJ): [2019] EWCA Civ 9; [2019] 4 WLR 42. That summary was itself based on the findings made by Ouseley J at first instance: [2017] EWHC 1694 (Admin); [2017] 4 WLR 153.

5. The appellant was born on 4 March 2001. He was placed on the child protection register aged six months, due to a likelihood of emotional abuse, and again when six years old. He witnessed domestic violence between his parents when very young. Since his parents could not care for him, from the age of seven he was in a succession of residential placements, which all broke down. A full care order was made in August 2015, when he was 14. He has learning difficulties and had a statement of special educational needs from 2007. He has been "known to the police" since he was ten. In June 2015, when he was 14, he received a detention and training order ("DTO"). He was placed at Medway Secure Training Centre. There, he suffered abuse at the hands of officers. He was released on licence on 23 December 2015. In April 2016, aged 15, he received another 12 month DTO, for criminal damage and common assault, and for a sexual assault. He was placed at Cookham Wood YOI, where he was detained until 12 October 2016, when he was again released on licence. On 22 November 2016 he pleaded guilty to two common assaults on prison officers committed at Cookham Wood. Other incidents took place at Cookham Wood, including three other assaults on officers. He committed further offences soon after his release on licence, at the care home where he was placed by the local authority. On 10 December 2016 he pleaded guilty to offences of indecent exposure and sexual assault, committed at the care home, and was remanded in custody at Feltham YOI while awaiting sentence. He was sentenced on 13 January 2017, when he received another 12 month DTO. The pre-sentence report concluded that his risk of dangerousness was high, as was his risk of causing serious harm. Even under 24 hour supervision, care and support, he still managed to commit offences. He also had a history of setting fires, displayed excessively sexualised behaviour and had been found preparing weapons.

6. In the meantime, he had been sent to Feltham YOI on 10 December 2016, as explained in para 5 above. On arrival he was placed in the induction unit on "single unlock", meaning that he could not leave his cell when any other detainees were out

of their cells, apart from some time in "three-officer unlock", which involved three officers being present whenever he left his cell. He was placed on that regime initially for the protection of officers, in the light of his behaviour at Cookham Wood, and subsequently (from around 18 December) for his own safety, in the light of his behaviour towards other detainees at Feltham. He could not be left alone with any female member of staff because of his conviction of a sexual offence, and his abusive behaviour towards women. This had implications for the provision of education, as a large majority of the teachers in YOIs are female. The fact that the appellant posed a danger to members of staff, both male and female, and was also at risk of attack by other detainees, presented a particularly difficult problem in relation to his social contacts with other people within the YOI.

7. The appellant describes in his witness statement what his "single unlock" regime was like. He was woken up when officers opened his door with his breakfast. Typically, before 9am he was then taken to collect his medication, which took between ten and 20 minutes. He was allowed out of his cell for another 30 minutes to shower, make phone calls (if his parents did not answer, he was sometimes allowed out of his cell to try them again later: the records indicate that he did not want them to visit him in the YOI, as he was afraid that they might be subject to attack), and exercise, accompanied by at least two officers. He was then locked in his cell for the rest of the day. Lunch and dinner were brought to his cell, and he ate them alone. In the evenings, he could hear others around him having association.

8. During the relevant period, he had interactions with the YOI staff and social workers. On 11 December 2016, he was visited by the chaplain, who engaged him in a brief conversation. On the same day, he played table tennis with an officer out of his cell. He did this on four occasions in the period to the end of January, including on 30 and 31 December 2016. In terms of social services, an initial assessment was made on 12 December 2016, with the aim of making contact with a community social worker. The appellant was also seen that day by a member of the community mental health team. No concerns were raised: he was eating and sleeping well, although he was not yet receiving all of his required medication. The governor states that he was immediately added to the risk management meeting agenda after the social work assessment. On 14 December 2016, an educational assessment was carried out, but the appellant was not allocated an educational pathway (ie a group with which a detainee can attend all lessons). It was not until a multi-disciplinary meeting on 24 January 2017 that the YOI realised that he had not been provided with education packs. These were provided thereafter. It was also on 14 December 2016 that the appellant had his gym induction. His risk management was also discussed at a meeting that day. On 15 December 2016, a unit manager witnessed the appellant and another young person having a negative verbal exchange (as it was put). The unit manager spoke to him about his shouting out of his door at other detainees and repeatedly pressing his bell. They had a sensible discussion in which it was explained to the appellant that he was on three officer unlock due to his behaviour at Cookham Wood, and that his behaviour at Feltham would decide how

his risk to officers was assessed. Later that day, his case worker introduced himself and answered some of the appellant's questions. On 16 December 2016, the appellant again saw a member of the community mental health team, and discussed short term goals and his behaviour.

9. On 18 December 2016, the appellant was seen shouting racist abuse at other detainees, including threats to urinate and defecate on their copies of the Quran. This was one of various occasions around this time when he made threats of violence towards staff and shouted abusive and racist comments to other detainees, which generated threats in response. This behaviour led the governor to believe that the appellant had created a risk to himself, due to the possible reaction from the other boys. This was affirmed by a documentary record, which states that the appellant was placed on single unlock since his safety would be compromised otherwise. On 20 December 2016, his safeguard induction was completed, involving his identifying those whom he knew in Feltham and where he came from. The case notes record that, over the Christmas period, he refused to go for his medication on 21 December 2016, and spent the morning of 22 December ringing his bell.

10. On 25 December 2016, the appellant had some Christmas time out of his cell. On 29 December 2016, a social work welfare check was completed. A health assessment was also carried out, which reported that his mental health would not deteriorate significantly if he were segregated. Another welfare check was undertaken on 30 December. This involved the social worker informing the appellant about education, including the information that the education team would be providing him with work booklets. The governor states in his witness statement that, at this time, the appellant's history of violence and fears for his safety at the hands of other detainees justified the regime in place. The removal from association was not a "planned situation but rather an evolving response to our assessments of the risks to [the appellant], to staff and other young people". He continues, "I realise that there were regrettable delays in getting him access to education and also a broader regime. At the initial stage of his time at Feltham, our main focus was on addressing his behaviour in a positive way and although his behaviour could have been managed by moving him to our segregation unit we decided that engagement with him in normal location was likely to be more successful".

11. On 1 January 2017, the Personal Officer introduced himself to the appellant and set some personal objectives for him. On 3 January 2017, the appellant was moved to another unit within the YOI, Heron Unit, in an attempt to integrate him with a different group of detainees. He had not been moved earlier because non-essential moves had been halted during an outbreak of norovirus at the YOI. Within hours he was heard to have told a racist joke to the other detainees. He was moved back to the induction unit on 11 January 2017, since he and others in Heron Unit were in a negative cycle of abuse involving shouting at each other from their cells,

and his integration there had become impossible. Other incidents of his shouting out from his cell are recorded throughout his time in Heron Unit.

12. On 10 January 2017, the appellant's case worker came for a visit, and he also had a substance issue assessment the next day. During this time officers also discussed his behaviour with him a number of times. The governor states that, on 12 January 2017, the appellant claimed that he would "rape the families" of other boys because he was "boss on the wing". Case notes around this time recorded the appellant's behaviour as worsening, with him having no ability to understand the rules. Welfare checks continued on 17 and 19 January.

13. On 17 January 2017 the appellant was visited by his social work supervisor, following his being sentenced on 13 January, and they had a conversation regarding his release date, during which he was taken to have made veiled threats. In light of his behaviour, a disciplinary adjudication led to his being deprived of his television for seven days. He subsequently misused his bell repeatedly and continued to shout abuse out of his cell. On 19 January 2017, he was moved to another unit, Eagle Unit, in another attempt to give him a new start and an opportunity to integrate with different detainees, but because of his continuing behaviour the conclusion was reached that he was at risk of harm from the other detainees if he came into contact with them. The governor spoke to his social worker, and to the children's charity Barnardo's, about his time out of his cell. Those individuals and other staff then had further conversations with the appellant about his behaviour. On the same day, he contacted his solicitor at the Howard League, who in turn contacted the Youth Justice Board expressing concerns about the appellant's isolation. A member of the Youth Justice Board visited Feltham on 20 January 2017 and asked for a multi-disciplinary meeting. The Youth Justice Board visit included a discussion of the appellant's needs, including psychological support in light of his sexual offending, and a discussion of whether he could be taken back to Cookham Wood. He was visited on 23 January 2017 in order to discuss the authorisation of his home telephone numbers for the purpose of his calls.

14. The first multi-disciplinary meeting took place on 24 January 2017. At that meeting the authorities clearly took the appellant's situation very seriously. He and various staff members and support workers were present at the meeting. The Youth Justice Board wanted to look at moving him back to Cookham Wood. Various interventions and programmes were discussed, as well as discussion of the short-term goals he would need to achieve in order to come off single unlock. It was agreed at the meeting that the focus was on getting him off single unlock. It was agreed that his return to Cookham Wood would not be in his best interests, since he had begun to make progress at Feltham. It was noted that he should have been getting gym provision, even in light of the difficulties of his single unlock. Similarly, education packs should have been provided. The governor notes that a bespoke educational package had been difficult to deliver, due to the inability to leave the appellant alone

with women (all the relevant members of staff being female). The appellant's social worker and Barnardo's also visited him that day to discuss a safeguarding referral. On the same day the Howard League sent a letter before claim challenging the appellant's solitary confinement, as they described his situation, and the lack of educational provision. On 31 January 2017, he was given a warning for rudeness, abuse and misuse of his cell bell. But the case notes record that he was settling in well on Eagle Unit and beginning to develop positive relationships with staff. It was also noted that he was being seen by the mental health team. On 2 February 2017, he received the first input from Kinetic (life skills training) for one hour. This provision continued for six weeks. He received the training outside his cell, with a male worker.

15. No complaint is made about the appellant's treatment after 2 February 2017. It is however relevant to note that on 3 February 2017 the Deputy Director of Custody ("DDC") at the National Offender Management Service reviewed the appellant's removal from association. He authorised its continuation on the basis of a desire to keep the appellant safe from harm from others, with the appellant's own behaviour driving the situation. The DDC Review states that, initially, the appellant's single unlock was seen as a period in which to assess his behaviour and to allow him to integrate, with knowledge of his previous behaviour at Cookham Wood. His shouting of racist abuse put his safety at risk. It was also noted that he was receiving support from his caseworker, social worker and unit staff. The DDC also requested a psychological assessment of the appellant. This was undertaken on 13 February 2017, and concluded that the appellant's safety and security were compromised due to his attitudes and behaviour. Various measures were suggested in order to address these, including interventions and meetings with chaplains and others. It was also suggested that he should be referred to the community mental health team for therapeutic assessments concerning trauma and sexual behaviour. No concerns were expressed about the impact of his removal from association upon his mental health.

16. The Court of Appeal concluded, at para 143, that "the reasons why [the appellant] was treated as he was were essentially for the protection of others and for his own protection". That conclusion is not disputed.

The relevant domestic law

1. The Young Offender Institution Rules 2000

17. The relevant rules for the regulation and management of YOIs are contained in the Young Offender Institution Rules 2000 (SI 2000/3371) ("the Rules"). Under rule 3(1), the aim of YOIs is to help offenders to prepare for their return to the outside community. Under rule 3(2), YOIs must achieve that aim, in particular, by:

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

18. Rule 37(1) requires that an inmate must be occupied in a programme of activities provided in accordance with rule 3, which shall include education, training courses, work and physical education. In relation to inmates of compulsory school age, as the appellant was at the material time, arrangements must be made for their participation in education or training courses for at least 15 hours a week: rule 38(2). Under rule 41(2), arrangements must also be made for each inmate to participate in physical education for at least two hours a week, in addition to the hours allotted to education under rule 38(2).

19. Rule 49 makes provision for removal from association. So far as material it provides:

> "(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that an inmate should not associate with other inmates, either generally or for particular purposes, the governor may arrange for the inmate's removal from association for up to 72 hours.
>
> (2) Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal of up to 14 days.
>
> (2A) Such authority may be renewed for subsequent periods of up to 14 days.
>
> (2B) But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the inmate was removed under paragraph (1).
>
> (2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State."

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

21. As appears from rule 49(1), removal from association is concerned only with limiting contact between detainees. It is not concerned with the time that a detainee is permitted out of his cell or his contact with teachers, psychologists, the staff of the institution or other persons. It can be used for disciplinary purposes or, as in the present case, in the detainee's own interests and those of other persons. Rule 49(1) does not disapply the rules requiring detainees to participate in educational activities and physical education, as explained in para 18 above.

2. The Human Rights Act 1998

22. There is a body of case law concerned with the application of Convention rights under the Human Rights Act in the context of the removal from association of adult prisoners. Authorities at the level of this court include *R (Bourgass) v Secretary of State for Justice (Howard League for Penal Reform intervening)* [2015] UKSC 54; [2016] AC 384 and *Shahid v Scottish Ministers* [2015] UKSC 58; [2016] AC 429. In these cases, the court has applied the relevant jurisprudence of the European Court of Human Rights, as it understands it.

The history of these proceedings

23. At first instance, Ouseley J made a number of findings in the appellant's favour. First, he held that the Secretary of State had failed to comply with the requirements of rule 49 of the Rules pertaining to procedural oversight of the appellant's removal from association. The process for such removal and the further process of regular reviews of that decision did not take place, in breach of the Rules. This was acknowledged by the Secretary of State and an apology was made for it. Secondly, Ouseley J held that the Secretary of State had failed to comply with rules 3(1), 37(1), 38 and 41 of the Rules, pertaining to the appellant's education. In particular, Ouseley J (again reflecting concessions made by the Secretary of State) held that there had been breaches of the provisions in the Rules relating to compulsory education for a detainee such as the appellant, who was of compulsory school age at the time.

24. In the light of these findings, Ouseley J held that there had been a breach of article 8 of the Convention, since the appellant's detention during the period in question had not been in accordance with the law. That conclusion is no longer challenged on behalf of the Secretary of State.

25. Ouseley J rejected the submission that the appellant's treatment between 10 December 2016 and 2 February 2017 was sufficiently severe in all the circumstances of the case to cross the high threshold which is required before treatment can be regarded as being inhuman or degrading, in violation of article 3 of the Convention.

26. In reaching that conclusion, Ouseley J derived the following principles from the case law:

> (1) A fact-sensitive approach, taking account of all the circumstances, including the purpose of the segregation, is required in an article 3 analysis: *Ramirez-Sanchez v France* (2006) 45 EHRR 49, para 118 ("*Ramirez-Sanchez*").
>
> (2) There is no "bright line" rule, at least in the adult context, that solitary confinement lasting more than a specific period of time automatically breaches article 3. The European court stated in *Ahmad v United Kingdom* (2012) 56 EHRR 1, para 210 ("*Ahmad*"), that no precise rules could be set down. Rather, the question whether the threshold conditions of article 3 had been met depended on "the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned": para 209. In order to avoid arbitrariness, attention must be paid to the purpose of the restriction applied to the prisoner (para 211) and the procedural safeguards in place: para 212. Solitary confinement should be ordered only exceptionally and after every precaution had been taken: ibid.
>
> (3) Focus on whether treatment constitutes "solitary confinement" within a variety of international definitions is a distraction from what matters, namely the substantive question of whether article 3 has been breached, irrespective of labels.
>
> (4) The "decisive" factors to be considered when analysing whether a prisoner's article 3 rights had been breached were outlined in *Ahmad*, para 178. They include: (a) the presence of premeditation; (b) the intention to break the individual's resistance or will; (c) the intention to humiliate or debase, or the implementation of a measure causing fear, anguish or feelings of inferiority; (d) the absence of specific justification for the measure; (e) the arbitrary punitive nature of the measure; (f) the length of time for which the

measure was imposed; and (g) any degree of distress or hardship exceeding the levels unavoidable within the detention context.

(5) The age of the person under consideration is relevant: *Ramirez-Sanchez*, para 118.

(6) Articles 3 and 8 impose positive obligations on the state to treat vulnerable individuals like children with respect, involving a balance of their interests against those of the community, but always treating the interests of the child as a primary consideration: *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin); [2003] 1 FLR 484.

27. Turning to the facts, and drawing in particular on the principles outlined in the decision in *Ahmad*, Ouseley J found that article 3 was not breached. There was no suggestion that the physical conditions in which the appellant was detained contravened article 3. Nothing was done with the intention to humiliate or degrade the appellant. No part of the period when the appellant was removed from association was intended as punishment: it was initially intended to protect officers, in view of the appellant's history of assaulting them, and it was later intended to protect him from other detainees whose anger he had provoked by racist and other abuse. This protective purpose meant that the treatment always had a considered and proper justification. He was moved between units with the intention of integrating him with other detainees, but on every occasion the attempted integration was thwarted by his behaviour. He received regular welfare checks. He always had proper medical care. His mental health was monitored, initially by a psychiatric nurse and subsequently by a consultant psychiatrist and another specialist doctor. He was in contact with his solicitors from an early stage. His removal from association was reviewed, although not as frequently as the Rules required. He was never kept in "total solitary confinement". The assessment of this, Ouseley J accepted, encompassed both quantitative and qualitative components. The number of hours he was allowed to leave his cell varied each week, and he had limited forms of social contact, through the gym and occasional table tennis matches with an officer. There was no evidence that the appellant had suffered any harm to his mental health as a consequence of his removal from association, and the allegation that there was a latent risk of future harm to his mental health had not been established.

28. On appeal to the Court of Appeal, it was argued on the appellant's behalf, first, that the "solitary confinement" of any person under 18 (defined by counsel at that stage as "confinement in a cell for more than 22 hours a day and there being minimal meaningful contact with other human beings": para 57) is automatically a breach of article 3, or alternatively that "prolonged" solitary confinement (defined as more than 15 days) is automatically such a breach. Secondly, if that submission

were rejected, it was argued that there was a presumption of a breach of article 3 in such circumstances. Thirdly, if the first two submissions were rejected, it was argued that there was a breach of article 3 on the facts of the present case.

29. Those arguments were rejected by the Court of Appeal. It concluded that article 3, as interpreted to date, calls for a highly fact-sensitive inquiry into all the circumstances of a case such as this, in order to see whether the high threshold contained in it has been crossed. It did not consider that there were any "bright lines" or presumptions in this context.

30. Applying the jurisprudence on article 3 to the facts of this case, the court stated:

> "110. We are very conscious that this case concerns a child. Children are, of course, different from adults. As has often been said, the interests of a child are a primary consideration. In this particular case it is important to look at the circumstances from the perspective of a child. Accordingly, what might otherwise not be a breach of article 3 and/or article 8 could well be in the particular circumstances of a child. Nevertheless, in our view, close attention still has to be paid to the full set of circumstances of each child.
>
> 111. That is an exercise that Ouseley J rightly performed. Having looked closely at the facts we have come to the same conclusion as he did. We certainly cannot say that his conclusion was wrong. It is clear that a great deal was happening between 10 December 2016 and 2 February 2017, despite the many difficulties that [the appellant] presented to the authorities at Feltham. It is not the case that [the appellant] was simply left to languish, isolated, in his cell.
>
> …
>
> 147. It is accepted on behalf of the Secretary of State that not everything that should have been done during [the relevant period] was done. In particular there were breaches of the Rules relating to educational provision and oversight of [the appellant's] removal from association.

> 148. We do have some concerns that there were breaches of various Rules and that no MDM [multi-disciplinary meeting] took place until 24 January 2017. However, those considerations do not lead us to conclude that there has been a breach of … article 3."

31. Some of the arguments advanced before the Court of Appeal have not been pursued before this court. No argument is advanced on behalf of the appellant that "solitary confinement" or "prolonged solitary confinement" of a person under 18 gives rise to a presumption of a breach of article 3. Nor is there any argument that there was a breach of article 3 on an overall evaluation of the facts of the present case, of the kind carried out by Ouseley J and the Court of Appeal. The only arguments, as I have explained, are, first, that "solitary confinement" of a person under 18 is automatically a breach of article 3, a fortiori where the solitary confinement is "prolonged"; and alternatively, that the "solitary confinement" of a person under 18 is always a breach of article 3 unless there exist "exceptional" circumstances in which such treatment is "strictly necessary".

"Solitary confinement"

32. "Solitary confinement" is not an expression with a defined meaning in English law. Nor does it have any universally agreed definition in international law. It has been used by the European Court of Human Rights in cases covering a variety of circumstances, but has not been defined. In the case law of the European court concerning article 3, as in domestic cases applying the Human Rights Act, the court has carried out an evaluation of the circumstances of the individual case, rather than asking whether the treatment of the applicant satisfied a particular definition and, if so, basing its decision on whether the period of time during which the definition had been satisfied was in excess of a specified maximum.

33. Before this court, counsel for the appellant adopted the definition of the expression used by the UK's National Preventive Mechanism, an administrative body designated by the Government under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In its Sixth Annual Report to Parliament (2015), p 21, it adopted the following definition of solitary confinement:

> "Solitary confinement is the physical isolation of individuals who are confined to their cells for 22 or more hours a day. Where this lasts for a period in excess of 15 consecutive days it is known as prolonged solitary confinement. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people

> is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic."

34. That definition was taken from the Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007 at the International Psychological Trauma Symposium. The definition was not drawn up for legal purposes, and is not ideally suited to a forensic context. The first two sentences are clear as far as they go, but do not take account of social isolation. That issue is addressed by the remainder of the definition, but it is insufficiently precise to be used as a legal test. That is not a criticism of the definition, but it reflects the fact that it was not designed for that purpose. A more precise definition could, however, be adopted if a definitional test of compliance with article 3 were in principle appropriate. Nevertheless, it is difficult to see how an evaluative judgment based on the facts of the individual case could be avoided. Even the definition proposed by counsel for the appellant requires a fact-sensitive evaluation of the qualitative factors mentioned in the last three sentences.

Article 3

35. Article 3 of the Convention states:

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

The first argument: that the solitary confinement of a person under 18 is automatically a violation of article 3

1. The argument

36. In support of the contention that holding persons aged under 18 in solitary confinement (as counsel for the appellant defines it) is inherently a violation of article 3, counsel for the appellant argues (in summary) that:

> (1) Article 3 should be interpreted in harmony with article 37 of the United Nations Convention on the Rights of the Child ("UNCRC"), which states, so far as material:

> "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
>
> …
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."

(2) The UNCRC should be interpreted in accordance with the views of the UN Committee on the Rights of the Child ("the CRC"), expressed in General Comments and country reports, which must be regarded as "authoritative", in accordance with several judgments of this court.

(3) In particular, General Comment No 10 on Children's Rights in Juvenile Justice ("GC 10"), General Comment No 24 on Children's Rights in the Child Justice System ("GC 24") and the CRC's 2016 country report on the United Kingdom authoritatively establish that article 37 prohibits the solitary confinement of persons under 18 in all circumstances.

(4) Other international instruments, and the views of medical and penological experts, should also be taken into account when interpreting article 3 of the Convention, and demonstrate an overwhelming consensus that the solitary confinement of persons under 18 should never be permitted. In that regard, reliance is placed on numerous sources, including a number of reports by the UN Committee against Torture ("CAT"), rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, rule 45(2) of the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Special Rapporteur on Torture's report of 5 August 2011, the report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment ("the CPT") of 19 August 2017, a joint position statement adopted in 2018 by the British Medical Association, the Royal College of Psychiatrists and the Royal College of Paediatrics and Child Health, the Children's Commissioner's 2015 report, "Isolation and Solitary Confinement of Children in the English Youth Justice Secure Estate", the decision on 22 February 2017 of the US District Court for the Northern District of New York in *VW v Conway* 236 F Supp 3d 554, and the evidence given in that case by Dr Barry Krisberg.

37. The argument, if accepted, has the consequence that the test for determining whether there has been a breach of article 3 is based, first, on the adoption of a

particular definition of "solitary confinement" or "prolonged solitary confinement", and secondly, on the duration of the period during which that definition was satisfied. Instead of the court carrying out an evaluation of all the relevant circumstances, including such matters as the reasons for the person's isolation, the degree of social contact which he or she may have had with other people, the conditions under which he or she has been kept, and the effect of the isolation upon his or her health, there is substituted an essentially mechanical test.

38. As explained below, this argument is not based on the judgments of the European court concerning article 3. It depends on the jurisprudence of the European court solely in order to establish the relevance of the UNCRC, and of other international instruments, to the interpretation of article 3. The rest of the argument depends on the UNCRC and the other international instruments, as interpreted by a variety of international bodies, and assumes that a corresponding interpretation must be given to article 3.

2. The case law of the European court

39. When a question arises in connection with a Convention right, the courts are required by section 2(1) of the Human Rights Act to take into account any relevant judgment or decision of the European court. The starting point, where a question has arisen in connection with article 3, is therefore the relevant judgments and decisions of the European court concerning article 3.

40. In order for treatment to constitute a violation of article 3, the European court has consistently held that it must attain a minimum level of severity, which normally has to be assessed in the light of all the circumstances of the case. The position was explained by the plenary court in the early case of *Ireland v United Kingdom* (1979-80) 2 EHRR 25, para 162:

> "… ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."

That formulation, emphasising the need to consider "all the circumstances of the case", has been repeated in the subsequent case law.

41. The range of relevant circumstances was discussed in *Ramirez-Sanchez* (2007) 45 EHRR 49, where the Grand Chamber stated at para 118:

> "The court has considered treatment to be 'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment is 'degrading' within the meaning of article 3, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of article 3."

42. A somewhat fuller catalogue of relevant factors was provided in *Ahmad v United Kingdom*, para 178:

> "… in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the court's conclusion that there has been a violation of article 3:
>
> - the presence of premeditation;
> - that the measure may have been calculated to break the applicant's resistance or will;
> - an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
> - the absence of any specific justification for the measure imposed;
> - the arbitrary punitive nature of the measure;

- the length of time for which the measure was imposed; and

- the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

> The court would observe that all of these elements depend closely upon the facts of the case …"

The last sentence of that passage is particularly relevant to the argument in the present case.

43. The application of article 3 in relation to what can broadly be described as removal from association or solitary confinement has been considered by the European court in a substantial number of cases. The court has repeatedly held that removal from association is not in itself inhuman or degrading. In *Van der Ven v Netherlands* (2004) 38 EHRR 46, para 51, it stated, under reference to earlier decisions:

> "… the removal from association with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or degrading punishment."

That statement has been repeated in numerous other cases, including several judgments of the Grand Chamber: see, for example, *Ramirez-Sanchez*, para 123, *Ilaşcu v Moldova* (2005) 40 EHRR 46, para 432, and *Öcalan v Turkey* (2005) 41 EHRR 45, para 191.

44. The court has also made it clear that an assessment of whether removal from association falls within article 3 requires a range of considerations to be taken into account. As it said in *Van der Ven* (ibid):

> "In assessing whether such a measure may fall within the ambit of article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."

That statement again makes clear the necessity for a consideration of the particular circumstances, rather than the application of an automatic rule. The stringency of

the measure and its duration are naturally treated as relevant factors, but not as the only factors; and the court's consideration of the stringency of the measure is broader than the question of whether it conforms to a particular definition. The same approach has been adopted in later cases such as *Peňaranda Soto v Malta* (Application No 16680/14) (unreported) given 19 December 2017, para 75, and *AT v Estonia* (Application No 70465/14) (unreported) given 13 November 2018, para 72.

45. A summary of the court's case law in relation to solitary confinement can be found in *Ahmad*, paras 205-212. The court began its summary by stating at para 205 that "[t]he circumstances in which the solitary confinement of prisoners will violate article 3 are now well established in the court's case law". After considering complete sensory isolation coupled with total social isolation (para 206), with which this case is not concerned, and noting the seriousness of solitary confinement falling short of complete sensory isolation, and the damaging effects which it can have (para 207), the court added at paras 208-209:

> "208. At the same time, however, the court has found that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment …
>
> 209. Thus, whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."

The first sentence of the next paragraph is especially apposite in the present case:

> "210. In applying these criteria, the court has never laid down precise rules governing the operation of solitary confinement. For example, it has never specified a period of time, beyond which solitary confinement will attain the minimum level of severity required for article 3."

46. There do not appear to have been any cases in Strasbourg concerned with the application of article 3 to the removal from association of detainees aged under 18. None, at least, has been cited to this court. There are, however, a number of authorities concerned with the application of article 3 in relation to the detention of children and young people. In all of them, the court has adopted the same general

approach to article 3 as in the cases concerned with solitary confinement which I have discussed.

47. An early example is *V v United Kingdom* (2000) 30 EHRR 121, which concerned criminal proceedings taken against ten year old children. The Grand Chamber repeated at para 70 what had been said in *Ireland v United Kingdom*, para 162 ("all the circumstances of the case": para 40 above), and listed at para 71 the factors which had been held to be relevant, in the same terms as were subsequently repeated in *Ramirez-Sanchez*, para 118 (para 41 above). In relation to the indeterminate sentences imposed on the children, the court referred to article 37(b) of the UNCRC, which requires that the imprisonment of a child be used only as a measure of last resort and for the shortest appropriate period of time, but concluded at para 98 that the sentences were compatible with article 3 of the Convention.

48. The case of *Mayeka and Mitunga v Belgium* (2008) 46 EHRR 23 concerned the administrative detention of an unaccompanied five year old child in an adult detention centre for a period of two months, in the context of immigration. The court repeated the "all the circumstances of the case" statement made in *Ireland v United Kingdom*, para 162. Noting that no one had been assigned to look after this very young child, that no measures had been taken to ensure that her needs were met, that the attention she received was far from adequate, and that her detention under these conditions had caused her considerable distress and had serious psychological effects, the court concluded that her detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment, contrary to article 3. A similar approach, focusing on the vulnerability of children and the unsuitability of the living conditions imposed upon them, was followed by the court in later cases concerned with the administrative detention of young children in the context of immigration, such as *Muskhadzhiyeva v Belgium* (Application No 41442/07) (unreported) given 19 January 2010, *Popov v France* (2016) 63 EHRR 8 (a judgment of the Grand Chamber) and *GB v Turkey* (Application No 4633/15) (unreported) given 17 October 2019. In *Rahimi v Greece* (Application No 8687/08) (unreported) given 5 April 2011, which concerned the administrative detention of a 15 year old boy for a period of two days, the court followed essentially the same approach. The critical feature was that the physical conditions of his detention in a camp were so poor (in terms of overcrowding, lack of sanitation and so forth) that they undermined the very essence of human dignity and could be regarded in themselves as degrading treatment in breach of article 3, regardless of the duration of his detention there. In that regard, the court repeated what had been said in *Ireland v United Kingdom*, para 162 (para 40 above) about the need to consider all the circumstances of the case.

49. Another relevant case is *Güveç v Turkey* (Application No 70337/01) (unreported) given 20 January 2009, which concerned the detention of a 15 year old boy in an adult prison, contrary to the relevant legislation, for over five years. During

part of that time he was facing a capital charge. He was subjected to a severely limited visiting regime, and had no adequate legal assistance. As a result of his conditions of detention he developed serious psychiatric problems, and attempted suicide on three occasions. These involved his taking an overdose of drugs, setting himself on fire, as a result of which he suffered extensive and serious burns, and slashing his wrists. Although the authorities were aware of his psychiatric problems and suicide attempts, and received medical advice that he required treatment in a specialised hospital, he continued to be detained in prison, and received no adequate medical care (indeed, the authorities prevented him from receiving medical care: para 95). The court repeated the "all the circumstances of the case" statement made in *Ireland v United Kingdom*, para 162. It also referred to the positive obligation imposed on contracting states by article 3 to protect the physical well-being of persons deprived of their liberty, and held that the authorities had breached that obligation (para 96). It concluded at para 98 that having regard to the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and the failure to take steps with a view to preventing his repeated attempts to commit suicide, he was subjected to inhuman and degrading treatment, in violation of article 3.

3. Discussion

50. The judgments which I have cited demonstrate a consistent approach to the application of article 3. In cases concerned with allegations of ill-treatment, the court asks itself whether the ill-treatment has attained the minimum level of severity which is necessary for article 3 to apply. That minimum level is not fixed, but depends on the circumstances of the case (para 40 above). A range of matters are relevant. They include the age of the applicant and the duration of the treatment, but they are by no means confined to those factors. Judgments concerned with solitary confinement, such as *Ramirez-Sanchez* and *Ahmad*, have provided lists of factors which the court has found to be relevant. As the court has noted, all of the elements in question depend closely upon the facts of the particular case (paras 41-42 above).

51. In relation to removal from association, in particular, the court has repeatedly said that such removal does not in itself amount to inhuman treatment (para 43 above), and that a range of considerations must be taken into account (para 44 above). They include the stringency of the measure and its duration, but the court has not laid down a definition of a particular level of stringency (short of complete sensory isolation coupled with total social isolation), or a particular duration, which is sufficient in itself to violate article 3 (paras 44-45 above). As was stated in *Ahmad*, para 210, the court has never laid down precise rules governing the operation of solitary confinement, and in particular has never specified a period of time beyond which solitary confinement will attain the minimum level of severity required for article 3 (para 45 above).

52. There do not appear to have been cases under article 3 concerned with the removal from association of detained offenders under 18 years of age; and it has to be borne in mind that the detention of persons under 18 raises different issues from the imprisonment of adults, essentially because of the vulnerability and needs of persons in that age group. However, there is a body of case law under article 3 concerned with the treatment of children and young people in a range of other contexts concerned with detention and criminal proceedings. Those cases do not suggest that a radically different methodology should be adopted. On the contrary, the court has followed the general approach described in para 50 above, focusing on matters such as the duration of the treatment, its physical and mental effects, and the age and state of health of the person concerned, while giving appropriate weight to the vulnerability and needs of children and young people (see paras 47-49 above). The existing case law supports the general approach adopted by the courts below, summarised by the Court of Appeal at para 110 of its judgment (para 30 above).

53. Counsel for the appellant argues, however, that this court should adopt a very different approach to the application of article 3 in the context of the removal from association of detained offenders aged under 18. The correct approach, it is argued, is to lay down a definition of solitary confinement, and to hold that treatment satisfying that definition is automatically a violation of article 3 if it is imposed on a person aged under 18, at least if it exceeds a specified duration. This, as I have explained, would be a major departure from the principles currently laid down in the Convention jurisprudence.

54. It is of course possible that the European court may choose to develop its jurisprudence in this way, if a suitable case comes before it. But it is not the function of this court to undertake a development of the Convention law of such a substantial nature. The general approach to be adopted by domestic courts applying the Human Rights Act was explained by Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20 ("*Ullah*"), expressing the unanimous view of the House. As he said, the House had previously held that "courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court". That, as he explained, reflected the fact that the Human Rights Act was intended to give effect in domestic law to an international instrument, the Convention, which could only be authoritatively interpreted by the Strasbourg court. Accordingly, domestic courts were required "to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

55. Lord Bingham expanded on that rationale in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 29. Citing earlier statements to the same effect in earlier decisions of the House of Lords, he observed that "the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies available to those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the

domestic courts and not only by recourse to Strasbourg". There should therefore be a correspondence, in general, between the rights enforced domestically and those available in Strasbourg. Parliament can of course legislate to provide for rights more generous than those guaranteed by the Convention, but it did not do so when it enacted the Human Rights Act.

56. An important additional rationale, which follows from the objective of the Human Rights Act as explained in *Ullah* and *Denbigh High School*, was identified by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153, para 106. Referring to Lord Bingham's statement that domestic courts should keep pace with the Strasbourg jurisprudence, "no more, but certainly no less", he commented:

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

57. As Lord Brown explained, the intended aim of the Human Rights Act - to enable the rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts - is particularly at risk of being undermined if domestic courts take the protection of Convention rights further than they can be fully confident that the European court would go. If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected.

58. The approach to this issue laid down in *Ullah*, *Denbigh High School* and *Al-Skeini* has been repeatedly endorsed at the highest level. For example, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] AC 1312, Baroness Hale of Richmond stated at para 53:

> "The Human Rights Act 1998 gives effect to the Convention rights in our domestic law. To that extent they are domestic rights for which domestic remedies are prescribed: *In re McKerr* [2004] 1 WLR 807. But the rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20. Our task is to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] 1 AC 153, para 106."

In *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45; [2011] 2 AC 104, a nine-member constitution of this court unanimously stated at para 48:

> "Where, however, there is a clear and constant line of decisions [of the European court] whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

In *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52, Lord Hope, with whom Lord Walker, Lady Hale and Lord Kerr agreed, summarised the position at para 43:

> "Lord Bingham's point [in *Ullah*, para 20] was that Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the Treaty obligation, into free-standing rights of the court's own creation."

59. It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal

undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved. That approach is discussed, for example, in *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] UKSC 2; [2012] 2 AC 72, paras 112 and 121, *Surrey County Council v P* [2014] UKSC 19; [2014] AC 896, para 62, *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, paras 145-148, and *Moohan v Lord Advocate (Advocate General for Scotland intervening)* [2014] UKSC 67; [2015] AC 901, para 13.

60. As I have explained, however, that is not what counsel for the appellant invites the court to do in the present case. He is not inviting the court to decide the appeal on the basis of principles established in the case law of the European court, but on the basis of a principle which, he argues, ought now to be adopted in the light of a body of material concerned with other international instruments. That approach is not open to this court under the Human Rights Act, and his argument must therefore be rejected.

61. I would only wish to add some comments on certain assumptions inherent in counsel's argument. First, it is well understood that the European court takes account of other international treaties and other materials in its interpretation and application of the Convention. However, it also needs to be borne in mind that "it is for the [European] court to decide which international instruments and reports it considers relevant and how much weight to attribute to them": *AM-V v Finland* (2018) 66 EHRR 22, para 74. Accordingly, although the European court frequently refers to international treaties, it does not necessarily follow the views adopted by the bodies established to interpret them. That was made clear by the Grand Chamber in *Correia de Matos v Portugal* [2018] 44 BHRC 319, para 135 ("even where the provisions of the Convention and those of the ICCPR [the International Covenant on Civil and Political Rights] are almost identical, the interpretation of the same fundamental right by the HRC [the UN Human Rights Committee] and by this court may not always correspond"). The judgment in *AM-V v Finland* is another example: the European court's approach to the application of article 8 and article 2 of Protocol No 4 to the Convention, in relation to a decision made on behalf of a person lacking the mental capacity to understand its significance, differed from the interpretation given to the corresponding provision of the UN Convention on the Rights of Persons with Disabilities by the relevant committee; and see also *Popovic v Serbia* (2020) 71 EHRR 29, para 79.

62. This approach is also evident in the court's case law concerning article 3. For example, in *Muršić v Croatia* (2017) 65 EHRR 1, the Grand Chamber declined to treat the CPT's standards for prison cells as being decisive of a breach of article 3, as it had a "duty to take into account all relevant circumstances of a particular case before it when making an assessment under article 3, whereas other international

institutions such as the CPT develop general standards in this area aiming at future prevention" (para 112). That is an important distinction, with implications beyond the CPT, as the court indicated by its reference to other international institutions. As the court explained at para 113:

> "Moreover, as the CPT has recognised, the court performs a conceptually different role to the one assigned to the CPT, whose responsibility does not entail pronouncing on whether a certain situation amounts to inhuman or degrading treatment or punishment within the meaning of article 3. The thrust of CPT activity is pre-emptive action aimed at prevention, which, by its very nature, aims at a degree of protection that is greater than that upheld by the court when deciding cases concerning conditions of detention. In contrast to the CPT's preventive function, the court is responsible for the judicial application in individual cases of an absolute prohibition against torture and inhuman or degrading treatment under article 3."

The same approach was also adopted in *Aggerholm v Denmark* (Application No 45439/18) (unreported) given 15 September 2020, para 100, in relation to reports by the CAT. It has a wider relevance to reports, comments and so forth by other treaty bodies whose purpose is aimed at prevention or the promotion of good practice, rather than adjudication.

63. Furthermore, even where an international instrument is relevant to the European court's consideration of whether there has been a violation of the Convention, it cannot be assumed that the relevant article of the Convention is article 3, rather than some other article, such as article 8. The point is illustrated by the case of *V v United Kingdom*, where the court referred to a number of international instruments stating that children accused of crimes should have their privacy respected at all stages of the proceedings, and concluded at para 77 that "the foregoing demonstrates an international tendency in favour of the protection of the privacy of juvenile defendants". It continued (ibid):

> "However, whilst the existence of such a trend is one factor to be taken into account when assessing whether the treatment of the applicant can be regarded as acceptable under the other articles of the Convention, it cannot be determinative of the question whether the trial in public amounted to ill-treatment attaining the minimum level of severity necessary to bring it within the scope of article 3."

64. Secondly, it is unfortunate that the General Comments of the CRC have been described in some dicta in this court as "authoritative". In context, all that appears to have been meant was that the comments were issued by a body possessing relevant experience and expertise. That description has however been misread, so as to result in exaggerated claims as to the comments' status and effect, and is best avoided. Contrary to the tenor of the submissions in this and other cases, the CRC does not make binding decisions as to the interpretation of the UNCRC: it has no power to do so. Nor, of course, does it make binding decisions as to the interpretation of the ECHR. As Ouseley J commented in the present case, at para 113 of his judgment:

> "[T]he relevant convention being interpreted is a different one, the ECHR, with its own court which decides not just its autonomous meaning, but its fact sensitive application. Whether circumstances amount to a breach of the ECHR is a matter for the judicial body tasked with deciding the issue in the case before it, and not for the [CRC]. The committee, legitimately, may well be trying to bring about what it sees as desirable changes in policy and practice, but it is not performing a judicial function."

That observation is consistent with the European court's approach as explained in the authorities noted at paras 61-62 above.

65. The CRC was established "[f]or the purpose of examining the progress made by states parties in achieving the realization of the obligations undertaken in the present convention" (article 43 of the UNCRC). It is not a judicial body. Its members represent a variety of professional backgrounds. The members initially elected, for example, included persons with backgrounds in social work, medicine, journalism, governmental and non-governmental work, juvenile justice, human rights and international law. Article 44 requires it to receive reports from states parties and to report to the General Assembly. Article 45 permits it to "make suggestions and general recommendations based on information received pursuant to articles 44 and 45". It has a variety of functions under the UNCRC and its protocols, but none of them gives it any binding authority. It has adopted the practice of publishing its interpretation of provisions of the UNCRC, in the form of General Comments, but they have no defined status, and they are not analogous to the rulings of an international court. They do not contain the legal analysis which would be found in a judicial adjudication on the interpretation and application of an international treaty.

66. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26; [2007] 1 AC 270,

para 23, Lord Bingham considered a submission based on a report by CAT, which is a body of a similar kind to the CRC, and stated:

> "But the committee is not an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight."

67. The same conclusion was reached in *R (A) v Secretary of State for Health (Alliance for Choice intervening)* [2017] UKSC 41; [2017] 1 WLR 2492, para 35, in relation to recommendations made by the Committee on the Elimination of Discrimination against Women, and in relation to General Comments issued by the UN Committee on Economic, Social and Cultural Rights. The General Comments of the CRC fall into the same category. As Lord Wilson noted in *R (DA) v Secretary of State for Work and Pensions (Shelter Children's Legal Service intervening)* [2019] UKSC 21; [2019] 1 WLR 3289, para 69, "the guidance is not binding even on the international plane", and "while it may influence, it should, as mere guidance, never drive a conclusion that the [UNCRC] has been breached".

The second argument: that the solitary confinement of a person under 18 is automatically a violation of article 3 unless there exist "exceptional circumstances" in which such treatment is "strictly necessary"

1. The argument

68. In support of the contention that the solitary confinement of a person under 18 is automatically a violation of article 3 unless there exist "exceptional circumstances" in which such treatment is "strictly necessary", counsel for the appellant argues (in summary) that:

> (1) The European court has applied a strict necessity test where a right of particular importance is at stake, and where the consequence of the impugned conduct is particularly serious, but where there may be some compelling reason which justifies the treatment in question. Examples include (it is argued) *Handyside v United Kingdom* (1979-80) 1 EHRR 737, which concerned the question whether an interference with freedom of expression was "necessary in a democratic society" as required by article 10(2), and *McCann v United Kingdom* (1996) 21 EHRR 97, which concerned the

question whether the killing of IRA terrorists had been "absolutely necessary" as required by article 2(2).

(2) The same test (it is argued) has been applied under article 3 where the treatment in question is prima facie incompatible with a person's dignity, but may be lawful if required as a last resort: for example, the use of physical force on prisoners or psychiatric patients.

(3) The solitary confinement of children falls within the same category.

69. Counsel informed the court that he did not dispute that the appellant's separation from other inmates may well have been strictly necessary; but he drew a distinction between separation and solitary confinement, as he defined it.

2. The case law of the European court

70. A test of "strict necessity" has been applied in relation to article 3 in a line of cases concerned with the use of physical force against persons in detention. This is the line of authority on which counsel for the appellant relies, on the basis that the same approach should also be applied, by analogy, to the solitary confinement of persons aged under 18.

71. For example, the Grand Chamber judgment in *Bouyid v Belgium* (2016) 62 EHRR 18 concerned, among other matters, a complaint that a 17 year old youth had been slapped in the face by a police officer while held in a police station. In its discussion of the complaint under article 3, the court stated at para 100 that "where an individual is deprived of his liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3". The court emphasised at para 101 that the words "in principle" did not mean that there might be situations where a finding of a violation was not called for because the severity threshold was not attained:

> "Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly

> necessary by his conduct, whatever the impact on the person in question."

72. In support of that approach, the court cited at para 90 its judgment in *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, concerned with corporal punishment (the birching of a 15 year old boy on his bare buttocks), where it referred at para 32 to the humiliation involved, at least in the applicant's own eyes, and said at para 33 that "his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person's dignity and physical integrity". Similarly, in *Bouyid* the court emphasised at paras 104-106 the humiliation involved in a slap in the face, when inflicted by law-enforcement officers on persons under their control. A similar approach has also been adopted to the use of physical force upon patients in psychiatric hospitals: see *Aggerholm v Denmark*.

73. A strict necessity test has never been applied in relation to solitary confinement. The contrasting approaches adopted to the use of physical force against detainees, on the one hand, and their being kept in solitary confinement, on the other hand, is illustrated by the case of *Mathew v Netherlands* (2006) 43 EHRR 23. The applicant complained under article 3 both that he had been kept in solitary confinement, and that physical violence had been inflicted upon him by prison staff. In relation to the complaint concerning the use of physical force, the court applied a test of strict necessity: paras 176-179. On the other hand, the court applied no such test in relation to the complaint concerning solitary confinement, but instead followed the same approach as in later cases such as *Ramirez-Sanchez* and *Ahmad*: paras 197-205.

3. Discussion

74. There is no doubt that solitary confinement should be ordered only exceptionally. That is well established in the European case law: see, for example, *Ahmad*, para 112, to which both the courts below referred. That must be especially clear in relation to detainees under 18 years of age. Equally, it can hardly be doubted that solitary confinement should be used only when genuinely necessary, especially in the case of persons under 18. The point of the argument is not to establish those propositions. The point of the argument is that, if solitary confinement is used in the absence of exceptional circumstances rendering it strictly necessary, it is (if the argument is accepted) inevitably a violation of article 3, for that reason alone, and regardless of all other circumstances.

75. There is no support in the case law for the application of a strict necessity test in relation to solitary confinement. It is plain that no such test has been applied to the solitary confinement of detainees over 18: see, for example, *Mathew* (para 73

above). In *Ahmad*, the court noted at para 211 that "it has been particularly attentive to restrictions which apply to prisoners who are not dangerous or disorderly; to restrictions which cannot be reasonably related to the purported objective of isolation; and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk." Those are all situations in which the restrictions are not strictly necessary; but the court did not suggest that that consideration in itself entailed an automatic finding of a violation of article 3.

76. Nor is there anything in the case law to suggest that such a test would be applied to the solitary confinement of detainees under 18. The line of authority in which a test of strict necessity has been applied to the treatment of detainees has been concerned solely with the use of physical force. The test of strict necessity reflects the specific characteristics of the use of force in that context, as the Grand Chamber explained in *Bouyid* (paras 71-72 above): the powerlessness and vulnerability of individuals who are at the mercy of persons placed in positions of power by the state, and the humiliation which they inevitably suffer, not least in their own eyes, if they are the victims of assaults under those circumstances. It is entirely understandable that the court should have regarded the use of physical force under those circumstances as inherently degrading, unless it is strictly necessary. There does not appear to me to be any analogy between that situation and the removal of a detainee, whether over or under 18, from association with other detainees.

77. This court cannot, of course, exclude the possibility that the European court may at some point adopt the approach which counsel for the appellant urges upon us. For the reasons explained at paras 54-60 above, however, it is not the function of this court to anticipate such a significant development in the application of the Convention.

Conclusion

78. For the foregoing reasons, both the arguments advanced on behalf of the appellant are rejected. It follows that the appeal must be dismissed.