

# **All Human Beings? Reflections on the 70<sup>th</sup> Anniversary of the Universal Declaration on Human Rights**

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**Lady Hale, President of the Supreme Court**

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This year we celebrate the 70<sup>th</sup> anniversary of the United Nations' Universal Declaration of Human Rights – what Eleanor Roosevelt, who chaired the drafting committee, called a Magna Carta for all mankind. The Declaration was non-binding and it took until 1966 to turn it into the binding International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. The Europeans were well ahead of them in adopting the European Convention on Human Rights in 1950. Of course, these international treaties do not change the law in the United Kingdom. Only Parliament can do that, as it has done with the European Convention, in the Human Rights Act 1998, but only sporadically for the other two.

The Universal Declaration opens movingly in article 1: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

But do we really mean it? I well remember coming home from responding positively to a fine lecture by Albie Sachs on 'Do wicked people have human rights?' to find that our flat had been burgled. It is annoying but of course if the police had caught the burglar he or she would have been entitled to a fair trial and not to be seriously ill-treated in prison.

Today I want to concentrate on the relationship between the first and second sentences of article 1. Do human beings who are not (at least yet) 'endowed with reason and conscience' also have human rights? Or are human rights confined to those who have the capacity to play a full part in civic society? I have in mind, of course, both children and people with mental disabilities.

First, children. The law still has trouble seeing children as real people. There are two good illustrations of this. The first is that we still find a child referred to as ‘it’ in legislation, law reports and learned legal publications. As Michael Freeman has written, ‘calling a child an “it” gives the game away. It constitutes the textual abuse of childhood in the English-speaking world . . . the word dehumanises the person who is the subject of these proceedings.’<sup>1</sup> That quotation comes from an imaginary House of Lords judgment overturning the Court of Appeal’s decision in *Re T (A Minor) (Wardship: Medical Treatment)*,<sup>2</sup> that it was not in the best interests of a child under two to have a life-saving kidney transplant against the wishes of his devoted, caring mother who was well-informed as to the consequences of the operation. I am indebted to the editors and authors of *Children’s Rights Judgments*, published last year, for that and several of the other examples I am about to discuss.

The second illustration is that, in the interests of anonymity, we insist on referring to children in judgments by soulless initials, such as T, rather than as real people. So I always try and refer to a child by a plausible name, even though not her own. I thought I was doing my bit towards thinking of children as real people – but the well-meaning can also be misguided. Julia Brophy’s research-based ‘do’s and don’ts’ for judges anonymising judgments<sup>3</sup> contains following: ‘Avoid the use of pseudonyms: although said to make for easier reading, making the case and children ‘come alive’, some children do not like the use of pseudonyms and such practices can present problems for some minority ethnic families.’ The answer, I think, is to consult the children (if old enough) or their families about how they would like to be named.

But if we are clear that children are indeed human beings, in what ways are they human? Are they just little adults, to be treated once out of infancy in the same way that adults are treated? That was certainly the attitude of the criminal law throughout much of our history, and still is to a large extent. Or are they quite different from adults, having the right to have their basic developmental needs met, so that they can grow up into healthy and well-functioning adults, fit to play a proper part in society, but not the same rights as other people? Or are they *sui generis*

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<sup>1</sup> ‘Lord Freeman’, in *Re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242, rewritten for H Stalford and K Hollingsworth (eds) *Children’s Rights Judgments*, Hart, 2017.

<sup>3</sup> Association of Lawyers for Children, *Anonymisation and Avoidance of Identification of Children & The Treatment of Explicit Descriptions of the Sexual Abuse of Children in Judgments intended for the Public Domain, Judicial Guidance*, principal researcher, Dr Julia Brophy, Nuffield Foundation, 2016, p 3.

human beings, having some rights peculiar to childhood and some of the rights which all human beings have, modified if necessary to cater for the special status of childhood?

Whatever it may have thought in 1948, the United Nations has recognised that children do indeed have human rights. The UN Convention on the Rights of the Child, adopted in 1989, has been ratified by all but one of the member states (the USA). It takes the standard adult rights and adapts them to the special needs of children. But it also adds some rights which are special to childhood. Principal among these is article 3.1: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the welfare of the child shall be a primary consideration'. And article 12.1 spells out, because it might not otherwise happen, that 'States parties shall assure to the child who is capable of forming 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'. Article 12.2 specifies a right to be heard in judicial proceedings affecting the child.

What do we mean when we say that the best interests of the child must be a primary consideration in all actions which concern them? Are the best interests of the child the same as the welfare or well-being of the child or do they encompass wider interests? And, given that the UNCRC has not been fully incorporated into UK law, how can our courts give effect to article 3.1?

*ZH (Tanzania) v Secretary of State for the Home Department*<sup>4</sup> concerned the planned removal to Tanzania of the mother of two British children who had been born in England and lived here all their lives. There was no-one else to look after them so removing her would inevitably mean that they would have to go too and lose all the benefits of their citizenship. The Supreme Court held that the best interests of the children were a primary consideration in judging whether the interference with the children's right to respect for their private and family life, protected by article 8 of the European Convention, was justified. Article 3.1 of UNCRC does not require that the child's best interests be paramount, in the sense that they are a 'trump card' overriding everything else. They can be overridden by other considerations, either separately or

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<sup>4</sup> [2011] UKSC 4, [2011] 2 AC 166.

cumulatively; but no other consideration is to be taken to be inherently more important than the best interests of the child. As Lord Kerr put it:<sup>5</sup>

‘This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.’

Further, for the interference to be in accordance with the law, the Secretary of State had to comply with her statutory duty, under section 55 of the Borders, Citizenship and Immigration Act 2009, to discharge her immigration functions ‘having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom’. Section 55 is an echo of the similar duty imposed upon many public bodies, including local authorities, by section 11(2) of the Children Act 2004. The purpose was to implement the obligation in article 3.1 of UNCRC, but it doesn’t actually say that that the best interests of the child are to be a primary consideration. It also does not extend to most of central government, such as the Department of Work and Pensions, and is limited to children in the UK, although the government has said that it will abide by it, and also apply it to children outside the UK who are wanting to come here.

*ZH (Tanzania)* has been applied in many different contexts since then. But it is not an easy thing to do. *Collins v Secretary of State for Communities and Local Government*<sup>6</sup> was a case about town and country planning. A community of mostly Irish travelling families, consisting of 78 people, 39 of whom were children, appealed against the Secretary of State’s decision to uphold an enforcement notice issued by the local planning authority, requiring them to leave the land which they owned and on which they lived in mobile caravans. There were no travellers’ sites in the area and so, if forced to leave, the community would probably face a precarious roadside existence. The Planning Inspector had said that it was very likely that there would be serious disruption to the education of the 22 children currently attending school and the education of those on school

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<sup>5</sup> Para 46.

<sup>6</sup> [2013] EWCA Civ 1193, [2013] PTSR 1594.

waiting lists would also be disrupted. A roadside existence would make access to health care considerably more difficult. The Secretary of State's decision was challenged on the ground that it would constitute an interference with the community's right to respect for its home, under article 8, and that in considering whether such an interference was justified in the public interest, the best interests of the children concerned had to be a primary consideration.

The Court of Appeal agreed with the High Court that the best interests of the children did indeed have to be a primary consideration. But the court also held that the Planning Inspector had indeed taken the children's interests into account and, in substance, complied with the article 3.1 duty. This was despite the fact that his Report, on which the Secretary of State's decision was based, did not expressly address or assess the best interests of the children concerned or follow up the several concerns about their welfare which had been acknowledged. Nor had the Inspector consulted the children, either directly or indirectly. So it must be doubted whether the children's best interests had been properly considered, let alone given the priority they should have been given.

There are other obstacles to implementing article 3.1. In *R (SG) v Secretary of State for Work and Pensions*,<sup>7</sup> the government accepted that the benefit cap – limiting the total amount of benefit payable to a particular household even if this is less than they would otherwise be entitled to in means-tested benefits - was indirectly discriminatory on grounds of sex. This was because it impacted particularly harshly on lone parents with several children, who were less likely to be able to escape the cap by obtaining work, and the overwhelming majority of lone parents are women. A majority of the Supreme Court held that the government had not properly considered the interests of the children concerned when deciding to impose the cap. In practice their equality impact assessments do not conduct a children's rights analysis; this is no doubt because children under 16 are not protected from discrimination by the Equality Act 2010 and do not have the benefit of the public sector equality duty.

Even if the best interests of children do have to be considered, there is an undoubted risk that the courts will set the bar too low and be satisfied with standard paragraphs and perfunctory

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<sup>7</sup> [2015] UKSC 16, [2015] 1 WLR 1449.

reasons in official decision-making. But something is a great deal better than nothing. However, as the UN Convention has not been incorporated into UK law, it can only find its way into the law, unless sections 55 of the 2009 Act or 11(2) of the 2004 Act apply, through the medium of the European Convention rights. In *ZH*, it was not difficult to see that what was happening was an interference with the children's rights. But in *SG*, it was the mothers rather than the children who were being discriminated against in their right to claim welfare benefits. The children had no right to such benefits and the effect upon the children would have been the same whether they were living with their mother or their father. Hence a different majority of the Supreme Court held that there was no duty to take the best interests of the children into account in deciding whether the measure was justified.<sup>8</sup>

However, in *Mathieson v Secretary of State for Work and Pensions*<sup>9</sup> the Supreme Court found that regulations ending the disability benefit payable in respect of a very severely disabled child once he had been in hospital for 84 days discriminated against him on the ground of his status as a disabled child in need of lengthy inpatient hospital treatment. We considered the justification for the 84-day rule through the prism, not only of the UNCRC but also of the UN Convention on the Rights of Persons with Disabilities. This also requires that the best interests of children with disabilities shall be a primary consideration in all actions concerning them (article 7.2). The government had not considered the impact of ending this benefit on children. This breach of the procedural right under article 3.1 led to a breach of the substantive right and we held that the discrimination could not be justified. As the European Court of Human Rights in Strasbourg has said, 'the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.<sup>10</sup>

But what do we mean by 'best interests'? There is a tendency, perhaps particularly among family lawyers, to think of 'welfare' and 'best interests' as the same thing. But the UN Convention recognises that children have a wide range of other human rights, analogous to those of adults but adapted to their special position as children. So do their 'best interests' also encompass

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<sup>8</sup> The revised benefit cap has also been challenged, in *R (DA) v Secretary of State for Work and Pensions*, on appeal from [2018] EWCA Civ 504, heard by the Supreme Court from 17-19 July 2018, judgment awaited.

<sup>9</sup> [2015] UKSC 47, [2016] 1 WLR 3250.

<sup>10</sup> *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131.

respect for these wider rights? A particularly striking illustration can be found in *R (on the application of Castle) v Commissioner of Police for the Metropolis*.<sup>11</sup>

The claimants were Adam Castle, aged 16, Rosie Castle, aged 14, and Sam Eaton, aged 16. In November 2010 they took a peaceful part in a demonstration against the proposed increase in university tuition fees and the abolition of the Educational Maintenance Allowance. The march started at Trafalgar Square and proceeded down Whitehall towards Parliament Square. It was largely peaceful but there were some violent incidents. As a result, the senior police officer in charge decided, at about 12.30, that a large group of some three to five thousand demonstrators should be ‘contained’ in Whitehall, a process known colloquially as ‘kettling’. Some of the demonstrators, whom the police deemed vulnerable, were allowed to leave, but these three children were not. Rosie was ‘contained’ until 7.00 pm, that is around six and a half hours; Adam and Sam were contained until 8.00 to 8.30 pm, that is between seven and a half and eight hours. The temperature inside the cordon was near freezing. A toilet was provided at 4.00 pm, but this was nowhere near sufficient. There was no food and no water. The claimants were shivering and distressed when they left and now say that they no longer feel able to take part in peaceful protests for fear of being ‘kettled’ again.

The UK courts, upheld in Strasbourg, have held that, if imposed for the minimum time required to avert a real risk of serious injury or damage, kettling is not a deprivation of liberty contrary to article 5 of the European Convention.<sup>12</sup> So the claimants argued that, in their case, the kettling was a breach of the police duty in section 11(2) of the Children Act 2004 to ‘make arrangements for ensuring that . . . their functions are discharged having regard to the need to safeguard and promote the welfare of children’.

The Divisional Court held that the police were indeed subject to this duty when policing the protest. But they also held that it was reasonable for the police not to plan ahead for the possibility that kettling would be necessary and the likelihood that children would among those kettled and therefore not to make any specific arrangements for children, apart from a general

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<sup>11</sup> [2011] EWHC 2317 (Admin), [2012] 1 All ER 953 (it has not been reported in the official law reports).

<sup>12</sup> *Austin v Commissioner of Police for the Metropolis* [2009] UKHL 5, [2009] 1 AC 564; *Austin v United Kingdom* (2012) 55 EHRR 14.

reminder to commanders on the ground of the need to protect the vulnerable. Teenage children like these were not thought vulnerable.

But, even in section 11(2), it could be said that ‘welfare’ is a broad term which encompasses social and behavioural development, including the need for children to develop their personalities and experiences through safely engaging in activities with friends, communities and even in political activities. ‘Best interests’ in the UN Convention is an even broader term and should be read in the light of the other provisions of the Convention. Article 12 provides for the right of children to be heard in matters affecting them, such as the increase in university fees. Taking part in demonstrations and other political activities is one way of being heard, especially as children do not have the right to vote. Article 13 recognises that children have the right to freedom of expression and article 15 that they have the right to ‘freedom of association and to freedom of peaceful assembly’. This mirrors the right in article 11 of the European Convention to freedom of peaceful assembly and freedom of association with others. The Strasbourg court has held that there is a positive obligation to secure the effective enjoyment of this right.<sup>13</sup> Promoting children’s welfare should include promoting their rights under the UN Convention, including their political rights, facilitating their development as active democratic citizens, not just protecting their physical safety. Nor should they be deterred from playing a part in the democratic process, as otherwise they may become disengaged when they do grow up. Thus, it could be argued, the police should have foreseen that there would be large numbers of children at this demonstration and made specific plans to safeguard their welfare in this broader sense.

Another example which recognises that children’s best interests are wider than their welfare is *AAA v Associated Newspapers Ltd*.<sup>14</sup> This was an action brought on behalf of a child for the tort of ‘misuse of private information’, a tort which has been developed out of the action for breach of confidence to give effect to the right to respect for private life protected by article 8 of the European Convention. The equivalent in the UN Convention is article 16: ‘no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence . . .’. A very widely-read daily newspaper had published an article about the

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<sup>13</sup> *Oya Ataman v Turkey*, Applic no 74552/01, Judgment of 5 December 2006, para 16; *Baczowski v Poland*, Applic no 1543/06, Judgment of 3 May 2007, para 64; *Aldemir v Turkey*, Applic no 32124/04, Judgment of 18 December 2007, paras 31-43.

<sup>14</sup> [2013] EWCA Civ 554, [2013] WLR (D) 189; for the High Court decision, see [2012] EWHC 2103 (QB), [2013] EMLR 2, [2012] HRLR 31.



allegation that a very well-known, larger than life and ambitious politician had fathered the child as a result of an extra-marital affair. It illustrated the story with a photograph of the child on an outing with her mother in central London, possibly to suggest a resemblance between the child and her alleged father. The newspaper followed this with a further eight articles, three of which included the photograph. This provoked media attention at the child's home and the child was moved to her grandmother's house in the country to avoid this. The trial judge awarded the child £15,000 damages for the publication of the photograph and accepted an undertaking not to publish it again. But she dismissed the claim for damages for publication of the child's alleged paternity and an injunction to prevent repetition. She held that the child's 'reasonable expectation of privacy' was reduced because of her mother's indiscretion in commenting on the child's paternity (to the managing director of a magazine group) at a party and when later interviewed for a magazine article. Thus reduced, the child's privacy right was outweighed by the public interest in the information. The Court of Appeal upheld the judge's decision.

But what if the child's best interests, as well as her privacy interests, had also been taken into account? The child's best interests are not synonymous with a reasonable expectation of privacy. A reasonable expectation of privacy determines what is private information. The child's best interests, weighed against the countervailing interests, determine what protection that privacy requires. Also, if the child's rights are taken seriously, separately from those of her mother, what relevance had the mother's conduct to the protection of those rights? She could waive her own rights but not those of her child. Leaving the mother's conduct out of account, and taking into account the best interests of the child, might have led to a different conclusion on the balance between her rights and the public interest.

Turning now to people who lack the mental capacity to make decisions for themselves, we currently have before us a case which bridges the gap between children and those who lack capacity.<sup>15</sup> It concerns the position of 16 and 17 year olds who do not have the capacity to decide for themselves where to live and are placed in residential settings where they are deprived of their liberty. We have a real clash of international obligations in relation to depriving people of unsound mind of their liberty.

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<sup>15</sup> On appeal from *Re D (A Child) (Residence Order: Deprivation of Liberty)* [2017] EWCA Civ 1695, [2018] 2 FLR 13.

Article 5 of the European Convention provides that ‘Everyone has the right to liberty and security of person’. This means several things. First, no-one can be deprived of their liberty except in the circumstances listed in article 5.1. These include ‘the lawful detention of persons of unsound mind’ (article 5.1.e). This means a ‘true mental disorder’, established by ‘objective medical expertise’, and ‘of a kind or degree warranting compulsory confinement’.<sup>16</sup> Second, in order to be lawful, there must be safeguards sufficient to ensure that this is indeed the case and the detention is not arbitrary. The European Court of Human Rights decided, in the *Bournemouth* case,<sup>17</sup> that this was not the case with the informal admission to hospital of people who lacked the capacity to agree to it, because there were no procedural rules, no grounds, no statement of purpose, no limits of time or treatment, and no requirement of continuing clinical assessment. Third, anyone who is deprived of his liberty by detention has to be ‘entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’ (article 5.4).

HL, the patient in the *Bournemouth* case, was a profoundly mentally disabled and autistic man in his forties, who became agitated at his day centre, was sedated and taken to A & E where a psychiatrist assessed him as needing hospital care, so he was admitted informally, because by then he was compliant. But he was sedated, both to get him to hospital and to keep him there. He would have been compulsorily detained had he tried to leave. His carers were at first not allowed to see him in case he wanted to leave with them. The hospital would not release him back into their care until it thought that he was ready. Two members of the House of Lords and the Grand Chamber of the European Court of Human Rights held that he had been deprived of his liberty.

But hospitals are not the only places where people may be deprived of their liberty. In the case known as *Cheshire West*,<sup>18</sup> a man with Down’s syndrome and cerebral palsy who needed 24-hour care and help with all the activities of everyday life lived in a large house with two other residents. The staff helped him to live as normal a life as possible, but he was not allowed to go

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<sup>16</sup> *Winterwerp v The Netherlands* (1979-80) 2 EHRR 387.

<sup>17</sup> *HL v United Kingdom* (2005) 40 EHRR 761.

<sup>18</sup> *Cheshire West and Chester Council v P; S v Surrey County Council* [2014] UKSC 19, [2014] AC 896.

anywhere or do anything without them. The linked Surrey County Council case concerned two sisters with severe learning disabilities, known by their initials as MIG and MEG, who had been removed from home as children because of abuse. One lived in a small group home and one lived with a foster mother in an ordinary house. Neither was allowed out on her own. Neither had shown any wish to leave but if they had done so they would not have been allowed to go. The Supreme Court held that the 'acid test' of deprivation of liberty was whether they were under the continuous supervision and control of their carers and not free to leave. It did not matter that they were living lives which were normal for people with their degree of disability if their lives were not normal for people of their age who did not share those disabilities. They should not be treated differently because they were disabled.

This meant that legal safeguards were required for many more mentally disabled people than had previously been thought to be the case, echoing the result of the *Bournewood* case in relation to informal hospital admissions. If the person is placed in a hospital or care home, the deprivation of liberty safeguards in the Mental Capacity Act 2005 can be used to authorise the deprivation. If the person is placed in another setting, the only way to authorise it is by going to court.

However, while we have one set of human rights obligations which aim to prevent people from being deprived of their liberty without adequate safeguards, we have another set of human rights obligations which mean that they cannot be deprived of their liberty at all. The UK has ratified the United Nations Convention on the Rights of Persons with Disabilities, without any reservation aimed at preserving the current law in both the Mental Health Act 1983 and the Mental Capacity Act 2005. Unlike the European Convention, however, the rights contained in the UN Convention have not been turned into directly enforceable rights in UK law. Indeed, in some respects they are irreconcilable with UK law.

The entirely laudable purpose of the UN Convention is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity' (article 1). The definition of 'persons with disabilities' includes 'those who have long term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (article 1). This clearly covers many people

with long term mental disorders or disabilities. States Parties have an obligation to recognise ‘that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’ (article 5.1) and to ‘prohibit all discrimination on the basis of disability’ (article 5.2). This principle was the reason for saying, in *Cheshire West*, that mentally disabled people should be compared with people without disabilities, not with other people like them.

Article 14.1 of the CRPD requires states parties to ensure that persons with disabilities, on an equal basis with others, ‘(a) enjoy the right to liberty and security of person; and (b) are not deprived of their liberty, unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.’

According to the UN High Commissioner for Human Rights,<sup>19</sup> this marked a radical departure from the previous United Nations’ approach, which had accepted that mental disorder or disability was a lawful ground for detention. Under article 14 of the Convention, deprivation of liberty based on the existence of any disability, including a mental or intellectual disability, is forbidden. Not only that. Proposals to limit this prohibition to detention ‘solely’ on the ground of disability were rejected during the drafting of the Convention. So the prohibition applies whenever mental or intellectual disability is part of the grounds, along with other elements, such as dangerousness or the need for care and treatment. This does not mean that people can never be detained for these purposes, but ‘the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis’ (para 49).

In September 2015, the UN Committee on the Rights of Persons with Disabilities published its guidelines on article 14.<sup>20</sup> This emphasises that there are no exceptions to the absolute prohibition of detention on the basis of impairment (para 6). Involuntary commitment of people

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<sup>19</sup> *Thematic Study by the Office of the High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, A/HRC/10/48, 26 January 2009.*

<sup>20</sup> *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities.* Available at <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>.

with disabilities to mental health institutions on health care grounds is prohibited (para 10), as is deprivation of liberty on the basis of perceived dangerousness, alleged need for care or treatment or any other reasons (para 13). People thought dangerous to others should be dealt with under the criminal justice system (para 14). Not only that, detention based on declarations of unfitness to stand trial or incapacity to be found criminally responsible are also contrary to article 14 (para 16).

Thus it is not surprising that the Committee's *Concluding Observations on the initial report from the United Kingdom of Great Britain and Northern Ireland*, published in October 2017,<sup>21</sup> recommended that the UK repeal legislation and practices that authorise the non-consensual involuntary, compulsory treatment and detention of persons with disabilities on the basis of actual or perceived impairment (para 35). The Government has yet to respond, but somehow I don't think that it will agree.

We are between a rock and a hard place. Neither the Law Commission, in their review of the Deprivation of Liberty safeguards in the Mental Capacity Act,<sup>22</sup> nor the government in its response,<sup>23</sup> nor the Mental Capacity Bill now before Parliament, suggest that we do not continue to use the definition of deprivation of liberty adopted by the European Court – or that the interpretation in *Cheshire West* was wrong. A great many people are in fact being deprived of their liberty. The European Convention recognises this and says that there must be safeguards to protect them against arbitrariness. The UN Convention, on the other hand, says that people must not be detained at all on the basis of their impairment, whether mental or physical.

We can and do debate endlessly about the justification for compulsorily detaining people who suffer from mental disorders and disabilities under the Mental Health Act. But we cannot get away from the fact that the European Convention requires that people who lack the capacity to agree to their placement cannot be deprived of their liberty without procedural safeguards. Lack of capacity is not the same as having a disability under the UN Convention. So could lack of capacity be a way round article 14? Is it not inhumane to deny to a person the care and treatment

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<sup>21</sup> CRPD/C/GBR/CO/1.

<sup>22</sup> *Mental Capacity and Deprivation of Liberty*, Law Com No 372, 2017.

<sup>23</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-03-14/HCWS542>.

he needs, or a suitable place in which to live, because he is unable to decide whether or not to have it?

Could the substitute decision-making provided for in the Mental Capacity Act be made compatible with the UN Convention? Many of the people for whom it is invoked will in fact be persons with disabilities within the meaning of the Convention, but it is their lack of capacity rather than their disability as such which justifies the non-consensual intervention. You or I, if we were temporarily incapacitated by an accident or a stroke, would be in the same position. Thus, can we say that the Mental Capacity Act does not discriminate against persons with disabilities? Nor is it an attack on their autonomy, or mental or bodily integrity, because by definition the person concerned is not autonomous, at least in this respect at this time.

The problem is that article 12.2 of the UN Convention provides that ‘States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. In their General Comment on this article,<sup>24</sup> the Committee states that ‘perceived or actual deficits in mental capacity must not be used as justifications for denying legal capacity.’ It declares the ‘functional approach’, on which our own Mental Capacity Act is based, flawed for two reasons: ‘(a) it is discriminatorily applied to people with disabilities, and (b) it presumes to be able to accurately assess the inner workings of the human mind . . .’

Article 12.4 rather confusingly says this:

‘States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and

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<sup>24</sup> General Comment No 1, *Article 12: Equal recognition before the law* (April 2014).

impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.'

This rather looks as if the Convention does contemplate the taking of decisions on behalf of people who are unable to take them for themselves, subject to appropriate safeguards. But the Committee has made it quite clear that this is not so. 'The human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making' (para 3). Article 12.3 imposes a duty to provide such support (para 16). Article 12.4 is all about safeguards from abuse and undue influence. If it is not possible to ascertain a person's views, the 'best interpretation of will and preferences' must replace the 'best interests' determinations (para 21).

So it is not surprising that the Committee has recommended that the UK 'abolish all forms of substitute decision making concerning all spheres and areas of life by reviewing and adopting new legislation in accordance with the Convention to initiate new policies in both mental capacity and mental health laws'. It wants us to 'step up efforts to foster research, data and good practices in the area of, and speed up development of, supported decision-making regimes' (para 31). There is, of course, nothing wrong with encouraging and developing supported decision-making regimes, but is it sensible to think that they can provide the whole answer?

Back to our linking problem. Our decision in *Cheshire West*, like the Strasbourg decision in *Bournewood*, was predicated on people who lack the capacity to make decisions for themselves enjoying the same human rights as anyone else: in particular, that invasions of their right to liberty should be judged by the same standards as anyone else. So what about 16- and 17-year olds who lack the capacity to decide for themselves and are placed in settings where they are deprived of their liberty? There are many statutory provisions which make inroads into the power of parents to make decisions on behalf of their 16 and 17 year old children: section 8 of the Family Law Reform Act 1969, which validates their consent to medical and dental treatment; section 131 of the Mental Health Act 1983 which validates their consent to admission to hospital for psychiatric treatment; section 20 of the Children Act 1989 which validates their consent to be accommodated by a local authority. The last two expressly exclude the power of the parents to object or consent on their behalf and it is thought that the first does so implicitly. But these of

course all relate to 16- or 17-year olds who have the capacity to make that decision. What about a child who does not?

There is the well-known Strasbourg decision of *Nielsen v Denmark*.<sup>25</sup> This concerned a 12-year-old boy who was in the legal custody of his mother but wanted to live with his father. They went on the run for three years. When they re-appeared, the mother arranged for the boy to be admitted to a children's locked psychiatric ward, on the ground that he was apparently suffering from a 'neurotic condition', although he was not mentally ill. There he received 'environmental therapy and individual talks' and was brought back by the police when he absconded. He was discharged after six months and was eventually allowed to live with his father. He complained that his rights under article 5.1 and 5.4. had been violated and the European Commission on Human Rights agreed. The European Court, by a majority of nine to seven, disagreed. They accepted that the rights of the holder of parental authority could not be unlimited and there must be safeguards against abuse. But the restrictions imposed upon this child were no more than the normal requirements for a child of 12 receiving treatment in hospital. The conditions did not differ from those in many hospital wards where children are treated for physical disorders. The child was still of an age when it would be normal for a decision to be made by a parent even against the child's wishes. There was no evidence of bad faith on the part of the mother. 'It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which is clearly not covered by paragraph (1) of article 5.' (para 72) So there was no deprivation of liberty. A powerful minority disagreed: there had been a deprivation of liberty, this could not be compared with an ordinary hospital admission, and it did not fall within the list of situations where deprivation of liberty is permitted under article 5. The fact that the mother had authorised it made no difference. There was also a breach of the procedural safeguards required by article 5.4.

*Nielsen* was a 12-year-old and the majority clearly thought that 12-year-olds should do what their parents told them to do. This no longer holds good once a competent or capacitous child reaches the age of 16 or becomes '*Gillick* competent' to reach the decision in question before that age. We are going to have to consider what difference, if any, a lack of capacity makes. Do

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<sup>25</sup> (1988) 11 EHRR 175.



mentally incapacitated children have the same human rights as everyone else? There is a strong case for saying that they do, but that does not mean that UK law will say so.