[2018] AACR 7

(Willow v (1) Information Commissioner (2) Ministry of Justice [2017] EWCA Civ 1876)

CA (Leveson, McCombe and Newey LJJ) **GIA/428/2015**
22 November 2017

Freedom of Information – exempt information – public interest – application of Article 3 of United Nation Convention on the Rights of the Child

The appellant applied under the Freedom of Information Act 2000 (FOIA) for an unredacted version of a new manual issued for use in Secure Training Centres (STCs) for children and in Young Offender Institutions (YOIs). The Ministry of Justice refused the request on the basis that the unredacted manual was a restricted document under sections 31(1)(f) (good order) and 38(1)(a) and (b) (health and safety) of FOIA. The appellant complained to the Information Commissioner who concluded that the requested information was likely to prejudice the maintenance of security and good order in YOIs and therefore section 31(1)(f) FOIA was engaged. The appellant appealed to the First-tier Tribunal (F-tT) which decided that the threat to the good order and security of YOIs and prisons and the safety implications for the inmates and staff favoured non-disclosure. The appellant appealed to the Upper Tribunal (UT) arguing that the F-tT's reasons were inadequate and irrational and it had failed properly to consider the best interests of the child as required under Article 3 of United Nation Convention on the Rights of the Child (UNCRC). The UT dismissed the appeal, holding amongst other things that the F-tT's decision was not irrational, that its reasons were adequate and that the provisions of Article 3.1 had no application in the case. The appellant appealed against that decision to the Court of Appeal.

Held, dismissing the appeal, that:

1. the judgment of the F-tT was an assessment that was well within the bounds of the legitimate exercise of its responsibilities under the FOIA and cannot possibly be said to be irrational, perverse or inadequately reasoned (paragraph 37);

2. the relevance of the authorities relating to unincorporated treaty provisions in English law may arise where the meaning of a statute was ambiguous, however, in the context of this case the meaning of the words "public interest" was not in doubt and could not be clearer. It was a well-known and well understood concept both in law and in general use. Which factors are relevant to determining what was in the public interest in any given case are usually wide and various but that did not mean that it was necessary, at the outset, to resort to the UNCRC to determine the meaning of this perfectly common phrase (paragraph 48);

3. whether or not the UT was right to say that Article 3 of the UNCRC had no application in this case, the public interests surrounding children was clearly at the heart of the decision-making process (paragraph 52).

DECISION OF THE COURT OF APPEAL

Ian Wise QC and Michael Armitage appeared for the appellant

Gerry Facenna QC & Laura Elizabeth John (instructed by Richard Bailey, Solicitor, Information Commissioner's Office) appeared for the First Respondent

Oliver Sanders QC (instructed by The Treasury Solicitor) appeared for the Second Respondent

Judgment

SIR BRIAN LEVESON:

1. This is an appeal from a decision of the Upper Tribunal, Administrative Appeals Chamber (Upper Tribunal Judge Kate Markus QC) ("UT"), dated 24 March 2016, dismissing the appeal of Carolyne Willow against the decision of the First-tier Tribunal ("F-tT") dated 30 November 2014 which itself rejected an appeal from the Information Commissioner. UTJ Markus concluded that the F-tT had neither erred in their application of the law, nor acted irrationally and that the decision was adequately reasoned. She refused permission to appeal which was subsequently granted by Arden LJ on the basis that the case raised an important point of principle or practice or that there was some other compelling ground for what is, in fact, a third (or, counting the Information Commissioner, a fourth) tier appeal to be heard.

2. The appeal concerns the disclosure by the Ministry of Justice ("MoJ"), pursuant to the provisions of the Freedom of Information Act 2000 ("FOIA"), of a full, un-redacted, copy of the Minimising and Managing Physical Restraint training manual ("MMPR") which, as its name makes clear, is directed to training relevant staff in the mechanisms whereby children and young persons in custody may be restrained if circumstances require it.

Background

3. Ms Willow is a qualified social worker with considerable experience in advancing and protecting children's rights. Much of her work has focused on her concern regarding the use of restraint techniques on children in custody. From 2000 to 2012, she was the National Co-ordinator of the Children's Rights Alliance for England and as such she served on the expert advisory panel to the independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in custody conducted in 2006 by Lord Carlile of Berriew QC

4. During this period, Ms Willow made a FOI request for full disclosure of the Physical Control in Care restraint manual ("PCC"), which was then used in Secure Training Centres ("STCs") for children under 18. The Youth Justice Board refused disclosure relying on section 31(1)(f) FOIA. This decision was overridden by the Information Commissioner, who ordered that the PCC be disclosed on the grounds that there was significant public interest in its disclosure, taking into account the level of debate and controversy surrounding the use of physical restraint and the evidence that the techniques could result in physical harm. The PCC was published without, so it is argued, any adverse effect. It is of note, however, that in other proceedings, the Use of Force Manual (for Young Offender Institutions above the age of 17 and adult prisons) was considered to have been properly withheld from disclosure.

5. Thereafter, in July 2012, a further training manual was produced (the MMPR). It followed an independent review of restraint procedures in secure settings for juveniles, which was conducted following the deaths of two children in STCs during or following physical restraint. It is used in STCs (which accommodate children and young persons aged between 12 and 17 years of age) and juvenile Young Offender Institutions ("YOIs") (accommodating those between 15 and 17 years). No doubt encouraged by the decision in relation to the PCC, on 12 July 2012, a further FOI request was made under the same legislation requesting a "a full copy – without any redactions" of the MMPR.

6. This was because the publicly available copy of the MMPR contained extensive redactions; to provide context, it must be made clear (as the F-tT explain) that the online (redacted) version is 154 pages in length with redactions occurring on approximately 65 pages. The critical redactions essentially relate to aspects of the 12 core techniques for restraining, searching and disarming children and young persons with instructions on their application in different situations both with and without the use of ratchet handcuffs: each is to be used only as a last resort where it represents a necessary, proportionate, appropriate and ethical means of preventing injury to individuals or serious damage to property. Three involve potential pain compliance.

7. The redactions of which complaint is made do not prevent the techniques being identified but withhold precise details of the training instructions governing the way that ten are applied in practice; each of these ten is overtly marked and annotated with a gist of the redacted information, indicating the nature of the information which has been removed. By way of example, in the redacted version of the MMPR, the explanation of the technique involved in what is described as "inverted wrist hold – thumb only" has been removed and replaced with the following:

> "This sentence has been redacted. It describes how members of staff will take hold and control the young person's arm, hand and thumb without applying undue pressure or pain when employing the inverted wrist hold."

8. On 6 August 2012, the MoJ responded to the request by identifying the means of accessing the redacted copy of the MMPR. It was explained that the un-redacted version was a "restricted document" engaging the exceptions under section 31(1)(f) (good order) and section 38(1)(a) (b) (health and safety) of FOIA. In its letter, the MoJ provided a full explanation of the arguments for and against disclosure, but:

> "… considered on balance, the likely threat to the good order and security of YOIs and prisons and the safety implications of this for young people and staff in both YOIs and prisons favours non-disclosure of the un-redacted version of the MMPR training manual."

9. A review of the decision was requested but, on 1 March 2013, the MoJ again rejected the application. While acknowledging the arguments advanced, specifically to the effect that there was no evidence that the disclosure of the PCC had led to children in STCs developing countermeasures, it distinguished between the contents and application of the MMPR and the PCC and underlined that the Information Commissioner had supported the non-disclosure of the Use of Force Manual which operated in YOIs for those over 17 and in adult prisons. Thus, by way of example, the writer of the response made it clear that:

> "the MMPR… will also be used in Young Offender Institutions (YOIs), and there are significant differences between YOIs and STCs and the young people detained within them. YOIs accommodate an older group of young people, many of whom demonstrate a much higher level of dangerous and violent behaviour towards both other young people and staff alike. Staff must be able to respond to these situations in a way that supports the maintenance of health and safety of both the young person and others. Furthermore there are similarities between the application of some of the techniques included in MMPR and those included in Control and Restraint (C&R), the restraint system used in adult prisons…

> Finally I wanted to address the concerns you raise that the arguments in favour of disclosure made in the response of 6 August do not make specific reference to child protection or children's rights obligations. Those arguments clearly refer to a public interest in ensuring that young people are treated humanely and decently, and that the health and safety of young people is considered in the development and deployment of MMPR… There are also many arguments in favour of non-disclosure that relate to child protection or children's rights obligations. For instance, restraint techniques are often used in order to end a violent assault by one or more young people on another young person. It is therefore essential that staff can be confident in using restraint techniques, and not concerned that in doing so both their health and safety and that of young people may be open to compromise".

10. Following this refusal, Ms Willow mounted an appeal by way of complaint to the Information Commissioner. Again, the MoJ argued that the disclosure of the techniques in the MMPR could lead to some young people or adults developing countermeasures to their application. These assertions were challenged in the complaint which submitted that the background and educational status of children in YOIs made it unlikely that they would develop countermeasures and emphasised the vulnerability of the young people. Attention was also drawn to the United Nations Convention on the Rights of the Child ("UNCRC") with respect to children in custody and the specific duties of those having custody of them.

11. Following an inquisitorial investigation (which involved sight of the unredacted MMPR and the provision by the MoJ of other details), the Information Commissioner rejected the complaint and concluded that the information was likely to prejudice the maintenance of security and good order in YOIs, and therefore that section 31(1)(f) FOIA was engaged. He considered the public interest arguments for and against disclosure and decided that, on balance, the public interest favoured withholding the information. As a result of this conclusion, he did not need to consider section 38: this latter provision has not subsequently been an issue in proceedings before any of the three subsequent tiers of appeal.

12. Following rejection of the application by the Information Commissioner, on 29 September 2014, an appeal was mounted to the F-tT. The grounds of appeal is a lengthy document referring (among other things) to the vulnerability of children in STCs and YOIs, the history of child deaths, near fatal incidents and unlawful restraint in STCs, restraint concerns in YOIs, child protection laws and safeguarding requirements and concerns over the extent to which children might learn about or misuse information from the manual. There is a reference to Article 3 of the UNCRC as "an important part of the legal context".

13. The appeal challenged the conclusion that the public interest favoured non-disclosure of the MMPR and was supported by a detailed witness statement in which Ms Willow identified and explained her experience and expertise, expressed her concerns about the risks of restraint and the deliberate infliction of pain on children; she also emphasised the importance of openness and transparency. Statements were also provided by Jonathan Fayle (former Social Worker and Independent Reviewing Officer for children who are "looked after" within the meaning of the Children Act 1989), Phillip Noyes (NSPCC Chief Advisor on Child Protection), and Keith Smith (Manager of Vinney Green secure unit and Chair of the Secure Accommodation Network). These all supported the application and raised issues including the risks to children arising from secrecy and associated abuse of power, the vulnerability of detained children and the need for openness to enable effective monitoring and review of incidents. It was asserted that it was highly unlikely that detained children would use the manual to subvert discipline.

14. In addition to this material, the F-tT had the evidence that had been gathered by the Information Commissioner (including the unredacted version of the MMPR); it proceeded on the concession, made by Ms Willow in her grounds of appeal in respect of the Information Commissioner's decision that the exemption in section 31(1)(f) FOIA was, in fact, engaged, and that it was therefore likely that disclosure of the MMPR would prejudice the maintenance of security and good order in prisons and institutions where persons are lawfully detained. For whatever reason, the MoJ was not a party to the proceedings before the F-tT (although it was open to either Ms Willow, the Information Commissioner, the F-tT of its own motion or the MoJ to apply for it to become a party: see rule 9 of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009). Neither did the MoJ file any further evidence and although the Information Commissioner provided written submissions in response to the appeal, he was not represented at the oral hearing.

15. It was common ground that the PCC had been disclosed but the Use of Force Manual had been withheld. The conclusions of the F-tT were expressed as follows:

> "20. The Tribunal considered that given the extent and detail of what is already in the public domain the benefit in terms of transparency and of public confidence in the lawfulness and humanity of the system was limited. It noted the extent of supervision of the detention of young people and the need for recording of incidents. The Tribunal did not consider that the investigation of incidents would be obstructed by the protection of the contents of the MMPR and its non-disclosure to the world at large.
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> 21. It acknowledged that there was some force in the argument that few young people were likely to consult the manual and seek to learn from it how to resist restraint. The Tribunal noted that MMPR had been developed for an older age group than those detained in STCs. The client group within YOIs was older and could demonstrate the capacity for a higher level of dangerous and violent conduct to staff and other clients than those within STCs. In developing the techniques to safely and humanely control such clients, techniques used for adult prisoners and set out in the "Use of Force" manual used in adult prisons had been considered and where appropriate adopted or adapted. The Tribunal considered that the relevance of the manual to the far larger numbers of potentially violent adults within the prison sector, some of whom would clearly be capable of learning from and applying the manual, was decisive (it may be noted that Ms Willow was of the view that there were considerable similarities between MMPR and "Use of Force"; paragraph 7 above). The Tribunal endorsed the conclusion of the Information Commissioner in his letter to Ms Willow of 11 July 2013:-
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> > 'On balance, by quite a margin, the likely threat to the good order and security of YOIs and prisons and the safety implications of this for young people and staff in both YOIs and prisons favours non-disclosure of the withheld information'."

16. On 11 February 2016, with leave, Ms Willow pursued the application by way of further appeal to the Upper Tribunal. First, it was contended that the F-tT had failed to provide adequate reasons for its decision and/or that the decision was irrational; and, secondly, that it failed to properly apprehend and discharge its obligation to treat the best interests of the child as a primary consideration pursuant to Article 3 of UNCRC. On this occasion, both the Information Commissioner and the MoJ were represented.

17. On 24 March 2016, UTJ Markus QC rejected the appeal on both grounds. By way of introduction, she dealt with the concession that section 31(1)(f) of FOIA was engaged in these terms (at [18]):

> "In the present case, the Appellant had accepted the Commissioner's decision that prejudice was likely. … It is not now open to her to contend that there was not likely to be such prejudice nor that the tribunal should not have given weight to it. In the light of the agreed likely prejudice, the tribunal's task was to weigh the competing public interests for and against disclosure. There was little if anything that could be advanced by way of concrete evidence in that respect. It was a matter of judgment for the tribunal in the light of the facts."

18. In relation to the adequacy and rationality of the reasons, she concluded that the central issue was "that the MMPR would be used in YOIs which had an older population than STCs, and the use of the MMPR was not limited to the younger age group" (at [24]). Furthermore, "the older age group had capacity for more dangerous and violent behaviour" and "it was not irrational for the tribunal to accept that that age group would be better able to develop countermeasures in the light of that evidence" (at [25]).

19. UTJ Markus noted that the F-tT's decision was reached in the light of the extent and detail of what is already in the public domain, the supervision in the STCs and YOIs, and the requirement to record incidents. In her judgment, the case advanced by the appellant "did not call for any more detailed explanation than this" especially given that she had "provided little specific evidence as to the difficulties which are encountered" by not having access to the full un-redacted MMPR (at [27]).

20. As for the second ground of appeal, the judge analysed the decisions in *R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 and concluded in pithy terms (at [36]):

> "The present case does not fall within the principles stated by the Supreme Court in the above decisions. The relevant provisions of FOIA are not ambiguous, there is no issue under ECHR, and (even if this could in principle be relevant) FOIA does not incorporate or reflect the provisions of Article 3.1. Article 3.1 UNCRC has no application in this case."

The Freedom of Information Act 2000

21. Section 1(1) FOIA grants individuals a right of general access to information held by public authorities. This encompasses a right to be informed whether particular information is held and, if it is, to have that information communicated to them.

22. Section 1(1) is subject to exemptions articulated in Part II of the Act. The effect of the relevant exemption is explained in section 2(2) as follows:

> "In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [referring to the communication of information] does not apply if or to the extent that –
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> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
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> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

23. There is no suggestion that the MMPR benefits from an absolute exemption but section 31(1)(f) covers the disclosure of information which "would, or would be likely to, prejudice… the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained". Thus, if (as was conceded by Ms Willow), section 31(1)(f) is engaged, the decision turns on balancing the public interests justifying exemption with those justifying disclosure.

24. Where a public authority refuses to disclose information in reliance on one or more exemptions in Part II FOIA, section 50(1) permits the applicant a right of review by the Information Commissioner. There is then a further right of appeal to the F-tT under section 57 whereupon the F-tT has jurisdiction to decide, *de novo* on the merits, whether the decision of the Information Commissioner is "in accordance with the law": see section 58. This judgment following this rehearing generates the findings of fact from which any other challenge must spring.

25. Further rights of appeal are available in each case with leave, first, to the Upper Tribunal and thereafter to this court; these are limited to correcting errors of law: see sections. 11-14 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") and the explanation of the proper approach to such reviews in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 [2017] 1 WLR 1 per Lloyd Jones LJ at [34]. Although Lloyd Jones LJ dissented on two grounds, this analysis of the approach was also reflected by Richards LJ (at [60]-[61]) and Lord Dyson MR dealt only with the areas in which there was disagreement. In similar vein were the observations in *Criminal Injuries Compensation Authority v Hutton* [2016] EWCA Civ 1305 per Gross LJ (summarised at [57]).

Irrationality

26. Mr Wise argues the appeal on two distinct grounds. First, he submits that the Upper Tribunal was wrong to conclude that the F-tT's decision that the balance of the public interest favoured non-disclosure of the unredacted MMPR was not irrational: the contrary decision was, he submits, irrational and unreasonable in the *Wednesbury* sense. To that end, in his skeleton argument, if it was necessary, he sought to withdraw the concession that section 31(1)(f) of the FOIA was engaged, that is to say that disclosure of the unredacted MMPR would be likely to prejudice the maintenance of security and good order in institutions where persons are lawfully detained. Mr Wise abandoned that latter submission before us but he did argue an alternative formulation that the threshold which resulted in section 31(1)(f) being engaged was low and had little relevance to the balancing exercise which had to be undertaken in relation to the competing public interests. He also explained that Ms Willow intended the concession to be based on the position of adults although it was made in the context of the MMPR which was concerned with children and young persons.

27. Logically, it is necessary first to deal with the argument that little weight should be attached to the concession. In *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin), construing similar words in the Data Protection Act 1998, Munby J (as he then was) stated at [100] that the word "likely":

> "connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not"

That formulation was adopted by the Information Tribunal in *Hogan v Information Commissioner* [2010] 1 Info LR 588 (at [34]-[35]) which also referred to "a real and significant risk". In turn, *Hogan* was accepted as accurate in *Department for Work and Pensions v Information Commissioner (supra)* at [27] and [60].

28. When reaching its conclusion, the F-tT itself had to assess and then balance the prejudice between disclosing and maintaining the exemption: Ms Willow's assessment of the significance of the competing considerations is not to the point; it was for the F-tT to reach its own conclusion. The suggestion that it has little significance, however, is incorrect. The features which justify the engagement of section 31(1)(f) are equally relevant to the potential prejudice which falls on one side of the balance and, without being conclusive, may make it more difficult (but not necessarily impossible) to say that the countervailing arguments to disclosure are non-existent or so diaphanous that a decision to uphold the decision of the Information Commissioner is perverse, irrational or unreasonable. That is particularly the case given that no issue was taken before the F-tT with the conclusion expressed by the Information Commissioner in the decision dated 27 March 2014 (based on the statistics set out at [28]) that the prejudice caused would occur "relatively frequently".

29. Turning to the substantive argument, it is first necessary to underline what is at issue in these proceedings. This case is not about a challenge to the justification of the techniques deployed in the MMPR. Neither is it about discovering, in general terms, how children and young offenders might be restrained in appropriate circumstances (although that would assist transparency). In my judgment, the descriptors and that which is not redacted are sufficiently broadly defined to identify the end point of the technique if not the method of reaching it. To take the example identified above, "inverted wrist hold – thumb only" obviously involves holding and controlling the young person's arm, hand and thumb and, presumably, inverting the wrist, without applying undue pressure or pain. If Ms Willow wishes to challenge the use of this technique in all and any circumstances, the fact that she does not know how staff are trained to apply it does not impact on the generality of the point that she wishes to make. In that regard, the Information Commissioner and the F-tT had the unredacted MMPR and, if it was thought that the terms of redaction were themselves misleading, I have no doubt that would have been exposed as a relevant factor: this was not suggested as a matter of concern and it was not suggested that we see the unredacted MMPR.

30. A second, preliminary, point concerns the relevant evidence upon which reliance can be placed for the purpose of determining irrationality. In *APPGER v Information Commissioner & Foreign and Commonwealth Office* [2013] UKUT 560 (AAC), the point was made at [75]-[76]:

> "75. In our view correctly, it was accepted before us by the FCO and the IC that when assessing competing public interests under section 27 of FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would

> likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote…
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> 76. Such an approach requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice and (b) benefits that the proposed disclosure of the material in respect of which the section 27 [or for the purpose of these proceedings, the section 31] exemption is claimed would (or would be likely to or may) cause or promote. Plainly that includes an identification of the relevant material and the circumstances in which it was provided to or obtained by the body claiming the section 27 [or 31] exemption."

31. In written submissions, Mr Wise focussed on the word "proof", and submitted that this placed a requirement on the F-tT for all conclusions regarding prejudice and the public interest to be based on the evidence put to them by witnesses at trial. As is obviously correct, however, it became clear that he agreed that the evidence included all the material that the MoJ had adduced to the Information Commissioner that was available to the F-tT. This included the correspondence between Ms Willow and the MoJ and that between the Information Commissioner and the MoJ, the redacted and unredacted MMPR and the written evidence and submissions.

32. Furthermore, it was not in issue that the nature of such an assessment clearly included predictions of what would or was likely to happen in the event of disclosure. Accordingly, "actual harm" and "actual benefit" encompass risk of actual harm and real chance of benefit: see *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC) at [25]). Thus, "the tribunal should take account of any consequences that can readily be anticipated as realistic possibilities": see *London Borough of Camden v. Information Commissioner and YY* [2012] UKUT 190 (AAC) at [11].

33. Turning to the appeal itself, it amounts to an assertion that the F-tT (and thus the UT) acted irrationally and failed to provide reasons for rejecting the application. Making the same point another way, it is contended that the conclusion that prejudice would arise should the MMPR manual be disclosed was wholly unsupported by evidence to the extent that the decision could be described as perverse: see *R (Iran) v Home Secretary* [2005] EWCA Civ 982 at [11], citing *Miftari v SSHD* [2005] EWCA Civ 481. The difficulty of this submission is only underlined by the proper construction of section 31(1)(f) FOIA, the concession that it was engaged and the decisions made in requests for other manuals concerned with training of restraint techniques which have been approved in *R (FI) v SSHD* [2014] EWCA Civ 1272, per Richards LJ at [72] and [2013] EWHC 498 (Admin), per Foskett J at [122]-[127] and [132]-[134].

34. Mr Wise further submitted that the F-tT could not lawfully conclude that the public interest in disclosing the MMPR was outweighed by the prejudice that such disclosure would cause because it had not been argued that disclosure of the PCC had caused prejudice. He further pointed to the evidence of the witnesses that the risk of children learning how to resist restraint by reading the MMPR was so small as to be negligible. Furthermore, transparency favoured disclosure and it would be difficult for an independent reviewer of the use of restraint against those under 17 to do so without the unredacted manual.

35. The F-tT acknowledged force in the argument that few young people were likely to consult the manual and seek to learn from it how to resist restraint: given the similarities between the Use of Force manual and the MMPR (which fact was not challenged), however, the critical feature was not those under 15 but the older young offenders and adults (where the

argument for non-disclosure prevailed). That feature was underlined by UTJ Markus Q.C. in these terms:

> "10. The MoJ's case to the Commissioner was that disclosure of the techniques in the MMPR could lead to some people developing countermeasures to their application and that, since some of the techniques used in the MMPR were also used in adult prisons, countermeasures could also be developed by adult prisoners…The MoJ commented on this, explaining that there were fundamental differences between the two manuals and between the populations of SCTs [sic] and YOIs.
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> …
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> 20. Moreover, the finding of risk in relation to older detainees and adults was adequately supported by the evidence. The MoJ had explained that the MMPR was different from the PCC but that there were similarities with the Use of Force Manual which is in use in adult prisons. It supported this with an explanation of the background to the development of the manuals, the differences in techniques and the characteristics of the different populations in the institutions. The Appellant's witness evidence was principally directed to the risk of children and young people learning from the MMPR, without distinguishing between different age groups. Insofar as she addressed issues relating to adult prisoners, the tribunal noted (paragraph 21) the Appellant's view that there were considerable similarities between the MMPR and the Use of Force manual."

36. Turning to the issue of review, it seems to me to be inconceivable that an independent reviewer of the use of techniques of restraint on children and those under 17 would not be able to have sight of the manual if it was important for the exercise then being undertaken. The contrast with disclosure through the FOIA is obvious: the applicant and motive blind nature of the operation of the legislation means that requested information would have to be disclosed not just to Ms Willow but to any and every requester, including actual or potential offenders and their associates.

37. These were points made by the F-tT who concluded that, given the extent and detail of what is already in the public domain, the benefit in terms of transparency and of public confidence in the lawfulness and humanity of the system was limited (at [20] cited at [15] above). In my judgment, although expressed in brief terms (doubtless given the nature of the material to be judged and the evaluation), the judgment of the F-tT cannot possibly be said to be irrational, perverse or inadequately reasoned. On the contrary, it was an assessment that was well within the bounds of the legitimate exercise of its responsibilities under the FOIA. The same can be said for the decision of the UT. I would reject this ground of appeal.

The United Nations Convention on the Rights of the Child

38. The United Nations Convention on the Rights of the Child ("UNCRC") is an international human rights treaty that grants all children and young people (aged 17 and under) a comprehensive set of rights. The UK signed the convention on 19 April 1990, ratified it on 16 December 1991 and it came into force on 15 January 1992. Article 3(1) provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

39. It is common ground between the parties that the best interests of all children should be at the forefront of any consideration of the balancing exercise. The issue is the relevance of the provision to this decision relating to disclosure, the extent of that relevance and whether appropriate regard was had to the interests of children. Furthermore, the parties differ on whether or not the UNCRC was relevant as a matter of law.

40. On the face of it, as an unincorporated treaty, the UNCRC gives rise to no legal rights or obligations in domestic law in or of itself. In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 Lord Oliver explained at 500:

> ……"as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not a part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned it is *res inter alios acta*, from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations it is irrelevant."

41. On the other hand, challenging the observation by UTJ Markus QC that Article 3.1 UNCRC has no application, Mr Wise relied on the observations of Baroness Hale in *Smith v. Smith* [2006] UKHL 35 at [78] that:

> "our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken… the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the [UNCRC]".

42. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, Baroness Hale observed (at [23]) that Article 3(1) was a "binding obligation in international law" but she went on to explain (at [25]):

> "Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration'. Of course, despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'."

43. The relevance of Article 3(1) UNCRC in domestic law was discussed by the Supreme Court in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16. Lord Hughes stated the position at [137]:

> "Article 3 UNCRC is contained in an international treaty ratified by the UK. It is binding on this country in international law. It is not, however, part of English law. Such a treaty may be relevant in English law in at least three ways. First, if the construction (ie meaning) of UK legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations. Second, international treaty obligations may guide the development of the common law… Neither has any application to this case. This

> case is concerned with legislation, not with the common law, and it is not suggested that there is any room for doubt about the meaning of the regulations. Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the court to apply the European Convention on Human Rights (ECHR) via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC…".

44. Similar approaches were taken by Lord Reed at [82]-[83] and Baroness Hale at [211] and [217]-[218] respectively. Lord Carnwath applied the same fundamental principles at [115] and [116] but observed that it was trite law "that, in this country at least, an international treaty has no direct effect unless and until incorporated by statute, but that it may be taken into account as an aid to interpretation in cases of ambiguity". He was only considering the UNCRC for the purpose of interpreting the terms and notions in the text of the ECHR: see *Demir v Turkey* (2008) 48 EHRR 54, at [65], [67], [85].

45. The Supreme Court returned to the relevance of unincorporated treaties as a matter of domestic law in *R (Yam) v Central Criminal Court* [2015] UKSC 76. Without dissent, Lord Mance put the matter in this way at [35]:

> "In accordance with *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 , *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976 , para 13 and *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, para 56, per Lord Brown of Eaton-under-Heywood with whose reasons Lord Bingham of Cornhill and Lord Rodger of Earlsferry agreed at paras 1, 9 and 15, a domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate."

46. Against that background, Mr Wise submitted that the UT was wrong to conclude that Article 3 had no application to this case because it fell within the first of the three propositions advanced by Lord Hughes, namely that the meaning of the legislation was in doubt. He argued that the FOIA provisions were imprecisely worded and were clearly capable of being interpreted consistently with Article 3(1) UNCRC. Thus, that was the interpretation that should be adopted and that incorporated into the meaning of the phrase "public interest" that the best interests of children should be a primary consideration.

47. It is noteworthy, however, that the phrase "public interest" appears twice in section 2(2)(b) of the FOIA and represents but one specific example of the content of the public interest considerations arising under the provision. Furthermore, this argument assumes what Mr Wise wishes to prove. Of all the multitude of public interest considerations that may be relevant in deciding what course is in the public interest in any case, it is this one that is said to inform the meaning of the provision from the outset. One could equally say that the phrase "public interest" is capable of requiring consideration to be given to the avoidance of discrimination on grounds of race, gender etc. All these matters may inform the content of the "public interest" which the decision-maker has to consider but they do not contribute to determining the meaning of the words themselves.

48. The relevance of the authorities relating to unincorporated treaty provisions in English law may arise where the meaning of a statute is ambiguous. In my judgment, however, in the

context of this case, the meaning of the words "public interest" is not in doubt. It could not be clearer. It is a well known and well understood concept both in law and in general use. Which factors are relevant to determining what is in the public interest in any given case are usually wide and various. However, this does not mean that it is necessary, at the outset, to resort to the UNCRC to determine the meaning of this perfectly common phrase. The factors that are relevant to the public interest in a statute will be informed by the statutory context and, if relevant factors are ignored or irrelevant ones are engaged by the decision-maker, the consequences in public law are well-known. None of this makes doubtful the meaning of a statute that uses the phrase "public interest".

49. In my judgment, therefore, Lord Hughes's uncontroversial first category of case, where an unincorporated treaty provision may be relevant in English law, does not apply here. Mr Wise did not argue that either of the other examples were material in the present case.

50. In any event, however, it is obvious that the interests of children would be at the forefront of any consideration of the "public interest" in any case affecting the administration of institutions where children and young persons are detained. It is equally clear that they were at the forefront of the consideration by the Information Commissioner and the F-tT of the issues in this case. Thus, it is very much in the interests of young persons detained in YOIs that, if another inmate becomes disruptive, steps can be taken to control that inmate before harm can be caused to anyone else, to the inmate himself or to the staff. Put another way, as noted above, the phrase "public interest" appears on both sides of the statutory provision and is relevant both to disclosure and non-disclosure, there being factors affecting the interests of children pointing in each direction. This was the feature on which the F-tT focussed, along with other factors, which do not need repeating in the context of considering the proper meaning of section 2(2)(b). This serves to underline that the content of the "public interest" balance in the case does nothing to render the meaning of the section doubtful.

51. The F-tT had to balance the circumstances pertaining to STCs affecting those under 15 (where the relevant material in the form of the PCC has been disclosed without adverse effect) and those pertaining to YOIs and prisons for those over 17 (where the Use of Force manual has not been disclosed in circumstances which have not been further challenged). For those between 15 and 17, a decision had to be reached as to which side of the line the MMPR fell. The F-tT decided that it fell on the adult side for reasons which it gave, the most important of which, in my judgment, was the similarity between the MMPR and the Use of Force Manual. Reference to the safety implications for young people (echoing the conclusions of the Information Commissioner) demonstrates that, even without referring to the UNCRC by name, the interests of children were at the forefront of its thinking.

52. In mounting the appeal to the F-tT, Mr Wise argued (at [29]) that disclosure "serves the interests of those children against whom the restraint techniques as set out in the MMPR are liable to be used". He explained that he developed that submission orally, but I repeat the countervailing proposition that the fact that such techniques are available also serves the interests of children who might otherwise be at risk of violence from other children. Further, the disclosure to the world at large of the unredacted version of the MMPR does not directly correlate to the assessment of the best interests of any child. Whether or not UTJ Markus QC was right to say that Article 3.1 of the UNCRC had no application in this case, the public interests surrounding children were clearly at the heart of the decision making process. I would also reject this ground of appeal.

Conclusion

53. The challenge to the MoJ proceeded before the Information Commissioner and, in my judgment, was dealt with rationally, reasonably and entirely in accordance with the principles applicable to FOI requests. The same can be said of the appeals to the F-tT and the UT. While recognising the real concern that Ms Willow (and others) express about the use of restraint, the transparency of the disclosure of the mechanism for applying techniques of restraint is somewhat tangential to that concern, particularly as I have no doubt that any independent review of any use or misuse of restraint will require the reviewer to be fully informed of what was done and how it was done. In these circumstances, I would dismiss the appeal in its entirety.

LORD JUSTICE MCCOMBE:

54. I agree.

LORD JUSTICE NEWEY:

55. I also agree.