USING CEDAW IN LAW

Bringing Women's Rights Home

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1. Introduction

1.1 Over 25 years after the UK ratified the UN women's rights convention, CEDAW is still not used effectively in domestic litigation. CEDAW is an international bill of rights for women, which could be used creatively to push for improved state action, accountability and non-discrimination. Women's rights law is a relatively sophisticated field in the UK, combining our own legal landmarks with EU non-discrimination provisions and the jurisprudence of the European Court of Human Rights on the European Convention on Human Rights. This factsheet aims to outline the potential of CEDAW as a useful tool for lawyers to use in their mainstream practice and for legal campaigners to wield in strategic litigation.

2. CEDAW

<u>The History and Purpose of CEDAW</u>

2.1 In 1979, CEDAW was adopted in New York by the General Assembly of the UN. 187 countries have signed up to CEDAW and the UK ratified CEDAW on 7 April 1986. It was a culmination and result of over thirty years of work by the UN Commission on the Status of Women, designed to highlight adverse situations faced by women around the world and set up an agenda for international action. It is therefore often described as an 'International Bill of Rights for Women.'

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

2.2 In its preamble, CEDAW recognises that "extensive discrimination against women continues to exist". It therefore reaffirms the UN's commitment to fundamental rights and brings women's rights into focus as human rights. CEDAW addresses civil rights, the legal status of women, human reproduction and the impact of cultural factors on gender relations and stereotypes. In summary, CEDAW addresses by theme:

- Article 1 Non-discrimination
- Article 2 Policy measures to be taken to address discrimination
- Article 3 Guarantee of basic human rights and fundamental freedoms for women
- Article 4 Special measures – permitted temporary affirmative action
- Article 5 State obligation to address cultural sex roles, stereotyping and prejudice
- Article 6 Prohibition on trafficking and sexual exploitation
- Article 7 Political and public life

- Article 8 Representation at an international level
- Article 9 Nationality
- Article 10 Education
- Article 11 Employment
- Article 12 Healthcare
- Article 13 Economic and social welfare benefits
- Article 14 Rural women
- Article 15 Equality before the law
- Article 16 Marriage and family life

General Recommendations

2.3 Article 21 requires the Committee to report to the UN General Assembly each year through the Economic and Social Council and the Committee has interpreted Article 21 to allow it to issue General Recommendations which apply to all states as clarifications on CEDAW's position on a particular topic. General Recommendations address thematic, cross-cutting areas of concern the Committee has identified from state reports, including General Recommendations on:

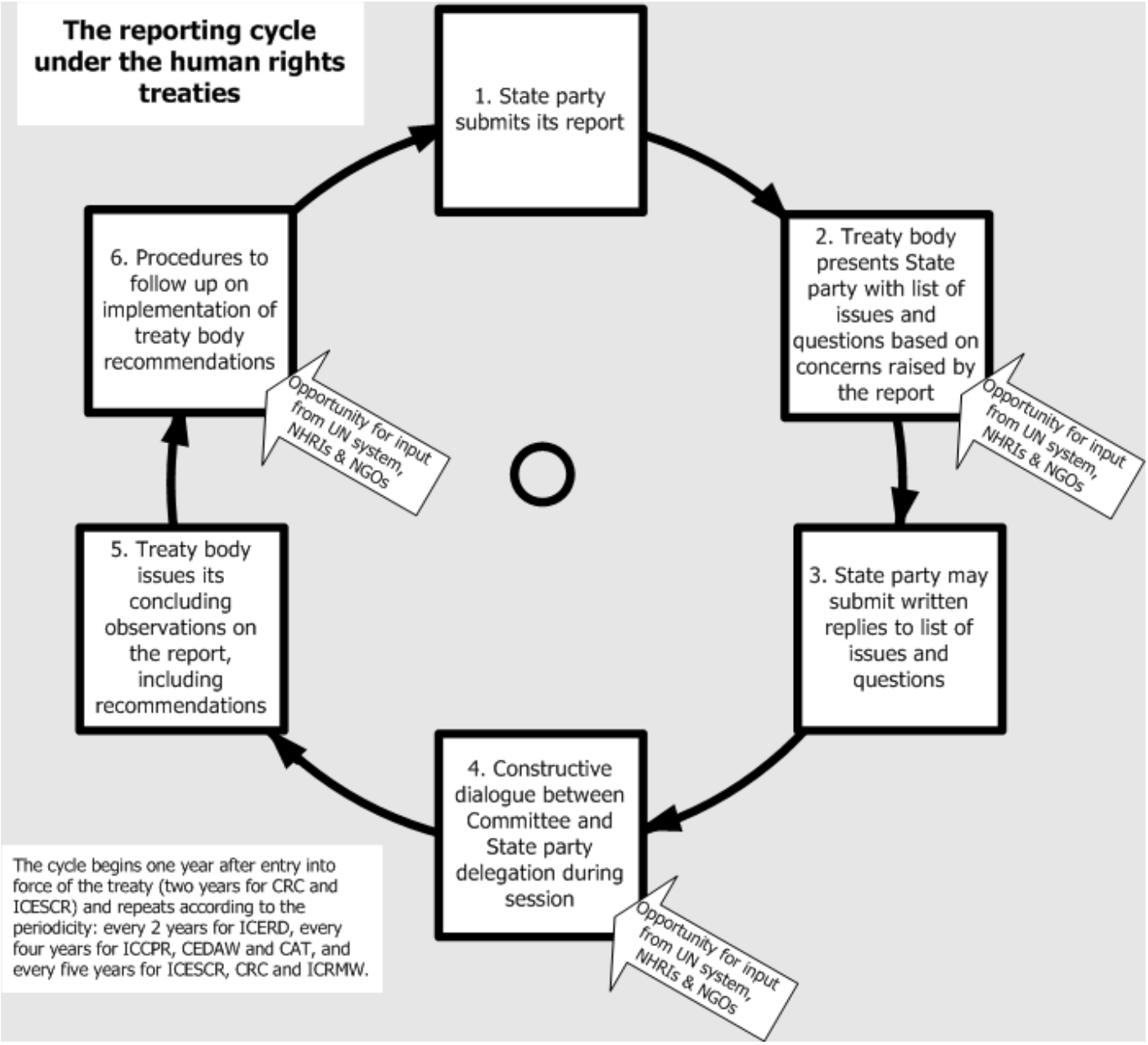
- Violence against women (12 and 19)
- Female Genital Mutilation (14)
- Women and AIDS (15) and health (24)
- International representation (8) and public life (23)
- Equal remuneration for work of equal value (13), unpaid women workers in family enterprises (16), unremunerated domestic activities (17), women migrant workers (26).
- Disabled women (18)
- Older women (27)
- Equality in marriage (21) and economic consequences of marriage (29)
- Women in conflict prevention, conflict and post-conflict (30)
- Reporting, statistical data, resources, effective national machinery, education on CEDAW, the 10th anniversary of CEDAW, core obligations under Article 2, reservations and temporary special measures (1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 20, 22, 25 and 28)

The CEDAW Reporting Process

2.4 The Convention is monitored by an independent committee of experts – the Committee on the Elimination of Discrimination against Women, which is established by Article 17 of CEDAW:

- Each country is obliged to submit a report within one year of becoming a party and thereafter every four years or whenever the Committee requests one (Article 18(b)). Reports should contain information about steps taken to implement CEDAW.
- State reports are considered by the Committee, who may ask questions of a delegation from the reporting state to clarify the report. NGO delegations often participate in the reporting process by submitting supplementary or shadow reports.

- Following consideration of each state report, the CEDAW Committee formulates Concluding Observations outlining factors and difficulties affecting the implementation of the Convention, positive aspects, principal subjects of concern and suggestions and recommendations to enhance implementation of the Convention.
- The UK was last examined in 2013 and, prior to that, in 2008. In 2013 the CEDAW Committee requested an interim update on access to abortion in Northern Ireland one year on and an update on access to justice and legal aid two years on.



Reporting flowchart created for IWRAW Asia Pacific, c.f. http://www.iwraw-ap.org/committee/flowchart.htm

2.5 For further information on CEDAW see:

The text of the Convention:
http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf

The text of the General Recommendations:
http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx

55th Session Committee's Concluding Observations to the UK 2013:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=810&Lang=en

Women's Equality in the UK: a Healthcheck, Ed. Women's Resource Centre 2013:
http://thewomensresourcecentre.org.uk/our-work/cedaw/cedaw-shadow-report/

From Rights to Action, Rights of Women 2011:
http://www.rightsofwomen.org.uk/pdfs/VAW_toolkit_From_Rights_to_Action_Amended.pdf

3. The Optional Protocol

3.1 The UK acceded to the Optional Protocol to CEDAW ('the OP') on 17 December 2004. The OP came into force on 17 March 2005. The OP provides two additional mechanisms for holding states to account.

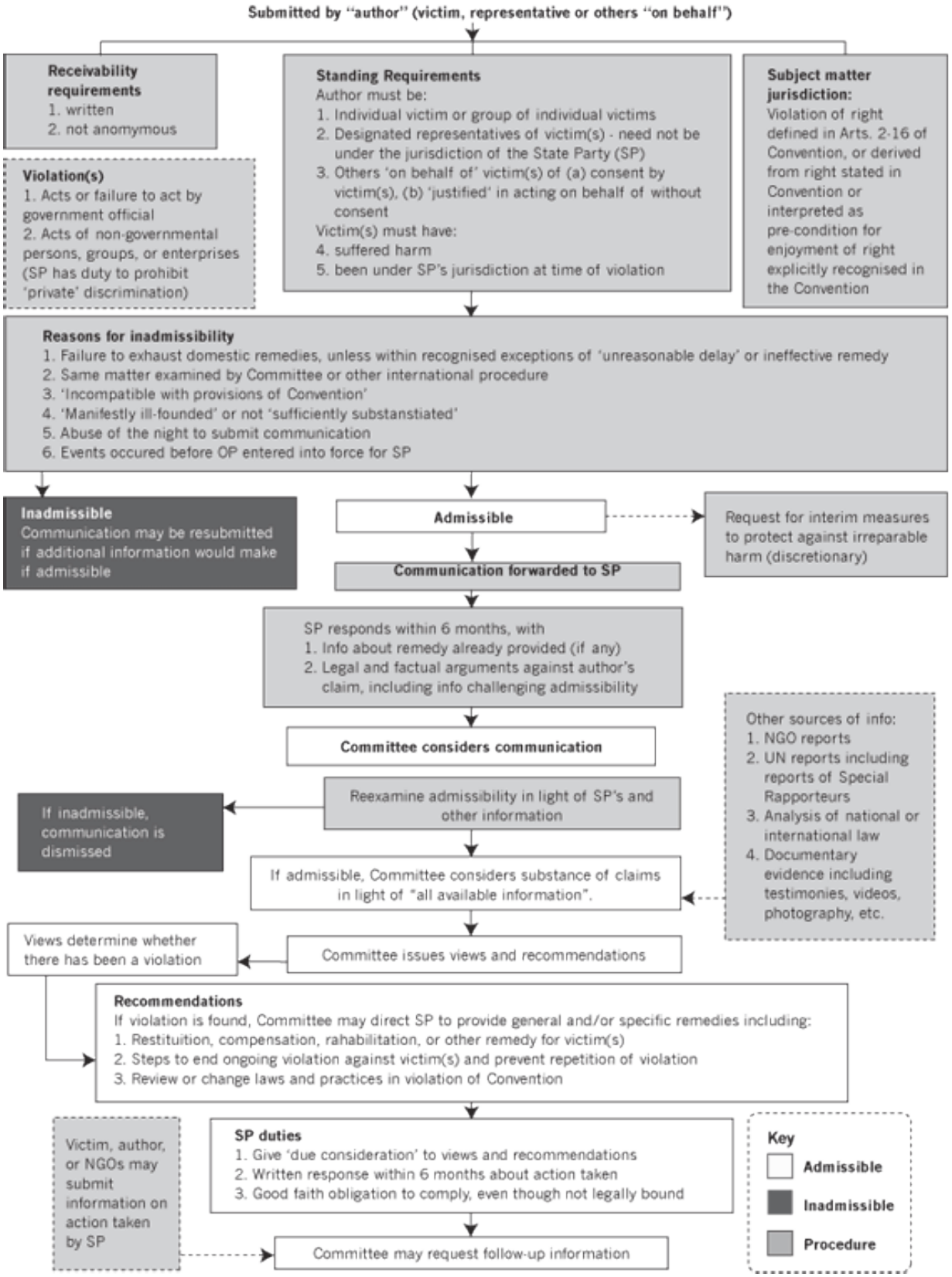
3.2 Article 8 of the OP allows the CEDAW Committee to conduct an Inquiry into breaches of CEDAW, where it receives reliable information of grave or systematic violations of CEDAW rights. So far, there has only been one CEDAW Inquiry, which took place in 2005 looking at large numbers of women who had been murdered with impunity in Ciudad Juárez in Mexico. Due to the limited resources of the CEDAW Committee and the small number of referrals received, the focus has tended to be on the reporting process rather than Inquiry procedure.

3.3 Articles 1-7 of the OP focus on the Communications Procedure, which allows written communications to be submitted by or on behalf of individuals or groups of individuals claiming violation of CEDAW rights. Communications can be brought on behalf of a deceased person, but communications brought without a person's consent must be justified.

3.4 The Communications Procedure offers lawyers an alternative to taking a case to the European Court of Human Rights. Procedurally CEDAW is relatively straightforward, however there are some important admissibility criteria. According to Article 4, a communication will be inadmissible:

- Unless legal and administrative domestic remedies have been exhausted or seeking such remedies would be unusually prolonged or unlikely to bring effective relief;
- Where the same matter has been examined by the Committee or under another international investigative process (so for example a case cannot both go to the European Court of Human Rights and the CEDAW Committee);
- If it is incompatible with the provisions of the Convention;
- Where it is manifestly ill-founded or not sufficiently substantiated;
- If it is an abuse of process;
- Where the discrimination pre-dates the CEDAW Optional Protocol (for the UK's purposes pre-dates 17 December 2004), unless the discrimination is continuing.

3.5 Article 5 of the OP gives the Committee the power to make an urgent request for interim relief where this is necessary to avoid irreparable damage to a victim. The CEDAW Committee's timescales for finally disposing of an OP communication are equivalent to the delays experienced in the European Court of Human Rights. Once the communication is accepted the Committee can request further information and they will give the state six months to submit a written clarification on the matter and domestic remedies available (Article 6); the communication will eventually be considered in a closed meeting (Article 7) and the decision later reported. If the Committee finds in favour of the complainant then they can issue wide-ranging recommendations in relation to the individual case and broader public interest.



OP flowchart produced for IWRAW Asia Pacific; c.f. http://www.iwraw-ap.org/protocol/commchart.htm

3.6 Over the past decade the CEDAW Committee has grown in confidence in its approach to the Communications Procedure and communications have been brought from all over the world on issues from employment to women in prison to violence against women to asylum. The two OP cases brought from the UK - N.S.F regarding a Pakistani asylum seeker and Salgado regarding transfer of nationality from mother to child prior to the OP - were both ruled inadmissible due to a failure to exhaust domestic remedies.

3.7 For further information on the OP see:

The 2005 Optional Protocol Inquiry into deaths in Mexico:
http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MEX/CEDAW_C_2005_OP-8_MEXICO_5739_E.pdf

A Lever for Change: Using the Optional Protocol to CEDAW, Equality and Human Rights Commission:
http://www.equalityhumanrights.com/uploaded_files/humanrights/a_lever_for_change.pdf

IWRAW-AP's guidance on the OP and the remedies available:
http://www.iwraw-ap.org/protocol/r_comm.htm

CEDAW Committee model communication complaint form:
http://www.ohchr.org/documents/HRBodies/CEDAW/InfoNote_OP_en.doc

Optional Protocol jurisprudence:
http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx

4. International Treaties and Domestic Law

4.1 The UK has a dualist legal system, within which international legal treaties are not directly enforceable in the courts unless they are incorporated or implemented in some way (such as the European Communities Act 1972, the Human Rights Act 1998 or the Rights of Children and Young Persons (Wales) Measure 2011). Although we do have women's rights protections enshrined in law in their own right (for example gender is a protected characteristic in the Equality Act 2010), as yet CEDAW has not been expressly implemented by UK legislation. CEDAW is therefore most likely to be brought into UK case law in cases which concern:

- A women's equality case where there is a public law challenge on the basis of irrationality or a discrimination claim brought under the Equality Act 2010;
- The European Convention on Human Rights, the Refugee Convention, EU law equality requirements and/or the EU Charter on Fundamental Rights;
- The interpretation of UK legislation which is expressly designed to protect women's equality, or where the UK government has made a commitment that the relevant legislation is or will be interpreted in compliance with CEDAW (e.g. a commitment made to Parliament or in the UK's state reports to the CEDAW Committee).

4.2 UK courts should be invited to consider CEDAW and CEDAW Optional Protocol jurisprudence in the same way they might be invited to consider persuasive Commonwealth case law or academic journals and, in cases which involve other international rights obligations or women's equality, the views of the CEDAW Committee should carry significant weight. In practice the domestic courts of England and Wales can be very reluctant to stray into the territory of international human rights law, but there is no reason why CEDAW should not be used by the courts to understand and interpret our laws. Our judges have expressed diverse views on the value of international treaties. For example at paragraph 80 in the recent bedroom tax case concerning disabled children, Lord Justice Laws stated:

> "*In my judgment some caution is required as regards the use to be made of unincorporated international conventions. The constitutions of many of the States Parties to the ECHR provide for the automatic incorporation of an international treaty into domestic law upon its being entered into by the appropriate government agency. The constitution of the United Kingdom does not; such a treaty only has effect in municipal law if an Act of Parliament so provides. I certainly accept that under our law an unincorporated treaty may be deployed as an aid to construction of an ambiguous statute to whose subject-matter it is relevant (so much has been clear at least since Garland v British Rail Engineering [1983] 2 AC 751); but care is needed to ensure that such a treaty is not seen as a source of substantive domestic legal rights. The point is important because the executive government, which enters into treaties in the name of*

the Crown, is not generally a source of law save where it exercises powers delegated by Parliament."[1]

4.3 Coming from a very different perspective, Lord Justice Elias in *Bracking v SSWP* [2013] EWCA Civ 1345 at paragraph 77 stated:

> *"However, the second and related issue is whether the Minister properly appreciated and addressed the full scope and import of the matters which she is obliged to consider pursuant to the PSED. There is simply no material from which one can properly infer that she did. A vague awareness that she owed legal duties to the disabled would not suffice; nor in my view was it enough simply to alert her to the obligation to have regard to the matters identified in the EIA and the IA. They did not identify her legal obligations. For example, there is no evidence that she had her attention drawn to the positive obligation to advance equality of opportunity, nor indeed (although it was not suggested that this was of itself directly a breach of the PSED) to the more specific obligations which the UK has undertaken with respect to the disabled in the United Nations Convention on the Rights of Persons with Disabilities and which ought to inform the scope of the PSED with respect to the disabled. I have in mind in particular Article 19 which requires states to take effective and appropriate measures to facilitate the right for the disabled to live in the community, a duty which would require where appropriate the promotion of independent living. There was no evidence that any of these consideration were in the mind of the Minister. Indeed, the primary focus of concern appears to have been on achieving fairness as between those who benefit from the fund and those who do not."*

4.4 The UK is a party to the Vienna Convention on the Law of Treaties. The Vienna Convention requires:

- Article 26 *pacta sunt servanda*. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
- Article 27 *Internal law and observance of treaties*. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
- Article 31 *General rule of interpretation*.
  "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

4.5 Prior to the Human Rights Act 1998, when the European Convention on Human Rights had an equivalent legal status to the one CEDAW has now, the UK courts regularly developed domestic law so that it complied with the decisions of the European Court of Human Rights ('the ECtHR'). For example, in 1991 the Scottish courts held that a prison regulation that permitted prisoners' legal letters to be read was lawful (*Leech v Secretary of State for Scotland,* 1991 SLT 910), the English High Court went on to find the same in *Leech (No.2)* [1992] C.O.D. 168. The same issue went to the ECtHR who found an interference with prisoners' human rights (*Campbell v United Kingdom* (1992) 15 EHRR 137). Subsequently in *Leech (No.2)* [1994] QB

[1] *R (MA and Ors) v Secretary of State for Work and Pensions and Birmingham CC* [2013] EWHC 2213 (QB); available online at: http://www.bailii.org/ew/cases/EWHC/QB/2013/2213.html

198 the Court of Appeal developed UK law to align with the ECtHR judgment. This demonstrates a general principle of interpretation that the domestic courts will presume that Parliament did not intend to depart from the UK's international obligations unless there are clear words demonstrating that this was indeed their intention. In *Leech (No.2)* the Court of Appeal was asked to find that *Campbell* "resolves any uncertainty in the common law" in the UK and Lord Steyn particularly noted at [217] that the decision in *Campbell* "reinforces' his findings and he places significant importance on ECtHR standards at [210] for interpreting British law:

> "*Equally clearly established is the important principle that a prisoner's unimpeded right of access to a solicitor for the purpose of receiving advice and assistance in connection with the possible institution of civil proceedings in the courts form an inseparable part of the right of access to the courts themselves. The principle was laid down by the European Court of Human Rights in Golder v. United Kingdom (1975) 1 E.H.R.R. 524.*"

4.6 Moreover, the ECtHR itself has explained that the Vienna Convention obliges European courts to take into account international treaties and standards when interpreting their obligations. Thus in *Golder*, which looked at the interpretation of the Article 6 right to fair trial, the ECtHR said at [35] that Article 6 "must be read in the light of" principles of international justice.

4.7 Subsequently, in *Neulinger v Switzerland* (2010) 28 BHRC 706*,* the ECtHR stated that the interpretation and application of the ECHR must take into account principles of international law:

> "*131. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see Golder v. the United Kingdom, 21 February 1975, § 29, Series A no. 18; Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II; and Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 55, ECHR 2001-XI).*
>
> *132. In matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must therefore be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see Iglesias Gil and A.U.I. v. Spain, no. 56673/00, § 51, ECHR 2003-V, and Ignaccolo-Zenide v. Romania, no. 31679/96, § 95, ECHR 2000-I) and the Convention on the Rights of the Child of 20 November 1989 (see Maire, cited above, § 72).*"[2]

[2] This principle was recently affirmed by the ECtHR in *Nada v Switzerland* [GC], no. 10593/08, ECHR 2012 at [169]-[170].

4.8 In relation to CEDAW in particular, the ECtHR case of *Opuz v Turkey* (2010) 50 EHRR 28, App. no. 33401/02 examined obligations under CEDAW when determining the scope and any breach of the ECHR. The ECtHR noted:

> "*...when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law, the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women.*" [185]

4.9 More recently in the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, Lady Hale referred to *Neulinger* and explored a broad range of international consensus on children's rights, including the UN Convention on the Rights of the Child before situating international obligations within the context of domestic principles and legislation (at [21] onwards). *ZH (Tanzania)* was an immigration case relating to Article 8 and family life. In her judgment at [29] Lady Hale applied children's rights principles from international law to the assessment of proportionality under Article 8 ECHR. Throughout her judgment she used international principles to understand and interpret the scope and content of children's rights.

4.10 Similarly, in *HC v SSHD* [2013] WLR(D) 157, [2013] EWHC 982 (Admin), which concerned the safeguards available for 17 year olds in police custody, the courts explored in detail the principles set out in the UN Convention on the Rights of the Child:

> *"43. ... General Comment of the UN Committee on the Rights of the Child No 10 draws attention to the discretion of States Parties. For example, there is no specific requirement for an appropriate adult in every case. But the significance of all of the relevant International Conventions are that they reveal a broad consensus that those aged 17 should be regarded as children, who must be treated differently from adults and sheltered by special protection designed to meet their best interests.*
>
> *44. In the past, the executive has explained how the UNCRC has underpinned implementation in England (Department for Children, Schools and Families, the UNCRC: How Legislation Underpins Implementation in England, March 2010). This document points out that international treaties are not automatically incorporated into United Kingdom law and that the United Kingdom will not ratify a treaty "unless the government is satisfied that domestic law and practice means that it can comply" (paragraph 1.2)…*
>
> *46. The failure of the United Kingdom to extend protection to 17 year-olds in detention has not escaped the attention of the United Nations Committee on the Rights of the Child. In its concluding observations on 4 October 2002 the Committee drew attention to "children belonging to the most vulnerable groups, one of which is 16-18 years-olds". In 2008 (2008 CRC/C.GBR/CO/4) it noted that the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the area of juvenile justice (paragraph 26..."*

4.11 International law is not only brought into domestic law through the European Convention on Human Rights. In the context of the Vienna Convention, international treaty obligations can be used directly as persuasive tools to interpret domestic law. For example in *R v Uxbridge Magistrates Court and Another, ex parte Adimi* [1999] EWHC Admin 765; [2001] Q.B. 667, the High Court directly interpreted the Refugee Convention in relation to public law principles in a case concerning the non-criminalisation of asylum seekers for arriving in the UK using false documents. Similarly in *R v Secretary of State for the Home Department, ex p Adan* [1998] UKHL 15, [1999] 1 AC 293, Lord Justice Slynn interpreted UK immigration law in light of the 'object and purpose' of the Refugee Convention.

4.12 In the Supreme Court case of *Yemshaw v Hounslow LBC* [2011] UKSC 3 [2011] 1 W.L.R. 433, at [20], Lady Hale referred to CEDAW General Recommendation 19 on violence against women[3] to demonstrate the international consensus that 'domestic violence' does not simply refer to physical abuse. Similarly in *Fornah v SSHD* [2006] UKHL 46 [2007] 1 A.C. 412, a case on whether women fleeing Female Genital Mutilation may constitute a social group for the purposes of the Refugee Convention, at [418] Lord Bingham refers to CEDAW General Recommendations 14 and 19 to establish that Female Genital Mutilation can constitute torture and violence against women: "*The international community recognises such mutilation as reflecting and reinforcing deep-seated gender discrimination and systemic subordination of women in the societies where it is practised*". The UK's obligations under CEDAW should continue to promote an acceptance of gender-based violence as persecution of a social group for the purposes of the Refugee Convention.[4]

4.13 In conclusion, CEDAW is not a UK law, but it can be used to interpret UK laws. Where a case explicitly involves the interpretation of any other international treaty or instrument then CEDAW will be even more persuasive.

[3] On the status of General Recommendations see *Diallo (Republic of Guinea v Democratic Republic of the Congo), Merits, Judgment,* ICJ Reports 2010, p. 639 at paragraph 66, which makes clear that while they are not binding, they are highly persuasive, since the UN Treaty bodies have been tasked with interpreting the treaties and should be given a level of respect commensurate with that.

[4] UNHCR, "Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/01, May 2002, p.3

5. Using CEDAW - a practical example

5.1 The detention of women in immigration removal centres ('IRCs') is a controversial issue in domestic law which may engage the provisions of CEDAW. There have been frequent allegations of ill-treatment of women in the immigration detention system, including allegations in 2013 of sexual assault by guards against women detained at Yarl's Wood IRC, a facility run by the private company Serco.[5]

5.2 According to the Migration Observatory, there are between 2,000 and 3,000 people in immigration detention at any one time. There were 2,685 non-citizens detained in immigration detention facilities in the United Kingdom as at 31 December 2012.[6] Non-citizens may be detained by the Home Office under a number of different powers in the Immigration Acts: this introduction will not give a detailed account of the detention powers available to the Secretary of State. Most detainees are held pending deportation or administrative removal from the United Kingdom. Immigration detention may come up before the court through bail applications, judicial reviews of the decision to detain or civil unlawful detention claims.

5.3 The Secretary of State's power to detain people in immigration detention is subject to certain general restrictions at common law, which were first set out by Woolf J in the case of *Hardial Singh* [1983] EWHC 1. They have since been repeatedly endorsed and developed by the higher courts, recently by the Supreme Court in *Walumba Lumba* [2011] UKSC 12. The principles, as originally set out, are:

- The Secretary of State must intend to deport/remove the person and can only use the power to detain for that purpose;
- The person pending removal may only be detained for a period that is reasonable in all the circumstances;
- If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation/removal within a reasonable period, she should not seek to exercise the power of detention;
- The Secretary of State should act with all diligence and expedition to effect removal.

5.4 Since 2000 some asylum-seekers have been detained in IRCs on the "Detained Fast Track" while their asylum claims are determined, with a significantly abbreviated timescale for interview, decision, and appeal. The policies governing the Detained Fast Track are set out in

[5] For further information on the unique experiences of women in IRCs see 'Detained: Women Asylum Seekers Locked up in the UK' produced by Women for Refugee Women and available at http://refugeewomen.com/wp-content/uploads/2014/01/WRWDetained.pdf

[6] The Migration Observatory briefing dated 29 November 2013, http://migrationobservatory.ox.ac.uk/briefings/immigration-detention-uk

the Asylum Process Guidance *Detained Fast Track Processes*, which will not be reviewed in detail here.

5.5 Rule 3 of the Detention Centre Rules 2001 sets out the permitted purposes of detention centres:

> *"3 Purpose of detention centres*
> *(1) The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression.*
> *(2) Due recognition will be given at detention centres to the need for awareness of the particular anxieties to which detained persons may be subject and the sensitivity that this will require, especially when handling issues of cultural diversity.*
>
> *10. Female detained persons*
> *Female detained persons will be provided with sleeping accommodation separate from male detained persons, subject to rule 11.*
>
> *11. Families and minors*
> *(1) Detained family members shall be entitled to enjoy family life at the detention centre save to the extent necessary in the interests of security and safety.*
> *(2) Detained persons aged under 18 and families will be provided with accommodation suitable to their needs.*
> *(3) Everything reasonably necessary for detained persons' protection, safety and well-being and the maintenance and care of infants and children shall be provided."*

5.6 Some women are detained in prison prior to deportation and for these women the Prison Service Order number 4800 - Ministry of Justice statutory guidance on the particular needs of women in prison - would apply. Arguably this guidance sets down minimum standards or commitments to women in detention more generally and so women detained in immigration detention centres may have a legitimate expectation that they would not be treated worse than women in prison. Many of the critical findings made about women in prison by the Corston Report, also apply equally to women in immigration detention.[7]

5.7 Constraints on the power to detain have been laid down by the Home Office's published policies. The policy of the Home Office, as set out in Chapter 55.10 of the Enforcement Instructions and Guidance (EIG), is that particular groups of vulnerable migrants should be detained "only in very exceptional circumstances". These groups are:

[7] http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf and a more recent update: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/92/92.pdf

- *"Unaccompanied children and young persons under the age of 18.*
- *The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention.*
- *Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 for the detention of women in the early stages of pregnancy at Yarl's Wood).*
- *Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.*
- *Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in criminal casework cases, [centre staff should] please contact the specialist mentally disordered offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act.*
- *Those where there is independent evidence that they have been tortured.*
- *People with serious disabilities which cannot be satisfactorily managed within detention.*
- *Persons identified by the competent authorities as victims of trafficking (as set out [for centre staff] in Chapter 9, which contains very specific criteria concerning detention of such persons)."*

5.8 Women in detention are covered by various international obligations to which the UK has signed up. For example, the protections provided by Articles 3 (prohibition on torture and inhuman and degrading treatment or punishment), 5 (right to liberty and security), 8 (right to respect for private and family life) and 14 (non-discrimination) of the ECHR. The International Covenant on Civil and Political Rights prohibits torture and calls for detained persons to be treated with humanity and respect for human dignity (Art.10). Furthermore, the International Covenant on Economic, Social and Cultural Rights enshrines the right to adequate standard of living at Article 11 and the right to the highest attainable standard of physical and mental health at Article 12.

5.9 The CEDAW Optional Protocol Communication concerning *Inga Abramova v Belarus* 23/2009[8], in which the UN CEDAW Committee refer to the UN Standard Minimum Rules for the Treatment of Prisoners[9] and the UN Bangkok Rules for the Treatment of Women Prisoners[10], concludes that Belarus had discriminated against a woman in prison by failing to meet her gender-specific needs. This case is relevant to women detained in Yarl's Wood, because it raised similar concerns about male staff accessing female detainees and about inadequate woman-focused medical care.

[8] http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-49-D-23-2009_en.pdf

[9] http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

[10] http://www.penalreform.org/wp-content/uploads/2013/06/United_Nations_Rules_for_the_Treatment_of_Women_Prisoners_and_Non-custodial_Measures_for_Women_Offenders_the_Bangkok_Rules.pdf

5.10 Rule 1 of the Bangkok Rules states: "*In order for the principle of non-discrimination embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory*". In *Inga Abramova* the CEDAW Committee goes further and states that the failure to meet these gender-specific needs can itself amount to discrimination under CEDAW (for example at paragraph 7.5).

Age disputed women

5.11 Paragraph 55.9.3.1 of the EIG sets out the Home Office's procedure where a person in immigration detention claims that they are under 18 years old. The Refugee Council's 2012 report *Not a Minor Offence* highlights the traumatic experiences faced by children wrongly detained as adults.[11] In 2013 the Refugee Council secured the release of 36 young people wrongly detained as adults and six other children were released to local authority care; 12 of these young people were under the age of 16.[12] For more legal background on this problematic field see Coram Children's Legal Centre's 2013 report *Happy Birthday*.[13]

5.12 The UN Convention on the Rights of the Child can be brought in to challenge the continuing detention of children (in the same manner as it was used in the *HC* case above). In addition CEDAW Articles 1 (non-discrimination), 2 (implementation), 3 (fundamental rights), 9 (nationality) and 12 (health and maternity care) may be particularly relevant where the young person detained is a girl, especially in cases where she has gender-specific health needs or requires support after experiencing gender based violence. Age assessment case law has in the past focused on giving 'the benefit of the doubt' to age-disputed young people (for example *R (Durani) v SSHD and Nottingham CC* [2013] EWHC 284 (Admin)). However, this has been found to be too subjective in practice and too weak to prevent immigration officials disputing the self-reported ages of young people as a matter of course. The trajectory at present is to move towards a rebuttable presumption in favour of the young person's claimed age and CEDAW could be a useful tool for demonstrating for vulnerable girls why this is the only proportionate approach.

5.13 In any event the courts have found that there is no 'temporal bright line' after which the needs of the child suddenly disappear.[14] Young women in detention have their own specific needs and the Home Office can be put to proof as to how these are met, as free-standing needs

[11] http://www.refugeecouncil.org.uk/assets/0002/5945/Not_a_minor_offence_2012.pdf
[12] http://www.refugeecouncil.org.uk/latest/news/3905_unlawful_child_detention_must_end
[13] http://www.childrenslegalcentre.com/userfiles/file/HappyBirthday_Final(1).pdf
[14] Paragraph 7, *KA (Afghanistan) v SSHD* (2012) EWCA Civ 1014; available online at: http://www.bailii.org/ew/cases/EWCA/Civ/2012/1014.html

(for example in relation to Rule 10 of the Bangkok Rules) and/or in comparison to the treatment of young men.[15]

Elderly detainees

5.14 In 2013 84 year old dementia sufferer Alois Dvorzac died in handcuffs, despite being ruled unfit for detention. The Chief Inspector of Prisons criticised the over-use of physical restraints and detention of those too unwell to be detained.[16] Article 12 of CEDAW and Rules 6 and 10 of the Bangkok Rules require access to gender-sensitive medical treatment, which includes the specific needs of older women. Older women in immigration detention may also suffer additional disadvantages due to language or cultural barriers and these should be addressed by the Home Office (for example in relation to paragraph 18 CEDAW General Recommendation 27[17] and Rule 54 of the Bangkok Rules).

Pregnant women

5.15 Paragraph 55.9.1 of the EIG provides that:

> *"Pregnant women should not normally be detained. The exceptions to this general rule are where removal is imminent and medical advice does not suggest confinement before the due removal date, or, for pregnant women of less than 24 weeks gestation, at Yarl"s Wood as part of a fast-track asylum process."*

5.16 Thus pregnant women can, under present policy, be detained in limited circumstances pending removal. The detention of pregnant women, and its severe adverse consequences on their health and wellbeing, was investigated by Medical Justice in the report *Expecting Change: the case for ending the immigration detention of pregnant women* published on 26 July 2013[18]. According to the report, in 2011 93 pregnant women were detained at Yarl's Wood. The report's authors interviewed 20 women who were pregnant at some time during their detention. In 2013 the Chief Inspector of Prisons conducted an unannounced investigation of Yarl's Wood and found that: "*Pregnant women had been detained without evidence of the exceptional circumstances required to justify this. One of these women had been hospitalised twice because of pregnancy related complications*."[19]

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[15] para 20 Women offenders: after the Corston report; http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/92/92.pdf

[16] 1.3 http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf

[17] Available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/53/PDF/G1047253.pdf?OpenElement

[18] http://www.medicaljustice.org.uk/about/mj-reports/2186-expecting-change-the-case-for-ending-the-immigration-detention-of-pregnant-women-11-06-13.html

[19] p.5; available online at: http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/yarls-wood/Yarls-Wood-2013.pdf

5.17 There has been limited judicial consideration of the implications of immigration enforcement against pregnant women. In *R (Chen) v Secretary of State for the Home Department* [2013] EWHC 2635 (Admin) the High Court considered the issue of the use of force against pregnant women and children during enforced removal. The proceedings arose out of the fact that the Home Office's policy relating to force to be used against pregnant women and children had been revoked in March 2012 and not replaced. In a late development during the course of the litigation, the Home Office reintroduced the old policy, and so interim relief was refused by Turner J.

5.18 Challenges to the immigration detention of pregnant women are an area in which the UK's obligations under CEDAW are relevant, in particular Article 3 on fundamental rights and 12 on the right to health and maternity care, read alongside Rules 6, 10, 11, 48 and 64 of the UN Bangkok Rules and the UN CRC. Rule 64 requires, for example, that: "*Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.*" It may be argued therefore that both pregnant women and those with dependent children should only be detained where the Home Office can demonstrate the most exceptional of circumstances.[20]

Sufferers of mental illness

5.19 The expression "mental illness" in the policy is not limited to illnesses which require hospitalisation or sectioning under the Mental Health Act: *Pratima Das v SSHD* [2014] EWCA Civ 45. The policy is in principle capable of applying to anyone with a "mental disorder" within the definition in the Mental Health Act 1983 as amended by the Mental Health Act 2007, but the mere fact that they are suffering from such an illness does not suffice. The effects of the illness on the particular individual, the effect of detention on him or her, and on the way that person's illness would be managed if detained must also be considered.

5.20 The 2013 Chief Inspector's report on Yarl's Wood noted at page 5: "*We were particularly concerned about how the cases of some very vulnerable women were handled. We identified a number of women who had been detained for very long periods – one for almost four years. Several obviously mentally ill women had been detained before being sectioned and released to a more appropriate medical facility; it was difficult to understand why they had been detained in the first place.*" In this context CEDAW Article 12 (healthcare) can be read alongside Rules 6, 10, 12, 13 and 16 of the UN Bangkok Rules and CEDAW General Recommendation 24, which states: "*While biological differences between women and men may lead to differences in health status, there are societal factors which are determinative of the health status of women and men*

[20] p.17 of the *Corston Report* and the work of Bail for Immigration Detainees on the impact of separation because of immigration detention on families: http://www.biduk.org/493/bids-work-on-children-and-detention-/separation-of-families.html and http://www.biduk.org/849/bid-research-reports/fractured-childhoods-the-separation-of-families-by-immigration-detention-full-report.html

and which can vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women".

5.21 There is currently an apparent conflict of authority as to the standard of review a court should apply when, in a claim for judicial review, the court is deciding whether a person is "mentally ill" within the meaning of the policy. The dicta of Black LJ in *Anam v SSHD* [2010] EWCA Civ 1140, relying upon *A (Somalia) v SSHD* [2007] EWCA Civ 804, suggest that the court should act as primary decision-maker in considering whether the exercise of the power to detain was lawful. So does the decision in *AM (Angola) v SSHD* [2012] EWCA Civ 521 (in relation to the analogous policy in respect of torture survivors). But in *LE (Jamaica) v SSHD* [2012] EWCA Civ 597 a differently constituted Court of Appeal, which was aware of the earlier authorities, reached the view that the court's role was to review the Secretary of State's decision on traditional public law lines including the *Wednesbury* unreasonableness test. In the way that the UN CRC is used alongside Article 8 ECHR in *ZH (Tanzania)* above, CEDAW may be useful alongside Articles 5 (liberty and security), 8 (private and family life) and 14 (non-discrimination) of the ECHR to suggest that a standard of proportionality should also be applied to cases where a woman with mental illness is detained in immigration detention.

Torture

5.22 If there is independent evidence that an individual has suffered torture, they can only be detained in exceptional circumstances. Rule 35(3) of the Detention Centre Rules provides that "*The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture*." Such a report is known as a "Rule 35 report". Per paragraph 55.8A of the Enforcement Instructions and Guidance, the information contained in the report needs to be considered in reviewing whether continued detention is appropriate. The 2013 Chief Inspector's report on Yarl's Wood noted at page 6: "*Rule 35 reports, which notified the Home Office if a detainee's health might be adversely affected by detention, in particular because the detainee alleged they had been tortured, were poorly completed and did not provide any diagnostic judgements concerning the claim*."

5.23 The definition of "torture" for these purposes was considered in *R (EO and others) v Secretary of State for the Home Department* [2013] EWHC 1236 by Burnett J, who held at [82] that "torture" in the context of the policy means:

> *"…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind."*

5.24 Unlike the narrower definition of torture in the UN Convention Against Torture, this definition is not limited to acts perpetrated by public officials or persons acting in an official

capacity. The definition in *EO* is now adopted in the Secretary of State's Asylum Process Guidance on Rule 35 reports.

5.25 Women for Refugee Women's 2014 report *Detained* found that over 80% of the women in detention they spoke to had either been raped or tortured.[21] Medical Justice have also released research about the process of re-traumatisation that victims of trafficking experience in immigration detention.[22] The Home Office policy does not explicitly address whether rape, sexual assault and domestic violence are considered to amount to torture within the meaning of the policy.[23] In many cases where violent acts have been intentionally inflicted on a woman in the context of gender based violence it is arguable that these have been done as a form of intimidation or coercion aimed at the woman, her family and/or community. This is a potential area in which the UK's obligations under CEDAW could be relevant as an interpretative aid, taking General Recommendations 12 and 19 on violence against women alongside ECHR case law like *Opuz v Turkey*.

Victims of trafficking

5.26 The recent Chief Inspector's investigation into Yarl's Wood found at page 6 that: "*Detainees who had clear trafficking indicators – such as one woman who had been picked up in a brothel – had not been referred to the national trafficking referral mechanism as required*." Women for Refugee Women's 2014 report similarly raised serious concerns about the detention of victims of trafficking.[24] Where women who have been trafficked are detained inappropriately, including on the Detained Fast Track, this may breach the UK's obligations under Article 6 of CEDAW, which requires states to take all appropriate measures to "*to suppress all forms of traffic in women and exploitation of prostitution of women*". Article 6 could be brought into UK law through Articles 4 (prohibition on slavery and forced labour[25]) and 14 (non-discrimination) ECHR, the EU Trafficking Directive and the EU Charter of Fundamental Rights.

5.27 CEDAW General Recommendation 26 provides additional protection for migrant domestic workers, which could be linked into a challenge to the way that Overseas Domestic Worker visas in the UK are currently tied to a particular employer, which traps women in domestic servitude.[26] In its 2013 Concluding Observations regarding the UK, the CEDAW Committee criticised the UK's protection of trafficking victims and recommended:

> *"39.* ***The Committee urges the State party:***

[21] Available online at: http://refugeewomen.com/wp-content/uploads/2014/01/WRWDetained.pdf
[22] http://www.medicaljustice.org.uk/reports-a-intelligence/mj/reports/2058-the-second-torture-the-immigration-detention-of-torture-survivors-22052012155.html
[23] There is some evidence to suggest that in international human rights law, such sexual abuse could amount to torture. See Geeta Ramaseshan, *IWRAW Asia Pacific Occasional Papers Series. No. 10 Addressing Rape as a Human Rights Violation: The role of international human rights norms and instruments*, 2007 at p14
[24] p.18 http://refugeewomen.com/wp-content/uploads/2014/01/WRWDetained.pdf
[25] Which covers a prohibition on trafficking, e.g. in *Rantsev v Cyprus and Russia* (2010) 51 E.H,R.R. 1
[26] For more information visit Kalayaan's website: http://www.kalayaan.org.uk/

(a) ***To adopt a comprehensive national framework to combat trafficking in women and girls;***
(b) ***To identify any weaknesses in the National Referral Mechanism and ensure that victims of trafficking are properly identified and adequately supported and protected****".*

Sexual assault of women in detention/access to women by male staff

5.28 The 2013 Chief Inspector of Prisons' report on Yarl's Wood asserted that in his view sexual abuse of female detainees was not pervasive, but "*There were insufficient female staff for a predominantly women's establishment, and women detainees complained that male staff entered their rooms without waiting for a reply after knocking. They were also embarrassed by male officers carrying out searches of their rooms and personal property. Given the women's previous experiences and vulnerabilities, any insensitivity or impropriety amongst staff was likely to amplify their feelings of insecurity*." The CEDAW Committee made similar findings in the case of *Inga Abramova* and found that unrestricted access to female detainees by male staff breaches the provisions under CEDAW. This may be useful in UK law for demonstrating that the staffing ratios at Yarl's Wood create an unacceptable risk of a breach of Article 3 of the ECHR and inhuman and degrading treatment.

6. Conclusion and next steps

6.1 The practical examples above are only the start of the legal analysis this legal project would like to apply to CEDAW and domestic law in the UK. The discourse of international women's rights can seem distant from real women's lives. In the UK international women's rights are often portrayed as something that only has value to 'other' women, overseas. This booklet has set out to demonstrate how CEDAW can provide specific and broad value to women's cases in the UK. It is time we brought CEDAW home.

6.2 Going forward the 'Bringing Women's Rights Home' project aims to provide ongoing support and information to bring international women's rights discourse and CEDAW into domestic jurisprudence. For more information, and to get involved, visit http://usingcedaw.wordpress.com/ or email usingcedaw@gmail.com.