Upper Tribunal for Scotland

2026UT34
Ref: UTS/AP/26/0014

DECISION OF

Lady Poole

ON AN APPEAL
IN THE CASE OF

City of Edinburgh Council

Appellant

- and -

SP

Respondent

FTS Case Reference: FTS/HEC/AR/25/0204

Representation
Appellant: Blair, advocate; Clarke, solicitor, City of Edinburgh Council
Respondent: Nisbet, solicitor

6 March 2026

DECISION

The appeal is allowed. The decision of the First-tier tribunal dated 23 December 2025 is quashed. The decision of the First-tier tribunal is re-made as follows:

"The reference to the First-tier Tribunal of Scotland of a claim (FTS/HEC/AR/25/0204) that Edinburgh City Council had acted in a way made unlawful by section 6 of the United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Act 2024, relying on section 7(1)(a) of that Act, is dismissed. The tribunal does not have jurisdiction to determine such a claim".

REASONS FOR DECISION

Introduction and summary

1. The United Nations Convention on the Rights of the Child ("**UNCRC**") was incorporated into Scots law by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the "**2024 Act**"). The respondent is a school pupil ("**SP**"). SP brought a claim in the Additional Support Needs Tribunal (the "**tribunal**") under the 2024 Act, arguing that the appellant (the "**Council**") had acted incompatibly with her rights under the UNCRC. On 23 December 2025 the tribunal upheld the claim.

2. This decision finds that the tribunal did not have jurisdiction to entertain the claim made to it under sections 6 and 7 of the 2024 Act. The tribunal also erred in law in its approach to articles 16 and 28 UNCRC, and the remedies it granted. The tribunal's decision dated 23 December 2025 falls to be quashed.

Background

3. SP is currently in S6. She has two diagnosed medical conditions, one of which may cause involuntary movements like throwing and kicking. There is a history of behaviour in school including kicking members of staff, and throwing objects such as a water bottle, ipad, computer mouse, soft toys and a poly pocket or folder. There is also a history of seizures. Stress may increase the likelihood of these types of incidents happening. This appeal proceeds on the basis that these types of behaviour of SP are involuntary, and result from SP's medical conditions.

4. SP's schooling was disrupted after some of these incidents. The Council then made arrangements for SP to attend school with a pupil support officer with her at all times, who knew of her diagnoses. SP found it annoying and stressful being accompanied by the pupil

support officer. After some months, SP requested that the pupil support officer arrangement cease. Although the Council initially agreed, there was then an incident surrounding SP's use of a mobile phone in school. SP threw an object at a teacher, behaviour which the FTS found to have been involuntary. When SP attended school the following day, she was excluded because of this incident and her refusal to share medical information about her conditions with staff.

5. The Council is content that SP return to school, but is concerned about risks to staff and other pupils as well as SP. Joint medical advice about how to manage SP's conditions was provided by four medical practitioners involved in SP's care in a report dated 31 December 2024. It contained recommendations, which included that it was "important everyone involved in [SP's] care is aware of her dual diagnosis…". The Council prepared a document entitled "Elaborated Pupil Risk Assessment and Management Plan" dated 20 March 2025 (the "**Plan**"). The Plan does not contain any of SP's medical records, but it names two medical conditions with which SP has been diagnosed. It describes resulting behaviour which may present risk or cause actual harm. It also has sections for known triggers, patterns, risks to SP, staff, peers or others, high risk behaviour, supports, control measures to reduce likelihood of behaviours, and actions to de-escalate. The Plan contains, under a step about control measures required to reduce anxiety and therefore likelihood of behaviours, a sub heading of medical supports. Those supports are the sharing of relevant details about the conditions, to include potential symptoms and support, with relevant staff, and to share the medical response plan with them "to support safe inclusion in learning, unsupported within a mainstream setting". The Council will only allow SP to return to in person learning in school with the Plan in place.

6. SP does not want her attendance at school to be subject to information about her conditions being disclosed to staff members. As a result, she has not returned to school. There was a considerable period when she was not receiving education, but currently she is receiving online learning.

7. SP brought a claim in the tribunal under section 7 of the 2024 Act. She claims that the appellant has acted unlawfully under section 6 of the 2024 Act, because it is a public authority which has acted in a way which is incompatible with requirements of the UNCRC, in particular the respondent's rights to privacy under article 16 and her right to education under article 28.

8. The Council appeals the decision of the FTS to uphold SP's claim on three separate grounds. This appeal was intimated, as parties agreed was required under the 2024 Act, to the Scottish Commission on Human Rights, the Children's Commissioner, and the Lord Advocate, all of whom confirmed they did not intend to intervene at this stage. Parties provided helpful written arguments as well as a joint bundle of authorities, all of which were taken into account and assisted in determining this appeal.

The jurisdiction of the tribunal

9. The first question for determination is whether the tribunal had jurisdiction to determine the claim brought before it. SP's claim before the tribunal is not based on existing jurisdictions of the tribunal under the Education (Additional Support for Learning) (Scotland) Act 2004 (the "**2004 Act**") or the Equality Act 2010 (the "**2010 Act**"). It is based solely on jurisdiction found by the tribunal to be derived from section 7(1)(a) of the 2024 Act (a "**freestanding UNCRC claim**"). The Council argues that the tribunal erred in finding it enjoyed jurisdiction to decide a freestanding UNCRC claim. SP on the other hand argues that the tribunal was correct to find it had jurisdiction.

Governing legal provisions

10. The Additional Support Needs Tribunals for Scotland were established by section 17 of the 2004 Act. In 2018, the Additional Support Needs Tribunals for Scotland were formally abolished, after their functions were transferred to the First-tier Tribunal for Scotland. In practice, the work of those tribunals continued as before, but now as part of the Health and Education Chamber within the structure established under the Tribunals (Scotland) Act 2014 (the "**2014 Act**"). The tribunal sits to determine cases such as the present one as a panel. There is one legally qualified member. There are also two ordinary members, who have knowledge and experience of children with additional support needs, including expertise in education, health, or social work. The tribunal seeks to make hearings accessible for the children they are about.

11. Parties agreed that, prior to the coming into force of the 2024 Act, the tribunal exercised two different jurisdictions which had been conferred on it. Initially, it exercised functions conferred under the 2004 Act. In 2010, section 17 of the 2004 Act was amended so that the tribunal's jurisdiction came to include functions conferred by the 2010 Act. The tribunal

continues to exercise its functions under the 2004 and 2010 Acts within the tribunal structure under the 2014 Act.

12. The jurisdiction under the 2004 Act is a specific and limited jurisdiction. Matters specified in section 18(3) of the 2004 Act may be referred to the tribunal. Broadly speaking, section 18 covers certain matters relating to co-ordinated support plans, and placing requests for schools relating to children with additional support needs. The tribunal's jurisdiction under the 2004 Act does not cover all children in education, but only those with additional support needs. Further, the tribunal's jurisdiction does not cover all duties imposed by the 2004 Act. For example, there is no power to make a reference to the tribunal to enforce the duty on education authorities to make adequate and efficient provision for additional support under section 4, or to take into account additional support needs under section 5.

13. The 2004 Act is also specific about the remedies which the tribunal may grant. Section 19(1) provides:

> "This section specifies the powers of a tribunal in relation to a reference made under section 18".

There is no general conferral of powers to grant remedies in this provision, but a conferral of powers to grant remedies in relation to references made under section 18. Section 19 goes on to specify tailored remedies that may be granted in particular types of reference made under section 18. So for example, in respect of certain decisions about co-ordinated support plans, section 18(2) provides:

> "(2) Where the reference relates to a decision referred to in subsection (3)(a), (b) or (d)(iv) of that section, the Tribunal may—
>
> (a) confirm the decision, or
>
> (b) overturn the decision and require the education authority to take such action as the Tribunal considers appropriate by such time as the Tribunal may require".

A further example, in respect of certain decisions about placing requests, is:

> "(4A) Where the reference relates to a decision referred to in subsection (3)(da) of that section the Tribunal may—

(a) confirm the decision if satisfied that—

(i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and

(ii) in all the circumstances it is appropriate to do so,

(b) overturn the decision and require the education authority to—

(i) place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and

(ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require".

In essence, remedies are declaratory (confirming or overturning) and orders *ad factum praestandum* (orders to do a specific thing).

14. The jurisdiction of the tribunal derived from the 2010 Act is also specific and limited. The relevant provisions are contained in schedule 17 of the 2010 Act. Paragraphs 8 and 9 provide:

"8 Jurisdiction

A claim that a responsible body has contravened Chapter 1 of Part 6 because of a person's disability may be made to the Tribunal by—

(a) the person's parent;

(b) where the person has capacity to make the claim, the person.

9 Powers

(1) This paragraph applies if the Tribunal finds the contravention has occurred.

(2) The Tribunal may make such order as it thinks fit.

(3) The power under sub-paragraph (2)—

(a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;

(b) does not include power to order the payment of compensation".

The powers of the tribunal to make orders are conferred only in cases where the tribunal "finds the contravention has occurred". By reference to paragraph 8 that means a contravention of chapter 1 of part 6 of the 2010 Act. Chapter 1 of part 6 contains six sections

which make provision in relation to certain discrimination and victimisation matters in schools. The tribunal is not given a general jurisdiction in relation to all forms of discrimination. Under section 84 of the 2010 Act, chapter 1 of part 6 does not apply to protected characteristics of age, marriage and civil partnership. There are also various exceptions in schedule 11 of the 2010 Act, but it is not in dispute that the tribunal has jurisdiction in relation to certain disability discrimination claims relating to schooling. Discrimination is defined earlier in the 2010 Act, in Chapter 2, and includes discrimination arising from disability (section 15), indirect discrimination (section 19), and a duty to make adjustments (section 20 to 22, and schedule 13 paragraph 2).

15. In this case the tribunal decided it also had jurisdiction to hear a case which was not brought under either of the jurisdictions in the 2004 and 2010 Acts. It relied on section 7(1)(a) of the 2024 Act, which provides as follows:

> "7 Proceedings for unlawful acts
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
> (a) bring proceedings against the authority under this Act in any civil court or tribunal which has jurisdiction to grant the remedy sought, or
> (b) rely on the UNCRC requirements concerned in any legal proceedings".

Section 6(1), referred to in section 7, provides:

> "(1) It is unlawful … for a public authority to act, or fail to act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements".

Public authority includes a court or tribunal, and any person certain of whose functions are functions of a public nature (section 6(5)). Relevant function is defined in section 6(2) in a way that aims to confine the effect of the incorporation of the UNCRC to areas within devolved powers. So, for example, if a public authority is exercising a function which arises under an Act of the Scottish Parliament such as the 2004 Act, section 6 may apply. However, if it is exercising a function arising under the 2010 Act, an Act of the Westminster Parliament, the 2024 Act will not affect the existing legal position.

Decision on jurisdiction

16. The tribunal found that the words in section 7(1)(a) of the 2024 Act are unambiguous, and their purpose is to confer jurisdiction on any civil court or tribunal which has jurisdiction to grant the remedy sought (para 57). The tribunal considered that the words used in section 7(1)(a) conferred jurisdiction on it. That decision was consistent with an earlier decision of the tribunal that section 7(1)(a) conferred jurisdiction in relation to freestanding UNCRC claims (FTS/HEC/AC/25/0132 paras 85-90). Underlying the tribunal's decisions in both cases is an assumption that because it is a tribunal, a type of adjudicative body mentioned in sections 7 and 8 of the 2024 Act, and has powers in some cases before it to grant remedies ordering a body to do something which are similar to those sought in this case, section 7(1)(a) confers jurisdiction on it in relation to a freestanding UNCRC claim.

17. The tribunal's decision does not directly address the source of its jurisdiction "to grant the remedy sought" within the meaning of section 7(1)(a). The tribunal erred in law because it failed properly to interpret and apply the words in section 7(1)(a) of the 2024 Act that it required to have "jurisdiction to grant the remedy sought".

18. To apply section 7(1)(a) properly, consideration requires to be given to the jurisdiction to grant remedies which the relevant court or tribunal enjoys. The tribunal is a creature of statute, and its powers are limited to those conferred on it by legislation. This particular tribunal has been entrusted with a specific and limited specialist jurisdiction. As set out above, its jurisdiction to grant remedies is limited by statutory wording to (i) references made under section 18 of the 2004 Act (section 19(1) of the 2004 Act) (ii) claims that a responsible body has contravened chapter 1 of part 6 of the 2010 Act (paragraphs 8 and 9 of schedule 17 to the 2010 Act).

19. The jurisdiction under section 7(1)(a) is predicated on there already being a jurisdiction to grant the remedy sought, but the tribunal has not been given a jurisdiction to grant remedies in anything other than section 18 references or specified 2010 Act claims. Freestanding UNCRC claims are not part of either sections 18 and 19 of the 2004 Act, or chapter 1 of part 6 of the 2010 Act. Accordingly, the tribunal has no jurisdiction to grant the remedies sought in this case, which are orders of specific performance in respect of a freestanding UNCRC claim.

20. To find otherwise leads to absurd or anomalous consequences.

20.1 It is difficult to see sensible limits on the jurisdiction in relation to the UNCRC which a tribunal could exercise, if the approach of this tribunal were to be correct. If it is enough that a tribunal has a power to grant a remedy of a similar type in respect of an alternative statutory jurisdiction for it to have jurisdiction over a freestanding UNCRC claim, then following the same logic, the present claim would be capable of being brought in many other tribunals, even if their specialism is completely different and unsuited to the claim. Further, the UNCRC rights incorporated under the UNCRC are numerous, with over 50 different articles being set out in the schedule to the 2024 Act, covering a wide range of subject matter. The tribunal's approach would give it jurisdiction over all UNCRC violations by public authorities, for example in relation to residence arrangements for looked after children relying on article 16, or disputes in relation to child social security payments under article 26. It cannot be the intention of section 7 of the 2024 Act to undermine the carefully worked out specialisms of tribunals, or long standing arrangements about the appropriate forum for determination of particular types of disputes. (On SP's behalf it was argued that an implied limitation in UNCRC claims is that remedies in the tribunal are only against education authorities or responsible bodies, by analogy with the restrictions in the 2004 Act and 2010 Act. But those are separate and different Acts to the 2024 Act. The relevant provisions of the 2004 and 2010 Act do not appear in the 2024 Act, so that argument is unpersuasive).

20.2 The tribunal's approach drives a coach and horses through the carefully worked out jurisdictions conferred on the tribunal by the 2004 Act. That approach would allow, for example, any claim about education rights under article 28 UNCRC to be brought before it. The tribunal's approach opens the door to claims being brought based on an education authority's provision for additional support needs as an aspect of education, despite Parliament having excluded that type of matter arising under section 4 and 5 of the 2004 Act from the ambit of references to the tribunal under section 18 of that Act. Similarly, on the tribunal's approach, any child could bring a claim based on placing in schools before the tribunal, although the 2004 Act currently restricts this right to pupils with additional support needs. It seems unlikely Parliament would have intended the restrictions on the existing jurisdictions of the tribunal to be sidelined in this way, without clear provision to that effect.

20.3 The tribunal also does not explain how the restriction of remedies under the tribunal's existing jurisdictions (those under the 2004 and 2010 Acts), so that neither involve compensation, sits with allowing freestanding UNCRC claims to proceed before the tribunal. The claim as brought sought monetary compensation, to include general

damages, reimbursement of costs incurred, loss of education and loss of earnings. The tribunal notes only that in her claim SP sought compensation, but elected not to advance this argument before the tribunal, reserving such rights should the case proceed onwards (paragraph 37). However, the exclusion of compensation claims from the tribunal's remit in the 2004 and 2010 Acts appears to have been a deliberate policy choice, to preserve the distinct ethos of this particular tribunal (FTS/HEC/AC/25/0132 paras 92-93). Section 8(2) of the 2024 Act might be argued to be capable of preserving that ethos, in that it restricts the remedy of damages to a tribunal "which has power to award damages in civil proceedings". On the other hand, if conferral of jurisdiction in relation to freestanding UNCRC claims on the tribunal was intended, express words restricting remedies to exclude compensation might have been expected, given that is what the Parliaments have done in relation to existing jurisdictions (paragraph 9 of schedule 17 to the 2010 Act and section 19 of the 2004 Act). As already explained, the wording of the remedies provisions in the 2004 and 2010 Acts confine powers to grant remedies only to the jurisdictions under those Acts, and say nothing about remedies for a violation of section 6 of the 2024 Act.

20.4 Further, the tribunal's approach runs the risk of cases before it becoming multiple party cases, also undermining the child-friendly ethos of the tribunal. In cases where it is claimed a public authority has acted incompatibly with UNCRC requirements, there are rights to intervene afforded to the Scottish Commission on Human Rights, the Children's Commissioner and the Lord Advocate (sections 11, 12, 31 and 34 of the 2024 Act). There are associated procedural rules setting out intimation requirements (First-tier Tribunal for Scotland (Procedure Rules) (Miscellaneous Amendment) Regulations 2026, due to come into force on 1 April 2026). Those are procedural rules and do not of themselves confer a jurisdiction to grant remedies in relation to freestanding claims of violations of section 6(1) of the 2024 Act. The potential for so many parties to be involved in a case, and the public funds involved in determination of the many freestanding UNCRC claims that could potentially be brought if the tribunal is correct, seems unlikely to have been intended in this particular jurisdiction.

20.5 Finally, it is unclear why, if the tribunal is correct, it would not also have jurisdiction over freestanding claims under the Human Rights Act 1998 (the "**1998 Act**"). The same wording as that relied on by the tribunal in relation to the 2024 Act (any tribunal which has jurisdiction to grant the remedy sought) appears in section 7(1)(a) of the 1998 Act read with rule 1(3) the Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000. The two jurisdictions are potentially very significant additions to the tribunal's existing

2004 and 2010 Act jurisdictions. An expansion of jurisdiction of this extensive nature might be expected to be the subject of clear and express provision.

21. It is notable that the Scottish Ministers have powers to make regulations conferring jurisdiction over freestanding UNCRC claims on the tribunal, if that were to have been the intention. Section 7(5) of the 2024 Act provides:

> "(5) The Scottish Ministers must, if they consider it necessary to ensure that a particular tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), bring forward regulations to add to—
>
> (a) the relief or remedies which the tribunal may grant,
>
> (b) the grounds on which it may grant any of them, or
>
> (c) the orders it may make".

Because of the limits on the tribunal's existing jurisdiction set out above, if the tribunal is to have powers to determine freestanding UNCRC claims, it would be necessary to make such regulations. Were regulations to be made adding freestanding UNCRC claims to grounds and remedies available under the tribunal's existing jurisdictions, the tribunal would have the "jurisdiction to grant the remedy sought" referred to in section 7(1)(a) of the 2024 Act. Using regulations in this way would allow legislators to define the limits of any new jurisdiction so that it fits with the tribunal's existing specialist role. Legislators might decide, for example, that criminal courts and children's hearings should deal with matters such as protection from sexual abuse under article 19, and social security tribunals address article 26 issues, while this tribunal might be suitable for certain education-related disputes under article 28. Those choices properly lie with legislators. It is true that sections 6 and 7 of the 2024 Act contain the word "tribunal" and envisage that certain tribunals might have jurisdiction in relation to freestanding UNCRC claims. But the absence of regulations conferring specific UNCRC jurisdiction on this tribunal does not justify an implication that all tribunals must have jurisdiction over freestanding UNCRC claims. If legislators wish the tribunal to have jurisdiction to determine freestanding claims about particular UNCRC rights, they can expressly confer that power.

22. This interpretation of section 7(1)(a) of the 2024 Act does not mean rights under the UNCRC are irrelevant in the tribunal. Section 7(1) has two limbs. Section 7(1)(b) allows people to rely on UNCRC requirements in legal proceedings before the tribunal. Section 7(1)(b) is not

qualified in the same way as 7(1)(a). Accordingly, in cases brought under jurisdictions conferred by the 2004 Act, words in that Act or subordinate legislation under that Act must be read and given effect compatibly with the UNCRC requirements (section 24 of the 2024 Act). Parts of the 2004 Act applied by the tribunal may also be affected by strike down or incompatibility declarators granted by courts (sections 25 and 26 of the 2024 Act). Cases brought under the jurisdiction conferred by the 2010 Act are in a different position because the interpretative obligation under the 2024 Act will not apply, nor strike down and incompatibility declarators under the 2024 Act. That is a consequence of the Scottish Parliament only having powers to legislate in respect of devolved matters, and the UK Parliament not having chosen to incorporate the UNCRC into domestic law. Nevertheless, in cases brought under the jurisdiction in the 2010 Act, there remains the general obligation for the tribunal to interpret and apply statutory provisions to comply with international obligations, which include the UNCRC (*R (Sturnham) v Parole Board* [2013] 2 AC 254 para 29).

23. The finding that the tribunal has no jurisdiction to determine freestanding UNCRC claims does not leave SP without a right of action. It is unclear why this case was not brought in the tribunal as a discrimination claim relying on the 2010 Act (section 85(2) in conjunction with section 15 or perhaps section 19). If that basis of claim was not available, then the supervisory jurisdiction of the Court of Session could in principle be invoked.

24. It is not necessary to address the Council's argument that this type of freestanding UNCRC claim must be brought under the supervisory jurisdiction (relying on *Ruddy v Chief Constable of Strathclyde Police* [2012] UKSC 57 and *Imtiaz, Safdar and Ali v Saddiq* [2025] SC FAL 25). The argument of absence of jurisdiction has already been upheld on the basis of a process of statutory interpretation.

The UNCRC claim

25. The second point for determination in this appeal is whether the tribunal erred in its approach to the substantive UNCRC claims before it. The Council argues that, even if the tribunal did have jurisdiction, it erred in law in concluding that the appellant had unlawfully interfered with the respondent's rights in terms of articles 16 and 28 UNCRC. A tribunal will err in law if the facts established do not satisfy the necessary legal standard for the conclusion reached by it (Forsyth and Ghosh, Wade and Forsyth's Administrative Law (12th ed 2023 p747-8). The Council argues that the established facts did not amount to an

unlawful interference with UNCRC requirements under articles 16 and 28. SP on the other hand submits that the tribunal applied the correct legal tests, did not misinterpret the law, and was entitled to reach the decision it did.

26. For reasons set out below, the tribunal erred in law in reaching the conclusion that the Council had acted incompatibly with rights under article 16 and 28 UNCRC. It erred in failing to appreciate the proper relationship between domestic law (considered apart from the 2024 Act) and UNCRC rights. It also erred in relation to the balance of rights required under the UNCRC, including the rights of other children under article 3 and the rights of school staff. It erred in relation to article 16 by failing to find sufficient facts, and to take into account all material considerations, so that it was unable properly to carry out the balancing exercise required of it. The facts it found did not satisfy the necessary legal standard for there to be an incompatibility with article 16. It erred in law in relation to article 28 by misinterpreting it, and failing properly to apply the terms of article 28 to the facts before it.

The general approach to rights under the UNCRC

27. The 1998 Act incorporates the European Convention on Human Rights ("**ECHR**") into domestic law. The 2024 Act broadly follows the scheme of the 1998 Act for incorporating an international rights convention into domestic law. Although the 2024 Act is not in identical terms to the 1998 Act, decided cases about the 1998 Act may provide some guidance as to how to approach other incorporated conventions, and in relation to particular incorporated rights.

28. After the 1998 Act came into force, many cases started to be brought as freestanding human rights claims, rather than on the basis of existing domestic law. The decision in *R (Osborn) v Parole Board* [2014] AC 1115 represented a turning point in human rights in litigation in the UK, a case in which Lord Reed explained why the approach then prevailing did not properly reflect the relationship between domestic law (considered apart from the 1998 Act) and Convention rights. Parts of his decision are also instructive in relation to the incorporation of the UNCRC into domestic law. The relevant parts are as follows:

> "55. The guarantees set out in the substantive articles of the Convention, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial

body of much more specific domestic law. That is true in the United Kingdom as in other contracting states. For example…the guarantee of a right to respect for private and family life, under article 8, is fulfilled primarily through rules and principles found in such areas of domestic law as the law of tort, family law and constitutional law. Many other examples could be given….As these examples indicate, the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system.

56. The values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law. The Convention taken by itself is too inspecific to provide the guidance which is necessary in a state governed by the rule of law. As the European court has said, "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct": *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271. The Convention cannot therefore be treated as if it were Moses and the prophets. On the contrary, the European court has often referred to "the fundamentally subsidiary role of the Convention": see eg *Hatton v United Kingdom* (2003) 37 EHRR 611, para 97.

57. Domestic law may however fail to reflect fully the requirements of the Convention. In that situation, it has always been open to Parliament to legislate in order to fulfil the United Kingdom's international obligations; as it has done, for example, in response to judgments of the European court concerning the application of article 5.4. The courts have also been able to take account of those obligations in the development of the common law and in the interpretation of legislation. The Human Rights Act 1998 has however given domestic effect, for the purposes of the Act, to the guarantees described as Convention rights. It requires public authorities generally to act compatibly with those guarantees, and provides remedies to persons affected by their failure to do so. The Act also provides a number of additional tools enabling the courts and government to develop the law when necessary to fulfil those guarantees, and requires the courts to take account of the judgments of the European court. The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European court. Human rights continue to be protected by our

> domestic law, interpreted and developed in accordance with the Act when appropriate….
>
> 63. ….the error in the approach adopted on behalf of the appellants in the present case is to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law. Properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the European court. As the Lord Justice-General (Rodger) once observed,
> "it would be wrong … to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply": *HM Advocate v Montgomery* 2000 JC 111, 117".

29. The rights relied on in this case, Articles 16 and 28 of the UNCRC, are rights expressed at a very high level of generality, to be filled in at a national level through a substantial body of much more specific domestic law. Article 16 UNCRC, for example, is even sparser than Article 8 ECHR, its rough counterpart in the ECHR. The incorporation of the UNCRC is not intended to result in the abandonment of other domestic law protecting rights under the UNCRC. Rather, the UNCRC supplements domestic law where its contents fail to protect guarantees. Put another way, the UNCRC is not the first port of call when bringing a case; existing and more detailed domestic law is. It is only where that existing domestic law fails to protect rights guaranteed under the UNCRC that there is a need for recourse to the UNCRC itself, for example to develop the common law and interpret legislation, or ensure public authorities are acting compatibly with UNCRC requirements.

30. The approach taken to the claim before the tribunal did not follow the *Osborn* analysis of the role of an international Convention. That is understandable because *Osborn* was not cited to the tribunal. The principles in *Osborn* are nevertheless part of the law. As already observed, it is unclear why this case was not brought in the tribunal as a discrimination claim under the 2010 Act, relying on section 85(2) in conjunction with section 15 or perhaps 19. The tribunal accepted that SP threw objects and kicked, as well as having some seizures herself, and that heightened stress might increase the likelihood of these types of incident. The fact that those behaviours were involuntary and attributed to a medical condition did not mean they were without risk. It was the Council's concerns about potential risks to other pupils and staff from those behaviours which led to the decision to exclude SP.

Examples given in The Technical Guidance for Schools in Scotland of the Equality and Human Rights Commission suggest this type of situation may well fall within the 2010 Act, an Act in which obligations have been set out in considerable detail. The tribunal's approach failed properly to take into account the proper relationship between domestic law and rights under the UNCRC.

31. A further underlying flaw in the tribunal's approach is a failure properly to apply the balance of rights inherent in an international convention such as the UNCRC. Under article 3 UNCRC, not mentioned by the tribunal, the best interests of the child shall be a primary consideration. That article does not extend only to a child claimant; it also extends to rights of other school pupils who may be affected by what another child does; for example if they throw objects and their behaviour is disruptive, even if involuntary. Similarly, the balance of rights inherent in the UNCRC is reflected by many articles being subject to limitations, for example to protect public safety, health, and rights and freedoms of others (eg article 14 and 15). The Council has duties of care towards those working in its schools, and pupils attending them. It is important that a tribunal makes sufficient findings in fact about all relevant interests, and when balancing them (as the UNCRC requires), takes into account all material considerations. If it does not do so, its conclusions will be based on errors in law.

Article 16 UNCRC

32. Article 16 of the UNCRC provides:

> "1 No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
> 2 The child has the right to the protection of the law against such interference or attacks".

33. The tribunal's findings in relation to article 16, in summary, were that the right to privacy guaranteed by that article includes privacy of medical information. The tribunal found that the sharing of medical information without the consent of SP was an interference with her right to privacy. The tribunal accepted that the safety of SP and others was a legitimate aim, but found that the Council's approach was disproportionate, and so it had behaved incompatibly with article 16.

34. It is not in dispute between the parties that disclosure of medical information may amount to an interference with a right to privacy. Although article 16 contains no express parallel provision to article 8(2) ECHR, interferences may be justified in a similar way to the justification process under article 8(2) (see *T v Finland* 18 EHRR CD 179, *Z v Finland* 25 EHRR 371). If an interference is justified, there is no incompatibility with UNCRC rights. As put by the UN Committee on the Convention on the Rights of the Child, "Interference with a child's privacy is only permissible if it is neither arbitrary nor unlawful. Any such interference should therefore be provided for by law, intended to serve a legitimate purpose, uphold the principle of data minimisation, be proportionate and designed to observe the best interests of the child and must not conflict with the provisions, aims or objectives of the Convention" (UN Committee on the Rights of the Child, General Comment No 25 (2021) on children's rights in relation to the digital environment at para 69, read with section 4(2)(c of the 2024 Act; *Toonen v Australia* Comm No 488/1992 (4 April 1994)).

35. Parties were in agreement that the four stage proportionality test applicable in relation to article 8 ECHR also applies in the proportionality assessment under article 16 UNCRC:

> "(i) whether the objective is sufficiently important to justify the limitation of a protected right
> (ii) whether the measure is rationally connected to the objective
> (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective
> (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent the former will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure)" (*Christian Institute v Lord Advocate* [2016] UKSC 51 para [90]).

36. The tribunal erred in its approach to article 16. The first problem is the absence of sufficient findings about the interference. That is relevant to justification, because in general terms, the less serious the interference, the less required to justify it, and vice versa. Accordingly, it would be expected that there would be findings about exactly what medical information was to be disclosed, and to whom, so that the magnitude of the interference could be assessed. The tribunal found that disclosure would include some information about

medical conditions to about 20 and 30 members of staff with whom SP would come into contact. The disclosure was not to all staff in the school, or to any children in school, so was subject to limitations. However, the tribunal made no clear finding about what was to be shared with staff who would come into contact with SP. Indeed, the tribunal found that "that the school had not specified what medical information they would share" (finding in fact 17). The tribunal has a fact finding jurisdiction, and a witness from the school in question was available to it. It is difficult to see how the tribunal could properly carry out a balancing exercise resulting in a finding of a violation, without knowing what information was to be shared and putting itself in a position to assess the magnitude of the interference.

37. When the Council was asked at the appeal hearing, the information to be shared with relevant staff is the Plan. This is not SP's medical records, nor is it a letter from treating medical professionals. It is a structured risk assessment, which aims to secure SP's safety in the light of her medical conditions, as well as the safety of others, so that the Council complies with duties to take reasonable care for staff and pupils when SP is at school. The first paragraph of the Plan mentions the two medical conditions with which SP has been diagnosed in the context of identifying behaviour that may cause risk. The medical information given is minimal, and the focus of the document is risk management. There is no suggestion the Plan will be disseminated to other children or all staff. It will only be disseminated to staff SP is likely to come into contact with, so they will know what to do to secure the safety of SP and others. It is not unusual to share some medical information, particularly if a person seeks to benefit from some sort of service. Examples might be if they wish to return to a workplace after a period of absence, claim a social security benefit, participate in certain activities, or receive sick pay. It is difficult to see why receiving education at school should be in any different position. Had the tribunal made sufficient findings, the interference is unlikely to have been found to be something that required high levels of justification.

38. The next problem relates to the tribunal's approach to the risks being guarded against by the interference with SP's privacy. In the third and fourth limbs of the proportionality analysis set out in *Christian Institute*, it must be assessed whether a less intrusive measure could be used without unacceptably compromising the aim of the objective, the safety of staff, other pupils, and SP; and that there is a fair balance. Without making proper findings about risks to safety of others the tribunal did not put itself in a position where it could take all material considerations into account in applying these parts of the proportionality analysis.

39. The tribunal made some findings in fact which were relevant. It found that SP can fall, have functional seizures, and throw and kick. There is a finding about an involuntary throwing of a poly pocket or folder on one occasion. But there is a complete absence of findings about incidents spoken to in the evidence before the tribunal, which have led to the Council's concerns. In the bundle before the tribunal, there was evidence from the deputy head teacher of multiple incidents since 2024. SP threw various objects including a water bottle and a soft toy at members of staff and pupils. She kicked a member of staff three times. On a different day, she threw an ipad, a computer mouse and a soft toy at staff. On a different day she threw the folder/poly pocket (the incident referred to by the tribunal) and it struck a teacher. Throwing objects at people creates an obvious risk of injury, as does kicking people. There were also seizures on multiple occasions, which caused risks at the very least to SP.

40. The fact that incidents may be involuntary does not mean they do not give rise to risks to staff and pupils which are relevant in the proportionality analysis. That is particularly so in a context in which stress exacerbates SP's symptoms. Acceptance of evidence "regarding the most up to date position" (at paragraph 101), when SP had been at home and out of the school environment which she found stressful for a considerable time, did not mean the tribunal could overlook unchallenged evidence before it of multiple incidents which happened when SP was actually at school. It is not enough for the tribunal to find that "teachers, staff and pupils will be exposed to behavioural risks daily" but the school should have "knowledge and experience to respond to this" (para 98). The tribunal does not address how they will have such knowledge without access to the information in the Plan about SP's conditions, particularly when four treating professionals had recommended that "it is important that everyone involved in SP's care is aware of" her diagnoses and how they should be treated. The Council had tried an alternative way under which the dissemination of SP's medical information could be restricted, by providing a pupil support officer with SP at all times. That involved fewer people having medical information disclosed to them, but it had not worked because SP would not tolerate it. The failure of that alternative measure was clearly relevant to whether disclosure of the Plan was the least restrictive measure available to meet the legitimate aim, and represented a fair balance of interests. Yet that is not mentioned by the tribunal in the relevant part of its decision. The inference drawn from these various failures is that the tribunal did not properly take into account all material considerations. That made it unable properly to apply the third and fourth limbs of the proportionality analysis.

41. The tribunal therefore erred in law in its conclusion that the Council had acted incompatibly with article 16. The facts it found were not sufficient to support the conclusion reached, because they did not put the tribunal in a position where it could properly carry out the balancing exercise required of it under article 16. There was an error in law in that the facts established did not satisfy the legal standard for there to be a violation of article 16.

Article 28 UNCRC

42. Article 28 of the UNCRC provides, insofar as relevant:

> "1 States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>
> …
>
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
>
> ….
>
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
>
> 2 States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention".

43. The tribunal found that SP had a right to education under article 28, and the Council had acted incompatibly with that right. The tribunal made that finding on the basis that it did not consider that the right to education could be made conditional on the disclosure of confidential medical information. Exclusion was a disproportionate response to the particular event on 17 March 2025 which it resulted from. There had been an absence of education during the period of absence.

44. When applying article 28, it is important to have regard to its actual terms. Article 28 contains various different strands, and the tribunal did not specify which particular part of article 28 it considered had been violated. Potentially relevant parts of article 28 are set out above. The ECHR also contains a right about education in article 2 of protocol 1. It is not in identical terms to article 28 UNCRC, but caselaw about it provides helpful guidance about what is intended to be covered by article 28. Article 28 does not say "a child has a right to education". Instead, it records that "state parties recognise the right of the child to education", then goes on to specify particular things they should do in furtherance of that recognition. By analogy with the analysis in *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, article 28(1) is aimed at state parties recognising education. Article 28 seeks to ensure that the state has an established system of state education. Article 28(1)(b) quoted above, which relates to secondary education, the stage SP is at, requires states to "encourage the development of different forms of secondary education". What has to be available and accessible to every child is different forms of education, not any particular school or particular way of delivering education, such as unconditional in-person learning. Measures have to be taken to encourage attendance, but there is no obligation to provide schooling on an unconditional basis. Article 28(1)(b) does not prevent schools from having rules or conditions on attendance, such as rules about wearing school uniform or standards of behaviour. Indeed, article 28(2) is predicated on the basis there can be rules about school discipline compatibly with the UNCRC. Expulsion from a school is not contrary to the UNCRC education right under section 28(1)(b), unless no alternative source of state education is available. If a child can return to a school subject to a reasonable risk assessment, enrol in another school, or there is online learning made available by the state, education is accessible to the child.

45. By the time of the appeal hearing, SP was receiving some online learning, there having previously been an impasse between the Council and SP, so online learning appears in practice to be an available form of secondary education. The tribunal makes no findings of fact that no alternative schools are available, nor does it make any findings in fact about the availability on on-line learning. Article 28 does not guarantee unconditional access to in-person learning at a particular school. The tribunal erred in law by not applying the wording of article 28 to the facts before it, and its finding of a violation of that article cannot stand.

Remedies

46. The Council's third and final ground of appeal concerns the remedies granted by the tribunal. The remedies were that the Council:

> "shall:
>
> a) prepare a full and detailed apology (complying with SPSO guidance on apology) to [SP], within 3 weeks of this decision.
>
> b) provide an unconditional return to school after the Christmas break, with appropriate assurances and safeguards against disclosure of her medical information.
>
> c) provide effective and appropriate academic support to enable [SP] to catch up with schoolwork.
>
> d) permit [SP] to remain at school for an additional academic year, if she chooses (the remainder of the academic year 2025/26, followed by the academic year 2026/27)".

All are orders *ad factum praestandum*, orders requiring the Council to do the things specified in them.

47. The Council argues that the remedies in paragraphs (a), (b) and (c) were granted in error of law. An apology is not an appropriate remedy, applying the analysis in *East Lothian Council v SH* [2026] UTS 14 (paras 36 to 55). The orders in paragraphs (b) and (c) are sufficiently ambiguous in their terms as to be incompetent.

48. Given that the first and second grounds of appeal have been upheld, it follows that the tribunal ought not to have granted any of these remedies. It is therefore not necessary to address this ground of appeal in any detail, other than to observe that the *East Lothian Council v SH* was issued after the tribunal's decision in this particular case, explaining why it was not taken into account by the tribunal. However, the *East Lothian* case has not been appealed and it is binding on the tribunal. The underlying principles of *East Lothian* apply equally to this case. As they apply to this case:

    48.1 A declaratory order will often be more appropriate against a public body with competing demands on its resources than an order *ad factum praestandum* (an order compelling performance in a specific way); *East Lothian* para 42, citing *R (Imam) v Croydon London Borough Council* [2025] AC 335. Public bodies are expected to take necessary remedial action if there has been a declarator that rights have been breached, and in many situations it can be assumed that they will. Parties suggested that if there

is something in a particular case that properly gives rise to concerns on the part of the tribunal about future compliance by the education authority with the legal position stated in a declarator, the tribunal might accompany the declarator with a limited order *ad factum praestandum*, ordering the Council to provide a report within specified time frames on particular steps it has taken or proposes to take in response to the declarator. That properly leaves the balancing exercise between demands and resources to the education authority, but the Chamber President's powers to monitor implementation of the tribunal's decision might then arise (under rule 12 of the First-tier Tribunal for Scotland Health and Education Rules of Procedure 2018).

48.2 Even if ordering an apology is competent in a case which is not based on discrimination under the 2010 Act (which is not a matter which has been the subject of argument), an apology will rarely be an appropriate remedy (*East Lothian* para 44 to 49). In the present case, in which the Council has acted to try to protect safety of pupils and staff in a situation giving rise to legitimate concerns, it is difficult to see an apology as an appropriate remedy.

48.3 If an order *ad factum praestandum* is warranted in a particular case, it must be specific and go no further than necessary to enforce the underlying obligation (*East Lothian* paras 40 to 42). In this case, SP conceded that the word "unconditional" in paragraph (b) was too wide, because schools are entitled to have some rules or conditions on attendance such as school uniform or behavioural standards. The Council's criticisms of the use of "appropriate assurances and safeguards" and provide "effective and appropriate" academic support as being too ambiguous and imprecise are also well founded.

Conclusion

49. The grounds of appeal succeed. The tribunal erred in law and its decision dated 23 December 2025 is quashed. It is re-made as an order dismissing the freestanding UNCRC claim before it, because the tribunal did not have jurisdiction to determine it.

50. It is acknowledged that this decision may be a disappointment to SP and her family. The Upper Tribunal for Scotland recognises the importance of SP's education, and this appeal was expedited because of that. It is highly unfortunate that SP has missed so much education while the parties have been in dispute over the basis on which SP can attend school. The Council remains subject to its duties as education authority in relation to SP. It is encouraging that during the procedure leading up to this appeal the parties met to discuss

SP's return to in person learning, and she was provided with online learning at home. It is hoped that these efforts will continue and bear fruit.

Lady Poole

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*