



# HUMAN RIGHTS IN THE HEALTH SERVICE

A Guide to the  
Human Rights Act 1998

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An analysis of the implications for patient care of European human rights legislation and case law with suggestions as to how the Human Rights Act can be used to bring about improvements in the NHS.

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## **INTRODUCTION**

The Human Rights Act 1998 came into force in October 2000 in England, having been introduced slightly earlier in Wales and Scotland. This Act incorporates into UK legislation most of the provisions of the European Convention on Human Rights (the Convention).

The Convention has been in place since the 1950s. The UK was one of the first signatories to it. However, UK citizens were only able to rely on its provisions in UK courts after the Human Rights Act came into force.

The incorporation of the Convention into UK law was greeted with excitement in some quarters, with scepticism by some commentators and with outright hostility by others. Others were worried that the Act would be used by lawyers in such a way as to increase the cost to the public purse and delay the administration of justice. However, the Human Rights Act is exciting in the range of possibilities it throws up for seeking to remedy some of the faults in the way the NHS operates. It can prove a useful tool when pursuing many of the issues that Community Health Councils (CHCs) and other patient organisations have expressed concerns about, such as mixed-sex wards, long waits for treatments and problems with the NHS complaints procedure. Many vulnerable groups cared for by the NHS, such as those with mental illnesses and learning disabled adults need protection from abuse. The elderly need to know that they will not be left to die in hospital because their lives are not seen as valuable.

This publication details the rights provided for in the Convention and in the Human Rights Act and explores the case law relevant to the operation of the health service. It is meant as a tool for CHC officers and others who will be better placed to advise individuals whose complaints have human rights implications if they are aware of the basic requirements of the Convention and the Human Rights Act.

This document identifies policies and practices within the health service that may not be fully human rights compliant. CHCs and other organisations with responsibility for scrutinising and monitoring the operation of the health service may find this a useful tool in their efforts to identify ways in which improvements to the delivery of health services can be secured.

## **THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

The European Convention on Human Rights (the Convention) is supposed to form a base line for the personal rights that individuals in EC countries can expect their governments to honour. The various rights detailed in the Convention are supposed to limit the ability of government bodies to interfere with citizens' basic freedoms. The Convention primarily controls the relationship between state and citizen, but questions arise as to what is the state and who is a citizen?

All legislation in the UK must now be scrutinised before it is brought into force to ensure that it will not lead to breaches of the Convention.

### **Derogation**

Each state within the European Community has the right to derogate from particular parts of the Convention if they so choose i.e. to decide that they do not want to be bound by its strictures. For example, the UK formally derogated from the provisions of Article 5 when the Anti-Terrorism Crime and Security Act 2001 was passed.

### **A Living Body of Law**

Although the Convention was originally drafted after WW II, it is certainly not out of date. Over the years, European states have collectively agreed a number of protocols that have been added to the Convention. In addition the European Commission and European Court of Human Rights (ECTHR) have expanded its application through a series of innovative judgements. The Convention has been characterised as a living, growing piece of law. The Human Rights Act makes it plain that UK courts

must also take into account the case law that has been built up by the ECtHR. However, the decision in a particular ECtHR case is not binding on subsequent considerations of similar issues in the same way that case law sets precedent in the UK. The European Court of Human Rights considers each case on its merits. If it decides to make a general statement about the law in the context of a particular case, then that general statement has to be considered by all other European courts hearing subsequent cases.

### **The Pre-Human Rights Act Position**

The UK was one of the original signatories to the Convention. Although UK citizens could in theory rely on the rights in the Convention before the Human Rights Act came into force, enforcing these was difficult. The UK courts had limited interest in upholding these rights - citing a human rights violation was seen as scraping the bottom of the barrel. Taking a case to the European Court of Human Rights in Strasbourg takes years and can be expensive. The UK has been one of the countries most criticised by ECtHR for breaches of convention rights in a series of cases concerning sex discrimination, operation of immigration policies, torture and shooting of terrorist suspects, etc.

### **Use of the Convention by the Courts**

The rights contained in the Convention and associated Protocols have had an impact on UK law over the years. Judges have utilised some parts of the Convention when making common-law pronouncements. In addition, the courts have used the Convention as an aid to interpret domestic legislation. However, where UK legislation was drafted so as to exclude Convention rights, the courts were not prepared to find that the Convention took precedence.

### **Impact of the Convention on Domestic Legislation**

The Human Rights Act now expressly requires domestic legislation to be interpreted so as to give effect to the Convention<sup>1</sup>. Where a statute is found to be

in conflict with Convention rights, the courts are able to declare that the particular piece of the Act in question is incompatible with the Convention<sup>2</sup>. The idea is that Parliament should then be able to give consideration to any changes to legislation that may prove necessary to bring it into line with the Convention. The Scottish and Welsh Assemblies are expressly prevented from passing legislation which breaches the Convention. The courts can strike down legislation passed by the Assemblies if it is not compatible with Convention rights.

In addition, the courts have the power to strike down secondary legislation (regulations and orders) made by Parliament or the Assemblies if the courts consider that it is incompatible with Convention rights.

### **GENERAL PRINCIPLES**

Before considering the specific rights provided for in the Convention and in the Human Rights Act and how they may be relevant to policies and practices in the health service, it is necessary to address some of the basic principles involved in interpreting and applying the Convention.

#### **Retrospectivity**

In general, it is not possible to bring an action or claim against a public authority for breaches of human rights that occurred prior to the bringing into force of the Human Rights Act.

#### **Absolute and Qualified Rights**

Some of the rights are described as being absolute rights. These are:

- the right to life;
- the right not to be subject to torture; inhuman or degrading treatment;
- the prohibition on slavery; and
- the requirement that no one shall be punished for a criminal offence unless that offence was prohibited by national law.

These rights cannot be restricted in any circumstances. Member states are not

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<sup>1</sup> Section 3(1) Human Rights Act 1998

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<sup>2</sup> Section 4 Human Rights Act 1998

permitted to derogate from (pass legislation that expressly condones breaches of) these absolute rights, except for a clearly permitted reason, circumscribed within the Convention itself. Consequently, for example, interference with the right to life can only be justified to prevent violence against another person, or, in order to effect a lawful arrest, or to prevent the escape of prisoner, or to prevent a riot or insurrection.

Some rights, whilst being viewed as absolute, can be the subject of a derogation for reasons of say, national security. These include:

- a prohibition on compulsory labour;
- the right to liberty and security; and
- the right to a fair trial.

The other rights are known as qualified rights. Derogation is permitted from these rights. In addition, these rights can be balanced against public interest concerns. The qualified rights include:

- the right to respect for private and family life;
- freedom of conscience and religion;
- freedom of expression, etc.

The balancing act that states must engage in when deciding whether interference with one of these rights is justified, has been the subject of scrutiny by the European Court of Human Rights.

### **Legitimate Interference and Proportionality**

European case law specifies the circumstances in which interference with (qualified) rights can be justified. In order to lawfully restrict or interfere with any of these rights the member state has to show all of the following:

i. The limitation or restriction on the right is 'prescribed by law'. In other words, there must be a piece of legislation that sanctions the interference in question.

*and*

ii. In relation to the particular right, any limitation must be one that is in pursuit of those aims detailed within the text of the particular Convention right. Each of the qualified rights details the reasons why it

may be necessary to interfere with the rights. Any interference that is not in pursuit of the aims provided for in the wording of the Article, cannot be legally justified.

*and*

iii. The interference is not discriminatory in its application.

*and*

iv. The limitation or restriction is 'necessary in democratic society', i.e. the interference is to fulfil a pressing social need and is proportionate to the aim of responding to that need.

The fourth of these requirements includes the concept of proportionality, in that any interference must be necessary for a legitimate purpose. The requirement that any limitation of rights must be proportionate arises from the need to find a fair balance between the protection of individual rights and the interests of the state. The principle of proportionality is a key characteristic of the way in which the Convention is applied. This balance between individual collective rights can only be achieved if restrictions are strictly proportionate to the legitimate aim being pursued in the imposition of restrictions on individual rights. The ECtHR has laid down a series of tests to assist in establishing whether the balance has been correctly struck. They are as follows:

- i. Have 'relevant and sufficient' reasons been advanced in support of the interference?
- ii. Could the same aim be achieved through a less restrictive alternative?
- iii. Has the decision-making process been fair?
- iv. Have safeguards against abuse been built into the process?
- v. Has the Convention right been substantially undermined by the restriction imposed?

In addition, safeguards against abuse of Convention rights must be shown to be practical and effective rather than theoretical or illusory.

## Application of Interpretative Principles

Turning now to a hypothetical example, we can see how these principles might apply.

The UK government wishes to protect the countryside and rural communities against 'swamping' by travelling Europeans who have fled their own countries because of devastating floods. The government has no alternative but to permit European passport holders into the country. They would like these immigrants to live in urban areas, where work may be available and where they have set up refugee camps for them to live in. However, a significant proportion of the refugees object to the conditions in these camps, the lack of real job prospects and the way that they are being treated by the local populace. Large numbers of them move on to green-field sites. Farmers donate some of the land for their use, some of the refugees buy sites and others move onto national parkland. Most of the land is then farmed. The lack of proper sanitation systems on some of the sites leads to sporadic outbreaks of infectious diseases. Local health services are placed under strain, as are other local public services. The government wishes to force the immigrants back into the camps, claiming that there is a very real danger of an epidemic if they do not do so. It passes an Act of Parliament that requires non-UK passport holders to report daily to officials in the camps. Some refugees mount a challenge through the courts claiming that the Act will require them to leave their settlements to live in or near the refugee camps thus interfering with their right under Article 8 to live their private and family lives without interference from the state.

Article 8 provides a qualified right. Any court would almost certainly decide that Article 8 is engaged in this situation. It would go on to consider whether Article 8 has been breached and whether the breach is justified or not. In assessing the validity of the challenge, the court would consider whether the interference with rights under Article 8 is legitimate and proportionate by asking themselves a series of questions as follows:

- Is the interference prescribed by law?

So long as the statute has been properly brought into force, this requirement has been met.

- Do the qualifications attached to Article 8 permit this interference? Permitted qualifications are provided at Article 8 (2) which reads:

*'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

The government's stated aim is to prevent an epidemic, which falls within the need to protect health.

- Will the application of the Act have a discriminatory effect? Article 14 of the Convention provides;

*'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'*

As this measure is directed solely at refugees from other European countries and will have no effect on UK citizens, its effect is discriminatory on the basis of national origin.

- Is the limitation on the rights of the refugees necessary in a democratic society?

To establish this, the court will have to consider whether the danger the government was seeking to avoid was a real and pressing one. It will also need

to consider whether the problem could have been resolved by less restrictive alternatives, such as installing adequate sanitation in the rural sites. If so, then the government will be unable to justify forcing people back into the urban camps.

- The court will also consider arguments about the effectiveness of the relocation in reducing the risk of epidemics. If it can be shown that conditions in the urban camps are not conducive to the prevention of disease, then the government will not satisfy the effectiveness test.

The court would be justified in declaring that the legislation is incompatible with the Convention and the Human Rights Act

## THE CONVENTION RIGHTS

The Convention, and hence the Human Rights Act, contains a range of rights, some of which are obviously relevant within the NHS, such as the right to life, the right not to be subjected to inhuman and degrading treatment and the right to a fair hearing. Others, such as the right to respect for private and family life are equally relevant, but require some exploration and explanation.

Schedule 1 of the Human Rights Act contains the Articles (statements of rights) which are now directly incorporated into UK law. The Articles are reproduced at Appendix A. The only substantive right that has not been incorporated is the right to a remedy. The government decided to omit this right arguing that the courts in the UK already have the power to provide such remedies.

### Right to Life - Article 2

*'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally...'*

A number of exceptions then follow, none of which are relevant to the health sector.

The ECtHR has held that under this Article member states have a duty to take necessary steps to preserve life<sup>3</sup>.

Article 2 could become highly relevant in complaints about the failure of health services, such as ambulance services, to act promptly or appropriately, where the life of a patient is at risk.

Policies and practices which have an adverse effect on certain sectors of the community, for example practices involving starvation or dehydration of the elderly, a do-not-resuscitate policy for the over 80s, refusal to provide specific life saving treatments for the elderly, or failure to provide treatment for life threatening diseases suffered by particular ethnic minorities, could be challenged by virtue of this Article in conjunction with the prohibition on discrimination found in Article 14.

Article 2 also places a responsibility on the state to ensure that any death that may have occurred as a result of negligence on the part of the NHS, is properly investigated.

### Article 3 – Inhuman and Degrading Treatment

This Article prohibits torture, inhuman or degrading treatment or punishment.

CHCs have supported patients with complaints about a range of issues concerning inhuman or degrading treatment within the NHS. Examples include; long waits on trolleys in A + E departments, enforced medication in geriatric wards, and forcible feeding. As many of those facing degrading treatment are elderly, it may be that Article 14 becomes relevant as well. Article 8, which has been utilised to protect the dignity of citizens may be relevant in cases where the care of a patient is not so bad as to amount to inhuman or degrading treatment, but is nevertheless unpleasant or infringes their autonomy in some way.

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<sup>3</sup> Association X v United Kingdom [1978]

## **Article 5 - Right to Liberty and Security**

*'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the following cases and in accordance with a procedure prescribed by law'*

The majority of the exemptions provided for in this Article relate to arrest and detention in relation to criminal offences. However, one exemption is relevant to health services being:

*'(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants;'*

It should be noted that even in the circumstances covered by this exemption, any detention must be sanctioned by and comply with UK laws, for example under the Mental Health Act 1983, which itself is being reviewed to ensure that its provisions do not breach Convention requirements.

Further safeguards are provided for within this Article including the requirements that:

- *Everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him;*
- *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful; and*
- *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

It should be noted that any detention that the detainee agrees to would probably not be in breach of the Convention, but if the person concerned is vulnerable or does not have the capacity to consent or object, it may still be possible to argue that this right has been breached.

A number of pieces of UK legislation do permit the removal of persons to hospital

and their detention there. Such powers are found not only in the Mental Health Act 1983, but also in the National Assistance Act 1948, the National Assistance (Amendment) Act 1951 and the Public Health (Control of Diseases) Act 1984. It is likely that some people detained under powers contained in these Acts could challenge their detention as amounting to a breach of their Convention rights. If the public health objective which the authorities are seeking to accomplish by detention, could be achieved by less onerous means, or where the fact of possible detention might dissuade people with infectious diseases from reporting their illness then legal challenges might prove successful.

## **Article 6 - Right to a Fair Hearing**

The relevant parts of this Article provide that: *'In determination of his civil rights and obligations...everyone is entitled to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal, established by law. Judgement shall be pronounced publicly...except where publicity would prejudice the interests of justice.'*

This Article, considered in conjunction with various judgements of the European Court of Human Rights, could be used to challenge the operation of the NHS complaints procedure, in cases concerning complaints of a serious nature. Similarly, any inquiry into the death of a patient, or into any other serious incident which affects patients' convention rights, must also be carried out in accordance with these requirements.

## **Article 8 - Right to Respect for Private and Family Life**

This Article is concerned with the protection of the private lives of EU citizens and reads: *'Everyone has the right to respect for his private and family life, his home and his correspondence.'*

The ECtHR has given a very wide interpretation to this Article. Cases based on Article 8 have included:

- consideration of; family break-ups arising from deportation;
- care proceedings involving children;



- the right of a learning disabled woman to bring proceedings for sexual assault;
- the right of homosexuals to enter into relationships;
- the right to remain in an institution which had become a home;
- privacy;
- medical confidentiality; and
- rights of access to personal records.

This right is not absolute and is restricted in paragraph 2 as follows:

*'There shall be no interference by a public body with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.'*

Breaches can occur where the State fails to act to prevent an interference with rights covered by this Article<sup>4</sup>.

Sexual molestation of those the State has responsibility for, e.g. residents of a home for those with learning disabilities, might be actionable as a breach of the duty of the State to protect the physical and moral integrity of those it cares for. On the other hand, some cases may involve consideration of the right of all citizens to have a family life, which includes adult sexual activity<sup>5</sup>. This is closely related to the right to marry that is provided for in Article 12.

Environmental pollution caused by health service activities could become the basis for a challenge by persons whose homes are affected. The ECtHR has held that severe pollution that had an adverse effect on the health of nearby residents amounted to a breach of Article 8<sup>6</sup>. It remains to be seen whether patients and residents of residential homes can rely upon this Convention right

when faced with unmanaged outbreaks of infection.

The right to privacy contained within Article 8, compliments the UK's common law duty of confidentiality. Individuals' rights of access to personal records have been upheld under this Article<sup>7</sup>. The approach taken by the ECtHR in this case was to consider the conflicting public interests involved being; the right of access to information about oneself, as against the right to withhold information given in confidence. A similar balancing act may be expected where the conflicting issues at stake are the right to privacy and the right of freedom of expression as per Article 10.

#### **Article 9 - Freedom of Thought, Conscience and Religion**

*'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.'*

The limits and safeguards allowed are detailed as follows:

*'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'*

Article 9 protects the rights of those whose beliefs may not accord with mainstream attitudes and probably supports the right of self-determination of Jehovah's witnesses who refuse life-saving treatments in the form of blood transfusions and organ transplants. The NHS and coroners courts may have to modify their procedures to accommodate religious beliefs concerning how the body must be treated after death.

<sup>4</sup> X & Y v Netherlands [1986]

<sup>5</sup> Norris v Ireland [1988]

<sup>6</sup> Lopez-Ostra v Spain [1995]

<sup>7</sup> Gaskin v UK [1989]

### **Article 10 – Freedom of Expression**

*'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'*

The right to freedom of expression was the basis on which the families of the victims of Harold Shipman succeeded in their challenge to the decision by the Secretary of State for Health to hold the inquiry into this GP's activities in private<sup>8</sup>. However, this approach has not been followed in similar subsequent cases and it is unlikely that Article 10 will prove to be of much relevance in future cases involving the NHS or patients.

### **Article 11 - Freedom of Assembly and Association**

*'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.'*

Similar limits and safeguards are provided for as above, as follows:

*'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'*

Article 11 is principally concerned with the rights of workers to form trade unions but can also apply to visiting rights. Where patients are competent to decide for themselves, who they wish to see and whom they do not, this does not become an issue. However, the courts have had to consider applications made on behalf of adults without

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<sup>8</sup> R v Secretary of State for Health ex parte Wagstaff and others [2000]

the mental capacity to make such decisions. In the case of Re C [1993] it was held that there would be a breach of Article 11 if a carer were to prevent an incapacitated woman from seeing her mother. Clearly, any attempt by carers including NHS Trusts, to prevent patients being visited either generally or by specific individuals could come within the ambit of this Article. The courts would then have to consider whether this right should be balanced against any other public interest, for example if the visitor posed a danger to other patients or staff.

It should be noted that the provisions of this Article cannot be interpreted so as to give a right to people not to associate with others<sup>9</sup>.

### **Article 12 – The Right to Marry**

*'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'*

Any attempt by health service workers, or other carers, to prevent consensual (heterosexual) relations between learning impaired adults, could become the subject of a challenge. This right should also be considered in the context of the provisions of Article 8. It should be noted that the ECtHR has limited the application of this Article to relationships between consenting men and women and has not seen fit to extend it to homosexual relationships.

### **Article 13 – The Right to an Effective Remedy**

*'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national Authority notwithstanding that the violation is committed by persons acting in a personal capacity.'*

If a breach of a Convention right is at issue and there appears to be no means of redress, then it is likely that Article 13 is being breached as well. However the Human Rights Act does not incorporate this Article.

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<sup>9</sup> Cambridgeshire CC v R [1995]

Any challenge, which is based on this Article, or based in part upon it, will still have to be pursued by way of a complaint to the ECtHR as in the case of *Powell v UK*<sup>10</sup>, where parents claimed that there was no effective remedy in the UK against falsification of their dead child's medical records.

#### **Article 14 – Prohibition on Discrimination**

This has to be read in conjunction with the other rights detailed in the Convention.

*'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'*

This right cannot be used as a basis for complaint on its own. It can only be invoked when claiming rights provided for in the other Articles of the Convention and where it appears that rights are being applied or restricted in a way that is discriminatory (even if there has not been a breach of any of the rights in question).

#### **HUMAN RIGHTS ISSUES**

In this section different aspects of the health service are considered from the patient perspective and the relevant rights and case law applied to establish the extent to which patients may be able to utilise the Human Rights Act to obtain remedies for breaches of their rights and to secure improvements to services.

#### **Waiting Lists and Rationing**

In the public's perception the biggest problem with the NHS is the long waits that patients experience for appointments and treatment. The Convention does not expressly provide a right to medical treatment<sup>11</sup>. However, undue delay in the provision of treatment in particular cases could amount to breaches of Articles 2 and/or 3.

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<sup>10</sup> *Powell v UK* [2000]

<sup>11</sup> *L v Sweden* [1988]

Article 2 provides

*'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally...'*

The European Commission on Human Rights and the ECtHR have held that under this Article, member states, including the UK, have a duty to take the steps necessary to preserve life<sup>12</sup> and to keep the public informed of dangers to public health<sup>13</sup>. Consequently, this Article amounts to far more than an exhortation not to kill people and may be relied upon by those whose lives are put at risk by delays in arranging treatment. It is possible that the government's initiative to reduce waiting lists by arranging treatment in the private sector including treatment abroad, is in response to advice that some patients' rights under Article 2 are being breached.

Primary Care Trusts and NHS trusts that decide not to provide expensive life-saving treatments could be challenged by individuals whose life expectancy is adversely affected by the failure of the NHS to provide them with that treatment. It is clear that many of the decisions taken by the National Institute for Clinical Excellence (NICE) have been influenced by Article 2 considerations. However, as NICE cannot force local health providers to act on their recommendations, it is doubtful whether their decisions will genuinely protect the NHS against human rights challenges.

#### *Resources*

The UK courts have traditionally been reluctant to interfere with decisions made by health bodies concerning the allocation of limited resources. One example is the Court of Appeal's approach to the challenge brought by a father to a decision by a health authority not to provide or fund a lifesaving bone marrow transplant for his daughter<sup>14</sup>. The court refused to scrutinise claims by the

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<sup>12</sup> *Osman v UK* [1998]

<sup>13</sup> *Association X v UK* [1978]

<sup>14</sup> *R v Cambridge Health Authority, ex parte B* [1995]

health authority that they could not afford to pay for this treatment. Under the Human Rights Act the issue of budgetary constraints will still be relevant. Challenges to decisions concerning steps taken by public bodies to protect life and whether they were adequate and appropriate, will still be considered within the context of resources. However, the line that the health service has used in the past, that it is for them alone to decide how to use the resources available to them, is now unlikely to be accepted without question by the courts if the challenge concerns a fundamental human right. Courts are now likely to want to balance such assertions against the seriousness of the risk to the patient and the issue of whether any treatment that is being proposed will be adequate.

In order for an applicant to succeed in a challenge of this nature, it would be necessary to show that there was a failure on the part of a NHS body or practitioner to take reasonable steps to avoid a real and immediate risk to life.

The European Court of Human Rights held that a delay of 6 days in arranging for a prisoner to have an x-ray of a fracture amounted to a breach of Article 3<sup>15</sup>. Patients who experience pain while they are forced to wait for treatment such as a hip-replacement, might be able to argue that their Article 3 rights are being breached. It could also be argued that patients left on hospital trolleys for hours when there are bed shortages are subject to degrading treatment. It is possible that long waits in A + E for treatment could also be challenged by patients in pain and/or distress.

#### **No General Right to Treatment**

Article 2 does not equate with a general right to treatment. The European courts have stated that the Convention does not provide a right to treatment per se. L v Sweden. UK law does not provide an enforceable right to NHS treatment either. Similarly, the UK courts have stated that doctors cannot be

compelled to provide treatment that is contrary to their clinical judgement<sup>16</sup>.

However, Article 3 prohibits torture or inhuman or degrading treatment and it is possible to argue that a failure to provide treatment breaches this Article. A decision to deport a prisoner from the UK to St Kitts was overturned by the ECtHR because he was suffering from AIDS and was terminally ill<sup>17</sup>. It was submitted that the medical facilities he needed would not be available in St Kitts. The court considered that the withdrawal of medical treatment necessarily involved in his deportation, would entail the most dramatic consequences for the patient and undoubtedly hasten his death, finding this to amount to a breach of Article 3.

The UK has signed up to the European Social Charter. Article 13 of this Charter commits the UK authorities to ensure that necessary care is provided for those who are sick and without adequate resources to secure such assistance for themselves. While this Charter does not have the same force as the Convention or the Human Rights Act with the courts, it may have some impact on interpretation.

#### **Death**

##### *Withholding treatment or care*

Policies or practices that involve the starvation or dehydration of the elderly in hospitals and nursing homes<sup>18</sup> will almost certainly amount to breaches of Articles 2 and 14. Do not resuscitate notes (DNRs) which are placed on hospital records without the consent of patients may also breach the provisions of Articles 2 and 8 as well as outraging those patients and their families when they discover that such a decision has been made without consent. If challenges to these practices come before the courts it is likely that the claimants will succeed, as such decisions are not usually justified by health bodies as being necessary to manage

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<sup>15</sup> Hurtado v Switzerland [1994]

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<sup>16</sup> A National Health Service Trust v D and Others [2000]

<sup>17</sup> D v UK [1997]

<sup>18</sup> Hungry in Hospital ACHCEW 1998

limited resources (even if that is effectively what they are doing).

#### *Under-funded services and treatments*

The Stroke Association has pointed out that stroke care services are seriously under-funded. An audit of services carried out by the Royal College of Physicians published in July 2002 indicated that over half of those who suffer a stroke, do not receive life-saving care. It is estimated that 15 people a day die because they do not receive treatment in a stroke unit. It is probable that failure to provide sufficient resources to maintain life-saving services mainly required by elderly people engages both Article 2 and Article 14. In addition, there is evidence that younger stroke victims are more likely to be cared for in specialist stroke units than are older people who have suffered a stroke. The families of elderly stroke victims who miss out on specialist care, may be able to mount a challenge on their behalf relying on Articles 2 and 14.

Other practices and policies that have the effect of reducing life expectancy or failing to maximise a patient's chance of making a successful recovery, could also be challenged as potentially breaching Article 2. It is not inconceivable that the health service could be challenged for failing to make sufficient resources available for mental health services for people whose condition makes them more prone to suicide attempts.

#### *Post-death investigations*

The European Court of Human Rights decided that Article 2 requires that where a death occurs as a result of the actions or omissions of a public body or person carrying out functions of a public nature, then the death must be the subject of a public inquiry. The usual sorts of cases where a public inquiry is required concern situations such as the death of a prisoner in custody. The ECtHR has set very clear guidelines as to when a death should be the subject of a public inquiry<sup>19</sup>. It is clear that many deaths that occur within the NHS fall within this

remit. The system of coroners' inquests has been used as a form of public inquiry in these sorts of cases. However, the procedure followed by coroners is not itself compliant with Article 6. Families do not have a right of representation. Even if a family obtains the services of a lawyer (notwithstanding the lack of legal aid available to pay them) that lawyer can only speak at the discretion of the Coroner. There are other more technical breaches of human rights requirements in the coronial system.

The government is currently undertaking a review of the death certification and coroners court systems. In part, this review has been provoked by the activities of Dr Harold Shipman, but the fact that the system of coroners' inquests is not human rights compliant is also behind moves to change the system.

The requirement that proceedings be heard in public may prove useful when seeking to ensure that public inquiries are just that. The courts were prepared to order the Secretary of State for Health to hold an inquiry into the activities of Harold Shipman in public<sup>20</sup> on the ground that not to do so would interfere with the right to free speech. However, subsequent legal challenges to decisions to hold public inquiries behind closed doors have not been successful<sup>21</sup>.

#### *Post death religious practices*

Article 9 may also have an impact on post-mortem and burial issues. Many religions do not sanction interference with the body after death. The requirement for a post-mortem can cause great distress to relatives when it contradicts deeply held beliefs about respect for the dead. Similarly, some religions require that burial and cremation take place as soon as possible after death. It is possible that delays in releasing a body to

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<sup>20</sup> R v Secretary of State for Health, ex parte Wagstaff & Ors: R v Secretary of State for Health, ex parte Associated Newspapers Ltd & Ors [2000]

<sup>21</sup> Patricia Howard & Sheila Wright-Hogeland v Secretary of State for Health [2002]

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<sup>19</sup> McCann v UK [1995]

the family, or a decision that a post-mortem should be carried out, could be challenged on the ground that it interferes with freedom of religious expression and actions.

#### *Assisted suicide and euthanasia*

Article 2 provides a right to life. Article 8 supports the common-law contention that a person's autonomy prevents them being treated against their will. These two Convention rights do not actually conflict. The issue of whether euthanasia and assisted suicide are permissible under the Convention is the subject of continuing debate. In case of *Widmer v Switzerland* (1992) the ECtHR held that passive euthanasia - allowing death by not providing treatment - is not contrary to Article 2. In a more recent case<sup>22</sup> a UK court agreed that a woman who wished to be allowed to die should not have to undergo life-saving treatment. In that case it was not simply a question of not commencing treatment, but of withdrawing it at the request of the patient. However, a request under the Convention made by Diane Pretty that her husband should be permitted to assist her in committing suicide was not accepted. At present the courts have drawn the line at condoning active euthanasia of those wishing to die.

Where patients do not have the mental capacity to indicate whether they wish to live or die, the courts have taken a different approach. Before the incorporation of the Convention the courts accepted that patients in persistent vegetative states (PVS), could have treatment withdrawn from them in order to hasten their death<sup>23</sup>. In the joined cases of *NHS Trust v M* and *NHS Trust v B*<sup>24</sup> the Family Division of the High Court held that withdrawal of treatment to patients in PVS does not breach Article 2. In the case of *NHS Trust v D* the same court held that it was contrary to the best interests of the patient to continue treatment.

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<sup>22</sup> *Ms B v an NHS Trust* [2002]

<sup>23</sup> *Airedale NHS Trust v Bland* [1993]

<sup>24</sup> 1999

#### **Abortion**

Article 2 rights do not appear to extend to the unborn child. In a series of cases the ECtHR have confirmed that a foetus is not a legal person and thus not protected by Article 2. It is likely that this will be the subject of further challenges in the UK.

#### **Patient confidentiality and access to personal information**

Article 8 covers a wide range of issues, including the right to patient confidentiality and the rights of patients to access their records.

The most obvious anticipated danger to patient confidentiality is idle gossip, but many disclosures from patient records are made in connection with the administration of the NHS.

Concerns about misuse of personal data, particularly with the advance of information technology and the establishment of huge databases of citizen information led the European Union to introduce more detailed regulations to expand upon Article 8 and to protect personal information. The Data Protection Directive EU 95/46 places a duty on all member states to introduce their own legislation protecting personal data, such as medical records, from unauthorised disclosure. The UK introduced the Data Protection Act 1998 in response. However, it does not adequately protect medical records from abuse by the state. Patient confidentiality concerns are explored more fully in the ACHCEW briefing 'A Question of Confidence? A Guide to the Data Protection Act 1998.'

The UK courts have already considered the application of Article 8 to the confidentiality of medical records and confirmed that disclosure without the consent of patients can only be made in circumstances where the disclosure is required by law and for a compelling reason and further that once records have been disclosed they should not be further disseminated<sup>25</sup>. It is clear that the

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<sup>25</sup> *A Health Authority v Dr X and Others* [2001]

widespread use by the NHS of patient records for a multitude of reasons, without having obtained patient consent, makes it vulnerable to challenges under Article 8.

The fact that clinicians and hospitals also have an interest in confidentiality of medical records has been recognised by the House of Lords<sup>26</sup>, which held that a newspaper should not have published confidential extracts from Ian Brady's medical records although Ian Brady himself had previously placed information from his medical records in the public domain.

### Complaints

There has been much adverse comment about the NHS complaints procedure since it was set up. Major criticisms have been directed at it from the Health Select Committee, the Public Law Project and the National Audit Office. CHCs fed into the work upon which these criticisms were based. The NHS complaints procedure is characterised by delays, lack of impartiality and the failure to provide complainants with adequate information, or access to representation. An long overdue report of a government review of the complaints procedure is still awaited at the time of writing. This review has, at least in part, been provoked by fears that the complaints procedure breaches some of the provisions of Article 6.

Article 6 requires that procedures that are used to determine serious complaints must be:

- fair;
- held in public;
- without undue delay; and
- conducted by an independent and impartial tribunal.

The members of an independent review panel will also have to try to ensure that they bear in mind human rights requirements when adjudicating on the substance of a complaint.

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<sup>26</sup> MGN v Ashworth Hospital [2002]

### Fairness

The way independent review panel hearings are conducted is inadequate. Complainants have no right to be represented and no access to all the reports considered by the panel and may find that the charges levied for access to, and copies of, their own medical records, prevent them from even having these. In addition, there is no adequate right of appeal to a higher court. The Health Service Commissioner does not fit the requirements of a suitable appellate body and the process of judicial review is not usually suited to a consideration of the merits of a complaint.

### Independence and Impartiality

The first stage of the complaints procedure, involving as it so often does, consideration of the complaint by the person complained about is clearly in breach of the requirement that there be a fair, independent and impartial hearing. Likewise, Review Panels are arguably not independent or impartial. The courts have considered two cases concerning the composition of complaints panels. The membership of a social services complaints procedure panel comprising two councillors and an independent chair was held to be insufficiently independent<sup>27</sup>, although the Court of Appeal has since overturned this finding. Similarly, a housing benefit review board was found not to be sufficiently independent to meet the requirements of Article 6(1).<sup>28</sup> It is still possible that if a complainant were to challenge the composition of a review panel, the court would find it to be lacking the independence required by Article 6.

### Openness

The Article 6 requirement, that cases are heard in a public forum and judgements are made publicly available, is not met because hearings are invariably held in private and reports are not made publicly available. Clearly there will be instances where

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<sup>27</sup> R v Dorset County Council, ex parte Personal Representatives of Christopher Beeson & Secretary Of State For Health [2001]

<sup>28</sup> R (Bono) v Harlow District Council [2002]

complainants do not wish their complaints be heard in public, or where it would be inappropriate to do so. However, the fact that it is a rule, rather than an exception, for complaints to be considered behind closed doors, means that the complaints procedure breaches this requirement.

*Within a reasonable time*

The delays, which so often characterise the NHS complaints procedure mean that matters are not considered within a reasonable time.

How does the NHS Complaints Procedure Measure up to Article 6?		
Requirement	Compliance	Comment
Fair hearing		
- representation	?	At the discretion of the Convenor
- access to documentation	?	Not automatically.
In public	X	Private hearings. Reports may be marked 'in confidence'
In a reasonable time	X	Long delays.
Independent and impartial Tribunal	X	Investigation by body complained of
	X	Panel members links with same
Judgement in public	X	Confidential report
Appeals Mechanism	?	Dogged by similar problems

*Civil Rights*

For Article 6 to be relevant, the matter under consideration (the subject matter of the complaint) must be a civil right.

Most of the rights protected by the Convention count as civil rights, as do monetary claims and other serious matters forming the subject of a complaint. The European Court of Human Rights has held that entitlement to state medical treatment is not a civil right<sup>29</sup>. A complaint about rudeness on the part of a GP or health service employee would not be seen as sufficiently serious as to amount to a breach of a civil right.

In order to mount a human rights challenge to the operation of the NHS complaints procedure a patient would need to show that:

- ◆ they have a civil right that has been interfered with; and
- ◆ the complaints procedure has failed to meet the requirements of Article 6; and
- ◆ the complaints procedure is the only forum through which they can pursue their complaint.

This last requirement is likely to prove the major stumbling block, as the majority of civil rights can be pursued through the courts.

<sup>29</sup> L v Sweden [1988]



### Examples of Civil Rights

Right to Life	Withholding life-saving drugs and treatment Imposed 'do not resuscitate' notices
Prohibition on inhuman and degrading treatment	Long waits for treatment Abuse of vulnerable patients
Right to liberty	Detention of people without mental capacity
Respect for private and family life	Breaches of patient confidentiality Mixed sex wards

The same considerations apply to other complaints procedures, such as the social services complaints procedure and reviews of discharge decisions. GMC disciplinary procedures have had to be completely revised to ensure compliance and even so are still occasionally being successfully challenged.

#### **Detention under the Mental Health Act**

Article 5 protects citizens from unlawful arrest and detention and gives a right to compensation to those who are unlawfully held. Breaches of this Article do occur in the health service as in the Bournemouth case, where a learning disabled man was held for treatment without his consent, but without the protection afforded to those held under the Mental Health Act.

The Court of Appeal<sup>30</sup> decided that Sections 72 and 73 Mental Health Act 1983 were incompatible with Articles 5(1) and 5(4) of the Convention inasmuch as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention. The effect being that the patients were placed under an obligation to establish their sanity before a Mental Health Review Tribunal could agree

<sup>30</sup> R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health, ex parte H [2001]

The Government has now amended these sections of the Mental Health Act to bring them into line with the requirements of Article 5. The Mental Health Act is being reviewed, in part to ensure that its provisions do not breach Convention requirements.

#### **Closure of facilities**

While the closure of a health service facility in itself does not necessarily breach human rights, there may be occasions where individual human rights do come into play. The closure of residential and nursing homes may affect residents' rights to family life under Article 8.

The right to family life was important in the Coughlan case, which concerned a disabled woman's right to stay in a purpose-built residential facility when the local health authority wished to close it down. This case was heard before the Human Rights Act came into force, but the Court held that closure in those circumstances did breach Article 8 of the Convention. Proposals to close other homes have been challenged on this ground, although not always successfully<sup>31</sup>. The ECtHR has confirmed that such closures involve Article 8 considerations, but in a recent case held that

<sup>31</sup> R v Brent, Kensington & Chelsea & Westminster Mental Health NHS Trust, ex parte C (by his litigation friend the Official Solicitor) M (by his litigation friend the Official Solicitor) P (by his litigation friend the Official Solicitor) HM (by his litigation friend the Official Solicitor) (2002)

other factors such as the adequacy of alternative provision on offer can be balanced against the individual's rights<sup>32</sup> It is worth noting that the Leonard Cheshire judgement (see page 20) has the effect that the Article 8 right to a home will not apply if the home is run by the private or the not for profit sector.

There is evidence to show that there is an increased mortality rate amongst vulnerable elderly residents when they are relocated after home closures. Consequently a legal challenge to closures in such circumstances could be strengthened by reliance on the provisions of Article 2 of the Convention.

#### **Mixed sex wards, force-feeding and other issues concerning patient dignity**

Article 8, the right to family life, has been extended by a series of judgements from the ECtHR and now provides general protection for the autonomy and dignity of the individual. Article 8 may well prove useful in challenging some practices within the health service that CHCs and others have identified as eroding patient dignity.

Mixed sex wards are an affront to the dignity of many people who object to receiving treatment and personal care in the company of members of the opposite sex. Some people may feel so strongly about this that to force them to receive care in mixed sex wards might amount to inhuman or degrading treatment and constitute a breach of Article 3.

Force-feeding is a feature of the treatment of anorexics and some prisoners who go on hunger strike, such as in the case of Ian Brady. Force-feeding appears to be an obvious example of inhuman and degrading treatment and an invasion of the autonomy of the patient. The introduction of the Human Rights Act led to legal challenges to forcible feeding. However, in those cases that the UK courts have so far considered on this subject they have ducked the issue by ruling that the objections to the feeding (Ian Brady

and an anorexic) were not valid on the grounds that the patient lacked capacity to object through mental illness or other mental condition. It should be noted that treatment against the wishes of the patient could be justified on the basis of medical necessity only if the patient is deemed not to have the mental capacity to give informed consent.

#### **Informed consent**

Article 8 also requires informed consent to treatment. It may well be that it also encompasses informed consent to the use and disclosure of patient records. The privacy directive<sup>33</sup> defines consent as being informed and signified. The general legal position is that if a patient is deemed to be mentally competent they are entitled to make their own decisions about treatment. However, patients cannot insist on a particular form of treatment against the advice and wishes of the clinicians treating them.

A UK Court has refused to grant an injunction to a patient who objected to the imposition of a course of electro-convulsive therapy on the grounds that the patient did not fully comprehend the extent of her own mental illness (depression) and could not give informed consent.

In the Bournemouth case<sup>34</sup> a man, who had not been sectioned under the provisions of the Mental Health Act 1983, was detained for treatment of a mental disorder. This case concerned a young man with multiple physical and mental disabilities who lived with a foster family. He became distressed one day whilst at a day centre. There appears to have been no attempt to establish why he was distressed. He was taken to a mental health institution and treated there. He did not have the mental capacity to agree or refuse treatment. He was not held under a section i.e. not under the auspices of the Mental Health Act 1983. His foster family tried to visit but were

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<sup>32</sup> Collins v UK [2002]

<sup>33</sup> EU Data Protection Directive 95/46/EC

<sup>34</sup> L v Bournemouth Community and Mental Health Trust [1997]

refused access. This went on for many months. Eventually the family persuaded a court that he should not have been held against his will. The Court of Appeal held that he should not have been compulsorily detained and treated, without either:

- his permission (which he was incapable of giving) or
- having been sectioned under the Mental Health Act 1983.

This case was decided before the introduction of the Human Rights Act and the Court of Appeal did not consider it necessary to discuss his Article 8 rights, but they appear to have reached the right decision anyway.

In the past women in labour who have refused medical interventions have been inappropriately admitted for treatment for a mental disorder to enable doctors to treat them as they think fit. Before the introduction of the Human Rights Act, the Court of Appeal criticised this practice. In any event, it is likely that overruling a woman's objection to certain forms of treatment during labour would be in breach of Article 8.

Article 9 (Freedom of thought conscience and religion) issues arise where patients refuse certain forms of treatment on religious grounds. Jehovah's Witnesses who refuse blood transfusions and organ transplants on their own or their children's behalf may find some protection in this Article.

### **Disciplining doctors and other clinicians**

Article 6 requires that trials and other procedures, in which civil rights are determined, must be carried out fairly. When the Human Rights Act was introduced doctors' organisations suggested that it would become impossible to strike doctors off the list of registered practitioners because it would interfere with their civil rights, i.e. the right to work. In fact, the Convention does not provide a right to work. While it has been treated as a civil right by the courts, it is not an absolute right. The GMC knew that they would have to bring their procedures in line with Article 6 and have, in the main, done so. Before they had completed the

reorganisation of their disciplinary committees and decision-making processes, a number of cases were brought by doctors who felt aggrieved. Some of them were successful, but more recently the courts have upheld GMC rulings refusing to find them in breach Article 6.

Patients too, have on occasions, successfully challenged the operation of the GMC's disciplinary procedures<sup>35</sup>.

### **Adults in care**

The abuse of patients, which emerged in the scandal involving the Lakeland NHS Trust, almost certainly involved a breach of Article 3 as well as those rights protected by Article 8.

Attempts by carers to prevent adults with mental disabilities from entering consensual heterosexual relationships could amount to a breach of Article 12 (the right to marry).

### **Medical Research**

Experimental medical treatment, which has not been the subject of fully informed consent, could be in breach of Article 3 and may also possibly amount to a breach of Article 8<sup>36</sup>. Likewise, pointless or unnecessarily painful treatment could engage in Article 3. However, the courts have approved experimental treatment for Variant CJD on two mentally incapacitated patients<sup>37</sup>. Mysteriously, the patients' human rights do not appear to have been considered by the court, notwithstanding that the treatment involved cranial injections and that there was a risk of serious side effects.

### **Clinical negligence**

People bringing cases involving clinical negligence and other similar claims arising from a failure on the part of health bodies to act promptly or appropriately where a patient's life is at risk, may want to argue an

<sup>35</sup> R v General Medical Council (Respondent), ex parte Arpad Toth (Applicant) & Dr David Jarman (Interested Party) [2000]

<sup>36</sup> X v Denmark [1983]

<sup>37</sup> Simms v An NHS Trust and PA v An NHS Trust [2002]

infringement of Article 2 when seeking to establish liability. Liability is easier to establish if it can be shown that the patient did not consent to the actual treatment given to them. For this reason Article 8 and informed consent has become important in clinical negligence disputes.

### **Poor treatment of the elderly**

The European Court of Human Rights has held that age discrimination is one of the factors, covered by Article 14. Consequently, if lower standards of treatment and care are made available to elderly patients than to younger patients, their treatment could be challenged. Infringements may arise if the conditions under which they are treated are inhuman or degrading as per Article 3 or where life-sustaining treatments are denied to the elderly, but not to younger patients with similar conditions. It may be that in the future, the courts will be asked to scrutinise decisions concerning the allocation of resources that have the effect of placing the lives of the elderly at risk.

### **Bed blocking**

Much has been made of the additional pressures the NHS faces because of 'bed blocking'. In an attempt to free hospital beds, many elderly people and their families are pressurised to agree that they should move to residential nursing homes. Many of the elderly people concerned only want to return home, but cannot do so because their local social services authority has not agreed to provide the appropriate community care services. On the face of it, this practice could breach Article 8, the right to family life/autonomy. Most people in this situation are unaware that they can refuse to move until their needs are properly dealt with.

Both Article 8 and 3 may be relevant if a patient is threatened with forcible removal from hospital, or forcible transfer to a nursing or residential home that they do not wish to go to. Physical interventions to remove someone from hospital without consent are likely to amount to an interference with personal autonomy and hence breach Article 8. Forcible transportation can amount to

inhuman and degrading treatment under Article 3.

If a person is obliged to remain in hospital because community care services have not been arranged to allow their discharge back into their home, it might be possible to challenge their continued detention in hospital, as amounting to a breach of Article 5<sup>38</sup> - the right not to be deprived of liberty without a fair trial. Similarly, holding someone against their will in a nursing or residential home might amount to a deprivation of their liberty, particularly if the authority does not have an appeals procedure that patients can use to have such decisions reviewed. However, the ECtHR has held that Article 5 does not prevent the removal of a vulnerable person from their home to a nursing home if it is a 'responsible measure taken by the competent authorities in the applicant's interest'.<sup>39</sup> In this case a 90-year-old woman, living in her own home in Switzerland was suffering from senile dementia, blindness and serious self-neglect, including untreated leg-sores. She was removed from her home by the authorities and placed in a nursing home. Her son brought an application of her behalf claiming that she was being detained against her will in the nursing home. The Swiss authorities had relied upon legislative provisions within the Swiss Civil Code which states that '*An elderly or incapacitated person may be placed or retained in a suitable institution on account of mental illness or mental weakness, alcoholism or other addictions or serious neglect, if the person cannot otherwise be afforded the necessary personal care.*' The comparable UK legislation is to be found in section 7 of the Mental Health Act 1983 which only gives powers to the authorities to remove someone from their home if they are mentally disordered and '*it is necessary in the interests of the welfare of the patient or the protection of other persons*'.

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<sup>38</sup> Stanley Johnson v UK [1997]

<sup>39</sup> HM v Switzerland [2002]

### **Vaccination and Screening programmes**

The European Court of Human Rights has considered a number of cases concerning vaccination programmes. In one case the adequacy of steps taken by the UK authorities to reduce risks from a vaccination programme was challenged<sup>40</sup>. The Court held that national bodies are required to take adequate and appropriate measures to protect life. However, in this particular case the court considered that the UK government had taken adequate steps. It is possible to envisage a future challenge to the NHS if it fails to implement screening programmes for common life-threatening illnesses.

### **Public Health Issues**

Article 2 has been widely understood to place a duty on states to provide public health advice and information where it is aware, or ought to be aware, that an individual, or population is being, or has been, exposed to risk of serious illness or injury. This equates to a duty to provide public health information and warnings.

Article 11 of the European Social Charter requires governments to take appropriate measures to remove causes of ill health and to prevent disease as far as possible. Actions taken by states and national organisations for the protection of public health have been accepted as legitimate justification for the placing of limits on some Convention Rights<sup>41</sup>. Any measures taken would have to be carefully balanced against the rights that may be under threat and principles of proportionality and the least restrictive course of action applied.

As detailed above, a central tenet of European law is the principle of proportionality. This places an obligation on public authorities to ensure that where individual rights might be affected, they carefully consider and balance competing interests and ensure that the actions they take are proportionate to the outcome they

seek to achieve. Even where an infringement of human rights can be justified under the Convention, say in the interests of public health, that infringement must be no more than is necessary in a democratic society. If another way of achieving the outcome exists that has no adverse impact, or a less adverse impact, on individual rights, then that course must be taken.

The European Commission on Human Rights has considered whether compulsory screening for TB breached Article 8. The practice was found to be acceptable on the basis that the public interest in monitoring and treating this disease outweighed possible infringements of human rights and the test was not detrimental to the patient<sup>42</sup>.

### **Access to Information**

Article 10 of the Convention only protects voluntary disclosure of information. The ECtHR has considered whether Article 8 provides a right to citizens to have access to their own personal records<sup>43</sup>. The Court confirmed that information held in public records can form part of an individual's private and family life and that public bodies cannot withhold such information without specific justification.

The privacy directive<sup>44</sup> requires the UK along with other European nations to allow individuals access to their own medical and some other public records containing personal information about them.

The Human Fertilisation and Embryology Act 1990 prevents children born as a result of donor insemination from accessing information about the donor. A number of people born by this technique applied for information about their biological parents, relying on the provisions of Article 8. The court held that Article 8 was engaged and that every person should be able to discover

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<sup>40</sup> Association X v UK [1978]

<sup>41</sup> X v Austria [1979]

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<sup>42</sup> Acmanne v Belgium [1984]

<sup>43</sup> Gaskin v UK [1999]

<sup>44</sup> EU Data Protection Directive 95/46/EC

details of his or her identity as an individual including details about biological parents<sup>45</sup>.

## **EFFECT ON HEALTH AUTHORITIES, NHS TRUSTS AND OTHER PUBLIC BODIES**

Section 6 of the Human Rights Act states that:

*'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'*

This places all public authorities under a duty to carry out their duties and to provide services in line with the Convention rights without waiting for a court to tell them to do so. However, where public bodies are required by an Act of Parliament to act in a manner which contravenes the Convention they will not be found to have behaved unlawfully.

### **Public Authorities/Private Organisations**

The Human Rights Act does not define 'public authority', although it expressly provides that courts and tribunals are covered by the term. It also makes it clear that a public authority includes 'any person certain of whose functions are functions of a public nature'. Local authorities, the Secretary of State for Health, Strategic Health Authorities, NHS trusts, Primary Care Trusts, Health Boards in Wales and Community Health Councils, are public bodies which carry out functions of a public nature. National NHS bodies, such as the National Institute for Clinical Excellence (NICE), the Commission for Health Improvement (CHI) and the Commission for Patient and Public Involvement in Health are also obliged to ensure that their activities do not result in breaches of those Convention rights covered by the Human Rights Act. The sorts of activities carried out by CHCs (and their successor bodies) are unlikely to bring them into conflict with Convention rights.

There seems very little doubt that public bodies established by statute are required to operate in accordance with the Human Rights Act. However, there has always been some debate over the interpretation of what "functions of a public nature" might mean. Commentators expected that there would be a grey area where service providers such as GPs and dentists provide some services under NHS contracts and some of private nature. Nobody anticipated that private providers contracted to provide public services would be deemed to be wholly exempt from the provisions of the Human Rights Act. In fact, all the guidance produced by the government prior to the introduction of the Act warned private organisations that if they carry out functions of a public nature, they are required to act in a way compatible with the Convention.

It is unfortunate that the first case to come before the courts on the issue of whether the body is carrying out functions of a public nature should involve a challenge to a charity<sup>46</sup>. The courts were unwilling to either designate the Leonard Cheshire foundation as a public body or to accept that it was carrying out functions of a public nature, because they thought that if they did so then the charity would lose any rights it might have under the Human Rights Act. Unfortunately in its desire to protect the Leonard Cheshire Foundation and other similar bodies, the court has stripped service users of their rights. This is particularly worrying when considering the rights of people in residential and nursing accommodation. Almost all of this provision is in the private sector.

The court suggested that users of contracted out services could require public bodies to impose contractual provisions on private providers to meet human rights obligations. However this is completely impracticable. Service users do not have that sort of power. The draft guidance on commissioning NHS acute elective care from independent

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<sup>45</sup> Rose & another v Secretary of State for Health and the Embryology Authority [2002]

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<sup>46</sup> R v Leonard Cheshire Foundation & another ex parte Heather and others [2002]

providers produced by the Department of Health in 2002 contained model contractual terms and conditions for contracts between NHS bodies and the private sector. Far from incorporating a requirement on private providers that they comply with the Human Rights Act, the model contract is conspicuously silent on the point.

## HOW TO SEEK A LEGAL REMEDY

### The Victim

Only the person whose rights have been infringed can make a complaint to the European Court of Human Rights under the Convention. Similarly, the UK courts will only consider human rights cases brought by or on behalf of someone whose Convention rights have been infringed.

Any person who considers that his or her Convention rights have been breached may apply to a court in the UK, seeking a remedy, by way of a court order, declaration (or compensation where the right to liberty has been compromised). The applicant does not have to be a British or even an EU citizen, so long as the applicant is a victim of a violation of Convention rights.

An applicant can claim to be the victim of a violation of more than one Convention right. However, the courts will not generally accept abstract challenges or complaints about hypothetical breaches. Any applicant must be able to show that the act or decision they are complaining about directly affects them. It is not necessary to show that the person's rights have already been breached. It is possible to bring proceedings against anticipated breaches so long as the applicant can show that they are at real personal risk of being directly affected by the violation.

Article 34 of the Convention permits applications from 'any person, non-governmental organisation, or group of individuals.' Claims have been accepted from individuals, groups of individuals, non-governmental organisations, companies,

professional associations, trade unions, political parties and religious organisations. However, if a claim is brought by an organisation, the organisation itself must be able to show that its rights have been interfered with. It is not permissible for an organisation to make an application in respect of its members, nor on behalf of an individual or a group of people that it represents.

Children are allowed to apply. Parents or other adults are permitted to represent children whose rights have been violated. Likewise, adults who do not have the mental capacity to bring a case themselves can do so if represented by relatives or other suitable persons.

An application cannot be made in a deceased person's name. However, if an applicant dies during the course of proceedings it may be possible for a case to be continued by close relatives if the court is satisfied that the complaint is of general importance. It is also possible for relatives to bring a claim arising from the death of a family member if they can show that they have been affected directly or indirectly by the actions of a public body which led to, or caused the death in question. In those cases the claim must be brought by the family members as victims. Commercial organisations have been successful in claiming protection under the Human Rights Act.<sup>47</sup>

### The Proceedings

Convention rights can be pleaded in proceedings brought in any court in relation to another matter or by way of a defence by the person claiming that his rights are being infringed. For example, a defendant charged with trespass, who considers that s/he is being denied the right to freely associate with another person could plead that the action being brought against them breached the provisions of Article 11.

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<sup>47</sup> R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation [2000]

### **Time Limits**

Section 7 of the Human Rights Act places a time limit of one year for bringing proceedings against a public authority for breach of human rights. However, this time limit can be extended if the court considers it just and equitable to do so.

### **Damages**

Section 8 of the Human Rights Act permits courts to '*grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*'

Damages ordered by the European Court Human Rights for breaches of human rights have traditionally been quite small. Because there have been relatively few orders for damages for breaches of human rights made by the UK courts, it is still too early to say what sort of levels of compensation people may expect to receive. However, a severely disabled woman whose Article 8 rights had been breached because the local authority left her in unsuitable accommodation for 20 months has been awarded £10,000<sup>48</sup>.

### **CONCLUSION**

The effectiveness of the Human Rights Act as a tool for remedying unsatisfactory policies and practices within the NHS depends to a large extent on the way that scrutiny and campaigning groups use it. Although public bodies are charged with upholding Convention rights, health bodies and practitioners may not always be aware of the effect of their actions on patients' human rights. CHCs and other organisations working with patients have an important role in alerting the NHS to human rights breaches.

In addition, interpretation of the Convention rights as they apply to the NHS, will depend partly on the approach taken by the UK courts and in part by the sorts of cases they are asked to consider. Human rights challenges have traditionally been brought

by prisoners, asylum seekers, mental health patients and more recently by commercial organisations. Some groups of people have not had their human rights violations considered by the courts, for example: elderly mentally ill patients who are forced to move because of home closures; learning disabled adults abused in care; and competent children forced to have treatment they do not want. There are few groups in society who are as vulnerable as the sick and infirm. Patient organisations have a critical role to play in identifying cases where the rights of members of disadvantaged groups have been infringed.

It is important that the courts have the opportunity to hear these cases before they start to bind themselves with restrictive precedents arising from poor cases or cases where they have no sympathy for the applicant. For example the courts have been asked to protect the human rights of a disruptive pupil responsible for assaults on teachers and other pupils, rather the rights of those who suffer from bullying. Similarly, legal challenges under the Human Rights Act have been brought by prisoners who complained that telephone calls they made were identifiable as coming from a prison. The legislation should instead have been used by the victims of criminals who received threatening calls from them after they had been imprisoned.

There are concerns that industry will seek to avail itself of the rights under the Act to the possible detriment of patients. The UK courts have already been more sympathetic to the human rights of a charity than to the human rights of those living in the residential accommodation run by the charity<sup>49</sup>. It is important that human rights law is not subverted to become a vehicle for dealing with commercial disputes rather than acting as a buttress for the rights of the public. Consequently, it is important that those representing disadvantaged groups should

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<sup>48</sup> R v Enfield London Borough Council ex parte Bernard [2002]

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<sup>49</sup> R v Leonard Cheshire Foundation & another ex parte Heather and others [2002]



act quickly in identifying and bringing cases before the courts bind themselves with precedents which prevent them from finding in favour of the vulnerable citizen.

There are some safeguards against courts taking a conservative stance. Section 2 of the Human Rights Act 1998 requires UK courts to take into account judgements and decisions of those European bodies which have made pronouncements about Convention rights. UK judges must also apply principles common in European law including the central concept of proportionality, when they consider cases in which conflicting public interests arise.

The bringing into force of the Human Rights Act has already had the effect that people have both become more aware of what constitutes a breach of the Convention and have easier access to the courts to seek redress.

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## THE ARTICLES

### **Article 2 Right to Life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### **Article 3 Prohibition on Torture**

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

### **Article 4 Prohibition Of Slavery And Forced Labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

### **Article 5 Right to Liberty and Security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
  3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
  4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
  5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

#### **Article 6 Right to a Fair Trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **Article 7 No Punishment Without Law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

### **Article 8 Right to Respect for Private and Family Life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### **Article 9 Freedom of Thought, Conscience and Religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### **Article 10 Freedom of Expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### **Article 11 Freedom to Assembly and Association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### **Article 12 Right to Marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

**Article 14 Prohibition of Discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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