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Association of Community Health Councils for England and Wales

Annual Conference 4 – 6 July 2000

The Human Rights Act 1998 and Medical Law

1. The Human Rights Act 1998 ("HRA") incorporates into domestic law the European Convention on Human Rights (the ECHR). It comes into force on 2 October 2000. Following the implementation of the HRA all courts and tribunals (public authorities for the purposes of s.6 of the Act) must interpret the common law as well as statute so as to give effect to the ECHR. That means that a court must not follow a superior court's decision where it is satisfied that it is inconsistent with the HRA and ECHR.

2. The House of Lords, the High Court, the Privy Council can make a declaration of incompatibility if primary legislation is incompatible with ECHR. Secondary legislation can be struck down or simply disapplied UNLESS primary legislation prevents removal of the incompatibility. Common law must be developed to be compatible with ECHR

Convention rights

3. The rights guaranteed by the Convention are as follows:

Article 2 The right to life and the prohibition of arbitrary deprivation of life.
Article 3 The prohibition of torture, inhuman and/or degrading treatment/ punishment.
Article 4 The prohibition of slavery and forced labour.
Article 5 The right to liberty and security of person.
Article 6 The right to a fair trial.
Article 7 The prohibition of retrospective application of the criminal law.
Article 8 The right to respect for private and family life, home and correspondence.
Article 9 Freedom of thought, conscience and religion, including the right to manifest religion or belief in public or private worship, teaching, practice and observance.
Article 10 Freedom of expression, including the right to receive and impart information and ideas without interference.
Article 11 Freedom of assembly and association, including the right to form and join trade unions.

Article 12 The right to marry.
Article 13 The right to an effective remedy in domestic law for arguable violations of the Convention.
Article 14 The prohibition of 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.

The UK is a party to the First Protocol to the Convention, which guarantees the right to peaceful enjoyment of possessions (First Protocol, Article 1), the right to education (First Protocol, Article 2) and the right to free elections (First Protocol, Article 3). It is also a party to the Sixth Protocol to the Convention, which abolishes the death penalty (Sixth Protocol, Article 1) save in respect of acts committed in time of war or imminent threat of war (Sixth Protocol, Article 2).

The categorisation of rights.

4. The rights protected under the Convention can be divided into three categories:

(1) *Absolute rights:* i.e. those which cannot be restricted in any circumstances (even in times of war or other public emergency) and which are not to be balanced with any general public interest. These are Articles 2, 3, 4(1) and 7.

(2) *Limited rights*: i.e. those in relation to which the Government can enter a derogation, but which otherwise are not to be balanced with any general public interest. These are Articles 4(2) and (3), 5 and 6.

(3) *Qualified rights:* i.e. those which although set out in positive form are subject to limitation or restriction clauses which enable the general public interest to be taken into account. These are Articles 8, 9, 10, 11, 12 and Articles 1, 2 and 3 of the First Protocol.

The Strasbourg approach to the protection of human rights.

5. A number of general principles of interpretation have emerged from the case-law of the European Court and Commission. Among the most important are the following:

(1) As an international treaty, the Convention must be interpreted according to the international law rules on the interpretation of treaties contained in the Vienna Convention on the Law of Treaties,[1] Article 31 of the Vienna Convention requires that all treaties:

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[1] Cmnd. 7964.

"...shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

This rule has led the European Court to adopt a teleological approach, i.e. one that seeks to realise the objects and purposes of the Convention.

(2) The objects and purposes of the Convention include its role "an instrument for the protection of individual human beings" and the promotion of "the ideals and values of a democratic society".[2] And the European Court has consistently held that "democracy" is characterised by "***pluralism, tolerance and broadmindedness***".[3]

(3) The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[4] This has provided a springboard for the imposition of positive obligations on state authorities (see below).

(4) The Convention is a "***living instrument***" and therefore must be interpreted "***in the light of present day conditions***".[5] The change in the European Court's approach to issues such as corporal punishment, homosexuality and transsexuals are examples of this principle in play.

(5) The European Court is not bound by the definition of words in domestic law when interpreting the Convention. It can adopt an "autonomous approach" by which it decides for itself the meaning of Convention words or concepts. As a result, some proceedings are deemed "criminal" under the Convention despite the fact that they are treated as civil in domestic law.

Who is covered by the HRA?

6. Public authorities include (but are not limited to) courts, tribunals and `any person certain of whose functions are functions of a public nature'.[6] The definition is in wide terms and is intended to cover central government (including executive agencies), local government, the police, immigration officers, prisons and, to the extent that they are exercising public functions, companies responsible for areas of

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2 Belgian Linguistic Case (No. 1) A/5 (1967) 1 EHRR 241.

3 Handyside v UK A/24 (1976) 1 EHRR 737.

4 Artico v Italy A/37 (1980) 3 EHRR 1.

5 Tyrer v UK A/26 (1978) 2 EHRR 1.

6 S.6 (3).

activity which were previously in the public sector, such as the privatised utilities.[7] Introducing the HRAin the House of Lords debate, **the Lord Chancellor made it clear that the Government's intention was that the Act be applied to a wide rather than a narrow range of public authorities**, so as to provide as much protection as possible to those who claim that their rights have been infringed.[8]

A health authority and NHS trust would be a public authority within the meaning of s.6 of the HRA, as would a GP when acting in relation to her/his NHS functions. Section 6 would thus encompass a private health provider that has entered into a contract with an NHS purchaser for health services. Primary Care Trusts, CHCs, social services authorities would also be included in the definition.

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7 White Paper, para. 2.2.

8 House of Lords Debate. Hansard. 3 November 1997. Col.1231.

Public law challenges

7. Public law challenges to health care decisions usually arise from one or more of the following situations:

[a] A decision that has been arrived at by means of an unlawful and/or unreasonable process;

[b] A decision that has been made because of resource constraints;

[c] A decision that may lead to a fatal outcome.

In situations involving [a] and [b] the courts have traditionally been very reluctant to interfere. Up until the 1980's there was even an issue as to the justiciability of challenges. As a matter of law the court may only interfere in the exercise of an administrative discretion (such as a decision whether to treat a patient or to provide a particular treatment to the patient) where the decision is irrational and/or unlawful. The court is not concerned with the merits – see Sir Thomas Bingham MR in ex p B (below).

Situations involving [c] are more usually dealt with in the Family Division[9] particularly where the case concerns a child or under the court's inherent jurisdiction to make a declaration as to the lawfulness of a proposed course of action.

Locus

8. Under the HRA a "victim" may challenge a decision or action which is in contravention of her/his rights under the HRA. A victim must be "directly affected" or at risk of being so affected. (See, for example, Paton v UK[10], discussed further below)

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[9] Re R, a challenge to a trust's do not resuscitate policy, was transferred from the Queens Bench Division to the Family Division once the trust had launched its own application for a declaration. See however comments of Lord Woolf MR in ex p Glass (26 July 1999), discussed further below.

[10] (1980) 3 EHRR 408

Some cases re-considered under the HRA

9. Whilst there is no right to medical treatment as such under the ECHR a number of provisions could be invoked in cases concerning challenges to health care decisions:

Article 2 –Right to life
Article 3 – Prohibition of inhuman or degrading treatment
Article 12- Right to found a family
Article 13 – Right to an effective remedy
Article 14 –Prohibition of discrimination

Articles 2 and/or 3

A resource decision that will lead to a fatal outcome

10. In R v Cambridge District Health Authority ex p B[11] the father of a child suffering from non-Hodgkin's lymphoma and acute myeloid leukaemia sought to challenge a health authority's refusal to fund a further bone marrow transplant and chemotherapy. Laws J granted an order quashing that decision and requiring the authority to re-consider but refused to make an order of mandamus requiring the respondent to fund the treatment. He held that whilst the court should not make orders with consequences for the use of health service monies in ignorance of their effect on others, where the life of a child was concerned the authority had to do more than "*toll the bell of tight resources*". His judgment was particularly concerned with the question of whether the health authority, by its omission to fund the further treatment, had interfered with the child's fundamental right to life under article 2 of the ECHR. He held that if that was so it was not sufficient to determine the legality of the respondent's decision simply by reference to whether or not it was *Wednesbury* unreasonable, it had to explain "*the priorities that have led them to decline to fund the treatment*".

11 The Court of Appeal adopted a far more traditional approach. Sir Thomas Bingham MR (with whom Stephen Brown P and Simon Brown LJ agreed) held that whilst the fact that this was a case which involved the life of a young patient must dominate "*all considerations of all aspects of the case*" it must be emphasised that the courts "*are not, contrary to what is sometimes believed, arbiters as to the merits of cases of this kind...We have one function only, which is to rule upon the lawfulness of decisions.*"[12]. He went on to reject the contention that the health authority should not have regard to funding constraints which he said would "*be shutting one's eyes to the real world*" as "*Difficult and agonising judgments have to*

[11] [1995] 1 WLR 898 (CA); 25 BMLR 5 (QBD)
[12] 905A-B

be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make." He concluded that the decision reached by the respondent authority was a reasonable one and expressly dissociated himself from the opinion of Laws J that it would be hard to imagine a proper basis upon which the treatment in question, at least in its initial stage, could reasonably be withheld.

12. Under the HRA the court would not simply be able to say that as the decision was neither irrational nor unlawful it could not quash such a decision. To confine the scope of a successful challenge to being able to establish that the decision was either irrational or unlawful is very likely to be held to be too high a threshold where the decision concerned such a fundamental human right.

Declarations of lawfulness of withdrawal of treatment

13. In Airedale NHS Trust v Bland[13] the court considered an application for declarations that it would be lawful for doctors treating Tony Bland, one of the victims of the Hillsborough disaster, to withdraw life-sustaining treatment. The House of Lords upheld the grant of declarations that the Airedale NHS Trust might

"*lawfully discontinue all life-sustaining treatment and medical support measures designed to keep [Mr Bland] alive...including the termination of ventilation nutrition and hydration by artificial means; and (2) lawfully discontinue and thereafter need not furnish medical treatment to [Mr Bland] except for the sole purpose of enabling [Mr Bland] to end his life and die peacefully with the greatest dignity and the least of pain suffering and distress*".

14. Under the HRA it is conceivable that an application for a declaration in similar terms could be challenged on the basis that such an order would be in conflict with the patient's rights under article 2 and/or 3. It seems that the Commission has drawn a distinction between causing death by omission and causing death by a deliberate act – hence in Widmer v Switzerland[14] the Commission held that Article 2 did not require that passive euthanasia, i.e. the withholding of treatment, should become a crime. Such a distinction however is far from clear-cut. It may also be arguable that by withholding treatment the patient is subject to inhuman or degrading treatment and equally that by continuing to treat someone whose life is "***intolerable***" a patient is similarly subject to inhuman or degrading treatment[15]

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[13] [1993] AC 789; [1993]; 2 WLR 316; [1993] 1 All ER 821

[14] 1993, unreported

[15] In Re J (A Minor) (Wardship: Medical Treatment) [1991] Fam 33, [1991] 1 FLR 366 Taylor LJ said that the question of "best interests" was to be approached by the court asking, "whether in all the circumstances such a life would be so afflicted as to be intolerable." In that case the Court of Appeal drew on the principles of Re B (A Minor) (Wardship: Medical Treatment) [1981] 1 WLR 1421 in stating that there will be cases where the proposed treatment will cause increased suffering and produce no

15. Challenges to an NHS trust's "do not resuscitate" policy in relation to a particular patient could also invoke article 2. (See for example, R v Portsmouth Hospitals NHS Trust ex p Glass[16]) The court would have to determine whether the policy infringed article 2 bearing in mind the patient's expressed wishes (if any), the views of the patient's family and carers and the quality of the patient's life.

Enforced Caesarean: does a foetus have a right to life?

16 In St George's Health Care v S[17] the Court of Appeal held that it had no power to over-ride a mother's refusal to agree to medical treatment to save the life of her unborn foetus. The unborn child had no legal personality: "*in England and Wales the unborn child has no right, no right at all, until birth*"[18] Is an unborn child a person within the protection of Article 2 of the ECHR? In Paton v UK the Commission stated that Article 2 does not recognise an absolute right to life of an unborn child. Such an absolute right might lead to situations where the mother's right to life would be regarded as being of less value than the life of the unborn foetus. The Commission left undecided the issue of whether or not the foetus had no right to life under article 2 or rather a qualified right.

17 It seems that an abortion on the grounds of risk to the physical or mental health and social well being[19] of the mother would not contravene article 2.

NB In Paton the Applicant was the father off the unborn child and was accepted as a "victim".

An implied obligation of a thorough investigation where life has been lost as a consequence of acts or omissions of a public authority

18. In McGann it was argued that Article 2 implied a right for a thorough investigation where life had been taken by an agent of the state. The Court said that there had been no breach by the UK in the inquest into the deaths at the Gibraltar shootings

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commensurate benefits. In such cases, the principle of public policy regarding the sanctity of life would give way and accordingly, in appropriate circumstances, even where a ward was not terminally ill, the court might withhold consent to life-saving treatment. This test was applied in Re C (A Baby)[1996] 2 FCR 569 where the court gave leave for doctors caring for a severely brain damaged 3 month old baby to cease artificial ventilation. Her condition was described as "almost a living death". It was held that it was not in her "best interests" to be ventilated, which would mean that she would die within an hour or so.

[16] CA, 26 July 1999
[17] [1999] Fam 26; [1999] 3 WLR 936
[18] per Sir George Baker P [1979] QB 276. See also decision of the Court of Appeal in Re F (in utero) [1988] Fam 122 where it ruled that an unborn child could not be made a ward of court as it had no existence independent of its mother.
[19] See H v Norway

though it commented that the violation would be more appropriately considered within the scope of Article 6(1). A similar argument was made before the Divisional Court in ex p Touche (June 2000, unreported) but Kennedy LJ said, obiter, that such arguments would not have "turned the tide" in the Applicant's favour. However in Keenan (Susan) v UK the Commission held admissible an allegation that there had been a breach of Article 13 because the Inquest had been an inadequate means of investigation.

Article 3: freedom from inhuman/degrading treatment

19. In D v UK[20] the ECHR ruled that the deportation of someone in end-stage HIV disease on the basis that his removal to St Kitts, where both medical and social care would be far more limited than in the UK, would amount to inhuman treatment (contrary to article 3)[21]. The Court did not examine D's case under Article 2 on the basis that that the complaints raised under that article were "*indissociable from the substance of the complaint under Article 3*".

20. A similar argument has been made in Bensaid v UK which was ruled admissible on 25 January 2000. The Applicant was refused leave to enter the UK. He was a schizophrenic and he argued that by being returned to Algeria he would be exposed to the risk of severe damage to his mental health because of withdrawal of treatment (Complaint also in conjunction with Articles 8 and 13).

Article 6 : right to a fair trial

21. Article 6(1) of the ECHR provides that

"In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal represented by law."

22. Article 6(1) embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the Golder v. United Kingdom judgment of 21 February 1975, Series A no.18, p. 18, § 36 1 EHRR 524: rule prohibiting prisoner from bringing defamation proceedings incompatible with Article 6).

The applicability of this Article to immunities given to local and health authorities from private law proceedings is considerable – see Osman, TP and KM.

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[20] (1997) 24 EHHR 423
[21] See paras 52-53

Applicability of Article 6 to challenges to complaints procedure

23. Narrowly interpreted "civil rights and obligations" would appear to suggest private law rights and obligations. There is also an argument that in relation to essentially administrative adjudication provided there is a right of challenge by judicial review proceedings then there will be no violation of Article 6(see Bryan v UK (1995) 21 EHHR 342). HOWEVER

    [a] Judicial Review cannot investigate merits (though merits may go to discretion) and so Applicant would not be given the full benefit of Article 6 (? Could this be met by order quashing original hearing and ordering a fresh hearing) Depends on gravity and seriousness of issue – see Le Compte v Belgium[22] (disciplinary proceedings regarding doctors), W v UK[23] (local authority decision restricting access to child in care)

    [b] Increasingly all rights of a pecuniary nature are being interpreted as civil rights within the meaning of the Article

    [c] In many instances private law remedy not available to investigate acts/omissions of State which have led to loss of life (art 2); inhuman/degrading treatment (art 3), respect for family life (art 8) (e.g. because no compensatable loss; lack of funding for small claims)

    Interestingly, the JSB have advised tribunal members not to follow a restrictive interpretation of what is and is not a civil right.

24. Complaint hearings/proceedings could fall within this Article on the basis that the hearing could affect the way in which the practitioner(s) carry on their profession (see Le Compte). Additionally complaint hearings may come within Article 6 on basis that they will involve determination of other Article rights (eg 2, 3, 8, and 14).

25. Areas of challenge might include

    [a] Right of representation – "equality of arms"
    [b] Fair and impartial tribunal
    [c] Hearings in public
    [d] Paper hearings
    [e] Adequacy of reasons (see Stefan v GMC [1999] 1 WLR 1293 PC)
    [f] Right to hearing within reasonable time limit

26. Procedurally the challenge should be made at each stage of the complaints procedure. Failure to comply with ECHR would be grounds for judicial review challenge.

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[22] (1981)4 EHRR 1
[23] (1987) 10 EHRR 29

Article 8 – the right to privacy and respect for physical and mental integrity

27. This Article has been widely interpreted to include

[a] Access to health records (Gaskin v UK (1989) 12 EHRR 36)

[b] Right to respect for privacy of medical data

[c] Respect for physical and mental integrity

A positive obligation to protect psychological and bodily integrity

28. Whilst the Court has declined to provide an exhaustive definition of the notion of private life (Niemietz v Germany 72/1991/324/396, 23 November 1992) it has made clear that the Article is concerned not only with protecting the individual against arbitrary interference by the public authorities but that it also imposes positive obligations inherent in an effective respect for private or family life (see Markck v Belgium (1979) 2 EHRR 330 at paragraph 31 and Airey v Ireland (1979) 2 EHRR 305 at paragraph 32.) A state's positive obligation may extend to preventing the harmful effects of pollution caused by the activity of a waste-water treatment plant situated near the applicant's home (Lopez Ostra v Spain, 9 December 1994, Series A, no 303-c) or to notifying citizens of the effects of toxic emissions from a factory so that they can assess the risks they and their families might run if they continue to live in a town particularly exposed to danger in the event of an accident at the factory (Guerra and others v Italy, 116/1996/735/932 19 February 1998).

29 Similarly, a state's positive obligation extends to the right to protection from seriously adverse effects on physical and moral integrity. The obligations under Article 8 may involve measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. In Botta v Italy (153/1996/772/973, judgment delivered 24 February 1998) the Court held that:

"32. Private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."

30 Botta has been used as a basis for arguing a positive obligation to provide care for seriously ill psychotic applicants in Bensaid and Clunis. The former has been declared admissible and the latter is pending.

Right to marry and found a family (article 12)

31 In R v Sheffield Health Authority ex p Seale[24] Auld J refused an application for a declaration that the respondent's policy of refusing IVF to women over 35 was unlawful. That was because the policy was based on clinical evidence that the treatment's efficacy declined with age and the authority was entitled to limit the availability of costly treatment for the receipt of which there was no absolute right. As such the health authority could argue that its decision would not contravene article 12 inasmuch as policy was "proportionate". This argument could be challenged if the decision was not based on an acceptable assessment of the relevant facts (i.e. by countervailing clinical evidence) and/or because the policy was framed in absolute terms. It could also be challenged under article 14 if it could be argued that women over 35 came within the ambit of "other status"

32. Diane Blood may also have been able to succeed in her application for permission for her late husband's sperm to be exported so that she could receive treatment in Belgium. Her application succeeded in the Court of Appeal[25] on the basis that the prohibition would be contrary to EU law. Under the HRA she could additionally have relied on her right under article 12.

Prohibition against discrimination (article 14)

33. Although there is no right to medical treatment under the ECHR nor is there an absolute entitlement to NHS services under the NHS legislation, a purchaser or provider's decision to deny treatment could be challenged if the reason for the reason arose on the grounds of

"*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*"

E.g.

in conjunction with article 2

- heart surgery not available to children with Down's Syndrome

- life-saving surgery denied on the grounds of age

-Organ transplant only offered to recipient of particular religious belief

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[24] 25 BMLR 1, judgment given in October 1994
[25] [1999] Fam 151 and [1997] 2 WLR 806

in conjunction with article 12

- fertility treatment for lesbians

- fertility treatment for women with HIV

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Wednesday, 05 July 2000