



## Human Rights Act 1998

CHAPTER 42

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The Sainsbury Centre  
for Mental Health

# BRIEFING 12

The Sainsbury Centre for Mental Health is a registered charity, working to improve the quality of life for people with severe mental health problems. It aims to influence national policy and encourage good practice in mental health services, through a co-ordinated programme of research, training and development. The Centre is affiliated to King's College London (School of Health and Life Sciences).

## An Executive Briefing on the implications of the Human Rights Act 1998 for mental health services

The introduction of the Human Rights Act 1998 (the HRA) on 2nd October 2000 will have a major impact on the development of mental health law and practice. The HRA requires all public authorities (which include health and social care agencies) to act in a manner which is compatible with the European Convention of Human Rights (ECHR) and it allows individuals who claim that their rights have been, or will be breached, to take legal action against the relevant authority.

Many of the rights set out in the ECHR are of direct relevance to the provision of care for people with mental health problems and it will be important for mental health

agencies to review their practices and procedures to ensure that these comply with the ECHR. The HRA has great potential for facilitating the development of good practice and ensuring that mental health services are provided in a way that respects the individual rights of those in need of such services.

This briefing explains the main provisions of the HRA and identifies areas that may be subject to legal challenge. It is aimed at chairs, chief executives, directors, members and staff in health, social care and independent sector organisations, and at other stakeholders in mental health, especially users and carers.



## The effect of the Human Rights Act 1998

The HRA seeks to ensure that laws, practices and procedures comply with the rights set out in the ECHR. This is to be achieved in the following ways:

- ▶ So far as it is possible to do so, all legislation, including mental health legislation, must be interpreted and given effect to in a way which is compatible with the ECHR rights – so the emphasis for national courts will be the consideration of the purpose of the right rather than relying on a literal interpretation of the legislation concerned.
- ▶ All courts and tribunals will be required to take into account ECHR case-law and will be bound to develop the common law in a way which is compatible with ECHR rights.
- ▶ It will be unlawful for public authorities to act in a way which is incompatible with ECHR rights – unless legislation requires the public authority to do so.

### Why has the Act been introduced?

The European Convention on Human Rights (ECHR), came into force in 1953. Since that time the rights under the ECHR have been extended and enhanced by a series of Protocols. Over 40 States are now members of the ECHR.

The United Kingdom (UK) was one of the first states to sign and ratify the ECHR. However, it was not incorporated into UK law. This meant that up until the introduction of the HRA, UK courts were only allowed to consider ECHR rights in very

limited circumstances, for example as an aid to the interpretation to legislation where its meaning was ambiguous. The HRA now allows national courts to consider individuals' claims that their rights under the ECHR have been infringed, so hopefully avoiding the cost and delay of taking a case to the European Court of Human Rights (the Court). It will still be possible for individuals to pursue a claim to the Court once they have exhausted the available domestic remedies.

### Public authorities and the Human Rights Act 1998

Public authorities are required to act in a way which is compatible with ECHR rights unless they are prevented from doing so by statute. Apart from stating that courts and tribunals are public authorities, the HRA does not specify the agencies which are to be considered as a 'public authority'. The Department of Health has suggested that the following agencies are 'public authorities' for the purpose of the Act:

- ▶ NHS trusts;
- ▶ private and voluntary sector contractors when undertaking public functions under contract with the NHS;
- ▶ local authorities, including social services;
- ▶ general practitioners, dentists, opticians and pharmacists when undertaking NHS work;
- ▶ primary care trusts;
- ▶ a body that has functions of a public nature (e.g. a professional regulatory body – such as the General Medical Council) even if it has private functions;

## ECHR Rights included in the Human Rights Act 1998:

**Article 2** – The right to life

**Article 3** – Freedom from torture and inhuman or degrading treatment or punishment

**Article 4** – Freedom from slavery and forced labour

**Article 5** – The right to liberty and security

**Article 6** – The right to a fair trial

**Article 7** – Freedom from retrospective criminal law and no punishment without law

**Article 8** – The right to respect for private and family life, home and correspondence

**Article 9** – Freedom of thought, conscience and religion

**Article 10** – Freedom of expression

**Article 11** – Freedom of assembly and association

**Article 12** – The right to marry and found a family

**Article 14** – Prohibition of discrimination in the enjoyment of ECHR rights

**Article 16** – Restrictions on political activity of aliens

**Article 17** – Prohibition of abuse of rights

**Article 18** – Limitation on use of restrictions on rights

**Articles 1 – 3 of Protocol 1** – (the right to peaceful enjoyment of possessions and protection of property, the right to access to education (subject to a UK reservation) and the right to free elections)

**Articles 1 – 2 of Protocol 6** – (the abolition of the death penalty).

- ▶ a body that has both public and private functions will be a public authority only in relation to its public functions. For example, bodies in the private sector that provide private health or social care but who also contract to provide health or social care for the NHS and Local Government, will be public authorities when providing health or social care for the NHS and Social Services).<sup>2</sup>

Thus most of the agencies involved in the planning and provision of mental health services will be ‘public authorities’. Other agencies which are likely to be considered to be ‘public authorities’ include the:

- ▶ Mental Health Act Commission
- ▶ National Institute for Clinical Excellence
- ▶ Commission for Health Improvement
- ▶ Health Service Ombudsman.

## Who will be able to claim under the Act?

Only ‘victims’ can bring proceedings against public authorities under the Act. To be a ‘victim’ the person or company must be, or at risk of being, directly affected by the act the public authority has taken, or proposes to take. This means that interest groups or trade unions cannot pursue a claim under the Act unless they are directly affected by the action taken or to be taken by the public authority.

However, relatives may bring a claim on behalf of a victim where the claim relates to the victim’s death or if the person lacks capacity to pursue the claim for him or herself.

## New Terms and Concepts

### The three broad categories of the articles in the ECHR:

- **Absolute rights** – cannot be limited or qualified. For example Article 3 does not allow, in any circumstances, torture or inhuman or degrading treatment to be carried out.
- **Limited rights** – specify the limitations of the right. For example, the right to liberty specifically allows the lawful detention of ‘persons of unsound mind’.
- **Qualified rights** – set out the circumstances or conditions when interference with such rights will be permissible. Such rights may only be interfered with if:
  - it is in accordance with the law
  - it is necessary in a democratic society – this requires the interference to ‘fulfil a pressing social need’, pursue a ‘legitimate aim’, and to be proportionate to the aims pursued
  - it is related to one of the aims set out in the relevant article – for example, one of the circumstances in which Article 8 allows the right to private life to be interfered with is if it is ‘for the protection of the rights and freedoms of others’.

### Proportionality

Any interference with a right under the ECHR must be no more than necessary to achieve the intended objective. It must not be arbitrary or unfair. So where a right has been interfered with, the courts will be required to consider whether there were other options available to the public authority which would have been less intrusive to the individual concerned. This is likely to be an important factor in relation to actions such as seclusion or restraint.

### The Margin of Appreciation

This concept describes the measure of discretion that the European Court gives to the state in deciding what action is required in the particular circumstances (such as issues concerning national security) under scrutiny. The

doctrine enables the European Court to take into account the different cultures and traditions of member states when considering whether there has been a breach of an ECHR. For this reason it is considered that the doctrine has no place in the national courts.<sup>3</sup>

### The ECHR is a ‘living instrument’

The European Court of Human Rights interprets the ECHR in the light of present day conditions and will be influenced by the developments and commonly accepted standards of the member States.

### Positive obligations on the State

Many of the articles in the ECHR not only expect States to refrain from interfering with the ECHR rights but also require States to take positive steps to protect such rights.

### Horizontal and vertical effect

The requirement on public authorities to act compatibly with the ECHR and the ability of individuals to challenge public authorities where they believe that their rights under the ECHR are being or about to be breached is described as the ‘**vertical effect**’. This is because the ECHR rights affect the relationship between public bodies and private individuals. However, it is also argued that the HRA introduces an indirect ‘**horizontal effect**’ – so that ECHR rights can be considered where the dispute is between private individuals. This is because courts and tribunals are public authorities under the Act and are required to comply with the ECHR when adjudicating in disputes.

### The European Commission on Human Rights

Until the introduction of Protocol 11, which has established new procedures for dealing with complaints under the ECHR, the European Commission on Human Rights (the Commission) considered the admissibility of complaints from individuals claiming that their rights had been violated. As from November 1998 all cases are dealt with by the European Court of Human Rights (the Court).

## How will the Act enable the ECHR to be considered by the courts?

Individuals who believe that their rights under the ECHR have been infringed by a public authority can pursue a claim against the public authority in the following ways:

- ▶ Issue proceedings against the authority claiming that their ECHR rights have been breached. In such cases the claim must normally be made within one year, beginning with the date on which the act complained of took place (although the court or tribunal may extend this period if this is considered to be appropriate in the circumstances).
- ▶ Include the question of a breach of ECHR rights in the course of other proceedings, for example judicial review proceedings. In such cases the claim must be made within the period set for the particular proceedings, where the time limit could be shorter than one year.
- ▶ Victims may also rely on ECHR rights as a defence in any proceedings which a public authority brings against them, and this applies to acts taking place before 2nd October 2000.

If the court finds that a public authority has breached an individual's rights under the ECHR, it can grant whatever remedy it thinks just and appropriate. Courts which have the power to do so may award damages which will 'afford just satisfaction', but this will be in accordance with ECHR principles for awarding damages which tend to be fairly low.

Individuals would still be able to make complaints under existing complaints mechanisms, if they so wish. The public authority investigating the complaint would need to do so in a manner compatible with the ECHR. Where the complaint constitutes a claim that the individual's rights under the ECHR have been breached, the complainant should be advised of the right to pursue a legal action against the public authority concerned.

## Declarations of incompatibility

The HRA requires that all legislation – primary legislation, for example the Mental Health Act 1983 (MHA) – and secondary legislation, such as regulations – be read and given effect in a way that complies with the ECHR. If secondary legislation cannot be interpreted to comply with the ECHR the courts can override the legislation unless the legislation has to be interpreted in such a way, due to a provision contained in the primary legislation.

Where primary legislation cannot be interpreted so that it complies with the ECHR, a higher court (such as the High Court, the Court of Appeal and the House of Lords, but not the Magistrates court) can make a 'declaration of incompatibility'. Such a declaration has no effect on the legislation itself – which would still need to be followed – however, the expectation will be that the legislation would subsequently be amended so that it complies with the ECHR.

## The ECHR and mental health

While it is not possible to predict the type of mental health cases which will be successfully pursued under the HRA, it is clear that the following articles will be of particular relevance to the provision of mental health care:

- ▶ Articles 5 (the right to liberty),
- ▶ Article 8 (the right to private and family life),
- ▶ Article 3 (prohibition against torture and inhuman and degrading treatment), and
- ▶ Article 2 (the right to life).

## Detention under Article 5

Article 5 provides the right to liberty. This is a limited right, with the first paragraph of the article setting out the circumstances in which this right can be restricted. These include the detention of persons of 'unsound mind'. So the existing powers of detention under the MHA and the proposals for reform in the forthcoming White Paper will need to comply with the relevant provisions of Article 5.

### ■ Article 5(1)(e)

**“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:**

[...]

**e. the lawful detention of ... persons of unsound mind...”**

### I Persons of 'unsound mind'

This term is not defined in the ECHR. In *Winterwerp v The Netherlands* (1979),<sup>4</sup> the Court noted:

*“it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitudes to mental illness change, in particular so that a greater understanding of the problems of mental patients is becoming more widespread.”*

However, the Court has emphasised that Article 5 does not allow the detention of individuals simply because their views or behaviour deviate from the norms prevailing in a particular society.

### 2 Conditions for detention under 5(1)(e)

ECHR case law has established that, except in emergencies, the following three minimum conditions have to be satisfied in order for detention to be lawful under Article 5(1)(e):

- a a true mental disorder must be established before a competent authority on the basis of objective medical expertise
- b the mental disorder must be of a kind or degree warranting compulsory confinement
- c the validity of continued confinement depends on the persistence of such a mental disorder

### 3 Delay in discharge from detention

The Court has held it is not necessary to immediately and unconditionally discharge a person who no longer suffers from a mental disorder which justified his or her initial detention. However, the discharge should not be unreasonably delayed.

This approach was taken in *Stanley Johnson v the United Kingdom* (1997). Mr Johnson had been detained in Rampton Hospital, subject to a hospital order with restrictions. Three successive Mental Health Review Tribunals (MHRT) considered that Mr Johnson was no longer suffering from mental illness and ordered his conditional discharge, one of the conditions being that suitable arrangements for supervised accommodation were put in place. However, no such arrangements were put in place. Mr Johnson was finally discharged in January 1993, three and a half years after the first tribunal's finding that he no longer suffered from a mental illness. He complained that his prolonged detention was in breach of Article 5(1).

The Court considered that there may be circumstances, such as where the person committed a serious offence prior to the detention raising questions about public safety, which justify the deferral of the person's discharge and/or retaining some measure of supervision in the community after the person is discharged. However, neither the MHRT nor the appropriate authorities could ensure that the conditions set by the MHRT were met within a reasonable time, and there was no mechanism for Mr Johnson to request that the conditions be reconsidered in between the annual reviews. Given that Mr Johnson had no means of ensuring that his release from detention was not unreasonably delayed, the European Court found that there had been a breach of Article 5(1)(e).

### 4 Detention and the right to treatment

The Court has made clear that Article 5 does not provide a right to treatment for individuals detained on the basis of their 'unsound mind'. However, the place in which the person is detained must be a hospital, clinic or other appropriate institution authorised for the purpose of caring for people with mental disorder.

In *Aerts v Belgium*, the applicant was detained in a prison psychiatric wing. The Court heard that the detainees received neither medical attention nor a therapeutic environment and that the situation was harmful to Mr Aerts who was not receiving the treatment required by the condition which had given rise to his detention. In such circumstances the Court considered that the proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient and held that there was a breach of Article 5(1)(e).

#### ■ Article 5(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.”**

The Court considers that as the right to challenge the lawfulness of the detention Article 5(4) (see below) makes no distinction between those people who have been

deprived of their liberty by arrest and those that have been detained, Article 5(2) should also apply to those who have been detained:

**“Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty.”<sup>5</sup>**

This is an area in which the MHA is arguably in breach of the ECHR. Although section 132 of the MHA requires that certain information is given to patients as soon as practicable after their detention has begun, there is no duty to provide the person with the reasons for the detention.

The Code of Practice to the MHA (the Code)<sup>6</sup> however, states that patients should be informed of the reasons for their detention.<sup>7</sup> It also stresses the need to ensure that there is an easily accessible pool of trained interpreters.<sup>8</sup> This is crucial given that Article 5(2) requires that individuals are given the information in a language that they understand.

#### ■ Review of detention – Article 5(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.”**

##### I Scope of the review

The European Court considers that the requirements of 'lawfulness' in Article 5(4) mirror the requirements for 'lawfulness' in Article 5(1):

**“...The review should, however, be wide enough to bear on those conditions which according to the Convention are essential for the lawful detention of a person on the ground of unsoundness of mind, especially as the reasons capable of initially justifying detention may cease to exist.”**

So the review body must consider whether the conditions set out in *Winterwerp* (described previously) are met. The review body must consider whether objective medical evidence has established that the person has a mental disorder of a kind or degree warranting compulsory detention and that such a mental disorder persists.

##### 2 The review must be carried out 'speedily'

Article 5(4) requires that the lawfulness of the detention is carried out 'speedily'. It is not clear how soon the review must take place after the initial detention in order to comply with Article 5(4). In the case of *E. v Norway* (1990), the Court considered that a review under Article 5(4), which took approximately two months from the institution of proceedings to the delivery of judgement, was not conducted 'speedily'.

While noting that the initial delays were due to administrative problems arising from the fact that the

application was lodged during a holiday period, the Court commented:

*“The Convention requires, however, the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements... It is incumbent on the judicial authorities to make the necessary administrative arrangements, even during a vacation period, to ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual’s personal liberty is at stake.”*

So the current problems with delays in convening Mental Health Review Tribunals may lead to challenges under the HRA. The Department of Health’s most recent report on MHRTs states that the waiting times still exceeded the targets of eight weeks for non-restricted cases and 20 weeks for restricted cases.<sup>9</sup>

## Article 8 – the right to respect for private and family life

Article 8 covers a wide range of areas affecting individuals daily lives. Cases considered by the Court include restrictions on correspondence, access to children, compulsory treatment in the community and the role of the Nearest Relative under the MHA.

Article 8(1) states:

**“Everyone has the right to respect for his private and family life, his home and his correspondence.”**

If there has been an interference with the rights set out under Article 8, the State has to show that the interference was justified under one of the grounds set out in Article 8(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 of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”**

While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, the Court has made clear that in addition to the requirement that the State abstains from such interference, there may be positive obligations to ensure respect for private and family life.<sup>10</sup>

### The nearest relative under the Mental Health Act 1983

In *JT v the United Kingdom* (2000), JT, who had been detained under section 3 of the MHA 1983 from 1984 to January 1996, claimed that Article 8 had been violated on the basis that she had no means of changing the identity of her nearest relative under the MHA 1983. This was unanimously upheld by the Commission of European Human Rights.

The case was settled with the UK Government agreeing to amend the legislation so that patients may apply to a court to replace the nearest relative where the patient reasonably objects to a certain person acting in that capacity and to exclude certain persons from acting as nearest relative.

Such changes have not as yet been introduced. However, the Green Paper – *Reform of the Mental Health Act 1983, Proposals for Consultation*<sup>11</sup> (the Green Paper) includes proposals to remove the ‘nearest relative’ from future mental health legislation. Where possible, patients will be able to appoint a ‘nominated person’ who will have certain rights and responsibilities (which would not include the power to discharge the patient). The proposals also include procedures for displacing the ‘nominated person’ where thought necessary.

## Article 3 – prohibition of torture and inhuman and degrading treatment

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

The Court considers that Article 3 enshrines one of the most fundamental values of democratic societies. There are no exceptions to this article nor can it be derogated from even in the event of a public emergency threatening the life of the nation.<sup>12</sup> To fall within Article 3 the treatment must attain a ‘minimum level of severity’, but this will depend on the circumstances of the case such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>13</sup>

This article is likely to be relevant in complaints arising from the conditions of detention, seclusion and restraint.

The case of *Herczegfalvy v Austria* (1990) considered whether there had been a breach of Article 3. Mr Herczegfalvy complained that food and medication had been forcibly administered, he had been isolated for lengthy periods and had been attached, with handcuffs, to a security bed.

Although concerned about the length of time that the handcuffs and security bed were used, the Court did not find a violation of Article 3. The Court took the view that a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading, although the Court would need to be satisfied that the medical necessity has been convincingly shown to exist. In Mr Herczegfalvy’s case the Court felt that the evidence before it was not sufficient to disprove the Government’s argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. In addition the Court felt that some of the allegations were not supported by the evidence.

However, the Court commented that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the actions taken complied with the ECHR.

“While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3.”

Comments made in *Selmouni v France* (1999) indicate that the Court would now take a more robust view in considering similar complaints, requiring the State to produce evidence to justify the actions taken. In *Selmouni* the Court held that the repeated and sustained assaults that Mr Selmouni was subjected to over a number of days by the police while in police custody, amounted to torture. While noting that in previous cases it had described ‘torture’ as “deliberate inhuman treatment causing very serious and cruel suffering”,<sup>14</sup> the Court stated that certain acts which were in the past classified as “inhuman and degrading treatment” as opposed to torture could be classified differently in the future. Furthermore, the Court stated:

“the increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”

This suggests that there is now a lower threshold for what amounts to inhuman or degrading treatment under Article 3.

The Court also stated that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. Failure to do so gives rise to a clear issue under Article 3. It is likely that detention in a psychiatric hospital would fall within the same principle.

In considering any future complaints in relation to seclusion or restraint, the Court might refer to guidelines issued by the Council of Europe aimed to “ensure the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment”. The draft guidelines state that seclusion and restraint should only be used in exceptional cases and where there is no other means of remedying the situation:

“...furthermore, such measures should be used only on the express order or under the supervision of a medical doctor or immediately brought to the knowledge of a medical doctor for approval, the reasons and duration of these measures should be mentioned in a proper register and in the patient’s personal file.”<sup>15</sup>

## Article 2 – the 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 persons 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 purposes of quelling a riot or insurrection.”**

The Court has emphasised that in addition to refraining from the intentional and unlawful taking of life, States are required to take appropriate steps to safeguard the lives of those within its jurisdiction. This positive obligation is likely to be considered in relation to deaths of individuals who were receiving psychiatric services, particularly where detained in hospital under the MHA.

The urgent need to reduce the numbers of suicides by people with mental health problems is highlighted by Standard 7 (Preventing Suicide) of the National Service Framework for Mental Health. More recently the National Mental Health Director, Louis Appleby, has called for immediate action to be taken to prevent mental health inpatients from taking their own lives:

“It is a simple fact that there are far too many suicides on acute psychiatric wards, at least 60 a year, many of which are avoidable. This rate must be reduced to zero by the end of March 2002.”<sup>16</sup>

In *Osman v The United Kingdom* (1998), the Court considered the claim by relatives of Ahmed Osman, who had been shot dead by his son’s school teacher, that there had been a violation of Article 2. The Court considered that where there is an allegation that the authorities have violated their positive obligation to protect the right to life by taking operational measures to protect an individual whose life is at risk from the criminal acts of another individual, two conditions must be established:

- a** that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and
- b** that they failed to take measures, within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

The Court held that in the circumstances of the *Osman* case there was no violation of Article 2. This was because the applicants had not shown that the police knew or ought to have known that the lives of the *Osman* family were at real and immediate risk from the school teacher nor that the measures that the police may have taken would have produced any concrete results.

The Commission followed the approach taken in *Osman* when considering *Keenan v The United Kingdom* (1998) which concerned a complaint made by the mother of a 28 year-old man who died of asphyxia caused by hanging while serving a sentence of 4-month imprisonment. Mrs Keenan, argued that Article 2 had been violated on the basis that the government had a positive duty to take adequate care

and take appropriate measures to secure effective protection of her son's life while he was detained as a prisoner known to be suffering from a mental illness.

The Commission agreed that prison authorities have an obligation under Article 2 to take appropriate steps to safeguard the lives of the prisoners under their control. However, it concluded that in all the circumstances of the case the prison authorities were not shown to have acted unreasonably in the way in which they treated Mark Keenan in the period of detention before his death. Nor had they omitted measures which they could reasonably have been expected to have taken to avoid a risk to his life.

## The Mental Health Act 1983 and the ECHR

There are a number of areas in which the MHA clearly contravenes the ECHR. For example, *JT v The United Kingdom* made clear that the inability of patients to change their nearest relative is in breach of the ECHR. The following section highlights other areas which may be susceptible to challenge:

### ■ Article 5

#### 1 Conditions for Detention

One of the conditions for detention under Article 5 on the basis that the person is of unsound mind (Article 5(1)(e)) is that the detention should only continue for as long as the mental disorder persists.

The Code seeks to avoid a potential breach of Article 5(1)(e) under the MHA. Section 136 provides that a person believed to be suffering from mental disorder can be removed by the police to a place of safety, where the person can be detained for up to 72 hours. The MHA requires that the person is assessed by a doctor and a social worker before being discharged. However, if the person does not have a mental disorder, there will be no grounds under Article 5(1)(e) to detain the person. Accordingly, the Code states that if the doctor forms the opinion that the person does not have a mental disorder the person should be discharged immediately.

#### 2 Hospital managers and delayed discharge

The Code states that where hospital managers consider that a patient ought to be discharged but arrangements for aftercare need to be made, “they may adjourn for a brief period, to enable a full CPA/care planning meeting to take place”. In the light of *Stanley Johnson* (discussed above) such an approach would be susceptible to challenge if the delay in discharge was unreasonably delayed.

#### 3 Article 5(4) and Mental Health Review Tribunals

The Court has accepted that a specialised body such as Mental Health Review Tribunals (MHRTs) can be ‘courts’ for the purpose of the review of the detention under Article 5(4) provided that they enjoy the necessary independence and offer sufficient procedural safeguards.

However, the role of MHRTs and their procedures are likely to be subject to a variety of challenge under the HRA. Two crucial areas of potential challenge are the delay

in convening the hearings (discussed above) and the fact that the burden of proof is placed on the patient to show that the grounds for detention do not exist. Whereas the conditions for detention under Article 5 (see the discussion on *Winterwerp*, page 5) require the detaining authorities to show that there are grounds for the detention, MHRTs are only required to discharge a patient if they are satisfied that the grounds for detaining the patient are not met. This is arguably in breach of the Article 5(4).

### ■ Article 5 and the Bournemouth case

The House of Lords held in *R v Bournemouth Community Healthcare NHS Trust ex parte L* that people without the capacity to consent, but who do not object to their admission to hospital for treatment for their mental disorder, may be admitted and cared for without the need to detain them under the MHA.

The introduction of the HRA raises the question whether people admitted to hospital in such circumstances are detained. If this constitutes detention, Article 5 applies and safeguards to ensure compliance with this article must be put in place. So the person could only be detained if the *Winterwerp* criteria were met: that the person detained is of unsound mind (Article 5(1)(e)) and that the decision to detain is regularly reviewed (Article 5(4)). Two out of the five Law Lords considered that the patient in the Bournemouth case, Mr L, was detained, with one of these judges commenting that to suggest that Mr L was free to leave was ‘a fairy tale’.

### ■ Article 8 and visiting patients

Article 8 will be relevant to decisions taken in respect of visiting detained patients. The right of visits is not covered by the MHA but is dealt with in the Code which states:

**“All detained patients are entitled to maintain contact with and be visited by anyone they wish to see, subject only to some carefully limited exceptions.”**

However, the Code suggests that visits by children should only take place following a decision that such a visit would be in the interests of the child and that decisions to allow such visits should be regularly reviewed. Further guidance,<sup>17</sup> issued in response to widespread criticism on this part of the Code states that decisions to refuse visits should only be taken exceptionally and will need to be supported by clear evidence of concerns, and reasons should be given as to why the provision of support and/or supervision of visits were thought to be insufficient.

With the introduction of the HRA, decisions to refuse or restrict visits will have to be considered in the light of Article 8. For example, a crucial question will be whether the interference with the patient's right to family life is a procedure ‘prescribed by law’.

### ■ Compulsory treatment in the community

Comments made by the European Commission (there would appear to be no decision by the Court on this issue) indicate that compulsory treatment in the community will

not necessarily fall within Article 5. In *W v Sweden*<sup>18</sup> the Commission took the view that conditions attached to the complainant's provisional discharge – the requirement to take medication and attend hospital appointments – were not so severe to constitute a deprivation of liberty.<sup>19</sup>

In a similar case the applicant argued that the conditions of her 'provisional discharge' (that she receive medication) was in breach of Article 8. However, the Commission considered that there was no breach of Article 8 because the provisional discharge was in accordance with the law with the aim of protecting the applicant's health and it was necessary in a democratic society to protect her health.

The Green Paper suggests that there will be powers to convey to hospital individuals who fail to comply with the community order. This raises the question whether detention in such circumstances would comply with the conditions, set out in *Winterwerp*, for detention under Article 5(1).

## Conclusion – responding to the challenges introduced by the Human Rights Act 1998

This briefing has highlighted some areas of the ECHR which will be of particular relevance to mental health practice. However, the impact of the HRA extends beyond the examples given. Practitioners will need to be aware of the likely wide-ranging impact of their work on the rights of service users and carers and ensure any interference with such rights can be justified and the reasons for reaching decisions are fully recorded. While any new Mental Health Act may rectify some of the issues raised above, the impact of the HRA is likely to extend well beyond the fine detail of mental health legislation to the way in which patients are treated and their rights protected by health and social care agencies.

## References

- 1 See section 1 of the HRA. Articles 13 (the right to an effective remedy) and article 15 (exceptions in time of war) are not included. The Government considers that the HRA gives effect to Article 13 by establishing a scheme which allows claims under the ECHR to be considered by the national courts.
  - 2 *Human Rights Act 1998 – NHS and Social Services*, Questions and Answers, Department of Health. [www.doh.uk/humanrights/qa.htm](http://www.doh.uk/humanrights/qa.htm)
  - 3 John Wadham & Helen Mountfield *Human Rights Act 1998*, Blackstone Press Ltd, London, 1999, page 18
  - 4 The European Court of Human Rights cases referred to can be found at: [www.echr.coe.int](http://www.echr.coe.int) – ECHR cases web site
  - 5 Van der Leer para 28
  - 6 Department of Health, The Stationery Office, March 1999
  - 7 Paragraph 14.5b
  - 8 Paragraph 1.5
  - 9 Mental Health Review Tribunals for England and Wales, Annual Report 97-98, Department of Health, May 2000, page 43
  - 10 See for example *Botta v Italy* (1998)
  - 11 Department of Health, November 1999
  - 12 See *Ireland v The United Kingdom, Selmouni v France* (1999)
  - 13 *Selmouni v France*, 28th July 1999, paragraph 100.
  - 14 *Ireland v The United Kingdom* (1979 –1980)
  - 15 Council of Europe White Paper, paragraph 11(6), January 2000
  - 16 Department of Health Press Release, 9th October 2000
  - 17 HSC 1999/222
  - 18 Application 12778/87
  - 19 See also Application 10801/81
- [www.doh.gov.uk/humanrights/weblinks.htm](http://www.doh.gov.uk/humanrights/weblinks.htm) – DOH website on human rights

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