

The Human Rights Act 1998: implications for clinical practice

Dr Martin Curtice

**Consultant in old age psychiatry
Hollyhill Unit1, Birmingham**

**Special Committee for Human Rights
Royal College of Psychiatrists**

Outline

- Key basics of the Human Rights Act 1998
- Medical emphasis
- Articles 3, 5 & 8 - case law
- Human rights based approach (HRBA)
- References

Public perceptions?

‘The words ‘human rights’ send everyone into panic mode’

Daily Mail 29th September 2009

Oh no not lawyer stuff.....

QuickTime™ and a
decompressor
are needed to see this picture.

Human Rights Act 1998

- HRA 1998 enacts (most of) the ECHR into UK law
- Enforced E&W 2000 – ALL courts & tribunals (MHRTs)
- HRA requires public authorities to act compatibly with Convention rights ('positive obligations') →
NHS IS A PUBLIC AUTHORITY = YOU!!
- *Joint Committee on Human Rights – The Human Rights of Older People in Healthcare (August 2007) → BGS newsletter Oct 2007*
- Scathing of the 'failure' of DoH and the Government
- **Widespread poor knowledge, training & understanding of HRA**

Key HRA 1998 concepts

- ***PROPORTIONALITY***
= *least restrictive/worst option*
- ***MARGIN OF APPRECIATION***
- Violations = financial compensation
- HRA = a 'living instrument' = evolves over time

Article 3 HRA

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

- **Absolute** convention right
- *‘limited’* rights e.g. Article 2 – right to life
- *‘qualified’* rights e.g. Article 8

Article 3 HRA: *Herczegfalvy v. Austria* (1992)

*‘While it is necessary 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.....such patients nevertheless remain under the protection of Article 3’*

= Bournewood & DoLS patients

Article 3 HRA: *Herczegfalvy v. Austria (1992)*

- *‘A measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.....’*
- *.....as long as convincingly shown to exist’*
- **Medical notes therefore vital to demonstrate this**

Article 3 HRA: *McGlinchey v. UK (2003)*

- **Medical treatment of heroin addict was inadequate and breached Article 3**
- €22,900 damages – humiliation and degradation but **NOT** for clinical negligence
- Heroin withdrawal, asthmatic, vomiting, fits and weight loss (20% in a week), lack of monitoring/IV fluids/hospitalisation → death
- Ill-treatment had to attain a minimal level of severity – *‘exceptionally shocking deficiencies in treatment’*

Article 3 HRA: *Pilcic v. Croatia* (2008)

- Prisoner
- **Delay in medical treatment for kidney condition
= Article 3 violation**
- Various physical ailments all managed and treated adequately
- But not kidney stones
- Seen dozens of times for renal related symptoms (pain)
- Delay of a few years for recommended surgery

Article 3 HRA:

Kaprykowski v. Poland (2009)

- 3 February 2009 - Remand prisoner - Born 1966 - recidivist
- *“Epilepsy marked by frequent (daily) seizures and encephalopathy accompanied by dementia....also suffers from ulcers and syphilis”*
- Submitted the Remand Centre refused to supply him with Gabitril (a foreign medicine).
- Instead, the in-house doctors prescribed cheaper Polish generics and provided inadequate medical care.
- ***‘...Lack of adequate medical treatment.....and the placing of the applicant in a position of dependency and inferiority vis-à-vis his healthy cellmates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty.’***
- Court concluded ***‘applicant's continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment amounting to a violation of Article 3.’***

Article 5 HRA

- *Bournemouth*
- **Article 5** = the right to liberty and security
- Article 5(1) - not in accordance with law
- Article 5(4) - speedy court
- **High Court** (1997) - judicial review declined
- **Court of Appeal** (1997) - unlawful detention
- **House of Lords** (1998) - lawful detention
- **HL v UK** (2004) - unlawful detention under Article 5
- **DoLS procedures to plug the infamous Bournemouth 'gap'**

M Curtice - BGS Aut 2009

Article 8 HRA

Qualified right and provides that:

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”*

M. Currie - BGS Aut 2009

Article 8 HRA

- One of the most dynamically interpreted provisions of the HRA
- Wide & varied application
- **Personal care from same sex staff**
- **Use of manual or hoisting equipment**
- **Delay in moving to disabled-adapted property**
- **Appropriate use of bedpans**
- **Complex end-of-life decisions** (*Burke v. GMC*, 2005)
- **Assisted dying/Suicide Act 1961**
 - Debbie Purdy & Diane Pretty cases

M Curtice - BGS Aut 2009

Article 8 HRA – medical treatment

- *North West Lancashire Health Authority v. A, D & G [2000]*
- Rationality of a HA's policy on funding for gender reassignment
- Article 8 “*imposes no positive obligations to provide treatment*” i.e. private life
- “*....fair balance ...to be struck...between community and the interests of the individual*”

Article 8 HRA – medical treatment

- *R(Ann Marie Rogers) v. Swindon NHS PCT & Sec State for Health [2006]*
- High Court – PCT refusal to fund off-licence Herceptin did not breach Article 8
- HC – “*difficult and agonising judgments....how a limited budget is best allocated to the maximum advantage of the maximum number of patients.....and that is not a judgment which the court can make.*”
- Overturned CoA – funding policy “*irrational*” and unlawful
- 10/09/08 - multiple myeloma drug Revlimid - 'postcode prescribing'

Article 8 HRA – medical treatment

- *Valentina Pentiacova v. Moldova (2005)*
- Haemodialysis funding
- Margin of appreciation
- HRA “*does not guarantee ...right to free medical care.....lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment.*”
- Article 8 could be relevant but “*fair balance*” needs to be struck: pt ↔ community M Curtice - BGS Aut 2009

Article 8 - Care homes

- *Haggerty v. St. Helens Council (2003)*
- Lawful to close a care home
- Council refused to ↑ rates paid to the extent demanded by the home
- Precautions taken... “no cogent evidence”...of disruption of private or family life
- Financial resources were a **proportionate** consideration in the balancing exercise of individual ↔ community
- “*the court is slow to interfere with decisions which involve a balance of competing claims on the public purse in the allocation of economic resources*”

Article 8 HRA - Care homes

- **Louisa Watts** - Wolverhampton
- 106 yr old lady
- Court of Appeal **7th October 2009**
- Highly likely Article 8 based
- Lawful to move her from care home and interfere with her private life

Article 8 - Day care

- *R(Bishop) v. London Borough of Bromley [2006]*
- Day care services similarly can be 'lawfully' closed
- Courts accept it does affect long established friendships and hence Article 8(1) engaged
- But....any interference with the users' private lives could be justified as being necessary for the economic well-being of the Council and those in need of services
- i.e. 'disinvest to reinvest' - release funds for development

HRA 1998

= top-down knowledge

- Widespread poor knowledge of the technicalities of the HRA – nebulous concept(s)
- *“you can’t do that it’s against their rights”*
- *“that’s violating their rights”*
- But which article or right(s)?
- **Top-down approach** – technical knowledge led

Welcome to FREDA

- A human rights based approach (HRBA) - DoH
- 'Bottom up' vs 'top down' knowledge-led approach
- **F**airness
- **R**espect
- **E**quality
- **D**ignity
- **A**utonomy
- All healthcare staff can use and apply [M Curtice - BGS Aut 2009](#)

Summary

- **Proportionality** - vital and helpful concept
- **Article 3** - standard of medical care
- **Article 5** - produced major legislative change
- **Article 8** - community (£££) >> individual
- **HRBA & FREDA** - easier concept to apply in clinical practice by all

References

- Curtice, M. (2007) From rhetoric to reality? Human rights of older people in healthcare. M.Curtice. ***British Geriatric Society Newsletter*** 13: 6-10.
- Rizkalla, N. & Curtice, M (2009) 'Changing Lives' - human rights and the Human Rights Act 1998 in action for older people. ***British Geriatric Society Newsletter***. 23: 15-19.
- Curtice, M. (2009) Article 8 of the Human Rights Act 1998: implications for clinical practice. ***Advances in Psychiatric Treatment***. 15: 23-31.
- Curtice, M (2008) Article 3 of the Human Rights Act 1998: Implications for Clinical Practice. ***Advances in Psychiatric Treatment***. 14: 389-397.

M Curtice - BGS Aut 2009