

## Human rights and the Human Rights Act 1998 – implications for psychiatrists

by Dr Martin Curtice and Dr Richard Symonds

### Article 3 of the Human Rights Act 1998 – the right to freedom from torture, inhuman and degrading treatment

**Capacity:** Patients with and without capacity remain under the protection of Article 3. Current jurisprudence suggests that capacity is not crucial when making decisions that may engage Article 3 as long as medical necessity is convincingly demonstrated.

**Degrading treatment:** Treatment in which the object is to humiliate and/or debase the patient, which could adversely affect their personality. Treatment that arouses feelings of fear, anguish, inferiority and/or that shows lack of respect for or diminishes the patient's dignity may be considered degrading.

**Inhuman treatment:** Treatment could be construed as inhuman if it causes intense physical or mental suffering in the patient.

**Level of suffering:** Inhuman or degrading treatment must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment such as force-feeding or electroconvulsive therapy.

**Margin of appreciation:** Domestic states have different accepted clinical practices and standards; the margin of appreciation is accepted as being very wide to reflect this. Consequently, clinical decisions that are proportional, therapeutically necessary and in keeping with accepted clinical practice are very unlikely to be outside this margin.

**Medical care:** Authorities are obliged to provide adequate and requisite medical care. A delay in providing care may engage Article 3. Good documentation in medical notes is vital both clinically and legally.

**Proportionality:** Clinical intervention needs to balance the severity of the effect of the intervention with the severity of the presenting clinical problem, i.e. be a proportionate response to a clinical scenario.

**Threshold of severity to engage Article 3:** Ill-treatment must attain a minimum level of severity; assessment of this minimum is relative. All circumstances of the case need to be considered.

**Therapeutic necessity:** A treatment or intervention that is convincingly shown to be a therapeutic or medical necessity in general will not be regarded as inhuman or degrading.

### Areas in clinical practice that may fall foul of Article 3

- Not considering all aspects and circumstances of the case e.g. age, disability, physical frailty or illness, or vulnerable personality, and the nature, duration and route of administration of treatment.
- Not adequately demonstrating therapeutic or medical necessity.

- Not adequately documenting therapeutic management plans e.g. absence or lack of documentation, illegible writing.
- Providing inadequate or substandard treatment.
- Not providing treatment or interventions quickly enough.
- Excessive restraint or force disproportionate to the risk being posed.
- Not considering capacity to consent to treatment.
- Using treatment intentionally to humiliate or debase a patient.

### **Article 8 of the Human Rights Act 1998 – the right to respect for private and family life, home and correspondence**

**Main aim of Article 8:** To protect the individual against arbitrary interference by the public authorities, while striking a fair balance between the interests of the individual and the interest of the community as a whole.

**Article 8 engagement:** The Court will first assess whether 8(1) applies; if it does, the Article will be engaged and the 8(2) components will be analysed to assess whether it has been violated.

**Article 8(2) violations:** An interference will be a violation unless it is:

- 1) in accordance with the law
- 2) necessary in a democratic society
- 3) in pursuit of one of the specified objectives.

The onus is on the state to establish that these criteria are met.

**Article 8 specified objectives:** National security, public safety, the economic well-being of the country, prevention of disorder or crime, protection of health or morals, and protection of the rights and freedoms of others. These exceptions will be interpreted narrowly.

**Margin of appreciation:** Domestic states have different accepted clinical practices and standards, and the margin of appreciation is accepted as being very wide to reflect this. Therefore clinical decisions that are proportional, therapeutically necessary and in keeping with accepted clinical practice are very unlikely to be outside this margin.

**Proportionality:** Clinical intervention needs to balance the severity of the effect of the intervention with the severity of the presenting clinical problem i.e. to be a proportionate response to a clinical scenario.

#### **'Proportionality' test**

- 1) What is the 'interest' which is relied upon?
- 2) Does the interest correspond to a pressing social need?
- 3) Is the interference proportionate to the interest?
- 4) Are the reasons given by the authorities relevant and sufficient?

**Private life:** Covers the right to develop one's own personality and to create relationships with others. It contains both positive and negative aspects:

- **Positive obligations:** The state has an obligation to provide for an effective respect for private life.
- **Negative obligations:** The state should refrain from interference in a private life.

### **'In accordance with the law' test**

- 1) There must be a specific legal rule or regime which authorises the interference e.g. the MHA 1983.
- 2) The citizen must have adequate access to the law in question
- 3) The law must be formulated with sufficient precision to enable the citizen to foresee the circumstances in which the law would or might be applied.

### **'Necessary in a democratic society' test**

- 1) The interference must correspond to a pressing social need
- 2) The interference must be proportionate to the legitimate aim pursued.

### **Reflection questions**

- (1.21) [Scenario: a detained elderly male patient with chronic paranoid schizophrenia and early cognitive impairment developed significant behavioural problems.] What possible treatment options and management strategies can you think of for this scenario?
- (1.23) Having reviewed the treatment options, which would be your preferred option in this case?
- (1.31) [Scenario: a female patient is detained under section 3 with a manic relapse of her chronic bipolar disorder.]. Whilst considering the principle of proportionality for this scenario, what possible treatment options and management strategies can you think of?
- (1.33) [List of possible treatment strategies] Are there other possibilities you considered that were not on this list?
- (2.14) [Scenario: A 63-year-old man suffering from chronic schizophrenia is detained in a medium secure hospital under section 37/41.] Which areas might fall foul of Article 3 in this scenario?
- (3.10) How many of these varied uses of Article 8 apply to cases you have dealt with in your clinical practice? Can you think of others?
- (3.22) Can you think of scenarios from your clinical practice that may include competing Article 8 rights? How might you deal with or address such scenarios?

### **References**

Beauchamp TL & Childress JF (2001) Principles of Biomedical Ethics. 5<sup>th</sup> Edition. Oxford: Oxford University Press. [[Amazon](#)]

Cass E, Robbins D & Richardson A (2006) Dignity in Care: Adults' Services Practice Guide 9. London: Social Care Institute for Excellence. [[website](#)]

Commission for Healthcare Audit and Inspection (2006) Joint investigation into the provision of services for people with learning disabilities at Cornwall Partnership NHS Trust. London: Healthcare Commission, Commission for Social Care Inspection. [[PDF](#)]

Curtice M (2008) Article 3 of the Human Rights Act 1998: Implications for Clinical Practice. *Advances in Psychiatric Treatment*, **14**: 389–397. [[abstract](#)]

Curtice M (2009a) Medical treatment under Part 4 of the Mental Health Act 1983 and the Human Rights Act 1998: a review of Article 3 and 8 case law. *Psychiatric Bulletin*, **33**(3): 111–115. [[abstract](#)]

Curtice M (2009b) Article 8 of the Human Rights Act 1998: implications for clinical practice. *Advances in Psychiatric Treatment*, **15**: 23–31. [[abstract](#)]

Curtice M (2008) From rhetoric to reality? Older people's rights. *Old Age Psychiatrist*, **50**: 4–5.

Department of Health (1999) Report of the Expert Committee: Review of the Mental Health Act 1983. London: The Stationery Office. [[website](#)]

Department of Health (2005) Promoting Equality and Human Rights in the NHS: A guide for non-executive directors of NHS Boards. Gateway reference 5256. London: Department of Health. [[website](#)]

Department of Health (2007a) Human Rights in Healthcare: A framework for local action. Gateway reference 8022. London: Department of Health. [[website](#)]

Department of Health (2007b) Essence of Care: benchmarks for the care environment. Gateway reference 8489. [[website](#)]

Department of Health (2008a) Human Rights in Healthcare: A framework for local action. Second edition. Gateway reference 10482. London: Department of Health.

Department of Health (2008) Code of Practice Mental Health Act 1983  
Published pursuant to section 118 of the Act. London: The Stationery Office. [[website](#)]

Department of Health (2009a) The NHS Constitution: the NHS belongs to us all. London: Department of Health.

Department of Health (2009b) Dignity in Care. [[website](#)]

deVries OJ, Ligthart GJ, Nikolaus T, on behalf of the participants of the European Academy of Medicine of Ageing-Course III (2004) Differences in period prevalence of the use of physical restraints in elderly inpatients of European hospitals and nursing homes [Letter]. *J Gerontol Med Sci*, **59A**: 922–923.

General Medical Council (2004) Confidentiality: Protecting and providing information. London: General Medical Council. [[PDF](#)]

General Medical Council (2008) Consent: patients and doctors making decisions together. Guidance for doctors. London: General Medical Council. [[website](#)]

House of Lords House of Commons. Joint Committee on Human Rights (2004) Deaths in Custody. Third Report of Session 2004–05. London: The Stationery Office. [[PDF](#)]

House of Lords House of Commons. Joint Committee on Human Rights (2007) The Human Rights of Older People in Healthcare. Eighteenth Report of Session 2006–07. London: The Stationery Office. [[Amazon](#)]

House of Lords House of Commons. Joint Committee on Human Rights (2008) A Bill of Rights for the UK? Twenty-ninth Report of Session 2007–08. London: The Stationery Office. [[website](#)]

Martin V, Bernhardsgrütter R, Goebel R & Steinert T (2007) The use of mechanical restraint and seclusion in patients with schizophrenia: A comparison of the practice in Germany and Switzerland. *Clinical Practice and Epidemiology in Mental Health*, **3**:1. Published online February 4<sup>th</sup> 2007. [[full text](#)]

Ministry of Justice (2008) Mental Capacity Act 2005, Deprivation of liberty safeguards, Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice. London: The Stationery Office. [[website](#)]

Randers I & Mattiasson AC (2004) Autonomy and integrity: upholding older adult patients' dignity. *Journal of Advanced Nursing*, **45**: 63–71. [[abstract](#)]

Roberts G & Wolfson P (2004) The rediscovery of recovery: open to all. *Advances in Psychiatric Treatment*, **10**, 37–49. [[abstract](#)]

Royal College of Psychiatrists (2004) Good Psychiatric Practice (Second Edition) Council Report 125.

Royal College of Psychiatrists (2007) *Vulnerable Patients, Safe Doctors: Good Practice in our Clinical Relationships*. Council Report CR146. [[PDF](#)]

Royal College of Psychiatrists (2008) *Fair Deal for Mental Health*. London: Royal College of Psychiatrists. [[website](#)]

Szmukler G & Holloway F (2000) Reform of the Mental Health Act: Reform or safety? *British Journal of Psychiatry*, **177**, 196–200. [[full text](#)]

Wicks E (2007) *Human Rights and Healthcare*. Oxford: Hart Publishing.

### Further information sources

The **Special Committee for Human Rights website** is part of the College website. [[website](#)]

The **British Institute of Human Rights** website provides background information and guides on the HRA 1998. [[website](#)]

European case law can be accessed free from the HUDOC database as part of the **European Court of Human Rights** website. [[website](#)]

UK case law and judgements can be freely viewed at the **British and Irish Legal Information Institute (BAILII)** website. [[website](#)]

The **Human Rights Act 1998** can be viewed at the OPSI website. [[website](#)]

A report by the **Equality and Human Rights Commission** entitled the '*Human Rights Inquiry*' published in June 2009 provides an in-depth review into how human rights and the Human Rights Act 1998 has thus far been incorporated into British society. [[website](#)]

The **Mental Disability Advocacy Center** (MDAC) is a non-governmental organisation registered in Hungary and has a sister charity in the UK called MDAC-UK. It advances the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities. It uses a combination of law and advocacy to promote equality and social integration. [[website](#)]

The Government has produced a publication entitled ***A Bill of Rights for the UK?*** outlining proposals for a Bill of Rights in the UK (House of Lords House of Commons, 2008). The report recognises that there are some vulnerable groups in society such as children, older people and adults with learning disabilities whose human rights are insufficiently protected with current legislation. A Bill of Rights would add more protective legislative rights for such groups and others. [[PDF](#)]

### Legal cases

*Grare v. France* [1992] European Court of Human Rights (Admissibility Decision) Application no. 18835/91 2<sup>nd</sup> December.

*Handyside v. UK* [1976] 1 EHRR 737.

*Herczegfalvy v. Austria* [1992] 15 EHRR 437.

*HL v the United Kingdom* [2002] European Court of Human Rights Application no. 45508/99 10<sup>th</sup> September.

*Hurtado v. Switzerland* [1994] European Court of Human Rights Application No. 1754/90, 28<sup>th</sup> January.

*Ireland v. UK* [1978] 2 EHRR 25.

*Keenan v. UK* [2001] 33 EHRR 913.

*Khudobin v. Russia* [2006] European Court of Human Rights Application no. 59696/00, 26<sup>th</sup> October.

*Kudła v. Poland* [2000] European Court of Human Rights Application no. 30210/96, 26<sup>th</sup> October.

*Matencio v. France* (2004) European Court of Human Rights Application no. 58749/00, 15<sup>th</sup> January.

*McGlinchey and Others v. UK* [2003] 37 EHRR 41.

*Moussel v. France* (2002) European Court of Human Rights Application no. 67263/01, 14<sup>th</sup> November.

*Naumenko v. Ukraine* (2004) European Court of Human Rights Application no. 42023/98, 10<sup>th</sup> February.

*Nevmerzhtsky v. Ukraine* [2005] European Court of Human Rights Application no. 54825/00, 5<sup>th</sup> April.

*Niemietz v. Germany* (1992) 16 EHRR 97.

*Papon v. France* (2002) European Court of Human Rights Application no. 54210/00, 25<sup>th</sup> July.

*Pretty v. UK* (2002) 35 EHRR.

*Price v. UK* (2001) European Court of Human Rights Application no. 33394/96, 10<sup>th</sup> July.

*R v. Bournemouth Community and Mental Health NHS Trust, ex parte L* [1997] EWCA Civ 2879.

*R v. Bournemouth Community and Mental Health NHS Trust, ex parte L* [1998] UKHL 24.

*R (on the application of A & Ors) v East Sussex County Council & Anor* [2003] EWHC 167 Admin.

*R (on the application of B) v. (1) Dr SS Responsible Medical Officer, Broadmoor Hospital (2) Dr G Second Opinion Appointed Doctor (3) Secretary of State for the Department of Health* [2005] EWHC 1936 Admin.

*R (on the application of H) v. Mental Health Review Tribunal for the North and East London Region* [2001] EWCA Civ 415.

*R (on the application of Howard) v. Health Secretary* (2002) 3 WLR 738.

*R (on the application of N) v. (1) Ashworth (2) Secretary of State for Health* [2001] EWHC 339 Admin; [2001] HRLR 46.

*R (on the application of PS) v. (1) Responsible Medical Officer (Dr G) (2) Second Opinion Appointed Doctor (Dr W)* [2003] EWHC 2335 Admin.

*R (on the application of Wilkinson) v. (1) The RMO, Broadmoor Hospital (2) The Mental Health Act Commission Second Opinion Appointed Doctor & Secretary of State for Health (interested party)* [2001] EWCA Civ 1545; [2002] 1 WLR 419.

*Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

*Re MB (Medical Treatment)* [1997] 2 FLR 426.

*Re T (Adult: Refusal of Treatment)* [1993] Fam 95.

*Samuel R (by his Grandmother and Litigation Friend June Margaret D) v. W Primary Care Trust* [2004] EWHC 2085 Fam

*Stjerna v. Finland* (1994) 24 EHRR 194.

*Treharne & Ors v. Secretary of State for Work & Pensions* (2008) EWHC 3222 (QB).

*Tyrer v. UK* (1978) European Court of Human Rights Application no. 5856/72, 25<sup>th</sup> April.

*YL v. Birmingham City Council & Ors* [2007] UKHL 27.

*Z v. Finland* (1997) European Court of Human Rights Application no. 9/1996/627/811, 25<sup>th</sup> January.