

Chapter 13. Human Rights

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The purpose of this chapter is to identify those human rights which might have a bearing on the issue of organ retention at Alder Hey and the University of Liverpool. We are not required by our Terms of Reference to adjudicate upon whether or not the matters under consideration constitute a breach of any Article under the European Convention on Human Rights or of the Human Rights Act 1998. The Act does not apply retrospectively. This chapter is for information purposes only.

1. Background

- 1.1 The European Convention on Human Rights was created in the aftermath of the Second World War. The UK Government was heavily involved in the drafting of the Convention and was the first to ratify it in 1951. Since 1966 the UK Government has accepted the right of individuals to petition the Strasbourg Commission and Court in respect of alleged breaches of the Convention. A significant development has been the passing of the Human Rights Act 1998, which came into force in England on 2 October 2000 and incorporated the Convention into domestic law. The Convention had already

been implemented, in part, in Scotland following Scottish devolution. Now, domestic courts must take the Convention into account whether or not it is put to them in argument by either party.

2. Human Rights Act 1998

- 2.1 The Human Rights Act 1998 preserves the sovereignty of Parliament to the extent that where there is a head-on conflict between UK legislation and the Convention, no court will be able to declare the legislation void. The highest courts, however, will be able to make a Declaration of Incompatibility with the Convention, which may result in amending legislation. Section 4(5) of the Human Rights Act 1998 provides that the relevant courts are:
- the House of Lords;
 - the Judicial Committee of the Privy Council;
 - the Courts-Martial Appeal Court;
 - in Scotland the High Court of Judiciary sitting otherwise than as a trial court or the Court of Session; and
 - in England and Wales or Northern Ireland the High Court or the Court of Appeal.
- 2.2 In addition Parliament, when enacting a statute, will have to consider whether there is any contravention of the European Convention on Human Rights. Section 19 of the Human Rights Act 1998 requires a Minister of the Crown in charge of any Bill, before its second reading, to make a statement that the provisions of the legislation are compatible with the Convention or specifically that the Minister cannot make such a statement.
- 2.3 It is unlikely that there is conflict between the Convention and domestic legislation with regard to the subject matter of this Inquiry. The duties of the Courts to take the Convention into account in determining cases involving the duties of public authorities are relevant and should be noted. In particular:
- section 6 of the Human Rights Act declares that it is unlawful for a public authority to act in a way incompatible with a Convention right;
 - section 7 permits any person who is or would be a victim of an unlawful act to bring proceedings against the authority in the appropriate Court or Tribunal (determined by regulations);
 - proceedings must normally be brought within one year;

- nothing in the Act creates criminal liability;
 - the Courts may grant damages in an appropriate case;
 - there can be little doubt that an NHS Trust and a Health Authority qualify as public authorities under the Act even if also carrying out private functions since section 6 (3) defines ‘public authority’ as including ‘any person certain of whose functions are functions of a public nature’.
- 2.4 However under section 6 (5) a person is not a public authority in relation to a particular act by virtue only of section 6 (3) (b) if the nature of the act is private. It may be that employment decisions might be regarded as purely private following a similar argument to that in *R v East Berkshire HA ex parte Walsh* (1985) QB 152. It is unlikely that decisions about the treatment of NHS patients would be regarded as private because the obligations of Trusts, Health Authorities and the Secretary of State for Health are imposed by statute. The Convention is unlikely to be relevant in circumstances concerning private medicine since that rests on contractual rather than statutory obligations.
- 2.5 There is little doubt that a university has functions of a public nature, as well as private functions. University functions such as sharing employees with the Trust, as for instance when a senior lecturer in a department of medicine devotes 5/11ths of his time to academic work and 6/11ths of his time to clinical practice within the Trust, may well result in a finding that the University’s actions are deemed to be public in nature. However, determination of this issue is not for this Inquiry.
- 2.6 Courts and Tribunals are also themselves public authorities and must therefore take account of the Convention in deciding disputes, whether or not these are with public authorities or with private individuals.
- 2.7 The European Commission and Court have developed important principles in their jurisprudence. Two are the ‘margin of appreciation’ and the ‘proportionality’ doctrines. The margin of appreciation principle gives a range of discretion to public authorities to make laws for their own states while respecting the principles of the Convention. ‘Proportionality’ allows Member States to exercise this discretion but only to the extent that it is necessary to do so to achieve their intended purpose. A balance must be struck between the rights of individuals and the general welfare of others and of the community. Thus, in an abortion case the right to life, argued on behalf of the fetus, was balanced against the rights of the mother – (*Paton v UK* (1980) 19 DR 244). In a case involving the killing of a gunman and his hostage in a failed rescue attempt, the Court determined that the degree of force used was proportionate to the danger of the situation (*Andronicou v Cyprus* (1998) 25 EHRR 491).

Potentially Relevant Articles

3. Article 3 – ‘Prohibition of Torture’

3.1 *‘No one shall be subject to torture or to inhuman or degrading treatment or punishment.’*

The argument here is that the treatment of parents has been inhuman or degrading. The Human Rights Court has held that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (*Ireland v UK* (1978) 2 EHRR 25 para 162). Corporal punishment of prisoners has been held to be degrading (*Tyrer v UK* (1978) 2 EHRR 1). Since the purpose of the Article is primarily to outlaw torture it is doubtful whether it should be applied in the present circumstances although it is arguable that mental anguish alone if sufficiently severe could fall within the Article. However, the Commission is considering whether a victim of rape, cross-examined personally for long periods by the defendant in a criminal trial, was degraded and humiliated by the process. Article 3 might have some application in cases concerning rationing of healthcare if palliative treatment is withheld. Article 3 has been invoked to challenge the refusal to supply pain-relieving therapy to a severely mentally handicapped woman. Here, a settlement was reached. The area for examination is whether the complaints of the parents summarised in Chapter 2 and resulting in the need to have two, three or even four funerals constituted inhuman treatment, namely treatment that causes immense physical and mental suffering. This is a matter to be determined elsewhere.

4. Article 8 – ‘Right to Respect for Private and Family Life’

4.1 *‘Everyone has the right to respect for his private and family life, his home and his correspondence.’*

It may be argued that the funeral and burial or cremation of a member of one’s family is one of the most important and sensitive parts of family life, and that to invade a family’s privacy at such a time by withholding part of the deceased’s body without consent is a denial of respect. There is, however, a balancing provision 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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others.’ The argument is that the promotion of medical education and research is in the long term for the protection of health for all.

- 4.2 It is our view that organ retention, without establishing lack of objection or obtaining informed consent following a Coroner's or hospital post mortem examination, was in breach of the provisions of the Human Tissue Act 1961 and thus not in 'accordance with the law.' This matter is analysed in Chapter 10. We are also of the view that without establishing lack of objection or obtaining informed consent the medical profession had no authority to retain the organs following the conclusion of the Coroner's process. Similarly, the medical profession had no right to carry out a hospital post mortem or retain organs without establishing lack of objection or obtaining fully informed consent.
- 4.3 There is a strong argument that burial/cremation of a child relates to a fundamental aspect of family life for the surviving family. The counter-argument is that it is not a fundamental aspect covered by Article 8 such as the right to live together and that the right to bury/cremate a child is something families do together but the question is whether it relates to 'family life'. This is not a matter for us to determine.

5. Article 9 – 'Freedom of Thought, Conscience and Religion'

- 5.1 *'Everyone has a right to freedom of thought, conscience and religion.'*

There is a balancing exercise in Article 9(2): 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

- 5.2 It is arguable that where the parents' religious beliefs dictate that a body be buried or cremated as a whole it would be a breach of their freedom of religion to deny this, unless there was some important health reason such as the spread of infection. It may be regarded as especially contrary to their human rights to flout their religious customs without their knowledge or consent. The purpose of this Article is to permit the relevant freedoms subject to the limitations as prescribed by law under Article 9 (2) or necessity as there defined. However, although there has been a breach of the Human Tissue Act 1961, none of the relevant necessities in a democratic society appear to apply.

6. Article 10 – ‘Freedom of Expression’

- 6.1 *‘Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’*

There are limits on this right set out in Article 10 (2). This article does not appear to impose a positive duty on a public authority, and in particular a doctor, to tell a person/patient anything. It appears to be outside the scope of any matter arising from this Inquiry.

7. Article 13 – ‘Right to an Effective Remedy’

- 7.1 This is not included among the Convention rights which are to be given effect in the domestic law under the Human Rights Act (see schedule 1). This is because the passage of the Act itself is regarded as meeting the requirement for a right to an effective remedy. The right overlaps with other Articles, particularly Article 6 (right to a fair trial). It has been held by the European Court that Article 13 does not oblige Member States to implement the Convention in domestic law in any particular manner (*Swedish Engine Drivers Union v Sweden* (1976) 1 EHRR 617).

There may be an argument that the inadequacies of the Human Tissue Act 1961 which provided for no sanction for breach were a contravention of Article 13. We recommend at the conclusion of Chapter 10 that the Human Tissue Act be criminalised by way of financial penalty for breach and consideration be given to the creation of a civil right of action.

8. Article 14 – ‘Prohibition of Discrimination’

- 8.1 This is not a free-standing right. It provides that the enjoyment of the rights and freedoms set out in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 8.2 Discrimination goes to the status of those visiting or staying at the hospital not whether they as a group have been discriminated against. Parents have not been discriminated against. In fact we find they have been treated the same. The question is whether there have been primary breaches of other Articles.

- 8.3 In order to bring a complaint it must be shown that one of the other Articles applies. Article 14 does not stand alone. The question for consideration would be whether there would be any evidence that parents were discriminated against on one of the grounds set out in Article 14, in respect of their rights under other Articles.

9. Conclusion

- 9.1 The Human Rights Act came into force in October 2000. Interpretation of its provisions is in its infancy. There is much to be decided as to the scope and application of the Act. It is for the courts, following detailed public argument as against the context of this confidential Inquiry, to develop the application of the Articles and the foundation for the future interpretation of the relevant law as well as making appropriate declarations for Parliament to consider.