

# Article 8 of the Human Rights Act 1998: A Review of Case Law Related to Forensic Psychiatry and Prisoners in the United Kingdom

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The Human Rights Act 1998 (HRA) was introduced into United Kingdom domestic law in 2000 and incorporated most of the European Convention on Human Rights. Article 8 of the HRA provides the right to respect for private and family life, home, and correspondence. It is a qualified right, underpinned by the core HRA principle of proportionality and therefore can be dynamically interpreted. The forensic and prison settings in the United Kingdom have produced numerous cases based on perceived infringements that may or may not have breached Article 8. These cases, when analyzed, help both to demonstrate how Article 8 may be breached in clinical practice and to illustrate key Article 8 principles that can be used and implemented in clinical practice to safeguard both clinicians and patients.

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The Human Rights Act 1998 (HRA)<sup>1</sup> came into force in the United Kingdom in October 2000. It incorporated into domestic law all but two of the rights enshrined in the European Convention on Human Rights (ECHR).<sup>2</sup> It is now statute enforceable by courts and tribunals, including mental health review tribunals (MHRTs) that independently review patients who are detained under the Mental Health Act 1983 (MHA),<sup>3</sup> and sets out fundamental rights that all people are entitled to enjoy. Before the introduction of the HRA, people had to take their complaints about their human rights to the European Court of Human Rights in Strasbourg, France.

All public authorities have a statutory duty to act compatibly with the ECHR (and hence the HRA). The National Health Service (NHS) is a public au-

thority and therefore NHS primary care practices, hospitals, trusts, and health authorities come under the auspices of the HRA. Domestic courts are obliged to interpret all laws in a fashion consistent with the HRA. If this proves impossible, a declaration of incompatibility can be made that usually must be remedied by the offending state. However, in the United Kingdom, a declaration of incompatibility actually has no legal effect and does not bind Parliament to remedy offending legislation. This is an idiosyncratic feature of human rights legislation in the United Kingdom and is in essence a compromise between human rights protection by the courts and the maintenance of parliamentary supremacy (in most domestic jurisdictions, the courts themselves have the power to quash domestic legislation incompatible with the ECHR, something the U.K. Parliament did not wish).

## Article 8 of the Human Rights Act 1998

Before the Act, English law did not provide a statutory right to privacy. Article 8 is a qualified right

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(other rights being absolute or limited) and provides that:

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

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 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.<sup>1</sup>

Courts first assess whether Article 8(1) is engaged (i.e., whether the infringement pertains to private and family life, home, and correspondence). If it is, Paragraph 2, which sets out the exceptions (to be interpreted narrowly<sup>4</sup>) in which interference with the right is permitted, will be analyzed. Under Article 8(2), before interference with the right is permitted, it must:

be in accordance with the law. Domestic law must be adequately accessible and formulated so that it is reasonably foreseeable, and there must be adequate and effective safeguards in that law to protect against arbitrary interference.<sup>5,6</sup> The need for flexibility and discretion is also recognized.<sup>7,8</sup>

be necessary in a democratic society. The reasons for the interference must be relevant and sufficient and must correspond to a pressing social need and be proportionate to the legitimate goal pursued. The more serious the intervention, the more compelling must be the justification.<sup>9</sup>

be in pursuit of one of the specified objectives or aims. The article is breached unless the state establishes that the criteria set out in 8(2) are met (i.e., interference must be justified by one of the exceptions and must be the minimum necessary to obtain the legitimate aims).

Article 8 has been one of the most broadly interpreted provisions of the ECHR and could apply in a myriad of situations: the right to practice one's sexuality<sup>10</sup>; to make complex end-of-life decisions<sup>11</sup>; and to having same-sex staff provide personal care.<sup>12</sup> The right to respect for private life has been found to

cover both the physical and moral integrity of the person.<sup>13</sup>

Some of the cases discussed in this article involve special hospitals. England and Wales are served by three such institutions: Ashworth, Broadmoor, and Rampton. These provide high-security hospital accommodation and services for persons liable to be detained under the Mental Health Act 1983.

The following cases analyze the evolution of case law emanating from the United Kingdom with respect to the Article 8 rights of prisoners and forensic patients.

### Seclusion

*The Munjaz case.* In 2002, Ashworth Hospital implemented a new policy governing the seclusion of patients detained at the hospital. Colonel Munjaz, who had been secluded on a few occasions (for up to 18 days), maintained that the policy was unlawful because it provided for a less frequent medical review of seclusion than was laid down in the MHA 1983 Code of Practice.<sup>14</sup> He did not submit, however, that his seclusion had been unnecessary. In 2002, the High Court<sup>15</sup> ruled that the minimum level of severity required for Article 3 (freedom from torture and inhuman and degrading treatment) was not met and there was no breach of Article 8. It also found that the Code was merely guidance.

In 2003, the Court of Appeal<sup>16</sup> held that the Code should be observed by all hospitals unless they had a good reason for departing from it in relation to an individual patient. It also held that seclusion is a breach of Article 8 unless it can be justified under Article 8(2). In considering the need for any interference to be "in accordance with law" in terms of Article 8(2), it found that the transparency and predictability required by this provision were supplied by the Code and concluded that the hospital's seclusion policy was unlawful.

In 2005, the NHS Trust appealed to the House of Lords.<sup>17</sup> By a contentious majority decision of three to two, their Lordships overturned the Court of Appeal ruling and decided that Ashworth's seclusion policy was lawful. They therefore declared that the Code has the status of guidance and should not be read as having legal powers, but as that to which great weight must be given and from which hospitals should depart only when they have cogent reasons for so doing.

The House of Lords' judgment considered the compatibility of the seclusion policy with the ECHR and in particular Article 8. Lord Bingham opined: "It is obvious that seclusion, improperly used, may violate a patient's Article 8 right in a serious and damaging way and may found a claim for relief" (Ref. 11, para. 32). He found that the Code was only guidance and was satisfied the hospital had shown good reasons for departing from it. Regarding Article 8(2), he found that the "in accordance with law" requirement had not been breached: "The procedure adopted by the Trust does not permit arbitrary or random decision-making. The rules are accessible, foreseeable and predictable" (Ref. 11, para. 34). Lord Hope noted that "so long as it does not amount to ill-treatment in violation of article 3, seclusion will not as a general rule result in an interference with the patient's rights under Article 8(1)" (Ref. 11, para. 88). In considering whether seclusion could be justified under Article 8(2), Lord Bingham opined that seclusion under the policy was "plainly necessary 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" and that, "properly used, the seclusion will not be disproportionate because it will match the necessity giving rise to it" (Ref. 11, para. 33). Col. Munjaz continues to contest these issues at the European Court of Human Rights.<sup>18</sup>

### Physical Integrity

*R(on the application of H) v. Ashworth Hospital.*<sup>19</sup> In this case, the High Court analyzed Ashworth Hospital's no-condom policy and found that it did not breach either Article 2 (right to life) or Article 8. The Court held that becoming infected with a sexually transmitted disease (STD) could indeed be a violation of a person's integrity and hence an interference under Article 8(1), but could be justified under Article 8(2).

The applicant claimed he was a potential victim of the policy but did not establish that the level of risk for the transmission of STDs was sufficient to present a real and immediate threat to life. Furthermore, he had not established that the hospital had failed to do all that could reasonably be expected to prevent such risk as existed; the hospital was doing all that reasonably could be expected to obviate risk by security precautions. The Court also noted that it was not unreasonable to make exceptions to the pol-

icy, as such exceptions would put the clarity and consistency of the policy at risk.

*John Shelley v. U.K.*<sup>20</sup> This case involved a prisoner who complained that the prison authorities' alleged failure to take steps to prevent the spread of viruses in prison (associated with illicit drug use) and the known immediate risk to his life, health, and well-being breached, among others, Article 8. The claim, on all HRA articles cited, was rejected as "manifestly unfounded." On Article 8, the Court gave consideration to the extent to which Article 8, which in its private life aspects protects physical and moral integrity, may require the authorities to take particular preventive measures to counter infections in prisons. The Court ruled that there was no authority that placed any obligation under Article 8 on a contracting state to pursue any particular preventive health care policy (matters of health care policy, in particular as regards general preventive measures, were in principle within the margin of appreciation of the domestic authorities who were best placed to assess priorities, use of resources, and social needs and proportional in its response).

*R(on the application of E) v. Ashworth Hospital Authority.*<sup>21</sup> This High Court case concerned the right of a male patient at Ashworth Hospital to wear women's clothing anywhere in the hospital. There was considerable discussion regarding diagnosis. The treating team at Ashworth described the applicant as a fetishistic transvestite who wished to dress as a woman, as he found it sexually arousing. A converse view was proposed by staff of the Gender Identity Clinic at the Charing Cross Hospital in London, who suggested the applicant was a transsexual and therefore had a clinically recognized need to live as a woman.

It was accepted that a refusal to permit the applicant to wear women's clothing, other than in private in his own room, was an interference with his right to respect for his private life under Article 8(1). The debate at Court was to decide whether that interference could be justified under Article 8(2)—that is, was the interference in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society? The High Court held that all three criteria were met, and hence the interference was lawful:

The restrictions applied by Ashworth were in accordance with the *MHA 1983*. The legal provi-

sions were also accessible to E and foreseeable by him; indeed the arrangements made for him were set out in a written care-plan.

The hospital had put forward “valid therapeutic and security concerns” (concerning both E himself and the effect permitting him to cross-dress publicly would have on other patients) in support of its approach. The judge was satisfied that restrictions imposed on E were both in pursuit of legitimate aims and that there was a “rational connection between the aims pursued and the concerns advanced.”

“Taking everything together,” the judge was satisfied that the restrictions placed on E were “proportionate to the legitimate aims pursued.”

The judgment espoused that it was not for the Court to “resolve disputed issues of diagnosis” but its role was to subject the decision of the hospital, and the reasons for it “to appropriately intensive scrutiny.”

### Communication and Correspondence

*R(on the application of N) v. (1) Ashworth Special Health Authority (2) the Secretary of State for Health.*<sup>22</sup> The High Court held that the policy of randomly monitoring 10 percent of telephone calls made by patients in Ashworth Hospital did not breach Article 8. Although the policy was clearly an interference with the patients’ right to respect for their private lives protected by Article 8(1), it could be justified under Article 8(2) because it was a proportionate means of meeting the legitimate aim of maintaining appropriate security in the high-security special hospitals.

The judgment included a helpful summary of the principles to follow when determining whether action is justified under Article 8(2) (which can be applied to clinical practice). The points were:

- (1) When considering whether an interference with a Convention right is proportionate the burden lies on the State to justify its action.
- (2) The interference must go no further than is strictly necessary to achieve its permitted purpose.
- (3) The more substantial the interference the more that is required to justify it.
- (4) The court should anxiously scrutinise a decision of the executive that interferes with Human Rights and should consider applying an objective test ‘whether the decision maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognized by the Convention.’
- (5) The mode of such objective review is more intrusive, or it could be said, more demanding than the conventional Wednesbury test [this test is a standard of unreasonableness used in assessing applications for judicial reviews of deci-

sions of public authorities under English law. A decision or reasoning is Wednesbury unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it. It is possible for a decision to fail a proportionality test without being Wednesbury unreasonable]. (6) The court should give due deference or allow a margin of appreciation to the decision maker [Ref. 18, para. 9].

*R v. Secretary of State For The Home Department, Ex Parte Daly.*<sup>23</sup> This important House of Lords judgment found the exclusion of prisoners from being personally present while their legally privileged correspondence is examined was a disproportionate interference with their rights to privacy and correspondence under Article 8. This case emphasized the key principle of proportionality is intrinsic to Article 8 case law. Lord Steyn in particular observed that the “contours of the principle of proportionality are familiar” and drew upon *de Freitas v. The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others*<sup>24</sup> in reiterating the adopted three-stage test. In determining whether a limitation is arbitrary or excessive, the court should ask itself:

... whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective [Ref. 19, para. 27].

*R(on the application of Szuluk) v. (1) Governor of Full Sutton Prison (2) Secretary of State for the Home Department.*<sup>25</sup> This case from the High Court involved a prisoner’s right to confidentiality when communicating with his NHS doctor (the applicant was receiving follow-up following a brain hemorrhage). It was held that it was lawful and proportionate for a prison medical officer to read a prisoner’s correspondence with his doctor as required by prison standing orders. The Court had initially held that the restrictions placed by the Prison Governor on the prisoner’s correspondence with his NHS consultant were disproportionate and therefore unlawful. The Prison Governor and the Home Secretary of the government thereafter successfully appealed this decision at the Court of Appeal which overturned the original decision. The core issue in this case concerned security, which is paramount in a high-security prison. The Court of Appeal held that the reading of the prisoner’s medical correspondence was necessary in a democratic society, for the prevention of crime and the protection of the rights and freedoms of others and that it was a proportionate interference with his Article 8 rights; short of withdrawing

all scrutiny, there was no less invasive measure available to the prison service; and, of importance, the process by which the measure was decided was not arbitrary and did not result from the rigid application of a policy.

### Other Cases

While the prison may interfere with nonlegal correspondence, jurisprudence has indicated that the European Court will investigate these interferences to ensure that they are justified under Article 8(2).<sup>6</sup> With further regard to prisoner correspondence, the European Court has held that there was no justification in restricting the state applicant's correspondence with his lawyer.<sup>26</sup> Such a view was upheld more recently where it was ruled that the interception of prisoners' letters to their lawyer violated Article 8.<sup>27</sup> The judgment in *Golder v. U.K.*<sup>26</sup> robustly rejected the contention that the ECHR contains "wide implied limitations" so far as the rights of prisoners are concerned. It held on the facts of that case that if a prison officer refuses a prisoner permission to contact his solicitor, he is violating the prisoner's Article 6(1) right of access to a court and his Article 8(1) right to respect for his correspondence. Such jurisprudence applies equally to forensic and other psychiatric patients.

### Hospital Transfers

*R(on the application of H) v. Mental Health Tribunal.*<sup>28</sup> The High Court held that there was no breach of Article 8 in detaining a patient in a special hospital remote from his home. In this case, the mother of a patient detained in Rampton Hospital applied for judicial review of a decision of an MHRT not to make any recommendations to transfer her son to a suitable hospital nearer where she lived. The Court found that even if it could be demonstrated that it would be in the applicant's best interests to be closer to his mother, there was at present no suitable placement for him. Also the fact that the MHRT's powers regarding transfer of patients between hospitals were limited to recommending transfers that may facilitate future discharge (as opposed, for example, to transfers that would make it easier for family to visit) did not mean that section 72 of the MHA (MHRT's Powers and Duties to Discharge patients from being detained under the MHA) was incompatible with the HRA (see also *R(on the application of S) v. City of Plymouth*<sup>29</sup> where the House of Lords had previously

established that a lacuna in the MHA did not mean that the MHA was incompatible with the HRA).

The Court commented on the obligation of a MHRT to give reasons for its decisions and found nothing to criticize in the fact that the MHRT's decision made only fleeting reference to its consideration of HRA concerns (because the medical evidence as to the applicant's needs was very clear). The Court further specifically commented on the role of the Court in matters affecting clinical judgment and resource allocation. The judge stated:

It is well known that there is a national shortage of places in secure units. The place in which, and the condition in which, a patient is detained are ultimately questions of clinical judgment. Any transfer of a patient from one unit to another involves the agreement of the NHS Trust which is responsible for his treatment. Realistically, it involves consideration and agreement by the hospital in which he is currently detained and being treated and of course requires assessment and agreement on the part of the receiving hospital. Such assessments and the decisions made on them are principally clinical matters with which any court is loath to interfere. They may also be affected by questions as to the availability of resources with which the court cannot interfere unless those resources, and the lack of them, lead to an infringement of a Convention right, for example, a right under Article 3. That is not the position in the present case [Ref. 26, para. 28].

In another case,<sup>30</sup> involving a Broadmoor patient's potentially being moved to a less (medium) secure forensic unit still some distance from his home, the court similarly found that this did not violate his Article 8 rights. In particular, the judgment stated that it was not appropriate for such decisions to be judicialized.

**Table 1** The Principle of Proportionality and Article 8

**Proportionality** Clinical intervention should balance the severity of the effect of the intervention with the severity of the presenting clinical problem (i.e., it should be a proportionate response to a clinical scenario).

**Proportional interference** When considering whether an interference with a convention right is proportionate, the burden lies on the state to justify its action. The interference must go no further than is strictly necessary to achieve its permitted purpose; the more substantial the interference the more that is required to justify it (i.e., a sliding-scale approach to its use).

**Proportionality test for the use of Article 8** What is the interest that is relied upon (i.e., private and family life, home and correspondence)? Does the interest correspond to a pressing social need? Is the interference proportionate to the interest? Are the reasons given by the authorities relevant and sufficient?

**Table 2** Article 8 Principles for Clinical Practice

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**Main aim of Article 8** To protect the individual against arbitrary interference by the public authorities, but in doing so, to strike 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 paragraph 1 applies, and if it does, Article 8 will be engaged; then the components of paragraph 2 will be analyzed to assess whether the Article has been violated.

**Article 8(2) violations** There will be a violation unless the three criteria are met: the interference must be in accordance with the law, a necessity in a democratic society and in pursuit of one of the specified objectives. The onus is on the state to establish that these are met; otherwise there will be a breach.

**In accordance with the law** This is a three-pronged notion: there must be a specific legal rule or regimen that authorizes the interference; the citizen must have adequate access to the law in question, and 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** This is a two-pronged notion and implies that an interference corresponds to a pressing social need and that it is proportionate to the legitimate goal. European institutions have stated that the typical features of a democratic society are pluralism, tolerance, and broadmindedness.

**Article 8 specified objectives** These are national security, public safety, economic well-being of the country, prevention of disorder and crime, protection of health and 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; hence, the margin of appreciation is accepted as being very wide to reflect this. Therefore, clinical decisions which are proportional, therapeutically necessary and in keeping with accepted clinical practice are very unlikely to be outside this margin.

**Private life** This concept 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 with a private life.

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## Summary

While these cases concentrate on mental health law that has emerged from forensic and prison settings, the concerns analyzed may pertain to a variety of other psychiatric specialties and settings. Article 8 is, and will continue to be, dynamically interpreted due to the qualified nature of its definition and will potentially be contested in different clinical scenarios.

An understanding of its use and application can be of help in clinical practice. In particular, it is underpinned by the concept of proportionality that is a principle that should be routinely used in everyday practice (Table 1). Other important Article 8 principles pertaining to clinical practice are outlined in Table 2.

In the future, Article 8 is likely to be tested for a variety of potential problems on the aspect of the right to a private and family life, particularly for patients who are on long-term MHA detentions. Prisoners have already sought judicial redress by way of

Article 8 in respect to marital and conjugal rights. The courts have so far been reluctant to allow married prisoners to enjoy sexual relations,<sup>31</sup> and the restriction on a wife's visits to her imprisoned husband to disallow sexual relations was justifiable and proportionate to the legitimate aim pursued—that is, the prevention of disorder in prison. The similar matter of refusing artificial insemination for married prisoners has also been successfully<sup>32</sup> and unsuccessfully<sup>33</sup> challenged under Article 8. It may be that patients in the future will challenge perceived restrictions on their private lives with regard to activities they could reasonably expect to undertake in the privacy of their home outside the hospital (e.g., for regular access to the Internet, access to pornography or display of such images in their own rooms, or restrictions on sexual relations in same-sex relationships). Whatever the future and the inevitable challenges made under Article 8, knowledge of it in the clinical setting and its main principles will be of benefit to the clinician involved in any such cases.

## Article 8 of the Human Rights Act in the United Kingdom

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