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Article 8 of the Human Rights Act 1998: implications for clinical practice†

ARTICLE

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SUMMARY

The Human Rights Act was introduced into UK law in 2000 and must be considered in all cases, including mental health review tribunals. Article 8 (the right to respect for private and family life) comprises two parts and has embedded in it 'tests' that must be applied when assessing any interference with this protected right. A review of Article 8 case law reveals how it is used and how it can be applied in a myriad of clinical situations. Because it involves the right to respect for private life, and is in a sense individualised, it will potentially affect people (both patients and staff) in the mental health services in a variety of ways. Article 8 has implications not only for patients but also for clinicians and healthcare organisations.

DECLARATION OF INTEREST

None.

The Human Rights Act 1998 was incorporated into UK statutory law in 2000 and it encoded most of the rights protected under the European Convention on Human Rights. Courts and tribunals in the UK must take account of Convention rights in all cases that come before them. Before the Human Rights Act, English law did not provide a statutory right to privacy.

Article 8 of the Act, which comprises two paragraphs (Box 1), is a qualified right (other rights being 'absolute', such as Article 3, or 'limited').

Judgments will assess whether Para. 1 is engaged and, if it is, Para. 2, which sets out the exceptions in which interference with the right may be permitted, will then be analysed. These exceptions are to be interpreted narrowly. Under Article 8(2), before an interference with the right is permitted, it must first be 'in accordance with the law', second it must be 'necessary in a democratic society', and third it must be in pursuit of one of the specified objectives. There will be a breach of the Article 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 dynamically interpreted provisions of the European Convention on Human Rights and it has an extremely wide application (e.g. to the use of medical records in court, or the right to practise one's sexuality). The following cases illustrate the diverse use of Article 8 and demonstrate how it has been interpreted in various issues pertaining to clinical psychiatry.

BOX 1 Human Rights Act: Article 8, Paras 1 and 2

Right to respect for private and family life

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.

Medical treatment

Passannante v. Italy (1998)

This case concerned a 5-month delay for a neurological appointment in the state system, although a private appointment was available in 4 days. The European Court of Human Rights held that Article 8 may include positive obligations to ensure effective respect for private life, as well as the negative obligation on the state to refrain from interference. The Court further opined that a delay in providing medical care could contravene Article 8 where the state had a duty to provide care and where excessive delay could have a serious impact on the patient's health. However, on the facts of the case this duty did not arise (no damage to health was alleged).

North West Lancashire Health Authority v. A, D & G [2000]

This case concerned the rationality of a health authority's policy on funding treatment for gender reassignment. Human rights issues were raised by the three patients seeking gender reassignment surgery. The judges opined that neither Article 3 (Curtice 2008) nor Article 8 gives a right to treatment, and Article 14 (prohibition of discrimination) is not relevant in determining what

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† This article continues Martin Curtice's discussion of the Human Rights Act that opened with Curtice M (2008) Article 3 of the Human Rights Act 1998: implications for clinical practice. *Advances in Psychiatric Treatment*; **14**: 389–97. In forthcoming issues, Dr Curtice will be discussing Articles 2 and 3 of the Act in relation to the treatment of prisoners. Ed.

priority should be given to providing treatment for different illnesses. They further commented that Article 8 'imposes no positive obligations to provide treatment', and when deciding whether the state has a positive duty to take action to ensure respect for an individual's private life, 'regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention'. The European Court has also held that Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases (*Sentges v. The Netherlands* 2003).

R (on the application of Ann Marie Rogers) v. Swindon NHS Primary Care Trust and Secretary of State for Health (interested party) [2006]

The High Court initially ruled that a primary care trust's refusal to fund the off-licence use of Herceptin, other than in exceptional cases, did not breach Articles 2 (right to life), 3 (prohibition of torture) or 8. This was subsequently overturned at the Court of Appeal, which ruled the policy regarding funding to be 'irrational' and unlawful.

The original High Court decision ruled that the trust had not come to its policy on cost grounds. The judgment recalled that if funding had been a central issue, then the decision in *R (on the application of B) v. Cambridge Health Authority* [1995] would be directly relevant, where it was held that 'difficult and agonising judgments' had to be made as to how a 'limited budget is best allocated to the maximum advantage of the maximum number of patients' and that 'that is not a judgment which the court can make'. The argument that the applicant's Article 8 rights had been breached in that the trust had 'failed to give due or any regard to her wishes and fears' was rejected. The judge held that the applicant's real concern was about the outcome of the trust's decision-making process and not about the process itself.

The issue of funding similarly arose in a dispute over the transfer of a patient from Broadmoor high secure hospital to a medium secure unit (*R (on the application of F) v. (1) Oxfordshire Mental Health Care NHS Trust (2) Oxfordshire Health Authority* [2001]). It was ruled that Article 8 was not engaged at all, and in particular the judge opined that it was 'not appropriate for decisions regarding financial priorities to be judicialised'.

Valentina Pentiacova and others v. Moldova (2005)

This case concerned the funding of haemodialysis and illustrates the 'margin of appreciation' allowed to states by the European Courts in issues of resource allocation. The applicants had been obliged to meet some of the costs of their haemodialysis treatment themselves, with the state funding only 'strictly necessary medication'. The applicants alleged that this led to unnecessary suffering and deaths and affected their family lives because of the costs incurred.

The Court dismissed the applicants' claims as 'manifestly ill-founded'. The Court was prepared to assume that Article 8 could be relevant 'to complaints about public funding to facilitate the mobility and quality of life of disabled applicants', but it reaffirmed previous case law that states have to strike a 'fair balance' between the needs of the individual and the needs of the community as a whole – and that the European Convention 'does not guarantee as such a right to free medical care' and 'while it is clearly desirable that everyone has access to a full range of medical treatment, including life-saving medical procedures and drugs, the 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'.

Psychiatric treatment

Grare v. France (1992)

The applicant complained that the imposition of antipsychotic drugs resulting in unpleasant side-effects breached Articles 3 and 8. The case was dismissed because even if the medical treatment in question and the applicant's lack of choice of therapist had breached Article 8(1), this could be justified under Article 8(2) because of the need to maintain public order and to protect the applicant's own health.

Christopher Clunis v. UK (2001)

The applicant had a long history of mental illness and had been diagnosed with paranoid schizophrenia in 1988. He was detained and treated on a number of occasions under the Mental Health Act 1983. In 1992, he was again detained under Section 3 of the Mental Health Act after attacking a fellow resident at his resettlement centre. The detention order was subsequently rescinded and he was discharged. He repeatedly failed to turn up for out-patient appointments and various unsuccessful attempts were made to contact him. Then in an unprovoked attack, he killed a complete stranger, Jonathan Zito. At his trial the applicant pleaded guilty to manslaughter on the basis of diminished responsibility and he was detained pursuant to Sections 37 and

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41 of the Mental Health Act. An inquiry, which received much media coverage, found significant deficiencies in the course of treatment given to the applicant. The applicant complained of a violation of his rights under Article 8 because the authorities failed to comply with their positive obligation to ensure effective protection of his right to respect for his private life, in particular his psychological and psychiatric well-being.

The application was rejected. On Article 8 the Court considered that there was no direct link between the measures which, in the applicant's view, should have been taken by Camden and Islington Health Authority and the prejudice caused to his psychiatric well-being attendant on the realisation of the gravity of his act, his conviction and subsequent placement in a mental hospital without limit of time.

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

The treatment of detained patients against their will has been considered by courts. In the case of this applicant, treatment with antipsychotic drugs against his will did not breach Article 3 or 8 rights even though he had capacity to refuse. The judge was prepared to assume that the applicant's Article 8(1) rights would be breached by treatment against his will. The issue to be decided was whether that treatment could be justified under 8(2). The test of 'necessity' was whether the proposed action corresponded to a pressing social need, was a proportionate measure and whether sufficient reasons for it had been given. The judge concluded that these tests had been met, considering not only the provisions in the Mental Health Act that permit compulsory treatment, but also the common-law doctrine of best interests.

Article 8 may also be engaged in issues regarding seclusion policy, as in the controversial case of Munjaz (*Colonel Munjaz…* [2003]; *R (on the application of Munjaz)…* [2005]), where it was held that the Mental Health Act Code of Practice was not legally binding on hospitals when developing seclusion policies.

Forensic and prison psychiatry

TV v. Finland (1994)

The European Court dismissed a claim by an HIV-positive prisoner that his Article 8 rights were breached because guards were present during his medical review at an outside clinic and because staff involved in his treatment had allegedly disclosed his HIV status to others. It was held that although access by prison and medical staff to information regarding the applicant's HIV status constituted an interference with his Article 8(1) rights, this could easily be justified under Article 8(2), as the access to this information was lawful, necessary to protect the rights and freedoms of others and proportionate, i.e. his medical notes were marked to alert staff to his blood-borne disease.

R (on the application of N) v. (1) Ashworth Special Health Authority (2) the Secretary of State for Health [2001]

It was held that the policy of randomly monitoring 10% of telephone calls made by patients in Ashworth Special Hospital did not breach Article 8. Although the policy was clearly an interference with patients' right to respect for their private lives, protected by Article 8(1), it could be justified under 8(2) because it was a proportionate means of meeting the legitimate aim of maintaining appropriate security in the special hospitals.

In another case concerning prison healthcare, correspondence and security, the Court of Appeal overturned the High Court decision which held that the restrictions placed by a prison governor on the prisoner's correspondence with his National Health Service consultant were disproportionate and unlawful (*R (on the application of Szuluk)…* [2004]). The Court of Appeal ruled that the process by which the measure was decided upon was not arbitrary, and that the reading of medical correspondence was necessary for the prevention of crime and was a proportionate interference with the prisoner's Article 8 rights.

It has also been held that a prisoner has the right to communicate with their lawyer with almost no interference (*Golder v. UK* 1975). Although the prison may interfere with non-legal correspondence, the European Court has stated that Strasbourg will investigate these interferences to make sure they are justified under Article 8(2).

R (on the application of H) v. Ashworth Hospital [2001]

It was held that Ashworth's no-condom policy did not breach Articles 2 (right to life) and 8. Although the claimant could be considered a 'potential victim' of the policy, he had not established that the risk of the transmission of sexually transmitted diseases was sufficient to present a 'real and immediate threat to life'; nor had he established that the hospital had failed to do 'all that can reasonably be expected' to prevent such risk.

Analysing Article 8, the High Court held that becoming infected with a sexually transmitted disease could be a violation of a person's physical integrity. The judgment recalled *Osman v. UK*

(2000), where it was claimed that the state had failed to protect an individual's physical integrity. These cases ruled that the test to be applied was that there must have been a real and immediate risk to health, combined with failure by the defendant to obviate that risk. Equally, if the test to be applied was the test of 'fair balance' between the individual and the community, the claim would similarly have failed.

R (on the application of E) v. Ashworth Hospital Authority [2001]

This case concerned the right of a detained male patient to wear women's clothing anywhere in the hospital. There was divided medical opinion as to why he wanted to dress as a woman: whether it was because he was a 'fetishistic transvestite' and found this sexually arousing or because he was a transsexual and needed to live as a woman.

It was accepted that restrictions placed on the patient concerning his wearing of women's clothes were an interference with his Article 8(1) rights. However, the High Court decided that interference could be justified under 8(2) because the three criteria of whether the interference was (a) in accordance with the law (restrictions were in accordance with the Mental Health Act), (b) in pursuit of a legitimate aim (the hospital put forward valid therapeutic and security concerns and the restrictions were proportional to the aims pursued), and (c) necessary in a democratic society, were met and therefore the interference was lawful.

The Court specifically commented that it was not for the Court to 'resolve disputed issues in diagnosis' and that the role of the Court was to subject the decision of the initial decision-maker, and the reasons for it, to 'intensive scrutiny'. It was 'not for the court to engage in a full merits review so as to reach its own independent decision on the matter'.

In another case involving Ashworth Hospital (*R (on the application of B) v. Ashworth Hospital Authority* [2005]) the judge commented that 'psychiatry is not an exact science. Diagnosis is not easy or clear cut … a number of different diagnoses may be reached by the same or different clinicians over the years'.

Residential homes and day care

R (on the application of Haggerty) v. St Helens council (2003)

The European Convention rights of elderly residents in a private residential home were not breached when their home had to be closed because the local council refused to meet in full an increase in residential rates demanded by the home. The private-sector home was not itself a public authority under section 6 of the Human Rights Act, but the judge assumed 'without deciding the issue' that the council was obliged to consider the Convention rights of residents in its dealings with the home. The judgment noted 'the courts accord a broad area of discretionary judgment to a public authority in deciding what is a fair balance between the interests of an individual and of the community'.

No breach of Article 8 was found because it was held that given all the precautions taken by the council, there was not cogent evidence of disruption of private or family life. Furthermore, the financial resources of the council were indeed an important element to be considered in the Article 8(2) balancing exercise and 'the Council is entitled to a substantial degree of deference relating to the way in which it allocates its resources and provides services'.

Conversely, in *Bernard v. London Borough of Enfield* [2002] the High Court held that the local authority was in breach of Article 8, having failed to provide suitable accommodation for a severely disabled woman and her family within a reasonable period of time.

R (on the application of J and others) v. Southend Borough Council [2005]

The decision of one borough to restrict its day-care centre services to local residents did not breach the Article 8 rights of residents of a neighbouring local authority area who had been long-time users of the same service. This case was brought on behalf of adults with intellectual disabilities ('learning disabilities' in UK health services) who had been attending a day centre in Southend, although they lived in a different local authority area. Southend had taken the decision to close one of its two day centres to release funding for modernising its learning disability services and wanted to reserve the places in the remaining day centre for its own residents.

The judgment accepted that the withdrawal of access to the day centre would affect the individuals' Article 8 rights because it would disrupt established relationships. The judge refused to accept that these rights would be breached, because steps were being taken to enable existing friendships to continue. Furthermore, it was not necessary to consider whether Southend's actions fell to be analysed under the 'negative obligation' to refrain from interference with individuals' private lives or the 'positive obligation' to take appropriate

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steps to promote respect for individuals' private lives. The proposals clearly had a legitimate aim (to improve services overall) and the action that had been taken was 'proportionate'. Public authorities were entitled to take policy decisions that 'strike a fair balance without the necessity to consider individual circumstances'.

R (on the application of Bishop) v. London Borough of Bromley [2006]

The High Court held that the decision by a local council to close a day-care centre in order to release funds for additional domiciliary services did not breach Article 8. The judge expressed doubt as to whether the impact of the proposed closure was sufficient to engage Article 8 at all. Assuming that Article 8(1) was engaged, he held that 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. This was on the basis that the decision had been taken because of the high unit cost of providing day care in a number of facilities with relatively low occupancy and because the savings made from the closure were released for domiciliary care.

Confidentiality

Z v. Finland (1997)

The applicant in this case was involved in criminal proceedings against her husband; both were HIV-positive. During investigations and in the court judgment the woman's HIV status was made known to the public via the press. The applicant submitted that there had been separate and multiple violations of her Article 8 rights. The European Court held that two of her submissions did breach Article 8, i.e. that only 'an over-riding requirement in the public interest' can justify breaching medical confidentiality.

The Court underlined the fundamental importance of keeping medical data confidential when it stated 'respecting the confidentiality of health data is a vital principle in the legal systems of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of a patient, but also to preserve his or her confidence in the medical profession and in health services in general'. The applicant received financial compensation.

Cornelius v. De Taranto (2001)

This case concerned the transmission, without the patient's consent, of a medico-legal psychiatric report to the patient's general practitioner (GP) and to another psychiatrist. Mrs Cornelius had commissioned the report as part of personal injury proceedings against her employer, in the belief that copies would be sent only to herself and her solicitors. The psychiatrist producing the report believed that Mrs Cornelius was in need of urgent psychiatric treatment, and although she had no consent to do so, made a referral for such treatment. As a result of this action, the medico-legal report became part of both the GP and hospital records.

The judge held that the contract between the applicant and the psychiatrist, under which a medico-legal report would be produced, undoubtedly included an implied duty of confidentiality. Despite the good intentions of the psychiatrist, the disclosure of the report without consent was a clear breach of this implied contractual term of confidentiality. The applicant consequently had suffered significant injury to her feelings and had incurred costs in her failed attempts to retrieve the report from her National Health Service files. Although the Courts have been very reluctant to award damages in contract for injured feelings, it was held that the right to respect for private and family life was violated and required the judge to make such an award and in his judgment (the applicant was awarded £3000 in respect of her injured feelings).

R (on the application of S) v. City of Plymouth [2002]

This case considered both the common law of confidentiality and Articles 6 (right to a fair trial) and 8 in determining whether or not the mother of an adult without capacity should be entitled to see his health and social work records, which related to his guardianship under the Mental Health Act. The mother was the 'nearest relative' under the Mental Health Act and was unhappy with the social service authority's decision to keep renewing her son's guardianship order. It had been made clear to her that if she used her power as the nearest relative to discharge the guardianship order, then the authority would apply to the court to displace her as the nearest relative. During the dispute, the local authority agreed to disclose key records to the mother's expert advisors (so that she could obtain appropriate clinical and social work advice on whether or not to discharge her son's guardianship order) but refused disclosure directly to the mother herself or to her solicitors.

The Court of Appeal ruled that 'both at common law and under the Human Rights Act, a balance must be struck between the public and private interests in maintaining the confidentiality of information and the public and private interests

in permitting, indeed requiring, its disclosure for certain purposes'. An incapacitous adult's interest in protecting his private life under Article 8 must be balanced by the obligation to protect both his and his mother's family life under the same Article. A majority of the Court of Appeal held that the balancing exercise should lead to the disclosure to the mother of the information already accorded to her expert advisors. The judge who gave the leading judgment noted, 'there is a clear distinction between disclosure to the media with a view to publication to all and sundry and disclosure in confidence to those with a proper interest in having the information in question'.

Private life – positive and negative obligations

In *Niemietz v. Germany* (1992) the concept of private life was held to cover the right to develop one's own personality as well as the right to create relationships with others. The European Court held that in defining 'private life' for the purposes of Article 8:

> it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with human beings.

The right to respect for private life contains both positive and negative aspects – not just that the state should refrain from interference but also that it has an obligation to provide for an effective respect for private life. *Stjerna v. Finland* (1994) stated that:

> the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition … In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

Botta v. Italy (1998) expounded on positive obligations that, although the essential object of Article 8 is 'to protect the individual against arbitrary interference by the public authorities', there may also be 'positive obligations' imposed on states as part of their duty to ensure effective respect for private or family life. Furthermore, these positive obligations 'may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations between individuals themselves'. Thus, even where interference with an individual's Article 8 rights comes about through the actions of another individual, rather than the state, the state may have a duty to take action to prevent this.

The qualifications of Article 8

In their analysis of the Human Rights Act, Wadham & Mountfield (2001) laid out the 'tests' for assessing whether an interference with the Act is 'in accordance with the law' and 'necessary in a democratic society'. The test for 'proportionality' derives from *Handyside v. UK* (1976).

'In accordance with the law'

'In accordance with the law' requires that:

- there be a specific legal rule or regime that authorises the interference
- the citizen has adequate access to the law in question
- the law be formulated with sufficient precision to enable the citizen to foresee the circumstances in which it would or might be applied.

There must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with rights safeguarded by Article 8(1). The primary object of Article 8 is to protect the individual against arbitrary action by public authorities, with the Court recognising that there are 'positive obligations inherent in the "effective" respect for family life' (*Kroon v. Netherlands* 1994).

'Necessary in a democratic society'

If a measure has been taken in pursuit of one of the legitimate interests listed in Article 8(2), it must be tested to determine whether it is 'necessary in a democratic society'. The necessity test requires that:

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

The question of necessity is often the most complex and intricate question in any Article 8 case. In *Dudgeon v. UK* (1981) the Court opined that 'necessary' in the context of Article 8 does not have the flexibility of expressions such as 'useful', 'reasonable' or 'desirable', but implies the existence of a 'pressing social need' for the interference in question. The Court suggested that it is for the domestic state to make the initial assessment of the pressing social need in each case, and accordingly a margin of appreciation is left to the state. Article 8 interference would be considered 'necessary in a democratic society' (the hallmarks of which include 'pluralism, tolerance and broadmindedness') for a legitimate aim, if it answered a pressing social need and in particular was proportionate to the legitimate aim being pursued.

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'Proportionality'

The issue of proportionality has been, and inevitably will be, a consistent issue in Article 8 case law. When considering whether interference is proportionate, the burden lies on the state to justify its action. The 'proportionality' test (*Handyside v. UK* 1976) entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of the individual with those of the whole community. The test is:

- What is the 'interest' which 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?

A measure will not be considered disproportionate if it is restricted in its application and effect and is duly protected by safeguards in domestic law, so that the individual is not subject to arbitrary treatment. Conversely, the state must not act disproportionately to achieve a legitimate aim. A salient point from *R (on the application of N) v. (1) Ashworth (2) Secretary of State for Health* [2001] regarding proportionality was that 'the more substantial the interference the more that is required to justify it', i.e. that a sliding scale should be applied.

Declarations of incompatibility – nearest relative and Mental Health Act amendments

A higher court which is satisfied that a piece of legislation is incompatible with the Human Rights Act is empowered to make a declaration of incompatibility. Oddly, and contrary to popular belief, although a declaration of incompatibility has to be made, it has no legal effect and does not actually bind Parliament in the UK to remedy the infringing legislation. This is a peculiar feature of human rights protection in the UK, an innovative compromise between human rights protection by the courts and the maintenance of parliamentary supremacy (Liberty 2007).

Through declarations of incompatibility, Article 8 has been pivotal in changing domestic law pertaining to the 'nearest relative' under the Mental Health Act 1983, covering England and Wales. A series of cases were based on claims that sections 26 (definition of 'relative' and 'nearest relative') and 29 (appointment by court of the acting nearest relative) of the Mental Health Act 1983 were incompatible with Article 8. In 2003, the High Court had made a declaration of incompatibility between sections 26 and 29 of the Mental Health Act and the Human Rights Act, on the basis that a detained psychiatric patient had no way of displacing the person appointed as her 'nearest relative', however unsuitable they might be to fulfil that role. The government, albeit slowly, has remedied 'nearest relative' legislation under the new Mental Health Act 2007 for England and Wales, amending sections 26 (civil partners now automatically become each other's nearest relative) and 29 (patients now have the right to make an application to displace their nearest relative and county courts can displace a nearest relative where there are reasonable grounds for doing so).

The future of Article 8

The above cases show the varied use of Article 8 in the clinical setting and demonstrate the core concepts that underpin its application in clinical practice (Box 1). It has been used to assess issues from the more common day-to-day matters such as the provision of personal care by same-gender staff, assistance to move to suitably adapted accommodation and the appropriate use of bedpans to complex end-of-life decisions (such as in *R (on the application of Burke) v. General Medical Council* [2005]). Owing to the nature of Article 8 it will continue to be tested in many and varied clinical situations and also in the area of research, for example in relation to written case reports and intellectual property rights over hypotheses and research results. It is also likely that Article 8 will be increasingly used in disputes regarding funding for treatment, particularly when new and more expensive treatments are developed and introduced, for example 'top-up payments' to be paid by patients for new treatments on the NHS and post-code prescribing.

The decision in *R (on the application of (1) A…* (2003) suggests that there will be more cases in which there are competing Article 8 interests between patients and their carers. Although the phrase is not used in the European Convention, the judgment highlighted the 'important concept' of human dignity, which 'is surely immanent in Article 8' and is 'in truth the core value' of our society. Respect for dignity is at the core of a human rights-based approach to healthcare. Such an approach is advocated by various organisations, including the Department of Health (2007) and the Mental Health Act Commission (2007), for increasing and coordinated use by healthcare professionals and organisations. This is a relatively new concept which, it is hoped, will embed itself in the individual and collective consciousness.

BOX 1 Article 8: concepts for clinical practice

- *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 are met.
- *Article 8 specified objectives* National security, public safety, 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

  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.

MCQ answers

1	2	3	4	5
a f	a f	a f	a f	a f
b f	b f	b f	b t	b f
c f	c f	c t	c f	c f
d t	d t	d f	d f	d f
e f	e f	e f	e f	e t

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MCQs

1 With regard to Article 8:
- a the article will be breached if either 8(1) or 8(2) is not complied with
- b to breach the article there need not be demonstrable interference with both 8(1) and 8(2)
- c the article is an absolute right
- d Article 8(1) must be engaged before the interference being assessed under 8(2)
- e the article is a limited right.

2 Specified objectives under Article 8(2) do not include:
- a protection of health or morals
- b protection of the rights and freedoms of others
- c national security
- d free healthcare
- e public safety.

3 With regard to Article 8 and the Human Rights Act:
- a the Human Rights Act does not apply to mental health review tribunals
- b the Human Rights Act incorporates all of the rights protected under the European Convention on Human Rights
- c a breach of Article 8 will result in financial compensation
- d the state has a narrow margin of appreciation in applying Article 8
- e under Article 8, decisions involving finances and funding may be judicialised.

4 With regard to respect for private life:
- a the right to private life applies only to the development of one's own personality
- b when considering respect for private life regard must be had to a fair balance between the interests of the individual and those of the community as a whole
- c the right to private life contains only positive aspects
- d negative obligations may involve the adoption of measures designed to secure respect for private life
- e states need not refrain from interference with an individual's private lives.

5 With regard to Article 8:
- a the article can impose positive obligations to provide specific treatment
- b interference under 8(2) need not be in accordance with the law
- c under 8(2) an interference need not be necessary in a democratic society
- d under 8(2), for an interference to be necessary in a democratic society it does not have to correspond to a pressing social need
- e under 8(2), for an interference to be necessary in a democratic society it must be proportionate to the legitimate aim pursued.