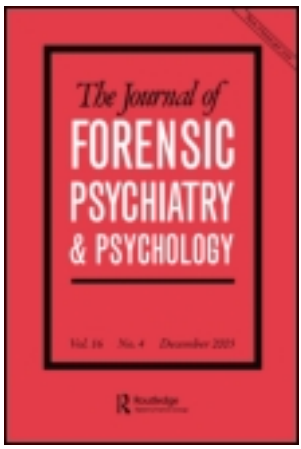


Journal of Forensic Psychiatry & Psychology
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/rjfp20

# Reid v. the United Kingdom : Restricted patients and the European Convention on Human Rights

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Published online: 17 Feb 2007.

To cite this article: Rajan Darjee & John Crichton (2005): Reid v. the United Kingdom : Restricted patients and the European Convention on Human Rights, Journal of Forensic Psychiatry & Psychology, 16:3, 508-522

To link to this article: http://dx.doi.org/10.1080/13691050500046182

*The Journal of Forensic Psychiatry & Psychology*,
September 2005; 16(3): 508 – 522

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# *Reid v. the United Kingdom*: Restricted patients and the European Convention on Human Rights

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**Abstract**
This article describes the recent decision of the European Court of Human Rights in the case of a patient with personality disorder detained under a restriction order in Scotland's high security hospital. This is set in the context of recent case law in Scotland in similar cases and in England where forensic patients have made challenges, in domestic courts under the European Convention on Human Rights (ECHR), to their detention and treatment. We conclude that the ECHR has offered little in the way of tangible benefit to such patients.

## Introduction

In February 2003 the European Court of Human Rights gave its decision on an application by a patient detained under a hospital order with a restriction order at the State Hospital, Carstairs. He alleged that his detention and the review procedures associated with it violated articles 5(1) and 5(4) of the European Convention on Human Rights (ECHR). This decision and a number of other recent decisions applying the ECHR to restricted patients clarified the status of domestic law and practice relating to restricted patients.

The ECHR was incorporated into domestic law in Scotland under the Scotland Act 1998 in a similar way to the Human Rights Act 1998 of England and Wales. The ECHR has been applicable and available to be used in challenges to law and practice on an international plane since 1965, but the incorporation of ECHR into domestic law now means that such cases can be tested in domestic courts without having to take cases to Strasbourg (Macgregor-Morris, Ewbank, & Birmingham, 2001). Gostin (2000) comprehensively reviewed the application of ECHR in cases of patients with mental disorder prior to incorporation of the ECHR into UK domestic law.

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ISSN 1478-9949 print/ISSN 1478-9957 online 
DOI: 10.1080/13691050500046182

Although new domestic law concerning restricted patients has been passed and will be implemented in 2005 with the commencement of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Darjee & Crichton, 2004), the pertinent issues from *Reid* and other ECHR cases will remain relevant. We have previously reported this case as far as an appeal to the House of Lords (Darjee, McCall-Smith, Crichton, & Chiswick, 1999) and some subsequent developments in Scotland (Crichton, Darjee, McCall-Smith, & Chiswick, 2001).

## The facts of the Reid case

Reid pled guilty to culpable homicide in 1967 and was ordered to be detained at the State Hospital, Carstairs under a hospital order with a restriction order unlimited in time (sections 55 and 60 Mental Health (Scotland) Act 1960). At the time he was categorised as suffering from mental deficiency, a mental disorder warranting his detention under the 1960 Act. By 1984 it was clear that he was not suffering from mental deficiency, but he continued to be detained on the basis that he had a mental disorder 'manifested only by abnormally aggressive or seriously irresponsible conduct' (section 17(1)(a)(i) Mental Health (Scotland) Act 1984; the equivalent of psychopathic disorder under the Mental Health Act 1983 in England and Wales). He made several unsuccessful appeals against his detention to the Sheriff Court, the last of which was in 1994.

## The law

At an early stage the relevant provisions of domestic and European legislation will be set out so as to act as a point of reference for the rest of this paper.

### *Domestic legislation*

Section 17(1) of the 1984 Act sets out the grounds for compulsory detention in hospital:

> *A person may, in pursuance of an application for admission under section 18(1) of this Act, be admitted to a hospital and there detained on the grounds that –*
>
> *(a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and*
>
> > *(i) in the case where the mental disorder from which he suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, such treatment is likely to alleviate or prevent a deterioration of his condition; or*

*(ii) in the case where the mental disorder from which he suffers is a mental handicap, the handicap comprises mental impairment (where such treatment is likely to alleviate or prevent a deterioration of his condition) or severe mental impairment; and*

*(b) it is necessary for the health or safety of that person or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this Part of this Act.*

Similar matters are set out for England and Wales under section 3 of the 1983 Mental Health Act. In the various judgments in this and other cases the terms 'psychopathic disorder' and 'treatability' have been used to refer to the matters set out in section 17(1)(a)(i).

Section 64(1) sets out the matters to be considered when a sheriff is considering an appeal against detention. In 1994 section 64(1) read as follows:

*Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall direct the absolute discharge of the patient if he is satisfied –*

*(a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or*

*(b) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case)*

*(c) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.*

Similar provisions for England and Wales are set out under sections 72 and 73 of the 1983 Act. Section 64(1) of the 1984 Act has subsequently been amended by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 (see below); and new legislation under part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 will supersede current provisions in April 2005 (Darjee & Crichton, 2004).

*European legislation*

Article 5 of the ECHR was the basis of Reid's challenge to his detention in the European Court of Human Rights. The relevant parts of this article are as follows. Article 5(1) of the ECHR states:

*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

. . .

*(e)the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.*

Article 5(4) of the ECHR states:

*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*



**Reid's appeals 1994–1998**

In 1994 Reid appealed for discharge. He argued that although he was suffering from a 'psychopathic disorder' he was not 'treatable' and therefore in considering section 64(1) of the 1984 Act the sheriff should find that he was not 'suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment'; i.e., that the criteria for admission under section 17 were linked to and had to be considered when reading section 64. Based on the medical evidence presented, the sheriff concluded that Reid was a psychopath who posed a high risk to the public. The sheriff stated that 'treatability' was irrelevant to his decision regarding section 64, rejecting any linkage between section 17 and section 64 criteria. He did however state that even if he did have to consider 'treatability' then there was evidence that medical treatment had alleviated Reid's condition and would continue to do so. This was in keeping with the decision of the Court of Appeal in an English case *R v. Canons Park Mental Health Review Tribunal, ex p. A* [1995] (Baker & Crichton, 1995).

There followed a series of judicial reviews. The review in the Outer House of the Court of Session (*R v. Secretary of State for Scotland* [1997]) confirmed the sheriff's decision. This decision was appealed in the Inner House of the Court of Session (*R v. Secretary of State for Scotland* [1998]) where Reid was successful and the sheriff's decision was quashed. The court held that the discharge criteria under section 64 incorporated the admission criteria under section 17 including 'treatability', and that based on the medical evidence presented the sheriff had been wrong to conclude that Reid was treatable.

The Secretary of State appealed to the House of Lords (*Reid v. Secretary of State for Scotland* [1999]). Their Lordships agreed with the Inner House that the discharge criteria incorporated the admission criteria including 'treatability'. However they disagreed with the Inner House regarding the quashing of the sheriff's decision. On a judicial review application the Inner House was not entitled to reconsider the evidence and override the sheriff's opinion regarding treatability. They clarified the broad legal interpretation of 'treatability'. Therefore a psychopathic restricted patient who was untreatable had to be discharged, but 'treatability' was to be interpreted widely and the sheriff was able to conclude on the basis of the medical evidence that Reid was treatable (Darjee et al., 1999).



## Subsequent developments

The House of Lord's decision paved the way for a successful appeal by another patient diagnosed with personality disorder detained at the State Hospital on a hospital order with a restriction order who had been convicted of culpable homicide (*Ruddle v. Secretary of State for Scotland* (1999)). In his case the sheriff held that, based on the medical evidence presented, the patient was untreatable and therefore had to be discharged. Although the treatability criterion was introduced as a safeguard, following this case it was castigated as a 'loop-hole'. This alleged 'loop-hole' was addressed by the first piece of legislation enacted by the newly reconstituted Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 (Crichton et al., 2001). The definition of mental disorder in the 1984 Act was amended to emphasise that personality disorder came within its scope and the criteria to be considered in discharging restricted patients were amended, so that section 64(A1) read:

> *Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall refuse the appeal if satisfied that the patient is, at the time of the hearing of the appeal, suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not.*

Therefore the link with admission criteria, including 'treatability', was irrelevant if the patient posed a serious risk due to mental disorder; this 'public safety test' trumped all other considerations. This enactment was retrospective, covering any appeals to the sheriff where hearings took place after September 1, 1999 (and also cases considered by Scottish Ministers after that date). Therefore the decision of the sheriff in Reid's case was not covered by the new law, but two patients who had initiated appeals and whose cases had not yet been heard were affected (see below).

The measures introduced by the 1999 Act were described as temporary by Scottish Ministers, pending reviews of the legislation. The Millan Committee (reviewing mental health legislation in Scotland; Scottish Executive, 2001) and the MacLean Committee (reviewing serious violent and sexual offenders in Scotland; Scottish Executive, 2000) could not provide an alternative approach for those restricted psychopathic patients who were already detained, but stated that such measures were unnecessary for mentally disordered offenders coming in front of the courts in the future due to comprehensive assessment procedures and the availability of the hospital direction.

The compatibility of the 1999 Act with the ECHR was challenged by three restricted patients detained at the State Hospital including Reid. The Inner House of the Court of Sessions (*Anderson, Doherty, and Reid v. The Scottish Ministers* [2000]) and the Judicial Committee of the Privy Council (*Anderson, Doherty, and Reid v. The Scottish Ministers* [2001]) rejected this challenge. The main points were:

- The retrospective nature of the legislation was justified on compelling grounds of the general interest. Such retrospective legislation is not usually favoured (*Zielinski v. France* (2001)), but in this case the risk of releasing dangerous mentally disordered offenders was seen as imminent, a speedy remedy was required, and adequate safeguards were provided against unlawful detention.
- The lack of mirroring of admission criteria by discharge criteria was not in breach of the ECHR. The three minimum conditions for the continued detention of a person of unsound mind under article 5(1)(e) had been set out in *Winterwerp v. The Netherlands* (1979) and restated in two UK cases (*X v. United Kingdom* (1981) and *Johnson v. United Kingdom* (1997)): (1) the person must be reliably shown to be of unsound mind, so a true mental disorder must be established on the basis of objective medical evidence; (2) the mental disorder must be of a kind or degree warranting compulsory detention; and (3) continued detention must depend upon the persistence of this mental disorder.
- The review of lawfulness of detention required under article 5(4) did not need to be of all the original admission criteria. A review addressing the minimum standards above was sufficient.
- The detention of a person of unsound mind must be in a clinical setting (*Aerts v. Belgium* (1998)), but the ECHR does not require that the detention of a person of unsound mind is for treatment or is contingent on 'treatability'.
- One of the appellants had been transferred from prison to hospital while serving a life sentence. He argued that the 'public safety test' should not apply to him as he would be returning to prison rather than the community if discharged. It was held that if he was considered to pose a

serious risk to the narrower section of the public in prison (including other prisoners and staff) then continued detention was lawful.
- In such cases there is nothing in the ECHR that places the rights of the detainee who is a danger to society above those of citizens to live in peace and security.

**Reid v. the United Kingdom (2003)**

Reid made an application to the European Court of Human Rights. He alleged that in his case his rights under articles 5(1)(e) and 5(4) had been violated. This application related to the appeal that started in the Sheriff Court in 1994 and led to the House of Lords in 1998. Therefore the relevant legislation was that which was in place in 1994 and excluded the amendments made by the 1999 Act. The 1999 Act and the decision set out above had stopped the discharge of dangerous restricted patients; this was Reid's last opportunity to secure his discharge under the previous legislation.

*Challenge based on article 5(1)*

Reid argued that:

- The ECHR did not permit the detention of a person simply because his views or behaviour deviated from societal norms, and that he should not be detained because of a propensity to re-offend without the possibility of intervention or the availability of medical treatment.
- The most authoritative consideration of his 'treatability' had been by the Inner House of the Court of Session who found him to be untreatable.
- If he were sentenced now, as a psychopath he would receive a prison sentence, and therefore detention in hospital was not in an appropriate institution.
- The broad legal interpretation of medical treatment was not in keeping with accepted clinical views; his treatment was indistinguishable from containment.
- Risk of re-offending should not be a valid ground for maintaining a person in hospital as this rendered the admission criteria different from the discharge criteria.

The Court set out the minimum conditions to be satisfied for a person to be detained, as set out in *Winterwerp* (see above), and the need for a relationship between the grounds for detention and the place of detention, as set out in *Aerts* (see above).

In keeping with the decision in *Anderson, Doherty, and Reid*, the Court stated that the ECHR did not impose a requirement that the mental

condition of a detained person should be amenable to treatment—rather, the person must suffer from a mental disorder of a degree warranting compulsory confinement. This might be necessary not only for treatment, but also where the person needs control or supervision to prevent harm to self or others (*Litwa v. Poland* (2000)). The Court held that the presence of a true mental disorder was established by the diagnosis of psychopathic disorder by medical practitioners, and being associated with a high risk of re-offending, detention in hospital did not violate article 5(1). The fact that he would not be detained in hospital if his offence occurred today, perhaps due to inevitable medical and legal developments, was not held to indicate a violation of article 5(1).

The Court therefore concluded that Reid's rights under article 5(1) had not been violated.

*Challenge based on article 5(4)*

Reid argued that:

- The weight of evidence before the sheriff indicated he was untreatable, as stated by the Inner House, but the latter's decision on the evidence not being allowed, as the hearing was a judicial review rather than an appeal, denied him a proper decision by a court on the merits of the evidence.
- The proceedings which commenced in April 1994 and ended in December 1998 were not conducted speedily, and that during 1995–1998 his prospects of success in further applications to the sheriff were adversely affected.
- In proceedings before the sheriff under section 64(1) the onus of proof to a high standard of probability was placed on him to show that he no longer fulfilled criteria for detention, whereas on admission the onus of proof had been on the authorities seeking to detain him; this contravened the ECHR.

The Court dismissed the first point; the sheriff could be regarded as a court in terms of article 5(4), and the process of and decisions made in subsequent appeals did not deny Reid a review which considered all the essential conditions necessary for his lawful detention. However, with regard to the two other points the court found that there had been a violation of article 5(4).

The review had not been decided speedily. In a previous case (*Rutten v. the Netherlands* (2001)) the first instance court took two and a half months to reach its decision and the appellate court took three months; the Court found that the speed requirement in article 5(4) had been breached. In Reid's case the delays at various stages were longer. The Court stated that

as article 5(4) concerned issues of liberty particular expedition was necessary and that there were no exceptional grounds justifying the delay.

It is for the authorities to prove that an individual satisfies the conditions for detention rather than the converse. Although the sheriff had stated that the onus of proof lay on the applicant, the government argued that the issue of the burden of proof was irrelevant to the actual decision made by the sheriff. The Court found that this issue had played no role in the sheriff's determination regarding the presence of mental disorder and the risk of further violence. The sheriff had made clear findings so as to affirm the presence of these. However, the domestic law also required him to make a finding as to 'treatability' and in considering this he stated that he was not satisfied that this condition was not met. The Court was not persuaded that this was irrelevant to the outcome. It was noted that recently, both in Scotland (*Lyons v. the Scottish Ministers* (2002)) and in England (*R (H) v. Mental Health Review Tribunal North & East London and the Secretary of State for Health* [2001]), it had been recognised that the onus of proof in such cases lay with the authorities and remedial action had been taken.

## English cases

A number of English cases applying the ECHR to patients subject to restriction orders have occurred since the Human Rights Act 1998 came into force in October 2000. These cases are summarised below. A disproportionate number of ECHR cases concerning mental health legislation have involved restricted patients and/or patients detained in secure hospitals (Bindman, Maingay, & Szmukler, 2003).

### *Challenges based on article 5*

*Onus of proof.* In *R (H) v. the Mental Health Review Tribunal North & East London and the Secretary of State for Health* [2001] the Court of Appeal held that sections 72 and 73 of the 1983 Act (setting out the matters to be considered by a MHRT when reviewing the detention of a restricted patient) contravened articles 5(1) and 5(4) of the ECHR as they placed the onus of proof on the patient to satisfy the tribunal that they no longer satisfied the criteria for ongoing detention. This was remedied by amendments to the wording of these sections under the Mental Health Act 1983 (Remedial) Order 2001.

*Speedy determination.* In *R (KB and others) v. Mental Health Review Tribunal* [2002] a number of patients, including one detained under a hospital order with a restriction order, alleged that in each of their cases the article 5(4) right to a speedy determination of the lawfulness of detention had been violated as tribunal hearings had repeatedly been adjourned. The

Queens Bench Division Administrative Court held that the patients' rights had indeed been infringed as the responsibility for the delays fell on central government which had not taken appropriate action to ensure tribunals were adequately resourced. This right to speedy determination was also found to have been breached in two other cases (*R (on the application of C) v. Mental Health Review Tribunal London South & South West Region* [2001] and *R (B)* v *(1) Mental Health Review Tribunal (2) Secretary of State for the Home Department* [2003]).

*Transfer, discharge, and leave.* In *R (IH) v. Secretary of State for the Home Department and another* [2004] a tribunal deferred the implementation of a conditional discharge so that preconditions necessary for the patient's discharge could be put in place. No psychiatrist willing to supervise the patient's treatment in the community could be found. Two years later the case was referred back to the tribunal who found that it was appropriate for the patient to be detained in hospital. The House of Lords found that there had been no breach of article 5(1) in that, although the first tribunal hearing had granted a conditional discharge, when it became apparent that these conditions could not be met, it could not be argued that he was detained when there were no grounds for his detention. If that had been the case the tribunal would have granted an absolute discharge. However, article 5(4) had been breached. The tribunal should have reconsidered the case as soon as it became apparent that the conditions of his discharge could not be met, rather than leaving him in limbo. It was stated that a health authority had no power to require a potential supervising psychiatrist to act in a way which conflicted with his/her clinical judgment. Similar decisions have been reached previously and subsequently in lower courts. In *R (K) v. Camden and Islington Health Authority* [2001] the patient had been granted a conditional discharge by the tribunal against medical advice, but no potential supervising psychiatrist in the community agreed to the patient's discharge and community aftercare could not be arranged. Continued detention was not held to have contravened article 5(4). Although health authorities should make reasonable efforts to meet tribunal conditions they were not absolutely obliged to do so. In *R (W) v. Doncaster Metropolitan Borough Council* [2004] the delay in the discharge of a restricted patient because of difficulties satisfying the conditions set by the Mental Health Review Tribunal was not found to constitute false imprisonment, a breach of section 117 of the Mental Health Act 1983, or article 5 of the ECHR.

*R (Secretary of State for the Home Department) v. Mental Health Review Tribunal* [2002] concerned the case of an elderly man who had been detained in a secure hospital for over 40 years. On a number of previous occasions the tribunal had recommended that he be transferred to conditions of low security, but the Secretary of State had not accepted

this recommendation. On this occasion the tribunal had granted a conditional discharge (a decision which could not be overridden by the Secretary of State) setting out that he should reside in suitable specialist accommodation and should not leave without an escort. The court of appeal held that this did not constitute transfer from one state of detention to another, and that the conditions imposed on his residence within the accommodation did not amount to a deprivation of liberty under article 5(1) as the conditions imposed were primarily in the interests of the individual rather than concerned with protection of the public. The Secretary of State's appeal, which rather paradoxically was aimed at retaining more control over the patient, was therefore dismissed.

In *R (RA) v. Secretary of State for the Home Department* [2002] the requirement that the consent of the Secretary of State is given before a restricted patient is granted leave of absence was not found to be incompatible with the ECHR. In *R (MP) v. Nottingham Healthcare NHS Trust & (1) Secretary of State for the Home Department (2) Secretary of State for Health (interested parties)* [2003] it was stated that article 5 is not concerned with the location in which a patient is detained as long as it is a clinical setting, and failure to transfer a patient to a more appropriate (lower) level of security does not breach the ECHR. The limited powers of the Mental Health Review Tribunal in this respect were not found to be incompatible with the ECHR (*R (LH) v (1) Mental Health Review Tribunal (2) Secretary of State for Health* [2002]).

*Challenges based on article 8*

*Restrictions placed on patients in secure hospitals.* The policy of monitoring telephone calls in high security hospitals (*R (N) v. Ashworth Special Hospital Authority* [2001]), not providing condoms in a high security hospital (*R (H) v. Ashworth Hospital* [2001]), placing restrictions on a male patient wearing female clothes (*R (E) v. Ashworth Hospital Authority* [2001]), and directions from the Secretary of State regulating visits by children to patients convicted of serious offences (*R (L) v. Secretary of State for Health* [2001]) were not found to be in breach of article 8. The rights to privacy and family life under article 8(1) which had potentially been breached in these cases were found to be justifiably overridden by exemptions permitted under article 8(2) protecting the rights of others.

Article 8 was not found to have been breached when a Health Authority refused to fund a medium secure placement nearer to a patient's family (*R (F) v. (1) Oxfordshire Mental Healthcare NHS Trust (2) Oxfordshire Health Authority* [2001]) or by a decision not to recommend transfer of a patient from high security to a hospital closer to home *(R (LH) v. (1) Mental Health Review Tribunal (2) Secretary of State for Health* [2002]).

*Information to third party.* Neither article 2 nor article 8 were found to require information to be provided about the conditions imposed on the discharge of a patient by a Mental Health Review Tribunal to a patient's former partner in *R (T) v. Mental Health Review Tribunal and G (interested party)* [2002].

## Comment

*Reid v. the United Kingdom* (2003) and the cases in domestic courts applying ECHR clarify a number of issues relating to the detention and treatment of restricted patients and what is compatible with the convention. These are summarised below:

- The ECHR does not require a link between the criteria to be considered on admission and those to be considered on discharge.
- A patient must be detained in a clinical setting, but does not have to be treatable or to receive medical treatment to justify detention.
- There must be a review of the lawfulness of detention, to be conducted speedily. Lack of resources and administrative difficulties cannot delay tribunal or court hearings and decision making.
- The onus of proof at these hearings is on the authorities to justify the ongoing detention of a patient.
- The ECHR is not breached by the executive's monopoly on the ability to grant leave and sanction transfer to another hospital.
- Ongoing detention of a patient granted a deferred conditional discharge is acceptable as long as there is a further tribunal or court hearing when it becomes clear that the conditional discharge cannot be achieved.
- Where a condition of such a deferred discharge is that the patient is supervised by a psychiatrist in the community, health authorities and psychiatrists are not in breach of the ECHR if they refuse to provide such supervision for clinical reasons.
- The exception to the article 8(1) right to respect for private and family life where there are issues related to the protection of the rights and freedoms of others—article 8(2)—justifies a number of restrictions placed on the freedom of patients in high security hospitals.

Therefore, apart from procedural matters relating to the review of lawfulness of detention, the human rights challenge has to a large extent been warded off by current legislation and practices relating to restricted patients. This should not be surprising. The ECHR was signed in 1950; its primary purpose was to prevent the type of atrocities committed in the Second World War. It was set out at a time when attitudes towards and treatment of patients with mental disorder were very different from today. It does not set high standards for modern mental health legislation or services.

Circumstances that satisfy the ECHR should not necessarily provide comfort, but clearly those that do not should cause major concern. The fact that a law or practice is compliant with the ECHR does not in itself make irrelevant questions about clinical and ethical standards, and domestic mental health law must be relied upon to set higher standards.

For patients where serious offending or risk to others are not at issue, then the domestic law agenda will be focussed on care, treatment, and the rights of patients. Domestic law may therefore be relied upon to provide a modern framework and to impose requirements in keeping with rigorous clinical and ethical standards. For restricted patients, the domestic agenda may primarily be concerned with risk to others and incapacitation. In such cases domestic law may fall back on the bare minimal standards required to jump the low ECHR hurdle.

A disproportionate number of mental health legislation 'ECHR cases' have concerned restricted patients and patients detained in high security hospitals. It has been argued that the findings in such cases may not easily be extrapolated to non-forensic cases (Bindman et al., 2003), particularly as the European Court of Human Rights places emphasis on proportionality when balancing conflicting rights. Where patients have committed serious offences and/or are considered to be dangerous, any potential breach of the ECHR has so far been countered by the right of members of society to live in safety. It is unlikely that in the future such cases will be decided differently.

The European Court of Human Rights in *Reid* and other cases has emphasised the potential danger posed by a patient to justify detention and other potential infringements on human rights. There is no differentiation in this context between patients who have committed offences and those who have not but are considered to pose a serious risk. The ECHR would therefore appear to permit the civil detention of a dangerous psychopath who has not committed an index offence, and the detention in a clinical setting of a prisoner at the end of a determinate sentence who is considered to pose a risk due to a mental condition. Such practices may appear to be clinically and ethically dubious, but as long as objective medical evidence is available, the ECHR is satisfied.

Although some patients, lawyers, and clinicians may lament the lack of tangible benefits for restricted patients provided by the ECHR, the public and politicians are likely to be reassured. The stereotypical scenario of the dangerous mentally disordered offender being released or granted apparently outrageous freedoms by the liberal continental court is, and is likely to remain, a myth.

New legislation in Scotland, the 2003 Act, does not change procedures relating to the ongoing detention of restricted patients in a major way. The new Mental Health Tribunal for Scotland will have a monopoly on decisions regarding discharge, taking this out of the hands of the executive

completely; but the executive will still be the main arbiter of transfer between hospitals and the sole arbiter of leave. The criteria to consider in reviewing the detention of restricted patients remain very similar to current criteria, and the 'public safety' test, a 'temporary' measure introduced by the 1999 Act, will continue to trump all other matters if a person remains mentally disordered. An appeal against level of security will not be implemented until May 2006. This will apply to all patients detained under the 2003 Act, and will potentially help entrapped restricted patients to move on. The ECHR has not helped such patients so far, but perhaps here is an example where domestic law can set better legal standards and promote better clinical practice. However, if domestic courts are not assertive in implementing this provision for restricted patients, it would seem unlikely that the ECHR will provide a useful back-up.

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