

Human rights in public authorities decision making



The purpose of this briefing is to provide an analysis of the role of a formal human rights assessment for public authorities including health and social care trusts.

The current legal position

In October 2000, the Human Rights Act 1998 came into force in Northern Ireland and embedded the European Convention on Human Rights into domestic law. Since then, the decision making, actions (and some omissions) of public bodies, which includes trusts, must be consistent with the Human Rights Act 1998.

Recently in the case of *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, the House of Lords was asked to consider the extent to which a public authority, when making a decision pursuant to its statutory function (in this case the issue was whether or not to grant a licence to a sex shop), must undertake a thorough human rights assessment prior to making its decision.

The House of Lords has ruled in this case that, in order to be compliant with the Human Rights Act 1998, the authority cannot be expected to be overly formalistic: **'a construction of the Human Rights Act which requires ordinary citizens in local government to produce formulaic incantations would make it ridiculous ... either the refusal infringed the respondent's convention rights or it did not.'**

The Court in *Miss Behavin' Ltd* relied heavily on the judgment of the House of Lords in *R (Begum) v Denbigh High School* [2006] UKHL 15. In the *Begum* judgment the House of Lords considered the purpose of human rights jurisprudence which focuses on **'not whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated.'**

The House of Lords in *Miss Behavin'* preferred to adopt a pragmatic approach when considering how far a public authority should conduct a Human Rights Act analysis. This pragmatic approach is reflected in the Human Rights Act 1998 itself. The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right. Further, the House of Lords was ready to re-emphasise a core criterion of

human rights law, that is, that an action under the 1998 Act may only be brought by a person who is the victim of an unlawful act.

Crucially for *Miss Behavin' Ltd* the court agreed that there had not been a violation of the respondent's Convention rights in the first place and that if the local authority exercises its powers rationally and in accordance with the purpose of the enabling statute, **'it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights'.**

At first sight the judgment in *Miss Behavin' Ltd*, appears to herald a dilution in a public authority's responsibility to consider and/or document the 'convention context' when conducting the necessary balancing exercises to determine whether interference with convention rights could be justified. However, caution must continue to be exercised by public authorities, in coming to specific decisions which involve convention rights. As with *Miss Behavin' Ltd*, the court it seems is not concerned with **'generalities about the legislation in question, but with whether the effect of the council's exercise of its statutory powers in the particular circumstances was in fact compatible with the Convention rights of the applicant'.**

Earlier caselaw

Re: Jennifer Connor [2004 NICA 45]

Prior to the decision in *Miss Behavin' Ltd*, the courts and in particular the Court of Appeal had been asked to consider the role of human rights in the assessment process and in decision making processes by public bodies.

In the Northern Ireland Court of Appeal case of Jennifer Connor, the Court of Appeal was asked to rule on a decision taken by the trust to apply for a Guardianship Order under the Mental Health (NI) Order 1986 which required her to reside in a certain residential care home. Ms Connor's principal argument was that the requirement to reside in residential care and not with her husband was a breach of her rights under Article 8 (the right to respect for private and family life) of the European Convention on Human Rights. The Court of Appeal on this occasion held that there had been a breach of her Article 8 rights.

Background to the Connor Case

Article 8 provides that:

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, morals or for the protection of the rights and freedoms of others.

In a social welfare context, the key principles of most relevance are the need for the action to be the least restrictive interference and overall to be balanced. In Connor, the judges held that this could only be achieved by a full analysis of all alternatives open to the trust and that the trust had failed to demonstrate adequately that its decision was the least restrictive in the circumstances.

The Court Of Appeal held that, where an individual's Article 8 rights are interfered with, there should be an analysis of the alternatives open to the trust. Without such an analysis, a trust decision interfering with an individual's Article 8 rights could not possibly be proportionate.

The Connor judgment highlighted the role that convention rights must occupy in the overall assessment process. As assessment of need is central to the provision of community care services, therefore, proper assessment which complies with human rights law is necessary to ensure that an individual's needs are properly met.

Connor re-emphasised the requirement for trusts to approach every assessment of need from a human rights perspective. By recording an analysis of alternatives, a trust will be able to demonstrate that appropriate consideration has been given to a person's human rights. It would not have been sufficient for trusts to simply refer to the fact that a user's Article 8 rights have been considered. Instead the trust must demonstrate that it has looked at all the alternatives available in the particular circumstances of the case. Connor also is good authority for the requirement that trusts analyse and document the effect of each alternative on the individual's human rights.

Begum v Denbigh High School [2006] UKHL 15

The *Begum* case dealt with one individual's right to freedom of expression under Article 9 of the Convention and also Section 6 of the Human Rights Act 1998 which makes it unlawful for a public authority to act in a manner which is incompatible with Convention rights.

In *Begum* the High Court dismissed Miss Begum's application for judicial review of her school's refusal to permit her to wear uniform which did not comply with the school's existing policy on school uniform.

On appeal to the Court of Appeal the court, allowing Miss Begum's appeal, held that where a school's uniform code imposed a particular uniform which did not meet the demands of certain pupils' religion it would be for the school to justify any limitation on the applicant's freedom under Article 9 of ECHR. The Court held that the school had infringed the pupil's rights under Article 9 because it had not reached its decision by an appropriate process of reasoning. The Court of Appeal then listed criteria for considering the matter in a formal decision making process which took full account of human rights even in circumstances where there was potentially no interference, but which reflected a balanced consideration of all the evidence.

As a result, whilst on a new consideration it was quite possible that the school would justifiably arrive at the same answer, in the absence of a balanced consideration the school's decision was annulled.

The House of Lords heard the case in February in 2006 and delivered its judgment on 22 March 2006. The Lords overturned the Court of Appeal decision and held that the rules with respect to suitable school uniform were not in breach of the pupil's Convention rights under Article 9.

The real question for the House of Lords was how to deal with such complex and delicate matters. Should it take a view on the evidence or should it concede that such complex factual issues are primarily for the initial decision maker and engage in some kind of procedural review. The judgment is a compromise between the two approaches.

The House of Lords decision criticised the highly structured approach to human rights assessment outlined by the Court of Appeal. The Court of Appeal had begun from the premise that Miss Begum had a fundamental right protected by law, and that any restriction must be justified and proportionate. It also wished to see that, in considering the policy, due weight was given to all relevant factors, notably Article 9 of the Convention.

The House of Lords, however, found that this formalistic approach to assessment for public body decision-making was too complicated. It was unreasonable to expect teachers to think in terms of human rights and follow the structure of Article 9. The House of Lords took the view that the ECHR did not contain procedural requirements but substantive ones. It does not matter how national authorities make their decisions, as long as they do not, in fact violate rights: ***'what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'***.

Conclusions

The current position as a result of the House of Lords' decision is not without problems. For a public body to make sure it does not violate human rights, it will have to make sure it considers all the relevant factors and make decisions according to procedures which allow representation of all interests. The decision in *Miss Behavin* in reality leaves public bodies in a more uncertain position as it is now suggested that, rather than considering all the criteria suggested by the Court of Appeal in *Begum* to ensure a decision is legally sound, a public authority now must do what it thinks is sensible and hope that the courts agree with the actual decision if it is challenged.

Until this issue is finally put to rest, perhaps by a decision of the European Court of Human Rights, it is prudent for public authorities to adopt a compromise position somewhere between *Connor* and *Miss Behavin*. The main tenet of public law itself demands that it must matter how a public authority makes its decisions, otherwise the administrative court would be obsolete. Considering and documenting the scope of an individual's human rights when making a decision where it is apparent that those rights are or may be engaged remains prudent. This approach will enable a trust to have a degree of confidence that it has arrived at a particular decision in a way that is as fair and balanced as possible and less likely to face legal challenge on administrative law or human rights grounds.

Further information

The cases discussed in this briefing can be found on the BAILII website (www.bailii.org):

- *Begum, R (on the application of) v Denbigh High School* [2006] UKHL 15 (22 March 2006)
(URL: www.bailii.org/uk/cases/UKHL/2006/15.html)
- *Belfast City Council v Miss Behavin' Ltd (Northern Ireland)* [2007] UKHL 19 (25 April 2007)
(URL: www.bailii.org/uk/cases/UKHL/2007/19.html)
- *Connor, Re an Application for Judicial Review* [2004] NICA 45 (14 December 2004)
(URL: www.bailii.org/nie/cases/NICA/2004/45.html)

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