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CO/7381/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2008

Before :

LORD JUSTICE PILL
and
MR JUSTICE SILBER

- -

Between :

The Queen on the application of G	**First Claimant**
- and -	
Nottinghamshire Healthcare NHS Trust	**First Defendant**
The Queen on the application of N	**Second Claimant**
- and -	
Secretary of State for Health	**Second Defendant**
The Queen on the application of B	**Third Claimant**
- and -	
Nottinghamshire Healthcare NHS Trust	**First Defendant**

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Paul Bowen (instructed by **Cartwright King)** for the **First Claimant** and (instructed by **Scott-Moncrieff Harbour & Sinclair)** for the **Second Claimant**

Hugh Southey (instructed by **Roberts Moore Nicholas Jones**) for the **Third Claimant**

David Lock and Nageena Khalique (instructed by **Mills & Reeve**) for the **First Defendant**

Jonathan Swift and Karen Steyn (instructed by **Department of Health**) for the **Second Defendant**

Hearing dates : 11, 12, 13, 14 March 2008

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Judgment

Lord Justice Pill :

This is the judgment of the court.

1. These are applications to quash Regulation 10(3) of the Smoke-free (Exemption & Vehicles) Regulations 2007 (SI 2007/765) ("the 2007 Regulations") as being incompatible with the rights of detained mental patients under the European Convention on Human Rights ("the Convention"). Alternatively, a declaration that regulation 10(3) is unlawful is sought. Regulation 10(3) is said to be unlawful in that it introduces only a partial, rather than a complete, exemption in relation to mental health units, from the requirement in the Health Act 2006 ("the 2006 Act") that all premises used by the public be "smoke-free" from 1 July 2008. In the further alternative, it is submitted that the regulation should be read and given effect under Section 3 of the Human Rights Act 1998 ("the 1998 Act") by reading into it the words "except in mental health units where it is not feasible to permit patients to smoke outdoors".

2. The claimants either are, or have been, detained at Rampton Hospital. Rampton is managed by the Nottinghamshire Healthcare NHS Trust ("the Trust"). It is one of three high security psychiatric hospitals in England and Wales established by the Secretary of State for Health under what is now Section 4 of the National Health Service Act 2006. The other two are Broadmoor and Ashworth. On the basis of information supplied by the Trust, we are content to assume that similar policies are followed in all three hospitals.

3. In so far as is material, section 4 provides:

> "(1) The Secretary of State's duty under section 1 includes a duty to provide hospital accommodation and services for persons who—
>
> (a) are liable to be detained under the Mental Health Act 1983, and
>
> (b) in the opinion of the Secretary of State require treatment under conditions of high security on account of their dangerous, violent or criminal propensities.
>
> (2) The hospital accommodation and services mentioned in subsection (1) are referred to in this section and paragraph 15 of Schedule 4 (NHS trusts) as "high security psychiatric services".
>
> (3) High security psychiatric services may be provided only at hospital premises at which services are provided only for the persons mentioned in subsection (1)."

4. In the case of B, who is separately represented by Mr Southey, it is claimed that the Trust's consideration of his application to smoke has been unlawful in that, in his case, the Trust's smoking ban has, in the light of medical evidence adduced, been

applied in an unlawfully inflexible manner. We consider his case separately, while having regard to Mr Southey's general submissions.

The Health Act 2006 and the 2007 Regulations

5. Section 1 of the Health Act 2006 ("the 2006 Act") makes provision for the prohibition of smoking in certain premises, places and vehicles. Smoke-free premises are defined in section 2. Section 2(4) provides:

> "In any case, premises are smoke-free only in those areas which are enclosed or substantially enclosed."

Section 3 provides for some premises, or areas of premises, not to be smoke-free, despite section 2. It provides, in so far as is material:

> "(1) The appropriate National authority may make regulations providing for specified descriptions of premises, or specified areas within specified descriptions of premises, not to be smoke-free despite section 2.
>
> (2) Descriptions of premises which may be specified under subsection (1) includes, in particular, any premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes and prisons and other places where a person may be detained). . . .
>
> (6) The regulations may provide, in relation to any description of premises or areas of premises specified in the regulations, that the premises or areas are not smoke-free
>
> (a) In specified circumstances,
>
> (b) If specified conditions are satisfied, or
>
> (c) At specified times,
>
> or any combination of those.
>
> (7) The conditions may include conditions requiring the designation in accordance with the regulations, by the person in charge of the premises, of any rooms in which smoking is to be permitted."

It is not claimed that the 2006 Act is incompatible with Convention rights.

6. Section 79 of the 2006 Act provides that any power to make an order or regulations under the Act is exercisable by statutory instrument and, with respect to Section 3 amongst other sections, it may not be made by the Secretary of State "unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament".

7. The 2007 Regulations have the further heading "Public Health England" and came into force, as did the 2007 Act, in July 2007. The Regulations apply in relation to England (regulation 1(2)). (There are no high security psychiatric hospitals in Wales). A series of exemptions is granted by Part 2 of the Regulations which includes regulations entitled "Private Accommodation" (regulation 3), accommodation for guests and club members (regulation 4), specialist tobacconists (regulation 7) and research and testing facilities (regulation 9).

8. Regulation 5 is headed "other residential accommodation" and, in so far as is material, provides:

> "(1) A designated room that is used as accommodation for persons aged 18 years or over in the premises specified in paragraph (2) is not smoke-free.
>
> (2) The specified premises are –
>
> (a) Care homes as defined in section 3 (care homes) of the Care Standards Act 2000;
>
> (b) hospices which as their whole or main purpose provide palliative care for persons resident there who are suffering from progressive disease in its final stages; and
>
> (c) prisons."

The meaning of "designated room" is specified in subsection 3.

9. Regulation 10 is headed "Temporary exemption for mental health units" and provides:

> "(1) A designated room for the use of patients aged 18 years or over in residential accommodation in a mental health unit is not smoke-free.
>
> (2) In this regulation -
>
> "designated room" means a bedroom or a room used only for smoking which –
>
> (a) has been designated in writing by the person in charge of the mental health unit as being a room in which smoking is permitted;
>
> (b) has a ceiling and, except for doors and windows, is completely enclosed on all sides by solid, floor-to-ceiling walls;
>
> (c) does not have a ventilation system that ventilates into any other part of the premises (except any other designated room);

(d) is clearly marked as a room in which smoking is permitted; and

(e) does not have any door that opens on to smoke-free premises which is not mechanically closed immediately after use; and

"mental health unit" means any establishment (or part of an establishment) maintained wholly or mainly for the reception and treatment of persons suffering from any form of mental disorder as defined in section 1(2) of the Mental Health Act 1983.

(3) Paragraph (1) and (2) shall cease to have effect on 1st July 2008."

The challenge is to the temporary nature of the exemption granted in regulation 10.

10. By virtue of the nature of their mental disorder and the risks they have been held to pose to the public, those admitted to Rampton tend to be detained there for a considerable time. The average length of stay, we are told, is 8 years and for some will be much longer. It is submitted, with justification, that Rampton should be regarded as their home and reference is made to section 3(2) of the 2006 Act which contemplates homes or residential accommodation of various kinds as premises which may be exempted from the requirement to be smoke-free.

11. The Trust have issued a policy for Rampton under the 2006 Act and 2007 Regulations. On 19 March 2007, the Trust issued guidance for Rampton Hospital on the "implementation of patient exceptions" to a smoke-free policy. (We assume that, for present purposes, "exceptions" is intended to have the same meaning as "exemptions"). In the document, reference is made to the Trust's smoke-free policy which provides exemptions:

> ". . . for long stay mental health patients in an acute psychiatric state or terminally ill patients exceptions may be made on a case-by-case basis. However, no blanket exception will be allowed for particular categories of patients. . . . The policy should allow for flexibility in exceptional circumstances."

The exemptions are more fully stated:

"2. Acute Psychiatric State

2.1 This is not defined. It is a decision for the Responsible Medical Officer and Clinical Team to determine clinically. Nicotine withdrawal symptoms such as irritability, anxiety, low mood and increased appetite do not constitute an acute psychiatric state.

3 Terminal Illness

3.1 The diagnosis and prognosis of the illness will have been determined by a Consultant Physician, Surgeon or Oncologist following investigation.

3.2 An incurable illness is not necessarily a terminal illness, until the patient is in the terminal phase of the illness.

3.3 On receipt of the information that a patient has a terminal illness the RMO (Responsible Medical Officer), in consultation with the Clinical Team, may allow the patient to smoke if requested by the patient.

3.4 If the patient's condition deteriorates to the extent that admission to a general hospital or a hospice is necessary, then the Smoke-free Policy operating in the receiving hospital will apply."

12. In the same document, a procedure is set out for "dispensing and administration of cigarettes". It includes the following guidance:

"5.9 The patient may only smoke outdoors. The location to be chosen should be discrete as the sight and smell of a patient smoking may upset other patients.

5.10 The Nurse will retain the cigarette until the patient has been safely escorted outdoors, when the cigarette will be given to the patient and then lit by the Nurse who will retain the ignition source.

5.11 When the patient has finished smoking the Nurse will ensure that the cigarette is extinguished in a suitable ashtray and disposed of safely in an appropriate bin.

5.12 The staff and patient will return to the ward.

5.13 Once the decision has been made for the patient to stop smoking then the remaining cigarettes will be returned to the [patients'] Shop for destruction."

Article 8

13. Reliance on article 8 of the Convention is central to the claimants' case. Article 8 provides:

"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".

14. Read literally regulation 10(3) is unlawful, it is submitted, because it fails to respect the claimants' article 8 rights, either directly, or by reason of discrimination against them (article 14) in the respect shown for article 8 rights. Alternatively, the additional words stated at the end of paragraph 1 of this judgment should be read into regulation 10. In seeking to demonstrate that article 8 is engaged, and also that the defendants' conduct cannot be justified under article 8(2), Mr Bowen, for the first and second claimants, relies on the background to the passage of the 2006 Act and 2007 Regulations, including reliance on a Ministerial statement in the House of Commons. Regulation 10(3) should be considered in the light of Parliamentary material showing the purpose of the 2006 Act, it is submitted.

The Evidential Background

15. For reasons which will be given, the court also needs to consider the background to the legislation and the views expressed, for example, during the consultation exercise and by way of evidence, about the dangers, and possible benefits, of permitting smoking in mental hospitals.

a) Public Documents

16. The 1998 White Paper "Smoking Kills" estimated that smoking in the United Kingdom caused each year 46,500 deaths from cancer and 40,300 deaths from all circulatory diseases. Those who smoke regularly and who then die of smoking-related diseases lose on average 16 years from their life expectancy when compared with non-smokers.

17. In reports of 1998 and 2004, the Scientific Committee on Tobacco and Health concluded that exposure to second-hand smoking ("SHS") was a cause of a range of serious medical conditions and recommended restrictions on smoking in public places and work-places so as to protect non-smokers from SHS. The overall increased risk of lung cancer for non-smokers exposed to SHS was put at 24%. In December 2005, the House of Commons Health Committee reported that SHS caused at least 12,000 deaths a year in the United Kingdom and, of those deaths, 500 of them were due to the presence of smoke in the workplace.

18. The position of mental health patients was considered by the Health Development Agency Guidance. In 2004, it issued a document entitled "Smoking and patients with mental health problems". That provided: "The smoke-free policy is designed to clarify where smokers can smoke, not whether they smoke" and "smoking should not take place in the buildings, but in a safe and discrete outdoor environment".

19. When the 2006 Act was under consideration, there was extensive consultation about the proposed smoking ban. In its First Report of the Session 2005-2006, the House of Commons Health Committee reported: "Moreover, recent research shows that public support is moving rapidly and decisively in favour of a comprehensive ban on smoking in public places and workplaces" (paragraph 54). However, in its Sixth

Report of Session 2005-2006, the Joint Committee on Human Rights of the Houses of Parliament considered the possible impact of the Health Bill on human rights. The Committee considered potential "interference with smokers' article 8 rights" and appear to have contemplated that the article would be engaged. The report stated, at paragraph 1.37:

> "In view of the evidence relied on in support of the proposed prohibition, the fact that it does not extend to a person's home, and that provision is made to exempt places which are peoples' de facto homes, the interference with the private life of smokers is in our view likely to be upheld as being proportionate."

20. To demonstrate the purposes of the statute, Mr Bowen relies in particular on Ministerial statements during the passage of the Bill which became the 2006 Act. In the debate on the third reading, the Secretary of State stated (Hansard 14 February 2006, columns 1293-1294):

> "The new clause provides a general power to make exceptions from the smoking ban. This is necessary to exempt from the ban people's own homes and places that are, in effect, someone's home, at least temporary – in other words, long-term adult residential care homes, hospitals and mental health hospitals for adults, prisons and hotel bedrooms. We are taking the power to make the limited exemptions not only because we believe that it is right in principle, but to fulfil our obligations under the Human Rights Act 1998 on respect for private life".
>
> ". . . We believe that it is right for prisoners, who quite properly have no choice about where they live, to be able to exercise choice in the matter of smoking within appropriate restrictions. My Department and the Home Office are discussing with the prison authorities precisely the nature of the limited exemption that should apply in prisons".
>
> ". . . I do not believe . . . that it would be right to legislate to ban people from smoking in their homes".
>
> (Column 1295): "As I indicated, the issue is how we strike the right balance between protecting people from harm on the one hand and protecting people's freedom of choice on the other".

21. The Government's response to the Health Select Committee recommendations of December 2005 stated, in relation to mental health units:

> "The issue of smoking in psychiatric institutions is complex and is a matter that is currently under consideration. The Government is considering evidence from a range of sources, including the Health Select Committee, before any final decisions are made".

22. The 2006 Act received Royal Assent on 19 July 2007. On 17 July, the Department of Health issued a further consultation document entitled "Consultation on proposed regulations to be made under powers in the Health Bill".

23. The proposal at that stage of the Department of Health was to exempt "designated rooms" within "mental health units that provide long-term residential accommodation" from the smoke-free requirements in the Health Act. This proposed exemption was to be permanent and was to be of the same type as that proposed for prisons, care homes and hospices.

24. Five hundred and fifty responses to the consultation paper were received. One hundred and fifty responses dealt with the issue of mental health and, of those, 65% suggested that the appropriate course was for either no exemption to be granted for mental health units or for only a time-limited exemption. Only 20% either agreed with the proposed indefinite exemption for mental health units in the consultation paper or proposed a broader exemption.

25. The Disability Rights Commission ("DRC") made the points, first, that their analysis of 8 million primary care records confirmed a very high smoking rate among those with long-term mental health problems and, secondly, that people with serious mental health problems were more likely than other citizens to experience heart disease, hypertension, respiratory disease, diabetes, stroke, breast cancer and bowel cancer.

26. Further, the DRC pointed out, first, that this group suffered from these illnesses for longer periods than other members of the community and, secondly, that they then died of these illnesses faster than other members of the community. The Commission concluded that this material meant "that a very good reason is needed to depart from the principle of a smoke-free NHS".

27. Support for the notion that mental health units should be smoke-free also came from the Royal College of Psychiatrists which noted that these patients "have difficulty in stopping smoking in an environment in which nearly 70% of their peers smoke and where smoking can become an occupation per se with non-smokers known to begin smoking in psychiatric units". The Royal College concluded, first, that the benefits of having smoke-free hospitals for long-stay patients would out-weigh the short-term difficulties and, secondly, that an exemption of long-stay psychiatric patients from the Health Act would discriminate against psychiatric patients by excluding them from the important benefits of mainstream health improvements and would further extend the health inequalities that psychiatric patients and those who work with them were already experiencing.

28. The Royal College of Physicians expressed the view in October 2006 that there should be no exceptions for mental health units, irrespective of the likely duration of residence. They stated that "the provision of exemptions for longer stay institutions discriminates against people with serious mental health problems and those who work with them, by denying them a safe environment . . . In special circumstances, such as secure units in which provision of secure or otherwise suitable safe smoking areas presents especial practical difficulty, it would be reasonable to allow a longer period of implementation . . . but the object should remain to achieve smoke-free status in all mental health facilities within a reasonable period (of perhaps 2-3 years) defined

within the regulations. The provision of comprehensive smoking cessation support services to underpin the smoke-free policy should clearly be obligatory."

29. Many respondents quoted from the King's Fund study published in 2006 entitled "Clearing the Air: Debating smoke-free policies in psychiatric units", which reported findings that:

> "Epidemiological studies suggest chronic smoking is associated with agoraphobia, generalised anxiety disorder and panic disorder... smokers have higher rates of and experience more severe depression are more likely to think about suicide and have higher suicide rates"

30. We acknowledge that there was a substantial body of opinion, which the Secretary of State would be expected to take into account when placing regulations before Parliament, supporting an indefinite or a time-limited exemption. These included the Mental Health Act Commission ("the MHAC"), the British Medical Association, Cancer Research UK and many NHS organisations.

31. The MHAC expressed the view that patients who are deprived of their liberty under the Mental Health Act should not, as a consequence, be deprived of the choice to smoke. Other points made were that not being able to smoke can add to the distress of patients at a difficult time and might be counter-productive to the patient's care and welfare. While it will not directly affect patients at Rampton, it is also submitted that a blanket ban on smoking could deter potential patients from seeking help from inpatient services, possibly resulting in more admissions under the Mental Health Act.

32. The 2007 Regulations followed. Describing the intended impact of the regulations, the National Clinical Director for Mental Health wrote, on 1 February 2007:

> "From 1 July 2008, smoking will be against the law in any enclosed or substantially enclosed part of any mental health establishment."

b) **Evidence**

33. In a statement prepared for the present case dated 18 January 2008, Mr AW Black, who was between January 2006 and September 2007 leader of the Smoke-free Legislation Team within the Department of Health, gave the main reasons for the decision to provide, for mental health units, only a temporary exemption from the smoke-free legislation. He stated (we summarise) that conclusive scientific evidence showed that second-hand smoke poses significant risks to the health and wellbeing of those exposed to it. Secondly, during the passage of the Bill, a large cross-party majority supported broad smoke-free provisions. Thirdly, the primary purpose of mental health units is to provide healthcare and to promote the physical and mental health of the patients. The evidence received suggested that chronic smoking is associated with, and may even intensify, some mental disorders. Fourthly, evidence and research demonstrated the feasibility of making mental health units smoke-free in the short-term, whereas the Department had previously only considered that to be possible in the longer term. Evidence and previous experience had shown that mental health units can feasibly become smoke-free and that prohibitions on smoking indoors are better received and complied with by patients than partial smoking bans.

34. Mr Black referred in detail to the assistance available to patients in mental health units to stop smoking. He added:

> "Finally, a 12-month 'sunset clause' was provided for residential mental health units, rather than no exemption at all, in order to allow sufficient time for these premises to prepare for the implementation of the smoke-free provisions. Given that, at the consultation stage, the proposal had been to provide an indefinite exemption for long-term residential mental health units, they had had less time to prepare for the smoke-free provisions coming into force than other bodies who had no expectation that they might be made exempt."

35. On the issues both of engagement of article 8 and of article 8(2), the claimants rely on the evidence of Professor Jane Powell, Professor of Psychology at Goldsmiths, who has dual specialisms in addictions and neurophysiological rehabilitation. Professor Powell stated (letter of 14 January 2008) that she had been asked "to provide the court with relevant information to weigh alongside and against other data in coming to its judgment . . . It is for the court to decide what weight, if any, to assign to these various issues". Among the points made by Professor Powell are:

(a) For people with neurological or psychiatric conditions, nicotine may enhance cognitive functioning relative to their normal level.

(b) There is considerable evidence that schizophrenia is characterised by specific cognitive deficits which are attenuated, at least acutely, by nicotine.

(c) There is evidence that smoking has subjectively greater salience and perceived benefits for people with a mental disorder than for those who do not. Patients with mental disorders find that the short-term psychological effects of smoking are perceived to be of value.

(d) The probabilities of reporting smoking for its calming and cheerful effects are related to the level of anxious and depressed symptoms experienced by schizophrenic patients, though there is no evidence that cessation worsens the overall behavioural disturbances of schizophrenia.

(e) It is crucially important to provide additional support if the imposition of a ban is to achieve any longer-term change in patients' motivation to smoke.

36. In summary, Professor Powell states that the evidence she has summarised "strongly suggests both that smoking does produce acute benefits to many patients with mental disorder in terms of its enhancement of certain cognitive processes, and also that subjectively they perceive smoking to be more helpful in coping with stress and in enhancing mood than do smokers who do not have mental disorders". Lay evidence is also submitted to demonstrate the benefits of smoking to those with depression and other forms of mental illness.

37. The Trust have obtained a medical report in reply from Professor Griffiths Edwards CBE, Emeritus Consultant Psychiatrist, Bethlem and Maudsley Hospitals, Emeritus Professor of Addictive Behaviour, University of London. In summary, he considers

that to recommend smoking as a treatment for schizophrenia or for the prevention of depression would be unethical. He says that Professor Powell's findings on the possible benefits of smoking, which may be clinically rather slight, failed to take into consideration the undoubtedly significant potential harms. Effective replacement therapy is available. There is no evidence that nicotine withdrawal is likely to lead to behavioural disturbance in the mentally ill.

38. In relation to the exemptions in the policy, Dr JM Harris Executive Director of the Forensic Division stated:

> "The consideration for the exemptions will be within the patient's own Clinical Team and would have to demonstrate both some benefit to the patient in being able to be exempted from the policy, i.e. it might help to relieve the symptoms of the acute exacerbation of their mental illness, and it was technically feasible. For Rampton Hospital this can sometimes cause a significant difficulty because of the very nature of having a hospital on three floors and because of the variability of some patients."

39. It is primarily relevant to a consideration of article 8(2) but we mention at this stage the evidence that, since a smoke-free policy was introduced in Rampton with effect from 31 March 2007, none of the disturbing consequences feared by the claimants have occurred. There has been no increase in the prescription of sedative drugs. Dr Larkin, a Consultant Psychiatrist and Associate Medical Director at Rampton, confirms that there have been health benefits such as fewer problems and medication related to asthma and respiratory matters as well as a reduction in manipulative behaviour associated with cigarettes, such as bribery, exploitation and bullying of vulnerable patients. This is consistent with the evidence of both Professor Edwards and Professor Powell that nicotine withdrawal has not led to behavioural disturbance. They also recognised difficulties inherent in any partial ban.

Reliance on *Hansard*

40. Before summarising Mr Bowen's submissions, we consider to what extent, if any, the court may have regard to the Ministerial statement, recorded in *Hansard*, and the other background material to which reference has already been made.

41. The relevance of *Hansard* for the purpose of the court assessing the compatibility of legislation with Convention rights was considered in *Wilson v First County Trust* [2004] 1 AC 816. Mr Bowen seeks to rely on the Ministerial statement, and other material, to demonstrate that the underlying objective of the legislation was not to ban people from smoking in their own homes but to protect others from SHS and make it easier for those who wanted to give up smoking to do so. In its assessment of whether the existence of article 8 rights renders the termination of the exemption for mental health units unlawful (at least when smoking outside is not possible) the court should have regard to the ministerial statements and other material, it is submitted.

42. In *Wilson*, Lord Nicholls, with whom Lord Scott of Foscote agreed, confirmed 'constitutional principle'. He stated at paragraph 67:

> "67. . .it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged in that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament . . . The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament."

43. However, in the course of his reasoning Lord Nicholls stated:

> "62. The legislation must not only have a legitimate policy objective. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force . . .
>
> 63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation."

44. At paragraph 64, Lord Nicholls added:

> "This additional background material may be found in published documents, such as a government white paper . . . In explanatory notes prepared by the relevant government department . . . The court would merely be placing itself in a better position to understand the legislation."

45. Lord Hope stated, at paragraph 118:

> "But proceedings in Parliament are replete with information from a whole variety of sources . . . Ministers make statements . . . issues are explored by select committees . . . and explanatory notes are provided with Bills . . . Resort to information of this kind may cast light on what Parliament's aim was when it passed the provision which is in question or it may not . . . But if it does, the court would be unduly inhibited

> if it were to be disabled from obtaining and using this information for the strictly limited purpose of considering whether legislation is compatible with Convention rights."

46. In the present case, the court is not concerned with compatibility of legislation with Convention rights. It is considering whether the power conferred, in section 3(1) of the 2005 Act, is lawfully exercised in the 2007 Regulations. It also needs to make value judgments as to the proportionality of the measures taken in relation to article 8 rights. In performing those tasks, the court is in our judgment entitled to have regard to the Parliamentary material which has been summarised.

47. That is not because the requirements in *Pepper v Hart* [1993] AC 593 are satisfied or because the court is entitled to evaluate the sufficiency of the legislative process, which it is not. It is part of the background against which it considers submissions on article 8. Along with other information and submissions, the material may throw light on the scope of article 8 and the value judgments which a court is required to make.

48. We do not accept that any legitimate expectation has arisen from the ministerial statement. Proposals were made by the Government. A public consultation exercise followed which was as thorough as the importance and public interest in the subject required. The claimants cannot require the Government to carry out its original intentions but are entitled to rely on what was said during the debate in support of submissions both under article 8(1) and (2). The Minister is not in law bound by views expressed in the course of the passage of the Bill, still less Parliament or the Court, or by other material from consultees. However, the material may assist the court in its analysis of the cogency of the submissions made under article 8 and evidence referred to in support of them.

The Issues

49. Subject to the possibility, considered later, of reading regulation 10(3) of the 2007 Regulations as if the time-limit in the exemption were to be excluded, the issues are whether article 8 is engaged by the proposed ban, either alone or read with article 14 of the Convention and, if so, whether, in circumstances in which smoking outdoors may not be practicable, failure to provide designated rooms for smoking for the use of patients in residential accommodation in a mental health unit can be justified under article 8(2). We doubt whether it adds anything but it is also submitted that, by making a regulation the effect of which is to violate article 8 rights, the Secretary of State has acted unlawfully under Section 6(1) of the 1998 Act.

Engagement of Article 8

50. On engagement, Mr Bowen puts his case with attractive simplicity. Respect for private life involves permitting someone to do what they want to do, however foolish others might consider the activity. People must be allowed, in private, to be left alone to get on with it. He cites John Stuart Mill's "On Liberty", written in 1859:

> "The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right,

> absolute. Over himself, over his own body and mind, the individual is sovereign".

51. Smoking is an activity of long-standing which over 20% of the general population, and a much higher percentage of detained patients, practise. It is submitted that, notwithstanding the overwhelming evidence of its harmful effects, the right to smoke comes within the scope of article 8(1). Rampton Hospital is properly regarded as the claimant's home and detained patients' right to smoke there is a Convention right. The right is not lost by reason of incarceration; indeed, the loss of other rights makes the remaining ones commensurately more important, it is submitted. There is a positive obligation on the defendants, it is submitted, to permit smoking and to provide appropriate facilities for that purpose. The difficulty of permitting smoking in patients' rooms is acknowledged but article 8(1) requires that arrangements, such as the provision of designated rooms, to permit patients to smoke, should be made.

52. Smoking can also be a social pastime, a means of developing relations with others and a means of making friends, and as such engages article 8. This social aspect is of great importance to patients, it is submitted.

53. It is also submitted that smoking has short term effects that ameliorate some of the symptoms of mental disorder and a complete ban denies them the opportunity of "self medicating" to achieve that effect. The subjective experience of certain patients is that a ban has led to a deterioration in their condition. A ban will also be a disincentive to smokers who need hospital admission for mental treatment. Support for those propositions comes, it is submitted, from the evidence of Professor Powell.

54. The history and scheme of the 2006 Act support the view, it is submitted, that the purpose of the Act is not to prevent people from smoking in their home, the concept of home being used in the statute to include not only hotels and care homes but other accommodation in which people are detained. Exemptions are contemplated which, it is submitted, should extend to institutions such as Rampton. In premises where, as Mr Bowen was prepared to accept may be the case at Rampton, smoking outside cannot reasonably be arranged, the designated rooms contemplated by the 2007 Regulations must be provided on a permanent and not merely a temporary basis.

55. A recognition that smoking outdoors, but within the grounds of the hospital, may not be a feasible option emerged during the consultation exercise. In their letter of 10 August 2006, the MHAC stated that "For a considerable number of such units it may be impossible to allow patients safe access to an outdoors smoking space because of the nature of the hospital estate." The Commission added:

> "There may be good reasons to do with the safety of the patient or of other people why it would be inappropriate for the patient to leave the ward at particular times or at all."

Similar views were expressed by the Disability Rights Commission in a letter of 9 October 2006.

The Authorities

56. The European Court of Human Rights ("ECtHR") has, in many different factual situations, considered the issue whether article 8 was engaged. In part by reference to them, domestic courts have conducted their own analysis in situations arising. In *Pretty v United Kingdom* (2002) 35 EHRR 1, the ECtHR considered whether there was a right to assisted suicide for a motor neurone disease sufferer. Article 8, among other articles, was relied on to establish a right to private life, which it was claimed included a right to self-determination and a right to choose when and how to die. The court held unanimously that neither the refusal of the Director of Public Prosecutions to grant the applicant's husband immunity from prosecution, if he assisted her in committing suicide, nor the prohibition in domestic law on assisting suicide, infringed her rights under article 8.

57. The court stated, at paragraph 61:

> "61. As the court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person . . . It can sometimes embrace aspects of an individual's physical and social identity . . . Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8 . . . Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world . . . Though no previous case has established as such any right to self-determination as being contained in article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

58. The court observed, at paragraph 62, that "the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned". The court found, at paragraph 63, that "the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under article 8(1) of the Convention".

59. The court concluded, at paragraph 67:

> "The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under article 8(1) of the Convention. It considers below whether this interference conforms with the requirements of the second paragraph of article 8."

60. In *Niemietz v Germany* (1993) 16 EHRR 97, the ECtHR held that a search of the applicant's office constituted an interference with his rights under article 8 (paragraph 33). The court stated, at paragraph 31:

> "More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of article 8, namely to protect the individual against arbitrary interference by the public authorities."

The broad meaning given to the words 'private life' and 'home' is relied on by Mr Bowen to establish the relevance of article 8 to those detained in mental hospitals.

61. In *Raninen v Finland* (1997) 26 EHRR 563, the ECtHR considered, in an article 8 context, handcuffing in detention. The court stated:

> "62. The Government again stressed that the handcuffing had had no adverse effects on the applicant's physical or moral integrity and that in any event, these had not been such as to amount to an interference with his right to respect for private life within the meaning of article 8.
>
> 63. According to the Court's case law, the notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances cover the moral and physical integrity of the person. The Court further recognises that these aspects of the concept extend to situations of deprivation of liberty."

62. In *Bensaid v United Kingdom* [2001] INLR 325, at paragraph 47, the ECtHR stated:

> "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world . . . The preservation of mental stability is in that context an indispensable pre-condition to effective enjoyment of the right to respect ."

63. A more recent analysis by ECtHR of the scope of article 8 appeared in *Gomez v Spain* 16 February 2005 (Application No 4143/02). The court stated, at paragraph 53:

> "Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those

> that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton v UK* [2003] ECHR 36022/97 at para 96)."

64. The ECtHR has recognised that physical wellbeing, within the meaning of article 8, may be impaired by non-physical assault such as pollution (*Lopez Ostra v Spain* [1994] EHRR 277), which may include noise pollution. Failure to protect against SHS may also be a breach of the Convention. In *Ostrovar v Moldova* (2006) (App no 35207/03) the 'cumulative effects' of conditions in a prison cell, which included 'exposure to cigarette smoke' were held to go beyond the 'threshold of severity under article 3 of the Convention'. There is no doubt that subjecting a person in his home to SHS may constitute a breach of article 8. The claimants seek to establish that, subject to safeguards, the article also protects their right to smoke.

65. Lord Bingham of Cornhill had considered the scope of article 8 in *R (Razgar) v Secretary of State for the Home Department* (2004) UKHL 27 where it was held that article 8 rights could exceptionally be engaged by the foreseeable consequences for health of removal of a person from the United Kingdom pursuant to an immigration decision. Lord Bingham stated, at paragraph 9:

> "It is plain that "private life" is a broad term, and the court [ECtHR] has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life (*Pretty*). . . . Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed ("The Developing Scope of article 8 of the European Convention on Human Rights" [1997] EHRLR 265, 270). "Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the State and society in ways which respect people's moral worth by taking account of their need for security."

66. In relation to the engagement of article 8, Mr Bowen also relies on the speech of Lord Rodger of Earlsferry in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52. It was claimed that the Hunting Act 2004, which prohibited the hunting of wild mammals with dogs in England and Wales, was incompatible with Convention rights, including those under article 8. Lord Rodger considered a range of human activities, including singing, mountaineering, puzzle-solving, as well as hunting. He stated, at paragraphs 101-2:

> "My Lords, in choosing these examples of people who give expression to their personality in different ways and arguing that article 8(1) is engaged in those circumstances, I have taken my cue from the idea that article 8(1) protects those features of

> a person's life which are integral to his identity. For those for whom it is a core part of their lives, hunting, too, can be said to be integral to their identity. Therefore, but for one point, to which I shall return shortly, I would have held that the legislation banning hunting did interfere with their private life for purposes of article 8(1).
>
> Confining the protection of article 8(1) to those for whom an activity is a core part of their lives may be to set the bar too high".

The one point was the public nature of the activity (paragraph 108):

> "The huntsmen and women are taking part in what they know is not just a private activity, but a much admired public spectacle. I therefore conclude that they are not entitled to the protection for their private life in article 8(1)."

67. However, the other speeches in the *Countryside Alliance* case, while accepting that the public nature of the activity of hunting posed a problem for the Alliance, followed a somewhat different approach to the question of the engagement of article 8. Lord Bingham cited decisions of the ECtHR, including *Pretty*. In relation to article 8, he stated, at paragraph 10:

> "The content of this right has been described as "elusive" and does not lend itself to exhaustive definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."

68. In holding that the prohibition of hunting wild mammals with dogs in England and Wales did not engage article 8, Lord Bingham stated, at paragraph 15(1):

> "(1) Fox-hunting is a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle. No analogy can be drawn with the very personal and private concerns at issue in *Brüggemann* and *Pretty*, nor with the interception of private telephone conversations (admitted to be an interference within article 8) in *PG* and *JH*, nor with the disclosure in *Peck* of closed circuit television pictures of the Complainant preparing to commit suicide. It is not of course to be expected that there will be a decided case based on facts indistinguishable from those of the case in issue, but none of the decided cases is at all close. With their references to notions of privacy, personal autonomy and choice and the private sphere reserved to the individual, they are in my opinion so

> remote from the present case as to give no guidance helpful to the Claimants."

69. Having considered other aspects of the case, Lord Bingham concluded, at paragraph 15:

> "I judge the HR claimants' complaints in this case to be far removed from the values which article 8 exists to protect."

70. Baroness Hale stated, at paragraph 115:

> "The right to respect for our private and family life, our homes and our correspondence, guaranteed by article 8, is the right most capable of being expanded to cover everything that anyone might want to do."

Baroness Hale added, at paragraph 116:

> "As yet, however, as Lord Bingham of Cornhill has shown, the Strasbourg jurisprudence has not gone so far in its interpretation of the rights protected by article 8 . . . Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. . . Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity."

71. Agreeing with Lord Bingham, though "strongly wishing that it were otherwise", Lord Brown of Eaton-under-Heywood concluded that the claims could not be held to fall within article 8. Lord Hope of Craighead indicated his view of the scope of article 8 by stating that the case before the House was "not about the choices that a person makes about his or her own body or physical identity". He agreed with Lord Bingham and Baroness Hale in the result, though adding reasons of his own.

Further Submissions

72. Acknowledging that the aspect of private life claimed to be relevant on the present facts is different from that in the reported cases, Mr Bowen develops his submission by submitting that denying an individual the right to smoke demonstrates a lack of

respect for that person's "moral integrity". Smoking falls within the range of activities capable of protection under article 8(1). The act of smoking is capable of being of fundamental importance to a person so that denial amounts to an unlawful lack of respect for his private life, it is submitted.

73. By way of example, deprival of the ability to support a football team might involve a breach. Mr Bowen accepts that preventing attendance at a football stadium to support a team would probably not engage article 8 because a public activity would be involved (*Countryside Alliance*). To proscribe a lifestyle which goes with support for a team, with its dress, tattoos, reading materials and friendships, which provide a strong sense of loyalty and identity, could engage article 8.

74. Mr Bowen also submits that the engagement of the article will often depend on the particular circumstances of the claimant. Activities which are little regarded by one person may be vital to the sense of identity of another. Thus smoking may be integral to a person's identity or ability to function socially as a person. To some people, the right to smoke is morally worthy of respect. It may be an indispensable pre-condition to effective enjoyment of the right to respect for private life.

75. Mr Swift submits that the quality of occupation is a significant factor. A patient at Rampton Hospital is detained and the circumstances of detention are inevitably such that respect for his home cannot have the same significance as in other accommodation. The regime at Ashworth is described by Sir Christopher Bellamy QC, sitting at a Deputy High Court Judge, in *R (Robert H) v Ashworth Hospital Authority* (2001) EWHC Admin 872, at paragraphs 25 to 33. Supervision is inevitably intense for safety and security reasons. All high risk patients and newly-admitted patients are subject to a high degree of observation at all times. Regular checks are made on all occupants. A patient is allowed time in communal areas of the hospital with other patients only with close observation and after a detailed risk assessment.

Article 14/article 8

76. We defer stating our conclusions until we have summarised the argument based on article 14 of the Convention, and the authorities. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any such ground as sex, race, colour, language, political or other opinions, national or social origin, association with a national minority, property, birth or other status."

77. Mr Bowen submits that, even if article 8(1) is not engaged in its own right, smoking comes within the ambit of the article and the claimants are thereby entitled to rely on article 14 to protect them from the discriminatory nature of the restrictions on smoking. An exemption is conferred on some who live or are detained in public places such as prisons, care homes and hospices but is denied to the claimants as detained mental patients. As such patients, they have a "status" within the meaning of article 14, it is submitted, and the discrimination is unalwful.

78. The relationship of article 14 to other articles in the Convention was stated by the ECtHR in *Botta v Italy* [1998] 26 EHRR 241 at paragraph 39:

> "According to the court's case-law, 'Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter.'"

79. In the *Countryside Alliance* case, Lord Bingham stated, at paragraph 23:

> "As the language of this article makes clear, and as has often been held, this is not a free-standing provision. But nor does it require that any other article should be shown to have been violated. It is enough that there should have been discrimination on a proscribed ground within the ambit of another article of the Convention."

80. In paragraph 24, Lord Bingham, having assumed that the claimants were the subject of adverse treatment as compared with those who do not hunt, and having further assumed that the complaints fell within the ambit of one or more articles of the Convention, stated:

> "I cannot link this treatment to any personal characteristic of any of the claimants or anything which could meaningfully be described as "status"."

81. In *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, the claimant complained of having to pay higher child support contributions under the Child Support Act 1991. She lived with a partner of the same sex and would have paid less had she been living with a man. Claims were made under articles 8 and 14.

82. It was held that the application of Regulations under the Act did not come within the ambit of article 14 as read in conjunction with article 8. Lord Walker of Gestingthorpe, with whom Lord Bingham, Lord Nicholls and Lord Mance agreed, analysed the scope of article 14 in relation to article 8. He stated, at paragraph 58:

> "The Strasbourg case-law does not, and could not, spell out any simple bright-line test for determining how close must be the link between the alleged discrimination and the rights granted by the substantive article."

Having referred to the Strasbourg case-law, Lord Walker added, at paragraph 60:

> "Nor does it lead to the conclusion that precisely the same sort of approach is appropriate, whatever substantive article is in

> point. That is particularly important, I think, in considering the ambit of article 8."

Having considered Convention rights which "have a reasonably well-defined ambit (or scope)", Lord Walker stated, that "article 8 is very different because of its much wider and much less well-defined ambit."

83. In the course of analysing cases on article 8, Lord Walker stated, at paragraph 63:

> "The Strasbourg court has however shown itself to be well aware of the dangers of any unrestrained or unprincipled extension of article 8."

84. Having referred to the submissions of the claimant's counsel, Lord Walker stated:

> "83. My Lords, in my opinion that is not the effect of the Strasbourg case-law which I have attempted to summarise. The European Court has taken a more nuanced approach, reflecting the unique feature of art 8 to which I have already drawn attention: that it is concerned with the failure to accord *respect*. To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his or her private life, even if in practice the criminal law is not enforced (*Dudgeon v UK* 4 EHRR 149 and *Norris v Ireland* 13 EHRR 186); so does intrusive interrogation and humiliating discharge from the armed forces (*Smith v UK* 29 EHRR 493 and *Lustig-Prean v United Kingdom* 29 EHRR 548). Banning a former KGB officer from all public sector posts, and from a wide range of responsible private-sector posts, is so draconian as to threaten his leading a normal personal life (*Sidabras v Lithuania* 42 EHRR 104). Less serious interference would not merely have been a breach of article 8; it would not have fallen within the ambit of the article at all.
>
> 84. Similarly the cases in which article 14 has been considered in conjunction with the family life limb of article 8 were all (whichever way they were ultimately decided) concerned with measures very closely connected with family life: *Petrovic v Austria* 33 EHRR 307 (parental leave), *Mata Estevez v Spain* (social security benefit for surviving spouse) and *Fretté v France* 38 EHRR 438 (adoption). By contrast *Logan v United Kingdom* 22 EHRR 178 (the CSA case) is an example of unsuccessful reliance on a much more remote link (financial resources to visit absent children)."

85. Lord Hope conducted a similar analysis in *Countryside Alliance*, though *M* is not cited by him. At paragraph 59, Lord Hope cited the decision of ECtHR in *Stec v United Kingdom* [2005] 41 EHRR SE 295 paragraph 39:

> "The prohibition of discrimination in article 14 thus extends beyond the enjoyment of the rights and freedoms which the

> Convention and Protocols require each state to guarantee. It applies also to those additional rights, falling within the scope of any Convention article, for which the state has voluntarily decided to provide."

86. At paragraph 60, Lord Hope stated:

> "As Lord Bingham of Cornhill said in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, para 13, expressions such as "ambit" are not precise and exact in their meaning. As he put it: "They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed." That will be so if, for example, the state, having set up an institution such as a school or other educational establishment in unilingual regions, takes discriminatory measures within the meaning of article 14 read with the right to education in article 2 of the First Protocol which are based on differences in the language of children attending these schools: see *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 para 32. *Clift's* case provides another example closer to home. It was held that a scheme which had been set up by legislation which gave the right of early release of prisoners fell within the ambit of the right to liberty in article 5 of the Convention. Differential treatment of prisoners otherwise than on the merits gave rise to a potential complaint of discrimination under article 14."

87. Having considered the "status" requirement in article 14, Lord Hope stated, at paragraph 63:

> "The question is whether, applying these principles, the Act is incompatible with article 14. In my opinion the argument that it is fails on both points. For the reasons already given, I do not think that article 8 or article 11 is engaged. Article 14 would be if the claimants could show that their case nevertheless fell within, or was at least close to, the core of the values guaranteed by either of those articles. But this is not something that can be plucked out of the air. It must be related to a right that, as it was put in *Stec v United Kingdom* (2005) 41 EHRR SE 295, para 39, the state has decided voluntarily to provide. Having done so, it cannot limit access to that right, restrict it or take it away on grounds that would conflict with any of the core values. That however is not this case. [The Hunting Act] is not directed at anything that the state itself has provided or seeks to provide. Its sole purpose is to restrict an activity in which persons can engage if they wish but in which the state itself is not involved at all."

88. In agreement with Lord Bingham, Lord Hope also held, at paragraph 64, that the claimants did not have the "status" required if reliance was to be placed on article 14.

Section 3 of the 1998 Act and Regulation 10

89. Section 3(1) of the 1998 Act provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Mr Bowen refers to the power to specify premises or areas not to be smoke-free conferred in Section 3 of the 2006 Act and the inclusion in premises which may be so specified of "prisons and other places where a person may be detained". He submits that respect for article 8 rights requires that the words "except in mental health units where it is not feasible to permit patients to smoke outdoors" are read into Regulation 10(3) of the 2007 Regulations. The effect would be to exclude, to that extent, the time limit on "designated rooms", as defined in the Regulation, not being smoke-free. Mr Bowen relies on his submissions as to the scope of article 8, the wording of Section 3 of the 2008 Act and on Ministerial statements and other parliamentary material apparently supporting the right of choice. He relies on it as supporting his submission that accommodation in which to smoke should be provided.

90. In our judgment, Regulation 10(3) cannot be read in that way without the court performing a legislative as distinct from an interpretative act. The exemption in Regulation 10 is plainly intended to be temporary. The word temporary appears in the heading and Regulation 10(3) could not be plainer in specifying a time limit. To impose the time limit is within the powers of Section 3 of the 2006 Act, with its repeated use of the word "may". The Secretary of State may exercise a discretion with respect to the type of premises to be covered by exemptions and the terms of the exemptions.

91. In *Ghaidan v Godin-Mendoza* (2004) UKHL 30, Lord Nicholls of Birkenhead stated, at paragraph 33:

> "33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

92. Lord Rodger of Earlsferry stated, at paragraph 109:

> "If a provision requires the public authority to take a particular step which is, of its very nature, incompatible with Convention

> rights, then no process of interpretation can remove the obligation or change the nature of the step that has to be taken."

93. Lord Millett dissented on the issue which arose in that case on the construction of paragraph 2(2) of Schedule 1 to the Rent Act 1977. On the test to be applied, however, he substantially agreed with the approach of Lord Nicholls with whom Lord Rodger and Baroness Hale of Richmond agreed. He stated, at paragraph 67:

> "[The court] can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of a legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must "strive to find *a possible* interpretation compatible with Convention rights. (*R v A* (2002) 1 AC 45, 67, para 44, per Lord Steyn). But it is not entitled to give it an impossible one, however much it would wish to do so)." (Emphasis added by Lord Millett)

94. The Secretary of State had power to make an exemption temporary and the exemption in Regulation 10 was plainly intended to be temporary. It cannot be read as conferring a permanent or longer term exemption.

Caveat

95. Having referred to background material, and to evidence received in written form, we enter a caveat. It has more relevance to a consideration of article 8(2) than to whether article 8 is engaged at all but we make it now because it has a bearing on both issues.

96. Courts, both the ECtHR and domestic courts, have made value judgments under article 8 and these depend on the evidence. The dangers of smoking, including SHS, and proposals to ban it, have been a major political and social issue for many years. A vast literature has accumulated based on the best medical evidence. In the absence of oral evidence tested by cross-examination, it is not possible for the court to draw precise conclusions about the extent of the risk presented to the smokers themselves, and to others sharing space with them, whether for employment or other purposes. Whether a complete ban is justified depends on findings of fact which the court may not be in the best position to make. We make that reservation, particularly because of the very considerable amount of evidence, some of it conflicting, to which we have been referred. We have to make the best of what is inevitably an imperfect situation. We do acknowledge the existence of a very substantial body of evidence that smoking, including SHS, is seriously damaging to health.

97. The court is not conducting a public enquiry into the benefits and disbenefits of smoking with a view to making policy recommendations. It is considering whether the conduct of the defendants has been lawful. That does involve making an assessment of the evidence, some of which is conflicting, to decide whether the measures taken are proportionate, as that word is used on a consideration of article 8(2). The court makes a value-judgment. In the absence of cross-examination, the court's ability to analyse, on judicial review, some of the issues raised is inevitably circumscribed and we think it advisable to make that reservation before expressing our conclusions.

Conclusions on article 8(1) and article 14

98. We say at once that we do not accept that either Parliament or the court is bound either by the Minister's statement of intention or by her view of the relevance of article 8. Parliament was entitled, subject to the court's scrutiny based on article 8, and following the public consultation, to approve the regulations in the form they were. No legitimate expectation arose from the Ministerial statement or earlier government responses to consultation. This was not the only area in which the legislation became stricter following consultation and parliamentary debate; a proposed exemption for members' clubs was withdrawn during the passage of the Bill.

99. The concept of respect for private life and home life in article 8 requires respect for 'physical and psychological development', 'personal development and autonomy' (*Pretty*), 'physical and moral integrity' (*Raninen*), 'mental stability', 'integrity of a person's identity' (*Razgar*), 'protection of private sphere and private space' (*Countryside Alliance*).

100. We do not accept that the respect required by article 8 is coextensive with the right of absolute independence contemplated by John Stuart Mill. The law may place restrictions on a person's freedom of action without necessarily interfering with the right to respect required by article 8. The expression "personal autonomy", used by the ECtHR in *Pretty*, undoubtedly resonates with the Mill philosophy but as Baroness Hale has stated in *Countryside Alliance*, at paragraph 116, the protection "falls some way short of protecting everything they might want to do even in that private space".

101. Preventing a person smoking does not, at any rate in the culture of the United Kingdom, generally involve such adverse effect upon the person's 'physical or moral integrity', or the other concepts cited above, as would amount to an interference with the right to respect for private or home life within the meaning of article 8. We do not accept the notion of an absolute right (subject to article 8(2)) to smoke wherever one is living. Nor, following the analysis of Lord Hope in *Countryside Alliance*, do references to the "ambit" or "scope" of article 8 introduce, via article 14, an application of article 8.

102. In considering what respect for personal autonomy and home life requires in a particular case, regard must be had to the circumstances in which a person is living. A distinction is to be drawn, when considering the engagement of article 8, between a private home in which a person freely resides, with his family if he has one, and an institution. Moreover, distinctions are possible between an institution such as a care home and an institution in which a person is detained. Within institutions in which persons are detained, distinction is possible between a prison in which healthy people live in their own cells and detention of mental patients in high security conditions. Rampton is operated as a hospital under Section 4 of the National Health Act 2006. We do not intend to explore these distinctions in detail but make the general point that the privacy and freedom of action to which a person is entitled, for the purposes of article 8, will in our view vary with the nature of the accommodation in which that person is living and the circumstances in which he is living there. Whether article 8 is engaged in relation to a particular activity will depend on those factors as well as the activity in question, and all the circumstances in which it is sought to practise it. Distinctions as to what is required in different accommodation may be justified. In

the present context, we do not consider that smoking as an aid to social contact assists the case to engage article 8, given the limited range of social contact which security permits at Rampton.

103. We are not persuaded that the requirement to respect private life and home in article 8 imposes a general obligation on those responsible for the care of detained people to make arrangements enabling them to smoke. Whether it is put in terms of moral integrity, identity or personal autonomy, no general right for mental patients to smoke, or general obligation to permit smoking, arises.

104. In the present context, we do not consider that resort to a claimed wider ambit of article 8, via article 14, can be successful. In *M*, Lord Walker drew the distinction between article 8, which is concerned with respect, and other articles such as article 11. It is much less well defined than other articles. In *Stec*, the ECtHR was concerned with the application of article 14 to additional rights the State had voluntarily decided to provide. In *Countryside Alliance*, Lord Hope, when considering article 14, used the example of discrimination in relation to schools which had been provided in performance of a duty under article 2 of the First Protocol to the Convention (and article 5, *Clift*).

105. The failure to provide smoking facilities for mental patients does not appear to us to come within the ambit of article 8 as that concept is viewed in the authorities. Neither is it a personal interest close to the core of such a right. It does not follow from the "much wider and much less well defined ambit" of article 8 that the right claimed in this case can be brought within its ambit. If the claimants fail to establish a lack of respect under article 8 alone, we do not consider that resort to the concepts of "scope" or "ambit" improve their position so as to create a claim based on discrimination.

106. On that view, the question whether the claimants have "other status" within the meaning of article 14 does not arise. However, as to that, the status relied on, for the purposes of article 14, is that of detained patients in high security mental hospitals. In *Clift* Lord Bingham cited the decision of the ECtHR in *Kjeldsen, Busk Madsen* and *Pedersen v Denmark* (1976) 1 EHRR 711, para 56. The Strasbourg court explained that:

> "Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

It was held in *Clift* that, where an early release system for prisoners existed, it was within the ambit of article 5 (right to liberty and security) for the purposes of engaging article 14. "Not without hesitation" Lord Bingham held that *Clift's* classification as a prisoner serving a determinate sentence of 15 years or more did not give him a "status" for article 8(2) purposes. In *Countryside Alliance*, Lord Hope stated that he would regard *Clift* "as lying close to the borderline".

107. The absence of exemptions in regulation 10 covers not merely hospitals such as Rampton but all mental health units, though in other units arrangements for smoking outside may be possible whereas it may not be possible in high security units. We

would not consider that mental illness itself confers a status, within the meaning of article 14, and any narrower definition of the status claimed for the claimants presents further problems of definition, whether the status is that of mental patient in hospital or mental patient detained in hospital. We are inclined to the view that the status claimed is not a "personal characteristic" (*Kjeldsen*) contemplated by article 14, especially when considered alongside the categories of status specified in article 14.

108. The 2007 Regulations do confer exemptions, subject to conditions, covering a wide range of accommodation which may be regarded as a person's "home". The exempted premises include care homes, hospices and prisons, as well as conventional homes. The exemptions are granted on policy grounds, following intensive public consultation and debate and influenced no doubt by the philosophy of JS Mill and the stated policy to regulate smoking rather than ban it completely. They can be granted, in our view, without creating a breach of article 8, read directly or by way of the protection against discrimination provided by article 14, with respect to detained mental patients.

109. We accept, as did Mr Swift when the point was put to him, that there could be cases, though on the evidence we would expect them to be rare, in which the protection of mental health requires that facilities to smoke be made available. As the ECtHR stated in *Bensaid*, mental health is associated with moral integrity and respect for mental stability may engage article 8. The Rampton policy document does provide for exceptions, though they appear to be of narrow ambit. A terminally-ill patient may not be able to venture outside. The expression "acute psychiatric condition" is defined, with respect, imprecisely, as may be inevitable, but it does confer a discretion upon the responsible medical staff.

Article 8(2)

110. We now consider whether if (contrary to our conclusion) the claimants' article 8 rights are engaged, either directly or read with article 14, the smoke-free policy enacted in regulation 10(3) and in the policy adopted by the Trust are justified under article 8 (2) of the Convention.

111. In order for article 8(2) to be invoked, any interference with the exercise of the claimants' article 8 rights must be (a) "in accordance with the law" and (b) "necessary in a democratic society" in the interests of one of the aims set out in article 8(2) and (c) a proportionate interference given those aims.

112. Condition (a) is satisfied as it is clear that regulation 10(3) and the Trust's policy under challenge are both enacted in accordance with domestic law. It is also common ground that both regulation 10 and the Trust's policy are propounded to further the aims of "the protection of health". The issue about the applicability of article 8(2) is whether the complete ban on smoking inside buildings from July 2008 adversely affects the article 8 rights of smokers such as the claimants disproportionately. They are detained in secure conditions which do not allow them to leave their buildings in order to smoke. High security is central to the operation of Rampton (Section 4 of National Health Service Act 2006) and the claimants have put their case on the premise that they will not be able to smoke outside.

113. The case for the claimants is that a proportionate measure would have allowed the exemption from the smoking ban to continue in mental health units where it has not proved feasible for patients to smoke outside their buildings. It is contended that the effect of the Trust's policy at the present time, and of regulation 10 after the time period for the exemption expires in July 2008, is not a proportionate interference with the article 8 rights of the claimants.

114. Mr Bowen submits that, in assessing proportionality, the court must determine whether a fair balance has been struck between the competing public interest and the interests of the individuals concerned. We approach the issue of proportionality in the light of the much-quoted statement of Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture etc* [1999] AC 69, 80 F- G in which he explained that, in deciding the lawfulness of a restriction on any human right, a court must 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"*

i) *Importance of legislative objective*

115. The legislative intention of regulation 10 and the Trust policy was not merely to reduce smoking but also to increase the number of smoke-free enclosed public places and work places, thereby reducing levels of exposure to SHS. The legislative objectives included protecting the rights of citizens to enjoy smoke-free air and increasing the benefits of a smoke-free enclosed public space and work places for people trying to give up smoking so that they can succeed in an environment where the social pressure to smoke is reduced. The Secretary of State and the Trust hoped that the consequence of their policy would be an overall saving of lives and a general improvement in health by reducing, first, exposure to hazardous SHS and, secondly, the rates of smoking in this country. We have already referred to the background to the 2006 Act.

116. We repeat the reservation we have expressed about this court making findings of fact but are satisfied that the legislative objectives are sufficiently important to justify limiting any rights the claimants have under article 8.

ii) *Were the measures in regulation 10 (3) and the policy of the Trust relating to smoking in mental homes rationally connected to the aims?*

117. In our view, the provisions in regulation 10 (3) and the policy of the Trust relating to smoking in mental homes in the words of Lord Clyde "are rationally connected to [the legislative objective of reducing levels of SHS and increasing the number of smoke-free enclosed public places]". . . Preventing patients at Rampton and at other mental

hospitals from smoking was clearly a consequence of and was connected with the objective of reducing smoking and of exposure to SHS.

iii) *Were the means used in regulation 10(3) and in the Trust's policy relating to smoking in mental homes, which impair the alleged article 8 rights of the smokers who were patients at Rampton and other high security mental hospitals, more than is or was necessary to achieve that objective?*

118. The claimants' case is that the means used to impair their article 8 rights were more than necessary to accomplish that objective and were disproportionate. They contend that a proportionate measure would have allowed the exemption in regulation 10 (3) to continue in mental health units where it was not feasible for patients to smoke outside. On the issue of "fair balance" (see *Secretary of State for the Home Department v Huang* per Lord Bingham [2007] UKHL 11; [2007] 2 AC 116 paragraph 19), the claimants' case is that the means used by the Secretary of State to achieve the legislative aims go further than was necessary to accomplish them.

119. Mr Bowen relies on the background material already summarised and places great reliance on the Ministerial statement of 14 February 2006, already cited. This statement, according to Mr Bowen, showed the balance that the democratically elected legislature had actually struck between the public interest and the right of the long-term inhabitants of Rampton, who had to regard that place as their home, to smoke. His submission is that the failure of the Secretary of State and of the Trust to respect and to honour this balance shows that regulation 10(3) and the Trust's policy were not proportionate.

120. Mr Bowen contends that the regulations are more invasive of human rights than the 2006 Act as they preclude patients from smoking anywhere in mental hospitals after 1 July 2008. He also submits that the Secretary of State did not intend to ban smoking altogether for the long-term residents of mental homes with the result that the unintended consequence of that measure is to ban smoking in Rampton, and in consequence this interferes with the claimant's article 8 rights in a way which is disproportionate.

121. It is submitted that the reasons given by the Secretary of State for distinguishing mental patients from those whose home is in a "public place" are unsound. Mr Bowen contends that even if the reasons given by the Secretary of State justify some difference in treatment, such as banning smoking indoors where it is feasible to allow smoking outdoors, these reasons do not justify what is in practice a complete ban on smoking in mental health units in circumstances when it is not feasible for patients to smoke outside.

122. Reliance is placed on the statement of ECtHR that "the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with" (*Herczegfalvy v Austria* (1992) 15 E.H.R.R.437) . We will bear that principle in mind as well as the recent statement of the ECtHR that "where a particularly important aspect of an individual's existence… is at stake, the margin of appreciation accorded to a State will in generally be restricted" (*Dickson v United Kingdom* (4 December 2007)).

123. The case for the Secretary of State and for the Trust is that regulation 10 (3) and the Trust's policy are proportionate. The measures adopted to prevent the claimants exercising their claimed article 8 rights were no more than was necessary to accomplish the aim of the statute. For the Trust, Mr Lock relies on the practical difficulties involved in permitting smoking in Rampton.

Conclusion on article 8(2)

124. We have no doubt that, within the powers of the 2006 Act, the Secretary of State was entitled to draft, and Parliament to approve, regulation 10 of the 2007 Regulations. If article 8 is engaged, some of the points already made in that context apply to a consideration of proportionality under article 8(2) and we will not repeat each of them.

a) **Health Considerations**

125. There is very strong evidence that smoking causes disease and endangers the health of the smokers themselves and other people who live and work in their vicinity. We accept that much of the background material relates to the health of the smokers themselves as well as to the effect of smoking on others. There is, in our view, powerful evidence that, in the interests of public health, strict limitations upon smoking, and a complete ban in appropriate circumstances, are justified.

126. A need to protect "the rights and freedoms of others" is another consideration mentioned in article 8(2) which is engaged in the present context. A duty to protect others from smoke pollution arises with respect to patients, some of whom may be vulnerable, and to staff (*Lopez*). On the view we take of the evidence, substantial health benefits arise from the ban and the disbenefits are insubstantial. (See also the reports of Professor Sashidharan in *B*, below). Rampton is operated as a hospital by National Health Service staff and distinction between it and prisons and other accommodation is justified. Like other hospitals it is smoke-free. Both health and security considerations justify the ban even though smoking in the grounds, which may be possible at other hospitals, is not feasible at Rampton.

127. We have referred to the evidence of developments at Rampton since a smoke-free policy was introduced there. Given the harm which smoking may cause, this evidence supports the defendants' case that the measures taken are proportionate.

b) **Security**

128. The Secretary of State was entitled to have regard to the duty under Section 4 of the National Health Service Act 2006 to provide high security psychiatric services and to the perceived "dangerous, violent or criminal propensities" which are the requirement for entry to and detention in Rampton. The "prevention of disorder or crime" is an aspect of article 8(2) to be borne in mind when making, or deciding not to make, arrangements for smoking. That concern for security is a legitimate consideration is reflected in the acceptance on behalf of the claimants that outdoor provision may not be feasible. Security requirements inevitably impose practical difficulties upon providing at Rampton facilities for smoking. Moreover, the claimed desirability of such facilities should not conflict with the legitimate intention to protect staff and other patients from SHS.

c) **Procedure adopted**

129. We also bear in mind that respect is owed by the judiciary to "the recent and closely considered judgment of a democratic assembly" see (*Countryside Alliance* per Lord Bingham at paragraph 47, Lord Hope at paragraph 89 and Baroness Hale at paragraph 127). In *James v United Kingdom* (1986) 8 EHRR 123, the ECtHR stated that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one.

130. The 2007 Regulations were enacted following an intensive consultation exercise, intense parliamentary scrutiny following the affirmative parliamentary procedure, and scrutiny by the Joint Committee on Statutory Instruments. In *Hatton v UK* [2003] 37 EHRR 611, the ECtHR stated, at paragraph 97:

> "In matters of general policy on which opinions within a democratic society may reasonably differ widely the role of the domestic policy maker should be given special weight."

B

131. In the case of B, the further point is taken that the exemptions including within the Trust's policy are being operated in an unlawfully inflexible manner because no exemptions have yet been granted at Rampton. Reliance is placed on a medical report from Professor SP Sashidharan, Consultant Psychiatrist, dated 10 June 2007 and a further short report dated 8 July 2007. He was asked to comment on the effect on B of the smoking ban imposed at Rampton on 30 March 2007.

132. Professor Sashidharan states that B was heavily dependent on tobacco use. He states that he is "not convinced that the smoking ban had a particularly de-stabilising effect on his [B's] mental state." However, underlying personality traits make it more difficult for B to adjust to the new reality in his life. He said that it appeared that B had received little help in managing the problem. Professor Sashidharan concludes that "B is now beginning to accept, albeit with a considerable degree of resentment, that he will have to give up smoking, at least for the time being." The psychological sequealae of being forced to stop smoking are beginning to diminish in their intensity. "I advised that it would be difficult to conclude that B has suffered particular adverse effects in terms of his mental condition as a result of the smoking ban."

133. In the later report, Professor Sashidharan states:

> "It would be very difficult to argue that giving up smoking by itself could have caused him to have these difficulties or that cessation of smoking is the critical factor causing him to experience psychological problems. I do not believe that permitting B to resume smoking will substantially moderate or end his current psychological problems".

134. This report is largely consistent with the medical evidence and other material given weight by this court`. It does not, in our view, begin to establish a case either that the smoking ban is unlawful or that the Trust policy is being applied inflexibly.

135. For the reasons given, these claims are dismissed.

POST-JUDGMENT RULING

1. **LORD JUSTICE PILL**: For the reasons given in the judgment of the court handed down, these claims are dismissed.

2. There are two outstanding matters on which we have received written submissions. The first is the question of costs. The Secretary of State does not ask for costs; the Trust does. We bear in mind the circumstances of the claimants, and there will be no order for costs, save that there will be an order for detailed assessment of the claimants' publicly funded costs.

3. We have had written submissions on the question of permission to appeal. It is sought by the first and second claimants, not by the third. Permission is refused. We do not consider that there is a real prospect of success because of the strength of the defendant's case on the Article 8(2) issue. We accept that difficult and potentially important considerations arise as to the scope of Articles 8 and 14 of the Convention. However, we bear in mind the substantial costs in terms of court resources, public resources and costs in any appeal. We doubt whether these are appropriate cases and circumstances in which to explore those considerations again, the application of the Convention depending on particular facts. Nor do we find compelling reasons for granting permission. If permission is to be granted, it should be the Court of Appeal's decision.