Human rights and social welfare law: The impact of article 8

Mr Justice Munby

We are here to consider how human rights principles have informed and are continuing to inform the development of the law relating to the provision of health, social care, education and justice services. I have been asked to provide an overview of where we are and where things are going. Let me say at once that I have neither the expertise nor the knowledge to essay such an important task. All I can offer you, I fear, are a few personal thoughts derived in significant measure from my experience of the problems which the chances of litigation have brought the way of a judge who spends most of his time in the Family Division. I am a family lawyer, not really a human rights lawyer. I trust that you will make due allowance for that, as also for the fact that much of what I am about to say will, I suspect, sound somewhat abstract.

The starting point is, of course, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8(1) provides that:

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

This is qualified by Article 8(2) which provides that:

"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."
In the present context the focus is plainly upon the Convention's protection of "private life". Article 14 is also important:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Convention is not the only relevant human rights instrument. There is also the Charter of Fundamental Rights of the European Union, proclaimed at Nice in December 2000. For present purposes the relevant provisions of the Charter are to be found in Articles 1, 3(1), 7, 20, 21(1) and 26:

"1 Human dignity is inviolable. It must be respected and protected.
3(1) Everyone has the right to respect for his or her physical and mental integrity.
7 Everyone has the right to respect for his or her private and family life, home and communications.
20 Everyone is equal before the law.
21(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
26 The Union recognises and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community."

All this is qualified by Article 52(1):

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Standing at the back of all this, as is recognised in the preamble to the Convention, there is the Universal Declaration of Human Rights, Article 1 of which proclaims that:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

The Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. The Charter is not at present legally binding in our

domestic law and is therefore not a source of law in the strict sense. But it can properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention: *R (A, B, X and Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194, at para [73].

What is the "private life" which is protected by Article 8(1) of the Convention and Article 7 of the Charter? In *Botta v Italy* (1998) 26 EHRR 241 at para [32] the Strasbourg court said:

"Private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."

Earlier, in *Niemietz v Germany* (1992) 16 EHRR 97 at para [29], the Court had indicated that "private life" includes at least two elements. The first is the notion of "an `inner circle' in which the individual may live his own personal life as he chooses"; the second is "the right to establish and develop relationships with other human beings." It elaborated this in *Bensaid v United Kingdom* (2001) *33* EHRR *205* at para [47]:

"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 precondition to effective enjoyment of the right to respect for private life."

It further elaborated it in *Pretty v United Kingdom (2002) 35* EHRR 1 at para [61]:

"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 ... 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."

It will be noted that the principle identified in *Botta* and in *Pretty* is expressly

recognised in article 3(1) *of* the Charter, which, as we have seen, proclaims "the right to respect for ... physical and mental integrity".

As the Court has long recognised – the principle goes back at least as far as *Marckx v Belgium* (1979) *2* EHRR *330* – the "respect" for private life which Article 8 guarantees imposes on the State not merely the duty to abstain from inappropriate interference but also, in some cases, certain positive duties. Moreover, in order to comply with its obligations under Article 8, the State may even be obliged in certain circumstances to take positive action to prevent or stop another *individual* from interfering with private life. As the Court put it in *Botta* at para [33]: "While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves ... In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual".

The "physical and psychological integrity" protected by Article 8 of the Convention, and which the State may in principle be under an obligation to take positive steps to protect, embraces, though it is not of course confined to, two particularly important concepts.

The first is human dignity. True it is that the phrase is not used in the Convention but it is surely immanent in Article 8, indeed in almost every one of the Convention's provisions. The recognition and protection of human dignity is one of the core values – in truth, surely, the core value – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is, I should like to think, a core value of the common law, long pre-dating the Convention and the Charter. This is not merely my view. It is the view of the Strasbourg court, which in *Pretty* at para [65] said that:

"The very essence of the Convention is respect for human dignity and human freedom ... it is under Article 8 that notions of the quality of life take on significance."

In this context I should like to take you to an interesting, and I believe important, passage in the concurring opinion of Judge Greve in *Price v United Kingdom* (2001) 34 EHRR 1285 at page 1296. *Price* was a four-limb-deficient thalidomide victim with numerous heath problems, including defective kidneys, who had been committed to prison for contempt of court in the course of civil proceedings.

The Strasbourg court held that there had been a breach of article 3 of the Convention. Agreeing that there had been a violation of Article 3, Judge Greve said this:

"In a civilised country like the United Kingdom, society considers it not only appropriate but *a basic humane concern* to try to ameliorate and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's bodily integrity. It follows that, for example, to prevent the applicant, who lacks both ordinary legs and arms, from bringing with her the battery charger to her wheelchair when she is sent to prison for one week, or to leave her in unsuitable sleeping conditions so that she has to endure pain and cold – the latter to the extent that eventually a doctor had to be called – is in my opinion a violation of the applicant's right to bodily integrity. Other episodes in the prison amount to the same.

The applicant's disabilities are not hidden or easily overlooked. It requires no special qualification, *only a minimum of ordinary human empathy,* to appreciate her situation and to understand that to avoid unnecessary hardship – that is, hardship not implicit in the imprisonment of an able-bodied person – she has to be treated differently from other people because her situation is significantly different."

This brings out the enhanced degree of protection which may be called for when the human dignity at stake is that of someone who is disabled, particularly if so disabled as to be critically dependent on the help of others for even the simplest and most basic tasks of day to day living. In order to avoid discriminating against the disabled – something prohibited by article 21(1) of the Charter – one may, as Judge Greve recognised, need to treat the disabled differently precisely because their situation is significantly different from that of the able-bodied. Moreover, the positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and, I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the State to secure their essential human dignity, calls for human empathy and
humane concern as society, in Judge Greve's words, seeks to try to ameliorate and *compensate* — my emphasis — for the disabilities faced by the disabled.

In her 2004 Paul Sieghart Memorial Lecture, "What can the Human Rights Act do for my Mental Health?", Baroness Hale of Richmond made much the same point at page 22:

"human dignity is all the more important for people whose freedom of action and

choice is curtailed, whether by law or by circumstances such as disability. The Convention is a living instrument ... We need to be able to use it to promote respect for the inherent dignity of all human beings but especially those who are most vulnerable to having that dignity ignored. In reality, the niceties and technicalities with which we have to be involved in the courts should be less important than the core values which underpin the whole Convention."

The other important concept embraced in the "physical and psychological integrity" protected by Article 8 is the right of the disabled to participate in the life of the community and to have what has been described (see below) as "access to essential economic and social activities and to an appropriate range of recreational and cultural activities". This is matched by the positive obligation of the State to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not "so circumscribed and so isolated as to be deprived of the possibility of developing his personality".

This aspect of Article 8 appears from *Botta* itself, where the claim was brought by a physically disabled man who went on holiday to a seaside resort but was unable to gain access to a private beach and the sea because they were not equipped with disabled facilities. The Strasbourg court dismissed the complaint, but on grounds which are revealing. Acknowledging (at para [34]) that "a State has obligations of this type where it has found a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life", the Court continued at para [35]: "In the instant case, however, the right asserted by Mr Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life."

Mr Botta's claim had previously been considered by the Commission. The concurring opinion of, amongst others, Mr N Bratza (as he then was), is illuminating and important:

"Such positive obligations may exceptionally arise in the case of the handicapped in order to ensure that they are not deprived of the possibility of developing social relations with others and thereby developing their own personalities. In this regard, the Commission observes that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention.

In the case of the physically handicapped, the abovementioned positive

obligations require appropriate measures to be taken, to the greatest extent feasible, to ensure that they have access to essential economic and social activities and to an appropriate range of recreational and cultural activities. The precise aim and nature of the measures undertaken may vary from place to place, and according to the priorities of facilitating access to sanitary facilities, footpaths, transport, entrances to buildings, historical sites, areas of natural beauty and areas of recreational use. In the case of the mentally handicapped, the measures would necessarily be different. This is an area in which a wide discretion must inevitably be accorded to the national authorities. Nevertheless, the crucial factor is the extent to which a particular individual is so circumscribed and so isolated as to be deprived of the possibility of developing his personality." The principle which one thus sees articulated in *Botta* is expressly recognised in Article 26 of the Charter, with its reference to "the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".

There is, I should like to think, increasing awareness of the importance of human rights law in general, and Article 8 of the Convention in particular, in safeguarding and protecting the more vulnerable members of our community. I take just a few examples at random, focussing on judicial developments in this country.

Human rights law, including in particular the positive obligations arising under Article 8, is now seen as an important protection for vulnerable children in Young Offender and similar institutions: see *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484. Similarly, Article 8 has been interpreted as imposing positive obligations on local authorities providing services in the home to vulnerable adults under the community care legislation: *R (A, B, X and Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194. Article 8 has also been important in the context of housing and benefits law: *R v Enfield LBC ex p Yumsak* [2002] EWHC 280 (Admin), *R (Morris) v Newham LBC* [2002] EWHC 1262 (Admin), *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin), [2003] UKHRR 148, *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124. These are obvious and quite well known examples. But there are others.

Over the last dozen or so years the judges of the Family Division have re-discovered – in truth, invented – a `custodial' and `protective' jurisdiction in relation to vulnerable adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdictions in relation to children: see, for the latest description of the jurisdiction, *Re SA, A local authority v MA* [2005] EWHC 2942 (Fam). The ambit of this jurisdiction has developed and expanded and continues to develop and expand.

Thus it now enables a local authority to bring what are in substance and reality care proceedings in relation to an adult who lacks mental capacity, clothing the local

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authority with very much the same kind of powers and responsibilities it would have if granted a care order in relation to a child under Part IV of the Children Act: *Re S (Adult Patient) (Inherent Jurisdiction: Family Life) [2002]* EWHC *2278* (Fam), *[2003]* 1 FLR *292.* It is a jurisdiction which is increasingly being used to protect vulnerable adults from forced marriages: *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend) [2004]* EWHC *3202* (Fam), *[2005] 2* FLR *230, M v **B,** A and S (By the Official Solicitor) [2005]* EWHC 1681 (Fam), *[2006] 1* FLR 117, *Re SA, A local authority v MA [2005]* EWHC *2942* (Fam). And it is a jurisdiction — this is the latest development — which it is now recognised can. be used to protect vulnerable adults even if they do not formally lack capacity: *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend) [2004]* EWHC *3202* (Fam), *[2005] 2* FLR *230,*
Re SA, A local authority v MA [2005] EWHC *2942* (Fam).

What is interesting for present purposes is the judicial recognition of the importance in this context of Article *8* and, in particular of the importance of the positive obligations imposed by Article 8. Thus there is judicial recognition of the fact that the court itself has, by virtue of Article 8 read in conjunction with section *6* of the Human Rights Act *1998,* an obligation to take positive steps, both in the development of the jurisdiction and in its application in particular cases: *Re S (Adult Patient) (Inherent Jurisdiction: Family Life) [2002]* EWHC *2278* (Fam), *[2003] 1* FLR *292,* at para [52], *In re A Local Authority (Inquiry: Restraint on Publication) [2003]* EWHC *2746* (Fam), *[2004]* Fam *96,* at para [96]. Further, there is judicial recognition of the fact, for example, that Article 8 may impose on a local authority not merely the power but in appropriate circumstances a duty to invoke the jurisdiction if that is necessary in order to protect a vulnerable adult from possible harm at the hands of his family. As I said in *Re S (Adult Patient) (Inherent Jurisdiction: Family Life) [2002]* EWHC *2278* (Fam), *[2003] 1* FLR *292,* at para [39]:

"as *Botta v Italy* shows, the State, even in this sphere of relations between purely private individuals, may have positive obligations to adopt measures which will ensure effective respect for the son's private life. Thus the State, in the form of the local authority, may have a positive obligation to intervene, even at the risk of detriment to .the father's family life, if such intervention is necessary to ensure respect for the son's Article 8 rights. And the State, in the form of the High Court, has a positive obligation to act in such a way as to ensure respect for those rights"

Finally in this context I should refer briefly to forced marriage. This is rightly seen

as a human rights issue. The judiciary has been forthright in its condemnation of forced marriage as a gross abuse of human rights: *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend) [2004]* EWHC *3202* (Fam), *[2005] 2* FLR *230, Re K (A local authority v N [2005]* EWHC *2956* (Fam). More specifically, it has been recognised that the basis of the court's intervention, whether the victim is an adult or a child, is the court's obligation to protect the victim's Article *8* right to respect for their private life. As Sumner J explained in *M v B, A and S (By the Official Solicitor) [2005]* EWHC 1681 (Fam), [2006] 1 FLR 117, at para [112], he was exercising the inherent jurisdiction in relation to a vulnerable adult, S, by granting an injunction:

"to protect S's private life. I do so to ensure it is not jeopardised by her parents' actions in seeking to arrange a marriage for her."

We can see then the amplitude of the rights protected by Article *8,* as exemplified by the cases I have just mentioned and in particular by cases such as *Botta, Bensaid* and *Pretty* which show just how wide is the potential reach of the Article *8* concept of private life. However, although the rights guaranteed by Article *8* may be extensive, they are not limitless. In this context it is not unimportant to remember, as Lord Hoffmann said in *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163, at para [26], that although:

"it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery"

the human rights protected by the Convention:

"certainly do not include the right to a fair distribution of resources or fair treatment in economic terms — in other words, distributive justice. Of course distributive justice is a good thing. But it is not a fundamental human right."
Even more pointed and in point are certain observations in *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 2 AC 368. Lord Bingham of Cornhill at para [9] acknowledged that:

"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."

And he went on to quote with approval Professor Feldman's observation ("The Developing Scope of Article 8 of the European Convention on Human Rights" [1997]
EHRLR 265, 270), that:

"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."

But he was careful to emphasise at para [4] that:

"The Convention is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits."

Lord Walker of Gestingthorpe made the same point at para [34]:

"There is no general human right to good physical and mental health any more than there is a human right to expect (rather than to pursue) happiness."

As Scott Baker J said in *R (on the application of Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin) at [37], [2002] 2 FLR 962 at para [37]:

"the State is not required to take every positive step that might possibly promote the emotional well-being of some of its citizens."

In short, the Convention protects `civil and political' rights, not `social and economic rights'.
Moreover, it must not be forgotten that, notwithstanding the wide statements of principle articulated by the Strasbourg court in *Botta v Italy* and again in *Sentges v Netherlands* (2003) 8 July (unreported, App No 27677/02), the applicants in both cases failed to make good their claims under Article 8, despite the evident sympathy of the court for the situations in which they found themselves. And, as was pointed out in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, both by Lord Walker of Gestingthorpe at para [34] and by Lord Carswell at para [74], the precise extent of the interests which Article 8 is capable of protecting still remains to some degree uncertain and the language of some of the statements in the Strasbourg jurisprudence must be treated with some caution.

In *Sentges* the applicant suffered from Duchenne Muscular Dystrophy (DMD), a disease characterised by progressive muscle degeneration and loss of the ability to walk. He was unable to stand, walk or lift his arms, his manual and digital functions were virtually absent, and he used an electric wheelchair to move about. He complained that his request to his health insurance fund to provide him with a special type of robotic arm specifically designed to be mounted on electric wheelchairs in order to give disabled people more autonomy in handling objects in their environment had been denied. Relying upon *Botta* and *Pretty,* he argued

that:

"his dependence on others for every single act meant that he was unable to pursue the establishment and development of relationships with other human beings and that he was not free in his choice of persons with whom to establish and develop relationships ... Total dependence on family and friends forced him to establish and develop relationships with persons he might not have chosen had he not been disabled. If provided with the robotic arm, [his] severely curtailed level of self-determination would be increased as he would to an important extent be less dependent on his family and friends, and he would be able to establish and develop relationships with persons other than for reasons of dependence. There was thus a direct and immediate link between the measure sought by the applicant and his private life."

The Strasbourg court rejected his complaint as manifestly unfounded: "Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life."

The court continued (citations omitted):

"Even assuming that in the present case such a special link indeed exists …, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the wide margin of appreciation enjoyed by States in this respect in determining the steps to be taken to ensure compliance with the Convention.

This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources. In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court ...

In the present case the Court notes that the applicant has access to the standard of health care offered to all persons insured under the [relevant legislation] ... The Court by no means wishes to underestimate the difficulties encountered by the applicant and appreciates the very real improvement which a robotic arm would entail for his personal autonomy and his ability to establish and develop

relationships with other human beings of his choice. Nevertheless the Court is of the opinion that in the circumstances of the present case it cannot be said that the respondent State exceeded the margin of appreciation afforded to it."

This recognition by the Strasbourg court of the very difficult issues which arise where the dispute is essentially about the allocation of limited state resources will strike a chord with anyone familiar with the desperate discrepancy between the huge demands placed on local authority community care and social services budgets and the necessarily capped funds which are available to meet them. The plain truth which we have to accept, however unpalatable the consequences, is that no amount of reference to the State's – the local authority's – positive obligations under Article 8 will automatically produce facilities or services for which the public budget makes no, or only limited, provision.

It is, of course, in the context of medical treatment that the problem of resources is most obviously and most prominently displayed. And here a tradition of judicial self-restraint is well established. The fundamental truths were set out very eloquently by Sir Thomas Bingham MR (as he then was) in a case which at the time was a cause celebre, *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898 at page 906:

"I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would, however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like, they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make."

The basic realities have not been changed by the Convention or the Human Rights Act 1998. As the Court of Appeal put it in *R v North West Lancashire Health Authority, ex p A [2000] 1* WLR 977 at pages 995 (Auld LJ) and 1001 (Buxton LJ):

"Article 8 imposes no positive obligations to provide treatment ... it is plain that in this case there has occurred no interference with ... the applicants' private life ... The ECHR jurisprudence demonstrates that a state can be guilty of such interference simply by inaction, though the cases in which that has been found do not seem to go beyond an obligation to adopt measures to prevent serious

infractions of private or family life by subjects of the state ... Such an interference could hardly be founded on a refusal to fund medical
treatment."

Lord Bingham's words in *ex p B* reflect two fundamental realities. In the first place we have, like all the countries in the European family of nations, a highly developed and very sophisticated health and welfare system which delivers extensive benefits, particularly to those who are physically, mentally, economically or socially vulnerable. But in the real world in which we live these systems are not, and never will be — for otherwise the burden of taxation would probably be crushing — funded at such a level as to meet all the unmet needs even of the vulnerable in our society. However, and this is the second point, these systems are designed to provide, within inevitable social and political constraints, a fair, equitable and appropriate allocation of resources, determined by those who are democratically elected and democratically accountable and by the application of skills and techniques which judges simply do not possess.

The Strasbourg court, as we have seen, affords the State a `margin of appreciation'. In the same way the judges recognise that there are contexts where an appropriate degree of `judicial deference' to democratically elected public authority is necessary, at least when government is acting within the domestic equivalent of Strasbourg's `margin of appreciation'. In the kind of context with which I am here concerned — other contexts may raise quite different issues and call for different approaches — there are two separate reasons why a certain degree of judicial reticence is appropriate. The first is that judges simply do not have the expertise, nor do they have access to all the relevant information, to enable them to decide what are, after all, hugely complex and technical matters of social and public policy. The other is that questions which are not merely social but also often highly political should be decided by democratically elected and democratically accountable politicians, not by judges. Politicians are elected to make difficult political choices; judges are appointed to decide questions of law.

What then is the real significance of the Convention in the context we are here considering? Directly and obviously its impact, I suspect, is more limited than many would want. At a minimum it provides a bedrock of rights to services below which the State cannot lawfully go, even if it might wish to politically. It mandates a minimum level of civil and political decency – and, in terms of the individual's private life, a minimum level of dignity and decency. But much – probably most – of our social welfare legislation is `Convention compliant' and most of the time it is implemented in a `Convention compliant' manner, so successful challenges relying on Article 8 are likely to be confined to the more egregious cases.

Probably far and away the most important effect of the Convention has been the

substitution of the subtle and adaptable Convention principle of `proportionality' for the inadequate common-law test of rationality – the replacement in many contexts of the *Wednesbury* test with the *Daly* approach. This has, I suspect, had the most profound effect on the quality and outcome of administrative decision-making at all levels and has probably done more in a practical way to transform our public law than anything else in recent years.

Beyond that, the Convention provides a most important role in assisting the courts to fill out the gaps which even now pervade our domestic legislation. This is a role which has traditionally been filled by the common law, which, as Lord Donaldson MR once memorably explained *(In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at page 13), is:

"the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole."

But the Convention and the Human Rights Act 1998 have given the judges new tools enabling them in appropriate cases to make innovations at which even the common law might have balked. The re-discovered jurisdiction of the Family Division to protect vulnerable adults is, I think, a good example. If it was the common law which in 1989 made the first breakthrough and which continued to drive developments during the 1990s, it is now in many ways the Convention, and Article 8 in particular, which is providing the motive force. And it is the common law, aided by the Convention, which will continue to plug the gaps that will still remain even after the Mental Capacity Act 2005 has come into force.

This leads me on to the third and final, and in the long run by far and away the most important, significance of the Convention. It has gradually been changing, and will continue to change, the way in which we think about many of these problems. It has imported novel concepts and given us new ways of solving a wide variety of legal and related problems. We have come a long way in only five years. There is now, I sense, and much more so than even five years ago, a judicial willingness to think about and analyse even the most familiar problems in terms of the Strasbourg jurisprudence and using the language and concepts of the Convention. This process will, I am sure, continue and is likely to accelerate. Where and how far it takes us is ultimately, however, a matter for practitioners. Judges, after all, can only decide the cases that the happenstance of litigation brings their way.