Richard Gutowski
Carl Evans - POLICY
David Daley - COMMS

From: Ian Steptoe SOLC4

Date: 6th August 2003
Cc: Vicki King
Jill Taylor
Zubeda Seedat
Mary Trefgarne SOLC4

RECOMBINANT CLOTTING FACTOR

1. Mary has asked me to reply to your minute of 31st July. The issues raised are similar to those arising in judicial review proceedings brought by Mr GRO-A against Newcastle PCT, which I think you are aware of with. Mr GRO-A challenges a decision not to treat him with Recombinant Factor VIII unless he suffers a life threatening bleed.

2. The letter from GRO-A asserts that the decision to roll out Recombinant Clotting Factor VIII over a three year period on an ascending age basis to be contrary to Article 14 of the European Convention on Human Rights (the Convention). The Convention was incorporated into domestic law by the Human Rights Act 1998; section 6 of the Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

3. Article 14 provides as follows

   "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."

4. The categories of prohibited discrimination are not expressly closed and it is highly arguable that age would fall within the 'other status' category of prohibited grounds of discrimination.

5. Article 14 is not free standing; the prohibition of discrimination is limited to the rights in the Convention. Article 14 can only be relied upon when the facts in issue fall within the ambit of one of the other rights. However whilst a claim of breach of Article 14 cannot be considered in isolation, the claimant is not required to show there has been a breach of the other right(s) in order to succeed under Article 14.

6. The Convention does not guarantee a right to medical treatment. However under Article 2 - the right to life, public authorities are required to take appropriate

measures to preserve life[1] and this might in some circumstances require the provision of medical treatment and care for those whose lives are at risk[2]. Lack of proper medical care in a case where somebody is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3[3] – prohibition on torture, inhuman and degrading treatment and punishment. Lack of proper medical care might also breach Article 8 – right to respect for private and family life (the notion of private life includes physical integrity in circumstances where the effect on the patient falls below the threshold of inhuman or degrading treatment in Article 3).

7. In my view an "appropriate" measure or "proper" medical care is that which would conform to generally accepted medical principles.[4]

8. As I understand it Recombinant Clotting Factor VIII is being phased in to replace plasma derived Clotting Factor VIII, with which haemophilia patients have previously been treated. I also understand that both treatments are regarded as clinically effective. The difference is that use of plasma derived Clotting Factor VIII carries a theoretical risk of transmission of new variant CJD. Recombinant Clotting Factor VIII is thought to be free from that risk. Therefore Recombinant Factor VIII is being rolled out not because it is a more clinically effective treatment (although that is in my view not relevant to the question of whether plasma derived Clotting Factor VIII is "appropriate" or "proper" for Convention purposes) but because it will restore the confidence in their treatment of haemophilia patients who have previously been exposed unwittingly to infection in the past.

9. There is no complaint as far as I am aware that appropriate or proper treatment has not been provided to a haemophilia patient that needed it so plainly there is no breach of the substantive Articles I have referred to. The fact that such treatment is available to those that need it in my view also takes the subject matter out of the ambit of those Articles and thus Article 14 is not engaged[5].

10. However if Article 14 is engaged then it should be remembered that Article 14 does not prohibit all kinds of different treatment, but that which has no reasonable and objective justification i.e. it must pursue a legitimate aim and be proportionate. It is for the claimant to prove he has been treated differently and for the respondent to justify the treatment.

11. It seems to me there are certainly arguments that can be advanced to show that the decision is justified. Recombinant Factor VIII is being rolled out over a period of time because there are insufficient funds available to provide it for all patients immediately. There was therefore a need to determine how to prioritise the

[1] Association X v UK
[2] In Osman v UK the court said the positive obligation under Article 2 must be interpreted in a way which does not impose an impossible or a disproportionate burden on the authorities.
[3] Tanko v Finland
[4] See e.g. Hercegfalvy v Austria albeit that concerned psychiatric treatment.
[5] See also R. v. North West Lancashire Health Authority ex parte A in which it was decided Article 3 ECHR has no application to mere policy decisions on the allocation of resources (decision not to provide surgery for transsexuals).

distribution of the funds available this year and difficult choices had to be made (the possibility of further funds becoming available this year being nil presumably or at least only at the expense of cuts in another sector at the expense of other patients and delaying roll out until funds were available for all being unattractive). Giving priority to "special cases" it seems was rejected on rational grounds. In any event it would only have moved the identifying badge of discrimination from age to some other factor. I do not know whether it would have been possible to prioritise according to clinical need or some other criterion within the resource limitations in a way that was less discriminatory. This might be an area of vulnerability and further information would be required to show why prioritising according to age was preferred.

Ian Steptoe
Room 530 New Court
GTN GRO-C