
Policing Care in the House of Lords

*Ralph Sandland*¹

The rights and interests of carers, and those in receipt of care, are related, directly and indirectly, in myriad, complex and contradictory ways. For example, poor pay and working conditions for carers is more likely than otherwise to lead to demotivated staff, with a corollary negative impact also on the rights and interests of those in receipt of care. Likewise, a carer working in good conditions for good pay is more likely than otherwise to provide a better quality of care. Sometimes, however, it is not the case that what is good for the care recipient is good for the care provider; and when decisions as to what constitutes the 'good' are made by third parties, such as governments, there is always the possibility that the balance between the rights and interests of the two groups will be inappropriately drawn.

Of course, as long as there have been state-provided or -purchased services, there have been Inspectors, Boards of Control, Regulatory Codes and so on. But in these cautious and scandal-ridden times, the tendency of government is to push for further and greater regulation of care providers and individual carers. Legislation such as the *Care Standards Act 2000*,² introducing into the care of vulnerable adults mechanisms such as 'listing' those deemed unsuitable to work in the field, which had previously been used only to police the care given to children, provides an example of this tendency. So too does the new scheme, introduced by the *Safeguarding Vulnerable Groups Act 2006*,³ which replaces both that in the CSA and the earlier regimes for the protection of children from care-related risks. The SVGA seeks to implement the central recommendation of the Bichard Report⁴ into children protection measures, as well as vetting, information sharing and record keeping in Humberside in the wake of the murder of two young girls by Ian Huntley, employed as a caretaker at their primary school. The Report made a number of Recommendations⁵ further to tighten the regulation of those who work with children. The government decided to utilise these recommendations to craft a new system which covers both those who work with children and those who work with vulnerable adults.⁶

The SVGA, however, is focused on the regulation of the individual carer. It makes no substantive change to the regime for the regulation of care providers, in respect of whom the system currently found in the CSA continues to apply. Despite the significant changes that it introduced, the CSA also contains traces of earlier regimes, and in some respects seems increasingly outdated. An example is what is currently s. 20 of the CSA, enacting in virtually identical form s. 30 of the predecessor statute, the *Registered Homes*

1 Associate Professor, School of Law, University of Nottingham.

2 Hereafter 'CSA'.

3 Hereafter 'SVGA'.

4 Sir Michael Bichard (2005) *The Bichard Inquiry Report* HC 653 London: The Stationery Office.

5 These are summarised at pp. 13–17 of the Report.

6 The new regime, which transfers responsibility from government to the new Independent Barring Board (IBB), constituted as part of the new Independent Safeguarding Authority (ISA), and which attempts to create a much more joined-up system for vetting, information provision and updating, after being phased in, came fully into operation in October 2009.

Act 1984. This allows the Secretary of State for Health (in practice a health authority or, these days, a strategic health authority) to apply to a magistrate *ex parte* for an order cancelling the registration of a care home when such an order is needed urgently in order to protect residents in the home from a serious risk of harm. Effectively, s. 20 of the CSA provides for a legal ambush. It bears little sign of human rights-based thinking.

On 21 January 2009, the House of Lords gave opinions in two cases, both concerning the policing of care provision in the independent sector. In the first case, *R(on the application of Wright) v Secretary of State for Health* [2009] UKHL 3, the issue was the fairness of aspects of the current system for listing individuals deemed to be unsuitable to work with vulnerable adults. In the second, *Trent Strategic Health Authority v Jain* [2009] UKHL 4, the legality of an *ex parte* application made by the Trent SHA to cancel the registration of the care home run by the respondents – followed by the immediate removal of the care home's elderly residents and consequent financial ruin for the respondents – fell to be decided. In essence, the issue was the same in each case: is a system which removes the right of a person to work in or to operate a care home, or to provide care services to a person in their own home, without giving that person any meaningful ability to defend or challenge the allegation against them, acceptable in the era of human rights?

Barring Carers: The Wright Case

Section 81(1) of the CSA requires the Secretary of State to keep a list of persons considered unsuitable to work with vulnerable adults. This is known as the POVA (Protection of Vulnerable Adults) list. Those who provide care services in the form of care home accommodation or domiciliary services are required by s. 82(1) of the CSA to inform the Secretary of State of any person employed by them who has been dismissed, or would have been dismissed had that person not resigned, retired or been made redundant, or who has been transferred to a non-care position, or who has been provisionally suspended or transferred pending a decision whether to dismiss, if the cause for dismissal, suspension or transfer is that the carer has harmed or placed at risk of harm a vulnerable adult.

The effect of being included on the POVA list is stark. It is a criminal offence to seek or accept any work as a carer once a listing has been confirmed by the Secretary of State.⁷ An employer must ascertain whether an individual is on the list before offering employment; if so, that person must not be employed. If an employer discovers that such a person is already in their employment 'he shall cease to employ him in a care position'.⁸

Inclusion on the POVA list has always been, in the first instance, on a provisional basis. This will be done 'if it appears [to the Secretary of State] from the information submitted...that it may be appropriate'.⁹ The practice of the Secretary of State is to make a judgment as to whether the information supplied is *prima facie* credible. Apparently, around 45% of those referred for listing are provisionally listed.¹⁰ The system has never moved quickly. In the *Wright* case, which involved four appellants all of whom had been provisionally listed, it took four to six months from referral to provisional listing, and a further nine months or so before a final decision whether to confirm the listing or remove the person in question from the list. The criteria applied by the Secretary of State when determining a referral are contained in section 82(7). He or she must conclude '(a) that the provider reasonably considered the worker to be guilty of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a

7 S. 89(5) CSA.

9 S. 82(4) CSA.

8 S. 89(2) CSA.

10 *Baroness Hale in Wright at para. 9.*

vulnerable adult; and (b) that the worker is unsuitable to work with vulnerable adults'. Before making that determination he or she must 'invite observations' from the worker and from the person making the referral, on both the incident(s) in question and the observations of each other.¹¹ There is a right of appeal to the Care Standards Tribunal against being confirmed on the list.¹² However, the only protection available to persons provisionally listed is that when a person has been so listed for nine months he or she may apply to the Tribunal for leave to have his or her listing determined by the Tribunal rather than by the Secretary of State.¹³

In *Wright* all four appellants were registered nurses. All had been involved in incidents as part of their employment in care homes leading to dismissal, resignation, or suspension. All had then been placed provisionally on the POVA list several months after being referred. Three were subsequently not confirmed on the list, the other appellant was confirmed but successfully appealed against her inclusion. Their complaint was that the system for provisional listing was in breach of Articles 6 and 8 of the Convention, by reason of failing to provide a right to make representations to the Secretary of State before being provisionally listed, and because of the low threshold criteria for provisional listing.

The only Opinion in the House of Lords was that of Baroness Hale, accompanied by the agreement of the rest of the House. The Baroness held, dealing first with Article 6, that the inhibition of employment opportunities in these circumstances clearly engaged a civil right within the meaning of that Article.¹⁴ Moreover, she accepted that provisional listing would often amount to a 'determination' within the meaning of Article 6, albeit that the starting point in the jurisprudence of the European Court is that 'Article 6 does not apply to proceedings related to interim orders or other provisional measures'.¹⁵ This was because the provisional listing system, in the extent and decisiveness of its impact on the employability of the person concerned, came within the exception to the general rule and so within the scope of Article 6.¹⁶ In her view, 'The problem, it seems to me, stems from the draconian effect of provisional listing, coupled with the inevitable delay before a full merits hearing can be obtained'.¹⁷

Turning to Article 8, she noted the breadth of that Article, and referred to Strasbourg caselaw which demonstrates that the concept of 'private life' includes employment prospects; at least, when those employment prospects have been inhibited by (unfair) state actions. This led her to hold that although it may be that an infringement of Article 8(1) is justifiable in particular fact situations by reference to one of the factors in Article 8(2), 'The point is that the procedures must be fair in the light of the importance of the interests at stake. I would agree that the low threshold for provisional listing adds to the risk of arbitrary and unjustified interferences and thus contributes to the overall unfairness of the scheme'.¹⁸ She concluded, for reasons principally to do with the breach of Article 6(1), that section 82(4)(b) CSA is incompatible with the Convention, and made a declaration to that effect.

The day before Baroness Hale delivered her Opinion in *Wright*, the Independent Safeguarding Authority (ISA), set up under the *Safeguarding Vulnerable Groups Act 2006*, assumed full responsibility¹⁹ for deciding whether an individual should be barred from 'regulated activity' involving either children or vulnerable

11 S.82(5) CSA.

12 S.86(1)(a) CSA.

13 S.86(2) CSA.

14 Para 19., citing *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1.

15 Para 20., citing *Dogmoch v Germany app No 26315/03*
18 Sept 2006 unreported.

16 Para 21., again citing *Le Compte*.

17 Para. 29.

18 Para. 37.

19 *In England and Wales. In Northern Ireland, the ISA took over full responsibility for decision-making on 13 March 2009.*

adults. This is not the place for a lengthy discussion of the 2006 Act, and in *Wright* Baroness Hale noted only that she could not comment on the human rights compatibility of the new scheme, knowing only at that time of its intended existence, but not its detail.²⁰ In fact, the new regime is different in a number of ways from that under consideration in *Wright*. The most pertinent distinction for present purposes being that provisional listing does not feature in it, and provisional listing ceased being used when the ISA became responsible for deciding on new referrals for blacklisting. However, the decision in *Wright* does have some bearing on the new regime.

The 2006 Act prohibits a barred person from engaging in any 'regulated activity',²¹ which essentially means any work with vulnerable adults. Employers who engage barred persons, or who fail to engage only those who have been approved – the terminology used in the Act is 'subject to monitoring' to emphasise the ongoing nature of the new vetting procedures – are guilty of a criminal offence,²² as is a barred person who seeks to engage in regulated activity.²³ Employers are under duties to check that they only employ suitable persons²⁴ and to refer any person for listing if he or she has any reason to think that the employee is unsuitable or has engaged in 'relevant conduct',²⁵ which is conduct that has harmed or risked harm, directly or indirectly to a vulnerable person.²⁶

All of this is very similar to the existing regime. One significant difference, however, is that there are now four routes onto the new adults barred list.²⁷ Two of the four routes are fully compliant with the decision in *Wright*. A person may be included on the list if it appears that he or she has engaged in relevant conduct,²⁸ but must be given the opportunity to make representations to the IBB before it makes that decision.²⁹ A person may also be included on the list on the basis of concerns that he or may harm, or cause, incite, attempt or risk harm to a vulnerable person,³⁰ but again, there is a right to make representations before being included on the barred list.³¹ The other two categories are more problematic. A person must be automatically included on the list, but with a right to make representations to the IBB as to why he or she should be removed from it,³² if he or she has been made subject to a sexual harm order under s.123 of the *Sexual Offences Act 2003*³³ or has been convicted of or cautioned for a specified offence.³⁴ A person must also be included on the list, with no opportunity to make representations to the IBB as to why his or her inclusion might be unwarranted,³⁵ if convicted or cautioned in respect of a serious sexual offence.³⁶

On one reading of *Wright*, the third of these categories can only be human rights compliant if the right to challenge one's inclusion on the barred list is speedily achievable. If the new system, in relation to this

20 Para 39.

21 Defined, in respect of vulnerable adults, in s.5(2) and Part 2 of Schedule 4 SVGA.

22 See ss. 8,9,10 SVGA.

23 S. 7 SVGA.

24 Section 11 SVGA. Section 12 applies a similar provision to employment agencies.

25 See para. 10, Sched. 3, SVGA.

26 See ss. 35–37 SVGA.

27 There is a parallel system in the SVGA for the new children's barred list.

28 Para. 9(1), Sched. 3, SVGA.

29 Para. 9(2) Sched. 3, SVGA.

30 Para. 11, Sched. 3, SVGA.

31 Para. 11(2), Sched. 3, SVGA.

32 Para. 8, Schedule 7 SVGA and para. 6, *Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 SI 37/2009* ('the 2009 Regs'). The IBB should remove that person from the list if their inclusion is 'not appropriate': para. 8(4), Sched. 3, SVGA.

33 S. 2 of the *Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005* if in Scotland.

34 A large number of offences are listed in para. 4 of the Schedule to the 2009 Regs.

35 Para. 7, Schedule 3 2006 Act and para. 5 of the 2009 Regs.

36 These are listed in para. 3 of the Schedule to the 2009 Regs.

category of barred person, were to operate in practice as a continuation of the system of provisional listing, it would seem to fall foul of the decision in that case. Representations against inclusion on, or for removal from, the barred list must be made within eight weeks.³⁷ If this is to be achievable there needs to be much more urgency (and greater funding) for the new system than was the case for the old under which, as seen above, a decision to confirm a person on the POVA list typically took around a year from initial referral.

The fourth category, which allows of no representation before listing and no appeal thereafter, on this reading, is simply incompatible with *Wright*, and therefore with Articles 6 (and possibly 8) of the Convention. This is not the view of the Government, however. It was justified in the Overarching Memorandum produced by the Department of Children, Families and Schools (DCFS) in consultation with the Home Office and Department of Health in February 2008³⁸ on the basis that those to fall into this category have committed offences which ‘indicate, of themselves, that any offender would pose such a high risk to vulnerable groups that they simply could not make a case as to why they should be allowed to engage in regulated activity’.³⁹ The same Memorandum annexes an extract from a DCFS Memorandum to the House of Lords Merits Committee of 19th March 2008, which states that it is the Government’s view that Article 6 does not apply to persons barred automatically on the basis of their criminal record because the act of barring does not constitute the ‘determination’ of a civil right. The relevant Minister, Parmjit Dhanda MP, explained to the Chair of the Joint Committee on Human Rights that ‘As the bar is an automatic one, arising by operation of law, there can be no dispute of law and so I am advised that article 6 has no relevance’.⁴⁰ This *might* be enough to answer any challenge grounded in Article 6, although the failure to provide any right to appeal or review of having being listed is in my view not clearly immune to challenge using this Article. In human rights terms, certainly as they operate in Strasbourg, whether the inhibition of employment opportunities occurs by operation of domestic statute law or domestic judicial or quasi-judicial decision is not particularly relevant. One cannot usually avoid human rights obligations simply by replacing the exercise of judgement with an automatic procedure.

The DCFS Memorandum is, moreover, silent on the relevance of Article 8, which as seen above was an important component of the decision in *Wright*. It is true that the decision in *Wright* rested partly on the low threshold for provisional inclusion on the POVA list whereas the new regime has much more tightly defined criteria and applies only to a limited class of persons, all of whom have been convicted of or admitted guilt in relation to serious sexual offences. Nonetheless it is at least arguable that automatic inclusion, on the basis of *Wright*, *prima facie* infringes Article 8(1), and so its deployment needs to be justified using one of the reasons in Article 8(2) and must be demonstrably proportionate. This does not mean that the new system is *per se* unlawful but it does seem to indicate that there should be a hearing, or at least the possibility of a hearing, at which the case for inclusion is made out on the facts. In pragmatic terms, no system is failsafe; and we should be slow to countenance a system that has the possibility of injustice built into it. The *Jain* case bears witness to that.

Closing down nursing homes: The *Jain* Case

The *Jain* case centred on actions taken by Nottingham Health Authority in late 1998, in seeking and obtaining an *ex parte* order from a single magistrate under s. 30 of the *Registered Homes Act 1984*⁴¹ to

37 Para. 2(5) *Safeguarding Vulnerable Groups Act 2006* (Barring Procedure) Regulations 2008 SI 474/2008.

38 This is appended to various other Memoranda including that which accompanies the 2009 Regs.

39 At para. 4.4.3.

40 Cited in the DCFS, HO and DH Memorandum, Annex B.

41 The 1984 Act was repealed and replaced by the CSA. The corresponding section in the CSA is s.20.

cancel the licence of, and so close down,⁴² a nursing home in the city run by J. An order under s.30 could only be made if 'it appears to the justice of the peace that there will be a serious risk to the life, health or well being of patients in the home unless the order is made'.⁴³ The home was closed within 24 hours of the order being made, and its 33 residents – with an average age above 80 and all suffering from mental health problems – removed from the premises.

Section 34 of the 1984 Act provided for an appeal to the Registered Homes Tribunal⁴⁴ against the making of an order under s. 30, and J appealed, successfully. The Tribunal was 'scathing in its criticism of the authority', which was found to have given improper consideration to 'irrelevant and prejudicial information', had made 'insinuations... notwithstanding the absence of evidence sufficient to justify any charges of abuse' and had also made 'untrue suggestions' relating to J.⁴⁵ In particular, the Tribunal found 'no justification whatever'⁴⁶ for the decision to apply for the order *ex parte* and without notice to J.

Success before the Tribunal, however, meant little to J. The summary closure of the nursing home had ruined J's business and caused J serious financial harm. Winning the appeal did not remedy that. J sued the Health Authority for negligence. The greater proportion of Lord Scott's speech, with which all other members of the House agreed, was taken up with this question. His conclusion was that no duty of care is owed by a health authority to the proprietor of a care home. This is not surprising. There is a significant body of authority on the same or very similar questions, discussed in detail by Lord Scott, which takes the view that it would be inappropriate to impose a common law duty on a local government body in such a situation. Lord Scott explained the reason for this as follows:

*'Where action is taken by a State authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the State authority to others whose interests may be adversely affected by the exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially averse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose'*⁴⁷

There is a second body of caselaw, also discussed by Lord Scott (in particular the decision of the Court of Appeal in *Martine v South East Kent Health Authority* (1993) 20 BMLR 51, which had a fact situation indistinguishable on all material points from *Jain*, and which was expressly approved by Lord Scott⁴⁸), which consistently holds that no duty of care is owed by one party in litigation or in the preparation of litigation to the other(s).

So J's appeal was rejected by the House of Lords, and the paucity of the common law remedies available by which to respond to such a clear injustice as J had suffered is underscored by that rejection. However, although of little consolation to J, the case also demonstrates the difference that the domestication of human rights may have made to those in J's position. As the events in question had taken place in 1998, the *Human Rights Act 1998* was not available to J, but Lord Scott did, albeit 'with some trepidation' consider at some length what the position would have been had the 1998 Act been in force. His Lordship, considering that a nursing home was within the concept of 'possessions' for the purposes of Article 1 of

42 S. 23 of the 1984 Act made it an offence to run a care home without a licence. See now s. 11 CSA.

43 The test, in s.20(1)(b) CSA, is very similar to, but broader than, that in s.30 of the 1984 Act. The only difference is that the CSA applies to 'persons' rather than merely to 'patients in the home'.

44 Section 21 CSA now provides for an appeal to the First-

Tier Tribunal in the unified Tribunal system introduced by the *Tribunals, Courts and Enforcement Act 2007*.

45 Lord Scott at para. 7.

46 At para. 8.

47 Para. 28.

48 At para. 35.

the First Protocol to the Convention, was clear too that, when the deprivation of a citizen's possessions is done pursuant to a court order made on an *ex parte* basis, Article 6 is also brought into play. He noted that, although an infringement of Article 1 of the First Protocol is permissible in the general interest, nonetheless

*'...an application to a court or a tribunal without prior notice to a respondent whose economic interests will be prejudiced, perhaps severely, by the order that is sought has an inherent potential for injustice and can be acceptable, and compatible with the Convention rights guaranteed under Article 6 and Article 1 of the First Protocol, only if hedged around with precautions and procedures designed to limit the injustice so far as practicable.'*⁴⁹

He then compared the lack of procedural safeguards accompanying the making and hearing of an application for an order from a magistrate under s.30 of the 1984 Act with those which ordinarily apply to an *ex parte* application before the High Court. He noted that the s. 30 route lacked (i) the ability for the judge to seek cross-undertakings in damages from the applicant for the order; (ii) the possibility for an order to be stayed or set aside on the immediate application of the respondent pending an inter parties hearing; (iii) any obligation on the applicant to make a full and frank disclosure of all facts known (or at least, the ability of the magistrate to impose and enforce any sanction for failure so to do).⁵⁰ In his view, it was 'very difficult' to see how the 1984 Act procedures could be said to be compatible with either Article 6 or Article 1 of the First Protocol.⁵¹

Baroness Hale was more guarded than Lord Scott. She declined to express any conclusion on the human rights questions as they were not before the House, and thus there was no call, in particular, for consideration of the impact of the duty imposed by s.3 of the *Human Rights Act 1998*, to interpret UK law compatibly with the Convention where possible.⁵² However, elsewhere in her judgment, her ladyship did seem to suggest that she had a good deal of sympathy with the approach taken by Lord Scott, and also hinted that the human rights of the residents of J's nursing home might also be the basis of a claim against the health authority. She said that

*'Controlling the use of premises as a home for vulnerable adults is fairly obviously in the general interest. But that does not mean that it is in the general interest to close down a home and ruin someone's business when, as the tribunal found, there was no good reason to do so; still less does it mean that it is in the general interest to descend upon a home with a number of ambulances and nurses, and remove 33 elderly mentally infirm residents to other hospitals and nursing homes without any notice or opportunity to prepare for such a distressing and potentially damaging disruption to their lives.'*⁵³

This comment seems to ground her ladyship's concern on the actions of the health authority rather than the substantive law, and her proposed solution pointed in the same direction. In her view, 'Authorities can and should refrain from making section 30 applications in cases which do not warrant them. Magistrates can and should refrain from making an *ex parte* order unless there is no alternative'.⁵⁴ Lord Carswell in similar vein advised magistrates faced with an application for an order under s. 30 'to devote care to probing the case made by health authorities', emphasising that: 'It is likely to be a very rare case where an order has to be made without giving the owners an opportunity to state their case'.⁵⁵ Lord Neuberger suggested that even if it may not be possible to comply with the formal requirements for providing notice,

49 Para. 14.

50 Para 16.

51 Para. 17.

52 Paras. 45, 46.

53 Para. 44.

54 Para. 47.

55 Para. 51.

it may still be possible to give informal notice, and consideration should even be given to doing so by telephone or email.⁵⁶ Whether such a course of action would satisfy the requirements of Article 6 remains to be seen: certainly, for Lord Scott, 'If procedural improvements on [the lines suggested by him] are not introduced, the 2000 Act section 20 procedure will continue to appear, as the 1984 section procedure appears to me now, to be incompatible with the Convention rights of those against whom these *ex parte* applications are made'.⁵⁷

To date, s. 20 of the 2000 Act⁵⁸ continues in force, although this decision clearly puts its future in doubt. It would seem clear (but bearing in mind that this issue was not argued before the House and that all comments in this case were hedged with caution) that a law unmodified in the ways he suggested would lead Lord Scott to issue a declaration of incompatibility under s. 4 of the *Human Rights Act 1998*, if and when a similar case came before him. Lord Neuberger expressed a similar view, albeit more briefly.⁵⁹ Baroness Hale, as seen above, was more cautious, and perhaps with good reason.⁶⁰ In her view, 'it may be possible to operate section 30 in a compatible way'.⁶¹ That is, if – as Baroness Hale suggests – it is possible for health authorities to only use the s. 20 procedure in cases where its use is warranted – in Convention language, its use is proportionate – and if it is possible for magistrates only to make an order *ex parte* when warranted/proportionate, there would be no infringement of Article 6 notwithstanding the lack of procedural safeguards, and no infringement of Article 1 of the First Protocol notwithstanding the arbitrary deprivation of the possessions of a care home proprietor in the circumstances which accompany an *ex parte* application.

But those are big 'if's. Some might feel that her ladyship's faith in the competency of health authorities to determine, accurately and routinely, the seriousness of the risk in a given case is overly optimistic. Moreover, the point that the s. 20 system might survive scrutiny in the context of a case where there is a clear justification for urgent action – where there is unambiguous evidence of significant ongoing abuse of residents by staff for example – does not provide sufficient justification for its continued use in the generality of cases. The basic and fundamental point is that the s. 20 system, operating absent the safeguards described by Lord Scott, does not look like the sort of system that Article 6 of the Convention is designed to ensure. Simply, it is not a 'fair' system, in the sense usually associated with that Article (nor, incidentally, in the sense usually associated with the rules of natural justice that have long applied in the U.K.).

On the other hand, if we accept Baroness Hale's claim that health authorities can correctly identify when the use of s. 20 is appropriate, and given the draconian nature of the powers in s. 20 and the purpose for that section, it follows that all s. 20 cases should by definition be 'extreme'. Perhaps then, thinking pragmatically, the lack of the safeguards discussed by Lord Scott is not such a problem. Indeed, the presence of such safeguards might well hinder the effective operation of the s. 20 procedure, as may any other limits placed on the availability of an *ex parte* order, resulting in care recipients being subjected to harm or the serious risk of harm for longer than would otherwise have been the case. As seen above, the current Government is sufficiently confident that a system which denies any right of appeal or challenge against a decision to list a carer is human rights-compliant that it legislated for its introduction in the

56 Para. 56.

57 Para. 39 He suggested that the powers necessary for the making of such procedural rules can be found in ss. 144 and 145 Magistrates' Courts Act 1980.

58 See footnote 41.

59 Para. 54.

60 Lord Rodger gave a short speech, and only in order to state that he preferred not to speculate on what the position would have been had the Human Rights Act been in force at the relevant time (para. 41). Lord Carswell did not discuss the human rights questions but did express agreement with Lord Scott (para. 49).

61 Para. 47.

SVGA. And as Baroness Hale reminds us, it is not only the human rights of care home proprietors that are at stake here.

The arguments, then, are perhaps more finally balanced than would at first glance appear. Ultimately, the position one adopts on such questions involve matters of intuition, faith or one's particular sense of justice, more than of law. My own view is that the risks of bringing the usual safeguards against inappropriate use of the *ex parte* procedure into the s. 20 system do not outweigh the injustice that their absence causes. It is worth noting that all members of the House of Lords in *Jain* who gave opinions expressed sympathy for J and regretted that the law of negligence could not be used to provide a remedy for J.⁶² Are we to accept that the *Human Rights Act 1998* has not changed anything? Baroness Hale said in *Wright*, in finding breaches of Articles 6 and 8, that

*'The care worker suffers possibly irreparable damage without being heard whatever the nature of the allegations against her. The care worker may have a good answer to the allegations no matter how serious they are. There may well be cases where the need to protect the vulnerable is so urgent that an "ex parte" procedure can be justified. But one would then expect there to be a swift method of hearing both sides of the story and doing so before irreparable damage was done'*⁶³

It is not clear to me why exactly the same considerations should not apply to the revocation of a licence without notice, which is no less draconian in its effects than provisional listing under the 2000 Act. It is to be hoped that if and when a post-*Human Rights Act 1998* fact situation comes before the courts this is the approach that will be taken. It would be better still if the Government would act to ensure that adequate safeguards against injustice are in place.

Concluding Comments

We live in times of heightened awareness that there are care homes in this country, and home care services, that are substandard and on occasion, perhaps often, outrageously so.⁶⁴ The need for adequate protection for such vulnerable members of society is obvious and pressing. The pressures on politicians to respond effectively to these very legitimate concerns must be very great, particularly when coupled with concerns about the safety of children raised by cases such as that involving Ian Huntley and the general clamour of intolerance towards paedophiles. The result is legislation which forcefully prioritises the protection of care recipients. In such times, the role of the courts, in protecting the human rights of those caught in the crossfire, attains a heightened importance. In *Wright*, the less politically tricky of the two cases under discussion here, the House of Lords proved equal to the task, although the lasting impact of *Wright* on the new regime introduced by the SVGA remains to be seen. The performance of the House in *Jain* was more ambiguous and, as of yet, the s.20 procedure, despite its fundamental unfairness and the slight yet vital changes that are required to bring it into human rights compatibility, remain unmodified. Those who look to the House of Lords to take a lead in developing human rights law in difficult contexts might justifiably feel that there remains room for further improvement in that regard.

62 See Lord Scott at para. 40, Baroness Hale at para. 48, Lord Carswell at para. 52 and Lord Neuberger at para. 57.

63 Para. 29.

64 The BBC programme *Panorama*, which aired an expose of care home standards in 'Please Look After Mum' on 12 February 2007, and of home care service providers in 'Britain's Home Care Scandal', aired on 9 April 2009, can take much of the credit for making the general public aware of this issue.