

# Conscientious objection to abortion

## *Ethics, polemic and law*

The pro-abortion lobby has announced the latest phase in its offensive. *Marie Stopes International* wants to force GP surgeries to display lists indicating which doctors in the practice will refer women for abortion, and the pressure group *Doctors for a Woman's Choice on Abortion* is encouraging patients to report to the GMC doctors who refuse to play any part in abortion.<sup>1</sup>

There is widespread confusion about the extent of the conscientious objection clause in the *Abortion Act 1967*. Section 4(1) reads:

*'Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorized by this Act to which he has a conscientious objection....'*

Subsection (2) relates to treatment *'necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant women.'*

What is covered by 'participate in any treatment'? The House of Lords in *R v Salford AHA ex parte Janaway* considered this point.<sup>2</sup> Mrs Janaway was a secretary at a health centre. She was a Roman Catholic and believed that abortion was wrong. She was asked by a doctor to type a letter relating to the referral of a patient to a consultant with a view to abortion. She refused, and further refused to type any other letters concerned with abortion. Apart from s4(1) this refusal would have been a breach of her contract of employment. She relied on s4(1), but the case was nonetheless dismissed. Did s4(1) apply to typing letters that were a part of the referral process? No, said the House of Lords. 'Participate', said Lord Keith, should have *'its ordinary and natural meaning'* and *'referred to actually taking part in treatment administered in a hospital or other approved place.... for the purpose of terminating a pregnancy.'*

This citation has been repeatedly quoted as authority for the proposition that anything that occurs outside the operating theatre falls outside the ambit of s4(1). But it not clear that this is the case. First, and obviously, *ex p Janaway* was not to do with a doctor. Is there really no distinction between a secretary typing a letter and a doctor referring? To assert that there is not downgrades the professional act of referral into a merely administrative business. Is not the initiation of the professional process that leads to the 'treatment' necessarily part of the 'treatment'? For all other purposes the doctor at the point of referral owes to the patient the duty of a doctor, not that of a secretary. This point was never argued in *ex p Janaway*.

Second, in *ex p Janaway* itself there was discussion of the *Abortion Regulations 1968*, which deal with the 'green form' (now blue!) to be signed by the two registered medical practitioners pursuant to s1 of the Act. While noting that, *'The Regulations do not appear to contemplate that the signing of the certificate would form part of the treatment for the termination of pregnancy...'*, Lord Keith went on to say: *'It does not appear whether or not there are any circumstances under which a doctor might be under any legal duty to sign a green form, so as to place in difficulties one who had a conscientious objection to doing so... So I do not think it appro-*

*priate to express any opinion on the matter.'* While of course the signing of a green form is much nearer the actual act of termination than the act of referral is, the general question of whether the medical steps preliminary to the act of termination are covered by s. 4 must be regarded as still open to argument.

Third, *ex p Janaway* was decided long before the European Convention on Human Rights was grafted into English law. Article 9 of the Convention provides that, *'Everyone has the right to freedom of thought, conscience and religion; this right includes... freedom ...to manifest his religion or belief in worship, teaching, practice and observance.'*

The Human Rights Act 1998 requires judges to interpret UK legislation, if it is at all possible to do so, in accordance with the Convention rights. If a UK law is incompatible with those rights, a 'declaration of incompatibility' can be granted – effectively an authoritative direction to the government to make the legislation concordant with the Convention. It can be argued strongly that Article 9 should require the conscientious objection clause to encompass a refusal to refer. The arguments are technical and outside the scope of this article.<sup>3</sup>

The BMA has given detailed guidance. It appears to assume that *ex p Janaway* applies to referral. It asserts: *'Doctors with a conscientious objection to abortion should make their views known to the patient and enable the patient to see another doctor without delay if that is the patient's wish.'*<sup>4</sup>

The GMC, in the current edition of *Good Medical Practice* states: *'If you feel that your beliefs might affect the advice or treatment you provide, you must explain this to patients and tell them of their right to see another doctor.'*<sup>5</sup> The new draft of *Good Medical Practice*, currently out for consultation, goes further. It says: *'If carrying out a particular procedure, or giving advice about it, conflicts with your beliefs, you must explain this to patients and tell them of their right to see another doctor. Where it is not practicable for a patient to make such arrangements themselves, you must ensure that arrangements are made for another suitably qualified colleague to take over your role so that the patient's care does not suffer.'*<sup>6</sup>

The new draft would impose a much more onerous duty on a conscientiously objecting doctor. It could itself be attacked under Article 9. There are some interesting times ahead.

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### references

1. See: Abortion lobby in campaign to expose pro-life doctors. *Sunday Times*, 17 July 2005: [www.timesonline.co.uk/article/0,2087-1697523,00.html](http://www.timesonline.co.uk/article/0,2087-1697523,00.html)
2. [1988] 3 All ER 1079
3. For detailed discussion see Hammer L: *Abortion objection in the UK within the framework of the European Convention on Human Rights and Fundamental Freedoms*, EHRLR [1999] Issue 6; 564
4. *The law and ethics of abortion*. British Medical Association, March 1997, revised December 1999.
5. *Good Medical Practice*. General Medical Council, 3rd Edition, May 2001, Clause 6
6. *Good Medical Practice*. Consultation Draft: General Medical Council, August 2005, Clause 6