

Jehovah's Witnesses and Blood Transfusions: An Analysis of the Legal Protections Afforded to Adults and Children in European/English Human Rights Contexts

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Abstract

This article considers the degree to which the religious beliefs of Jehovah's Witnesses are given consideration in European and English courts. Adults' refusal of blood transfusions, based upon religious belief, is examined within the context of European human rights jurisprudence. A focus is also placed on the position of Jehovah's Witness children who refuse blood transfusions in the specific context of English medical law due to the prevalence of related case law in this jurisdiction. It is argued that the European Court of Human Rights has given appropriate protection to the will-rights of competent adult Jehovah's Witnesses who refuse blood transfusions. The position of children is somewhat different, and it is suggested that the courts should give greater consideration to the rights of competent children to manifest their religious beliefs.

Keywords

Jehovah's Witnesses; blood transfusions; refusal of treatment; adults; children; human rights

1 Introduction

This article examines the issue of Jehovah's Witnesses and blood transfusions in European human rights law and adopts a specific focus on English law, in the context of children. This issue is not a dry academic one: it concerns a religious belief which, translated into practice, can result in arguably the needless death of a patient. The scenario of a patient refusing a life-giving blood transfusion has provided doctors and medical personnel with many difficult decisions to make. In some cases, legal intervention is made to support the decision making process and resultant action. This article will now consider that legal action. It begins by describing the approach taken by Jehovah's Witnesses and by outlining the biblical justification for the position adopted by them regarding blood transfusions.

A number of terms are used throughout the text that merit definition and brief explanation, as follows:

Autonomy: it is taken to mean the condition whereby a person is free from external control or influence to make a decision. Or, according to Harris '[a]utonomy is the running of one's own life according one's own lights ...To be autonomous, self-determined, just to be able to do as one wishes'¹

¹ John Harris, *The Value of Life: An Introduction to Medical Ethics* (Routledge, London, 1985) p. 199.

Capacity: when a person possesses decision-making authority that is legally recognised, that person has *capacity*. When a person lacks this legally recognised decision-making authority, then this person is said to have *incapacity*.

Competence: a patient is competent when they have sufficient cognitive faculties to be able to make a decision in relation to a particular situation or context. This definition sees competence as something that is defined within the sphere of cognitive functioning. An *incompetent* person is someone who lacks the cognitive faculties to enable them to make a decision for a particular situation or context. Pattinson explains that:

Conceptually, competence requires that the patient have the dispositional ability to understand and be cognitively able to exercise that ability in the context in question. Since competence is task specific, patients who have the dispositional abilities to make a decision will lack competence if they cannot exercise those abilities in relation to a specific task or decision. A patient who is completely overcome with emotion every time he thinks about his cancer might, e.g. have the dispositional abilities to make a competent decision but will be incompetent with regard to decisions concerning his cancer treatment.²

Gillick competence: This approach is adopted in English law in the determination of the capacity of children under 16. In *Gillick v. West Norfolk and Wisbech AHA*,³ Lord Scarman said that a child under the age of sixteen would be capable of legally consenting if the child has ‘sufficient understanding and intelligence to enable him or her to understand fully what is proposed.’⁴

Will-rights: An agent’s own rights are will-rights, the generic rights of agents. This means that agents have no duty to safeguard or not harm their own generic interests if this is not their wish. This holds unless allowing agents to harm or not protect themselves puts equally important generic rights or interests of others in danger.⁵ Therefore, you can kill yourself, but you can’t fly a plane that kills everybody. We have no duty to protect ourselves. We only have a duty to do so if, by not doing it, somebody else is harmed. Will-rights give a competent person the capacity to waive the protection that his rights give him. According to the will-conception, an agent can theoretically waive the protection of any right following an act which might breach his right.

The article concludes that the religious beliefs of competent adult Jehovah’s Witnesses are afforded appropriate recognition in both European and English jurisprudence. However, the right of children to manifest their religious belief in this particular context is given insufficient recognition by the courts.

2 Jehovah’s Witnesses and Blood Transfusions: Shifting Sands

Jehovah’s Witnesses are a millenarian restorationist Christian denomination whose beliefs are based upon strict interpretation of the Bible, belief in Armageddon and destruction of the

² Shaun D. Pattinson, *Medical Law and Ethics*, 4th ed. (Sweet & Maxwell, London, 2014) p 141.

³ *Gillick v. West Norfolk and Wisbech AHA* [1986] AC 112.

⁴ *Ibid.*, p. 189

⁵ Deryck Beyleveld, ‘The Principle of Generic Consistency as the Supreme Principle of Human Rights’, 13(1) *Human Rights Review* (2011) 1-18.

present world. They are directed by the Governing Body of Jehovah's Witnesses. Believers refer to their body of belief as 'the truth'. Sociological analysis of Jehovah's Witnesses conducted by Beckford indicated that this religious denomination has a low rate of doctrinal change and cultivates strict uniformity of belief.⁶ Jehovah's Witnesses have developed over time a number of publically held beliefs that have come into the public arena through the courts of law by virtue of their contentious nature. One such belief is their refusal of blood transfusions and it is this area that is the subject of this article.

It is the belief of Jehovah's Witnesses that the references made to the prohibition of 'eating blood' in the Bible means that blood transfusions must not be allowed. This has caused many Witnesses to carry a signed card saying that do not consent to blood transfusions.⁷ What do Jehovah's Witnesses believe that scripture delineates in this regard? Genesis 9:4 is important to them and the verse 'But flesh with the life thereof, which is the blood thereof, shall ye not eat' provides an argument that is made by the Witnesses that blood transfusions are the same as eating blood because of the similarity of this process to intravenous feeding. This argument is not accepted by most non-Witnesses. Leviticus is also used by the Watchtower Society in order to support their argument on blood transfusions. It is stated in Leviticus 7:26-27 that: 'And wherever you live, you must not eat the blood of any bird or animal. Anyone who eats blood must be cut off from their people'.

The position of Jehovah's Witnesses towards blood transfusion has, however, shifted from the intransigent stance of the 1960s to a more accommodating one at present. There has been movement from the position adopted by Guider in the *Watchtower* in 1961 who suggested that the receiver of a blood transfusion 'must be cut off from God's people by excommunication or dis-fellowship'⁸ towards a more softened approach: this modified approach adopted by Jehovah's Witnesses is to be seen in the 15 June 2000 issue of *The Watchtower* where it was claimed that 'fractions of all primary components' are now permitted.⁹ Jehovah's Witnesses cannot accept 'primary' components of blood. The article also says that '...when it comes to fractions of any of the primary components, each Christian, after careful and prayerful meditation, must conscientiously decide for himself'.¹⁰

However, as of April 2000, members will no longer be dis-fellowshipped for accepting blood components that are considered prohibited. Muramoto implicitly suggests, however, that there is an inherent pressure on Witnesses to conform to organisational policy.¹¹ It is contended here that this pressure can impact upon the validity of their autonomous decisions. Lee Elder also points to the fact that Jehovah's Witnesses do not encourage freedom of conscience and he considers that many Witnesses do not actually support the blood policy. Muramoto argues that most Jehovah's Witnesses are not adequately informed about blood products and, on a somewhat similar note, Lee Elder, argues as a Jehovah Witness, that no biblical basis exists for the Watchtower Society's ban of blood transfusions. He believes that this dissenting view should be made available to all Jehovah's Witnesses who reject blood on religious grounds.¹² He suggests that such patients should be guaranteed confidentiality if they accept 'whole blood or components that are banned by the

⁶ James A Meckford, *The Trumpet of Prophecy: A Sociological Study of Jehovah's Witnesses* (Blackwell, Oxford, 1975), pp. 92, 98-100.

⁷ *Ibid.*, p. 378.

⁸ *The Watchtower* (Watch Tower Bible and Tract Society of Pennsylvania, Brooklyn, NY, 15 January 1961), p. 64.

⁹ *Ibid.*

¹⁰ Watch Tower Bible and Tract Society, 'Questions from readers' (15 June 2000) pp. 29-30.

¹¹ Osamu Muramoto, 'Bioethics of the refusal of blood by Jehovah's Witnesses: Part 1. Should bioethical deliberations consider dissidents' views', *J Med Ethics* 24 (1998) 223-230.

¹² Lee Elder, 'Why some Jehovah's Witnesses accept blood and conscientiously reject official Watchtower Society blood policy', *J Med Ethics* 26 (2000) 375-380.

WTS [Watchtower Society]’.¹³ Notwithstanding this latter perspective that allows for a lack of definitive prescription, for many Jehovah’s Witnesses the refusal to accept blood transfusions is an important tenet of their faith and has consequential implications for their healthcare needs.

3 The European Human Rights Dimension to the Manifestation of Religious Belief and the Protections Given by European Human Rights Instruments to Jehovah’s Witnesses’ Refusal of Blood Transfusions

Human rights reasons exist for the protection of religious belief in medical law contexts. However, it is also argued here that that this protection is not limitless. Arguably the most important protection that is given in Europe is the European Convention on Human Rights (ECHR). Harris, O’Boyle and Warbrick say that ‘[c]ompared to most other international human rights treaties, the Convention has very strong enforcement mechanisms. It provides for both state and individual applications’.¹⁴ A margin of appreciation exists: this means that a state is allowed a certain measure of discretion.¹⁵

When National courts rely on the Convention, they are not bound to rely to the interpretation of the Strasbourg court. However, in practice, even though a number of exceptions exist, the National courts usually follow the ECtHR’s interpretation.

The most obvious protection offered to religious expression, both in a medical and non-medical sphere, is Article 9 of the Convention. Article 9 gives everyone the right to freedom of thought, conscience and religion. Article 9(2) places a limitation on the right to manifest one’s religious belief on the grounds of public safety, public order, health, morals and ‘for the protection of the rights and freedoms of others’. Member States, however, can derogate from Article 9 obligations under Article 15 in times of ‘war or other public emergency threatening the life of the nation’.

In recent years the court has developed its own guidelines due to the unprecedented number of Article 9 complaints. It is apparent under the *Travaux préparatoires* that religion is a fundamental right which demands inclusion.¹⁶ The drafters themselves recognised the importance of religious belief.¹⁷ The Article protects believers and non-believers. In *Kokkinakis v. Greece*,¹⁸ the court recognises that these values were the foundation of a democratic society.

There are two elements of Article 9: the ‘internal’ element (*forum internum*) which guarantees freedom of thought, conscience and religion and the external dimension (*forum externum*).¹⁹ The external dimension recognises that every person has the right to manifest ‘religion or belief’ in ‘worship, teaching, practice and observance’. The Court, in *Buscarini v. San Marino*, said that ‘the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention’.²⁰ What does Article 9 ECHR mean for European citizens? Essentially, it allows citizens the opportunity to have their religious beliefs protected. It allows people to

¹³ *Ibid.*

¹⁴ David Harris, Michael O’Boyle, Edward Bates, and Carla Buckley Harris, *Harris, O’Boyle & Warbrick Law of the European Convention on Human Rights*, 2nd ed. (OUP, Oxford, 2009) p. 4.

¹⁵ *Ibid.*, p 11.

¹⁶ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford, 2001) p. 39.

¹⁷ *Ibid.*, pp. 39-40

¹⁸ *Buscarini v. San Marino* A 260-A (1993); 17 EHRR 397.

¹⁹ See Harris et al., *supra* note 14, p. 428.

²⁰ *Buscarini v. San Marino* 1999-I; 30 EHRR 208, para. 34 GC.

change their beliefs and to worship, teach or observe these religious beliefs either individually or in a group.²¹ This is not Article 9's only function. It also safeguards the freedom of conscience of people. No definition is given to 'religion' in the Convention. The State has no role in assessing whether or not the religious beliefs and opinions of people are legitimate or the manner in which they are manifested.²² Article 9 ECHR includes a positive obligation on the State to ensure that everyone can enjoy their rights under the article by protecting them by law and by implementing sanctions if the rights are breached by the State or other institutions.²³ The State also has a negative obligation not to impede on people's rights to have either religious or non-religious beliefs.

Article 9 is not the only Article to give protection to the manifestation of a religious belief. Article 10, the freedom of expression, also offers protection. This allows people the freedom to have opinions and either receive or impart information without being interfered with by public authority. Article 8 ECHR also provides support to the manifestation of a religious belief. It gives the right for one's private and family life to be respected. Religious belief is very much connected to private and family life.

Article 2 is of particular significance in relation to the issues of beginning of life, end of life and the position adopted by Jehovah's Witnesses towards blood transfusions. The right to life is the most basic human right of all.²⁴ According to the ECtHR, it 'enshrines one of the basic values of the democratic societies making up the Council of Europe'.²⁵ 'The obligation to protect the right to life by law': this is in the first sentence of Art 2(1). In *LCB v. UK*²⁶ it was held that a positive obligation existed for states to take 'appropriate steps to safeguard the lives of those within their jurisdiction'. There is an obligation under Art 2(1) for the State to take 'appropriate steps' to protect life. This also requires the State, in some circumstances, to take preventative measures.

Parents have many responsibilities in the rearing of their children. These responsibilities include for some the need to 'hand on the faith' to future generations, to hand on the religious belief and practice that they value. Is this a limitless responsibility and do parents have an automatic right to do anything in order to protect their religious values? Their rights are to some degree protected under Article 8 ECHR.

Thus, there are specific protections in the Convention for the right to manifest religious belief. To what degree is the right to refuse blood transfusions on the basis of a specific religious belief (Jehovah's Witnesses) vindicated in practice?

4 Jurisprudence of the European Court of Human Rights

What is the position of the rights of competent adults to refuse blood transfusions within the broad European human rights context? A number of cases are relevant here.

4.1 Case of Jehovah's Witnesses of Moscow and Others v. Russia

²¹ Equality and Human Rights Commission, 'Article 9: Freedom of thought, conscience and religion', (2012) *Human Rights Review* 313-329, 314. Available at: http://www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_9.pdf (accessed 04 February 2014).

²² For example, see *Hasan and Chaush v. Bulgaria* [2002] 34 EHRR 55, para. 78.

²³ Equality and Human Rights Commission, *supra* note 21.

²⁴ See Harris et al., *supra* note 14, p. 37.

²⁵ *McCann v. UK* A 324 (1995); 21 EHRR 97, para. 147 GC.

²⁶ *LBC v. UK* 1998-III; 27 EHRR 212, para. 36.

The first case at the European Court of Human Rights (ECtHR), *Case of Jehovah's Witnesses of Moscow and Others v. Russia*,²⁷ involved the practices of Jehovah's Witnesses being banned by Russia for a number of reasons, following the implementation of the Russian Religious Act. Amongst the reasons given by the Russian government were the following: minors were being coerced into giving allegiance to this organization, family life was being destroyed and, of relevance here, the practice of refusal of blood transfusions was considered to have a negative upon life and health. It was held by the (Russian) Golovinskiy District Court that the applicant community caused 'mind control' and that this breached the right to choose one's religion. Jehovah's Witnesses were found to be different to other religious organisations because of 'their striving to integrate families into the life of a totalitarian non-secular collective' and "military-like discipline in domestic life".²⁸ The District Court contended that Jehovah's Witnesses caused a 'mindless submission' of their members, due to the 'salient theocratic hierarchy' of the religious community'.²⁹

This case can be linked to the English case of *Re T*.³⁰ *Re T* involved a pregnant woman who was not a Jehovah's Witness member, but was raised by her mother to follow many of the tenets of the faith. In 1989 she moved in with her boyfriend and had a close relationship with her father, who was not a Jehovah's Witness. Following a road traffic accident, she was admitted to hospital. The patient had previously told the nurse that she was not a Jehovah's Witness, but following a discussion with her mother; she later refused a transfusion that became necessary following a Caesarean section.

Her father and boyfriend applied for a declaration that it would not be unlawful to administer the transfusion without her consent. It was concluded by the judge that, as a result of the medication, she was not fully rational when she signed the form. A blood transfusion was consequently carried out. In this case it was concluded that the mother, a practising Jehovah's Witness put undue pressure on her daughter to refuse the blood transfusion. The decision to accept the patient's wishes to refuse the treatment was set aside due to the fact that she wasn't given the proper information, was incapacitated temporarily and was unduly influenced. Butler-Sloss LJ described in some detail the intrusive and pervading nature of such influence by saying that 'in equity it has long been recognised that an influence may be subtle, insidious, pervasive and where religious beliefs are involved especially powerful'.³¹

In *Case of Jehovah's Witnesses of Moscow and Others v. Russia*, the European Court made reference to Lord Donaldson's statement in *Re T* above that 'every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death' and that '[i]t matters not that those others sought, however strongly, to persuade the patient to refuse, so long as in the end the refusal represented the patient's independent decision. If, however, his will was overborne, the refusal will not have represented a true decision'.³² In the context of refusal of blood transfusions, the Russian Government claimed that this refusal, on the basis of religious belief, 'had led to grave consequences, such as the deterioration of health and the impossibility for doctors to render medical assistance'.³³

The ECtHR held that no evidence existed as to the fact that the religious organization 'had made any demands on its members as a condition for continuing their family relationship or, vice versa, that it had imposed any kind of condition or made any demands on non-Witness

²⁷ *Case of Jehovah's Witnesses of Moscow and Others v. Russia* (Application no 302/02).

²⁸ *Ibid.* See para. 59 where the ECtHR referred to the judgment of the Golovinskiy District Court.

²⁹ *Ibid.* (ECtHR), para. 96.

³⁰ *Re T* [1993] Fam. 95.

³¹ *Ibid.*, p. 120.

³² *Ibid.*

³³ *Case of Jehovah's Witnesses of Moscow and Others v. Russia*, *supra* note 27, para. 95.

members of the families of its followers under threat of breaking up their family relationship'.³⁴ They were not satisfied with the domestic court's findings and held that 'the Court finds that the charge that Jehovah's Witnesses forced family break-ups was not borne out and that the findings of the domestic courts were not grounded on an acceptable assessment of relevant facts'.³⁵ In direct contravention to the findings of the domestic court, the ECtHR found that 'community members testified in the proceedings that they followed the doctrines and practices of Jehovah's Witnesses of their own free will and personally determined for themselves their place of employment, the balance between work and free time, and the amount of time devoted to preaching or other religious activities'.³⁶ This finding of the European Court supports competent adults in the exercise of their will-rights.

What was the finding of the ECtHR in relation to the issue of blood transfusions? The ECtHR once again disagreed with the Russian District court and held that the refusal of a blood transfusion was not equal to suicide. The European Court stated that:

...for the situation of a patient seeking a hastening of death through discontinuation of treatment is different from that of patients who – like Jehovah's Witnesses – just make a choice of medical procedures but still wish to get well and do not exclude treatment altogether. As the charge of encouragement to suicide did not have any basis in fact, the Court's task will be confined to reviewing the second allegation, namely, that, at the instigation of the community, its members declined medical assistance by refusing the transfusion of blood or its components.

The ECtHR held that the Russian government failed to undertake a balancing exercise which would have given them the opportunity to consider the weight that should be given to the issues of public health and personal autonomy/manifestation of religious belief.³⁷ The Court stressed that the essence of the ECHR is respect for dignity and human freedom and that self-determination and autonomy are important aspects underlying the guarantees of the Convention.³⁸ As such, '[t]he ability to conduct one's life in a manner of one's own choosing includes the opportunity to pursue activities perceived to be of a physically harmful or dangerous nature for the individual concerned'.³⁹ They said that, even if the refusal of a blood transfusion or medical treatment resulted in death, the imposition of medical treatment without the consent of a patient who is competent would breach the patient's right to physical integrity and Article 8 ECHR.⁴⁰ In assessing whether or not the balance had been wrongly taken, the Court held that a competent adult patient is free to decide whether he or she wishes to have treatment or to have a blood transfusion.⁴¹ In order for this to be a meaningful freedom, he or she must be able to make decisions that reflect upon his or her values, irrespective of how foolish these choices seem to others.

Overall, the ECtHR held that the Russian Courts failed to show 'relevant and sufficient reasons' or appropriate evidence to justify such a restriction on the personal autonomy, physical integrity and religious beliefs of the applicants.⁴² As such, it was declared, in this case, that Articles 9 and 11 (the right to freedom of assembly and association) of the European Convention were breached and, particularly, in the particular

³⁴ *Ibid.*, para. 110.

³⁵ *Ibid.*, para. 114.

³⁶ *Ibid.*, para. 119.

³⁷ *Ibid.*, para. 134.

³⁸ *Ibid.*, para. 135.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para. 136.

⁴² *Ibid.*, para. 142.

context of this article, that the refusal of blood transfusions could not be used in order to justify the banning of the manifestation of the Jehovah's Witnesses' religious belief in Russia, or, indeed, in Europe.

4.2 Avilkina and Others v. Russia

The findings of this 2010 European case were implicitly ratified and vindicated in a further Russian 2013 case, *Avilkina and Others v. Russia*.⁴³ In this case, the applicants argued that Articles 8 Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the European Convention were breached due to the disclosure of their medical files and consequent confidential information to the Russian prosecution authorities as a consequence of their refusal of blood transfusions when attending public hospitals. The reason for the disclosure without the consent of the patients was based upon the applicants' known previous refusal of blood transfusions.

The Jehovah's Witness applicants submitted that the information sought by the Russian prosecutor's office was confidential and fell within Article 8's remit. They argued that the refusal of blood transfusions, due to their religious belief, was not of particular relevance and that, by making the decision to adhere to the beliefs of a particular religion, they did not surrender the right to respect for family or private life, as protected by the European Convention on Human Rights. However, the Russian Government claimed that there was no interference with their private lives. It was the opinion of the Russian Government that the applicants forfeited the right to confidentiality by refusing blood transfusions because the disclosure of the particular files did not involve negative consequences for the applicants.

The ECtHR was of no doubt that the State hospital's disclosure was an interference with the applicants' private life.⁴⁴ The Court said that the protection of personal data was fundamentally important and guaranteed under Article 8.⁴⁵ The ECtHR stated that:

Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. The disclosure of such data may seriously affect a person's private and family life, as well as their social and employment situation, by exposing them to opprobrium and the risk of ostracism (see *Z v. Finland*, 25 February 1997, §§ 95-96, *Reports* 1997-I).⁴⁶

The Court concluded that '[t]he above considerations are sufficient for the Court to conclude that the collection by the prosecutor's office of confidential medical information concerning the applicants was not accompanied by sufficient safeguards to prevent disclosure inconsistent with the respect for the applicants' private life guaranteed under Article 8 of the Convention'.⁴⁷ The authorities did not make a sufficient effort to strike a balance between the right to respect for their private life of the applicants and the aim of the prosecutor's to protect public health. The Russian authorities also did not give any pertinent or acceptable reasons to validate the confidential information being disclosed. As such, it was held by the ECtHR that there was a breach of Article 8. As a consequence of this breach of Article 8, there was no requirement to examine the complaint made by the applicants in relation to Article 14.

⁴³ *Avilkina and Others v. Russia* (application no. 1585/09).

⁴⁴ *Ibid.*, para. 32.

⁴⁵ *Ibid.*, para. 45.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, para. 53.

These two Russian cases solidify the strength of the European human rights instruments in protecting the manifestation of religious belief in this context.

4.3 Hoffmann v. Austria

A related case that was taken to the European Court was *Hoffmann v. Austria*.⁴⁸ The case involved an Austrian housewife who left the Roman Catholic Church and became a Jehovah's Witness. Following this, she introduced divorce proceedings against her husband, the divorce was subsequently granted and parental custodial rights were denied to her (former) husband. On appeal, the Austrian Supreme Court held that the lower court was incorrect not to consider the religious education of the children and the fact that the children would be brought up as Jehovah's Witnesses. This decision appears to have been based upon concern about the mother's Jehovah's Witness faith and the issue of potential damage to health due to the position of Jehovah's Witnesses in respect of refusal of blood transfusions.

The case was taken to the European Court and this court found in favour of the mother. They, crucially, found that making a distinction primarily or solely based on religious belief was unacceptable. Thus, it was held that there was a breach of Article 8 ECHR, in conjunction with the prohibition of discrimination under Article 14 ECHR. The ECtHR found that it was correct to consider that making a simple distinction solely on the basis of religion, adopted by the Austrian Supreme Court, was unacceptable. The Court found that focusing on one aspect of Jehovah's Witness faith, namely blood transfusion refusals, should not be the primary or sole determinant of decisions about parental custody. This case serves to highlight the fact that the Court will not view narrow aspects of religious affiliation as telling the whole story. They will situate religious belief and aspects of its practice within a broader religious and, indeed, non-religious context.

4.4 Implications of the ECtHR's Jurisprudence

To date, the ECtHR has vindicated the practice of religious belief, even when such belief includes the refusal of blood transfusions and the possible consequential injury to health. The European Court has accepted that the will of the competent patient to determine aspects of her/his own treatment must be protected, even when such self-determination appears to be injurious to health and at variance with the common person's interpretation of sensible medical decisions. The position of the ECtHR in these cases is welcomed in so far as the right of a competent adult to accept or refuse treatment, whether based upon religious belief or not, is upheld strongly and the right of a competent adult to act in accordance with the religious belief is strongly protected.

The ECtHR has treated cases involving Jehovah's Witness adults and their refusal to take blood transfusions with some degree of consistency. What has been consistently upheld is the autonomy of the competent adult to refuse medical treatment. The religious conviction of the adult is weighed as a factor within this process, but ultimately the law consistently takes the position that the autonomy of the adult patient is sacrosanct. What shifts the consistency of these legal decisions is when the competence of an adult is in question when, for example, undue influence is exerted. The right of an adult to refuse medical treatment is fully protected under law. Thus, the will-rights of competent patients are respected. This means that they are entitled the benefit of their right to life and that they can legitimately refuse blood transfusions. The basis of that refusal, whether it is religious belief or personal conviction, is not at issue. Religious belief, as the basis for the refusal, is not the central fact. The central fact is that the adult patient has made a decision, an autonomous choice has been made and the courts are seen to uphold that choice. It is primarily when additional factors,

⁴⁸ *Hoffmann v. Austria* [1994] 1 FCR 193.

such as undue influence or lack of competence/capacity come into play that the decision-making process is problematic.

The context of children will now be looked at from the perspective of English law, where a number of interesting cases have emerged. This analysis is confined to English law as a number of these cases have come before the courts that are confined to this context.

5 Children, Jehovah's Witnesses and Blood Transfusions (under English Law)

Cases involving children can be particularly difficult for the courts. As has been shown, for an adult in such a situation, there is no problem under the law; they are entitled to refuse medical treatment. This is not at issue. Does this refusal to accept medical treatment apply to their children on their behalf? This article contends that other factors outweigh the freedom of the Jehovah's Witnesses parent(s) and their rights under law to refuse blood transfusions for their child. There are a number of participants to this process: the court and the court personnel, the parents and their legal representatives and the child. If the child accepts a blood transfusion then this goes against the tenets of the religious faith in which that child has been reared, but the best interests, according to the court, are deemed to be fulfilled. If the child is not given the blood transfusion there is a grave risk to the health of the child. The child is faced with Solomon-like situation and it is the court that acts in the role of Solomon, but it is the child who bears the impact of Solomon's decision.

Human rights law is of central relevance to children in this case. For competent adults, the freedom not to accept blood transfusions is fully protected under Article 9 ECHR, in line with a will-conception of rights. This is also apparent in the case of children aged 16-17, when they conform to the capacity test under the (English) Family Law Reform Act 1969. The issue is, however, different for children under 16. Although their right to express religious belief is protected under Article 9 ECHR, the limitations of this article apply. These limitations are those that are 'prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. In the case of these children, a refusal to accept blood transfusions could damage their health. In line with the limitations, there is a need to specifically protect the 'health' of children who are not *Gillick* competent: thus, Article 9's limitations apply. The use of Article 9's limitations as the basis of an argument prohibiting the refusal of blood transfusions has not been called upon sufficiently by the courts to date, but its use has the potential to provide meaningful protection to vulnerable people and children.

5.1 Sixteen and Seventeen Year-old Children

Cases involving children are particularly problematic. Under English law, children are dealt with in a way that is context-specific. In the case of 16 and 17 year olds, the Family Law Reform Act 1969 is applied. A parent can overrule the wishes of the child and the child does not have the capacity to refuse. The distinction between an adult and a child is, however, an arbitrary one. The courts can say that the 16-year-old child is capable or incapable of making a decision. For example, in *Re E*, it could be inferred that the court manipulated the capacity test to get the result they wanted.

It has been highlighted above why decisions of competent (Jehovah's Witness) adults to refuse blood transfusions is supported. To what degree should the decisions made concerning 16 and 17 year-old children who want to refuse blood transfusions, based upon their religious (Jehovah's Witness) beliefs be supported? Reasonable disagreement applies in these cases. One rights-based argument could suggest that the voice of the child should be

heard, that the child has an entitlement to make decisions based her/his autonomous wishes. Such wishes, including those based upon religious belief, should not be disregarded. On the other hand, it could be argued that a child does not have the ability to make a decision that has potentially very grave consequences. Both of these perspectives give rise to reasonable disagreement. Therefore, if a 16-17 satisfies the two-tier capacity test, then he/she must be allowed to refuse treatment.

5.2 *Children under the Age of 16 in (English) Medical Law Cases*

Once again, English law, in this instance, is context specific. It will probably not allow a child who is younger than 16 to make a life-threatening decision, such as the refusal of a blood transfusion, that may have very grave consequences. The child making such a decision is unlikely to be deemed to be *Gillick* competent following application of the case on this subject. Therefore, it is very likely that s/he could not legally refuse this treatment.

What is the evidence of case law dealing with Jehovah's Witnesses children under the age of 16 who refuse treatment? Three specific cases will now be analysed in the context of children under the age of 16 in such cases.

5.3 **Re L**

The questioning of the free will of the child was raised in *Re L*.⁴⁹ The case involved a 14 year-old child who was a practising Jehovah's Witness and had been scalded in a hot bath. She refused a blood transfusion. The court authorised that the blood transfusion be given and came down strongly against the religious beliefs of the teenager in question. Sir Stephen Brown P held that the child was not *Gillick*-competent. This finding resulted partly from fact that she did not have all of the pivotal information about how exactly she would die. This information was purposefully withheld from her. The judge accepted that she had a limited experience of the world and this limited her ability to make the grave decision at hand. On the issue of information being withheld, he accepted that the girl believed in all sincerity that she should not be administered the transfusion even though it was articulated by her surgeon that this would inevitably result in her death. However, the surgeon did not give any detail of the way in which she would die or the fact that it would be a 'horrible death' where gangrene would occur.⁵⁰ Overall, the judge recognised the fact that she was only 14 and that her life has been very sheltered and that 60 hours of her week had been spent dealing with church issues before her accident.⁵¹ Consequently, it was held that her limited experience did 'limit her understanding of matters which are as grave as her own present situation'.⁵²

In this case the court looked for a level of competence within the child, a competence that they felt was impeded by the sheltered life held by the child and the confining and limiting influence of Jehovah's Witnesses religious belief on the child. What was required here by the child was not proof that she actually understood the consequences, but that she was capable of understanding the consequences. According to Pattinson, this represented an 'impossible threshold' because she had not been told of the manner of her death.⁵³ She did not have the required information to ever be able to achieve that level of understanding. Therefore, any decision she made was always going to be compromised by this lack of understanding. It could be said that the court operated in an over-controlling manner, but its paternalistic motivation was to protect the life of the child. The principle of the greater the

⁴⁹ [1998] 2 FLR 810.

⁵⁰ *Ibid.*, p. 526.

⁵¹ *Ibid.*, p. 527.

⁵² *Ibid.*

⁵³ Pattinson, *supra* note 2.

decision the greater the level of competence required was seen to be in play. But were the genuine beliefs of this child sufficiently factored into the judgment?

In *Re L*, the key question is now whether this judgment can be regarded as appropriate? Reasonable disagreement exists here. On one hand, there are those who hold a position that a competent child, in this case, should be able to make a decision in line with his rights. The other contrasting argument that duty-based proponents could propose is that a child is unable to make a decision that has grave and life-threatening implications to his future life and health. An additional factor in this case is that the goal posts shifted in terms of what was conceived to mean 'understanding'. The child now had to understand, not only the action, but, also, the consequences of the action and the gravity of those consequences. There was a resulting need to ensure that L had access to information on not only the actions, but the consequences of the actions.

When agents exercise their will-rights, they do so within a task-specific context. This means, essentially, that an apparent agent must have competence to complete a specific task. They may be competent in other areas, but they can be deemed not to be competent in relation to their ability to complete a particular task. The issue of competence is narrower and more particular than might be expected. Personal autonomy and the power to determine one's own actions will have centre stage. In other words, no matter what the consequences to myself are, I can act in accordance with my will-rights. I can harm myself, I can kill myself, and I can deprive myself of education. I have the ability to waive the benefits of my generic rights. However, when it comes to the impact of my actions on other people, there is no such limitless largesse. Life is categorically instrumentally valuable. It is still needed until purpose is achieved.

The key to this issue is one of competence. It is not about the agency or age of the child. If you are competent to make a specific decision, then this decision must be supported because it is that a competent child can act in accordance with her/his rights. In this case, there was a subliminal attempt to adopt a duty-based theory by bringing into play new requirements about a level of information that L had to have about his disposition. This level of information would be required because this would be seen to be at variance with the child's generic rights. The fact that the child is competent and has agential competence means that L should have been permitted to refuse the blood transfusion. I, therefore, do not agree with the decision of the court in this instance. The courts must protect the idea that competent people can make decisions in line with their rights. The only thing that has changed between this case and those dealt with under the FLRA is the age of the child and age is not a determinant of competence.

5.4 Re E

The case of *Re E*⁵⁴ played out in much the same manner. In this case a young fifteen-year-old Jehovah's Witness had refused treatment involving blood transfusion because it was not compatible with his Jehovah's Witness religious beliefs. It was held that the 15-year old was not *Gillick*-competent. The case had been made that, as the child in question was about to turn sixteen, it would be wrong for the court to interfere. A minor aged sixteen can consent to medical treatment under Section 8 of the Family Law Reform Act 1969. However, this did not apply, as the child was fifteen. The argument was also made that the parental right to decide whether or not the child could have the treatment no longer existed if the child were *Gillick*-competent and satisfactorily understood the consequences of the procedure. In this case it was held that he was not *Gillick*-competent as he could not fully understand the implications of refusing the blood transfusion. The court, in making its decision, had to apply

⁵⁴ [1993] 1 FLR 386.

the best interests test and regard his welfare as paramount. This was decided objectively. The main issue was not whether or not he could consent. Consideration was given to his wishes, but the court found that the strong influence of the Jehovah's Witnesses faith meant that his decision was not fully free. As such, when carrying out a balancing act between the child's wishes against the need for the opportunity to have a valuable life, the conclusion was made that the blood transfusions should be administered.

When he reached the age of eighteen he, again, refused blood transfusions. Given the fact that he had now reached the state of adulthood, this decision was accepted. The patient eventually died following this refusal. For Ward J, in *Re E*⁵⁵ the best interests of the child, and not capacity, was the most important issue for him. Nolan LJ said that '[a]n individual who has attained the age of 18 is free to do with his life what he wishes, but it is the duty of the court to ensure so far as it can that children survive to attain that age'.⁵⁶ There is an apparent contradiction here between rights-based and duty-based theory and practice. A rights-based approach would support a competent child's decision. A duty-based approach would allow the courts to intervene for what would be determined to be the good of the child. The court found that the child's decision was not fully free. There is an inference that the religious beliefs of E's parents impacted upon the decision-making-process of E, and so denied E of task-specific competence in this instance. This is a grave action for the court because a child, in most cases, is always going to be influenced by the parental direction given, benignly or otherwise. This does not impact upon the competence of the child to make a decision in a specific context for a specific purpose or, at least, the court did not adequately prove that the parents exercised sufficient coercive undue influence on the child so as to render that child incompetent to make a decision in relation to the specific issue. As a consequence, the court intervened in the manifestation of the child's rights, according to religious belief. Obviously, it did so out of concern for the consequences of the actions of the child and for safeguarding the best interests of the child. But, nonetheless, this intervention impacted upon the child's rights to make autonomous decisions. The central issue of the case should have been the competence of the child to make this grave decision, not what was conceived to be the best interests of the child. But the issue of the interests of the child is not straightforward.

The competent child is an **apparent** agent and claims his will-rights. When a child exercises these will-rights, this happens in a task-specific context. In all cases of competent children, self-determination wins out. Their will-rights prevail over duty-based theory that might limit the exercise of child's will-rights in accordance with the interests of others. This is a grave position because it ascribes very significant rights to a child and it infers a significant level of competence on the child to make highly consequential decisions. However, what is required is a demonstration that the child has task-specific competence. A very simple analogy of this is Isabelle, a 14 year old child, who was advised to take beta block medication for her migraine. Her pharmacist, informed her of the consequences of taking medication of this nature at such a young age and he advocated alternative treatment more suitable to her age, namely the use of a preventative nasal spray. Isabelle insisted on taking the beta blockers and ignoring her pharmacist's advice. It is argued that Isabelle, if competent, can make this decision even if it is the wrong decision, as long as she has the competence to understand all the information.

Reverting to *Re E*, it is contended that the child has task specific competence and that the case should not be decided on best interests but on the determination of such competence.

⁵⁵ *Ibid.*

⁵⁶ *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758 at p. 758.

5.5 **Birmingham Children's NHS Trust v. B & C**

A recent case is *Birmingham Children's NHS Trust v. B & C*⁵⁷ where the court said that, in applying the best interests test that a small baby should undergo an urgent heart operation even though his parents refused to consent due to their religious beliefs, as Jehovah's Witnesses. According to Mr Justice Keehan, the operation was in the child's best interests. On the issue of best interests, he said that '[i]t is plain on the evidence before me that, whilst there are risks attached to him undergoing the TGA procedure, those are minimal risks, whereas starkly, if he does not undergo the procedure, his chances of survival are extremely poor'.⁵⁸ Mr Justice Keehan sympathised with the child's parents who, on one hand, understand that in order for the child to live he has no choice but to have the operation, while, on the other hand, according to the judge, 'cannot consent to A receiving blood products during or subsequent to the surgery'⁵⁹ due to their religious beliefs. The judge concluded his judgment by saying that it is lawful and in the child's best interests to have the operation and, as such causing the child's 'blood to be passed through a heart bypass machine and a blood transfusion entailing the administration of blood and/or blood products'.⁶⁰ As well as this, in future circumstances involving a life-threatening situation where it is agreed by the medical profession that the administration of blood and/or blood products is necessary, it will be done without the need for parental consent.⁶¹ However, where there is not an immediate threat, the parents must be consulted and every other method should be considered.⁶² He further stated that there is 'no reasonable alternative to the administration of blood and/or blood products, they shall be at liberty to administer such blood and/or blood products without the consent of his parents'.⁶³

In this case the fact that the judge has allowed the administration of blood transfusion is to be welcomed. The baby's welfare (and the saving of his or her life) must outweigh the Jehovah's Witnesses' religious belief. The autonomy of the child, or, indeed, the child's parents, is not paramount. The saving of a child's life must trump their autonomy. Children can be regarded as vulnerable patients who are influenced heavily by external pressures, most notably from their parents. The life of the child needs to be safeguarded and protected at all times. Under the application of either best interests, which underpins the Children Act, or the not against the interests of the child test, the requirement to protect the sanctity of the life of the child is given more weighting than any adherence to religious belief. A baby should be treated with precaution.⁶⁴ That is to say, it can be considered the baby does not fully act like an agent and should be given moral status proportionate to the way that he does act. Therefore, the baby is owed a duty of protection. He cannot make the decision to refuse the blood transfusion. This means that the judge was wholly correct not to permit the refusal of the transfusion.

5.6 ***Implications of English Law Pertaining to Jehovah's Witness Children and Their Refusal of Blood Transfusions for the Wider European Context***

⁵⁷ *Birmingham Children's NHS Trust v. B & C* [2014] EWHC 531 (Fam).

⁵⁸ *Ibid.*, para. 6.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, para. 10.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ See Pattinson, *supra* note 2, p. 584. Also see Deryck Beylveled and Shaun D. Pattinson, 'Precautionary Reasoning as a Link to Moral Action' in M Boylan, *Medical Ethics*, (Prentice-Hall, New Jersey, 2000) pp. 39-53.

Cases involving Jehovah's Witnesses and their refusal of blood transfusions place great demands and responsibilities on the shoulders of the judge. There are a number of competing rights: the rights of parents to inculcate in their children an adherence to a valued religious belief and to act in accordance with that belief; the rights of a competent child to make decisions that are aligned to the religious beliefs that that child has freely chosen to follow; the rights of society, democracy and the broader context to ensure that there is a duty of care to a child, in effect, the right of society to protect the child from himself or herself. It is not easy to find resolution in this because the consequences of getting the decision wrong are of the gravest form. If a child does not undertake a blood transfusion, the child could potentially die. So there is no doubt about the gravity of the decisions that are to be made.

The courts, quite rightly, act in a way that is context specific. All of the cases that deal with this type of refusal of treatment analyse the specific circumstances of each case and judgments that are formed arise from consideration of the nuanced interpretation of the variables within these specific cases. There is, however, some evidence, albeit subliminal, that the agenda of duty-based theory and practice is a force behind and within the judgments that are made. The opinions of others are, perhaps, more important than the opinions of the child. This discounting of the rights of the competent child to act in accordance with their beliefs results in an implicit denial of the self-determination of the competent child.

Where it has been found that the rights of the child to exercise his will-rights are breached in the judgment of the court, then the judgments are seen not to be sufficient. The issue around all of this is the issue of competence. When the older child or adult capably makes a decision in the full knowledge of the consequences of the action, then the decision is supported. Obviously, when it comes to children under 16, the judgment of that competence must be undertaken with care as the consequences of some of the decisions made have the potential to be very grave. This finding, therefore, supports the competent child's right to act in accordance with religious belief, even if such belief gives rise to actions which have the potential to have grave consequences.

To date, the ECtHR has been not been asked to specifically arbitrate upon cases dealing with refusal of children to accept blood transfusions, based upon their religious belief. Some of the English cases outlined above, and the manner of their resolution, offer an exemplar of engagement with this difficult issue that potentially could be adopted in a wider European human rights context. Thus, the European Court could adopt a content specific approach, could see capacity of children as intrinsically linked to their specific competence, rather than their chronological age. The ECtHR should avoid an overly duty-based approach which ignores the will-rights of children who hold the specific competence to make grave and potentially life-threatening decisions. This would result in an explicit focus on the will-rights of competent children who can waive the benefits to their right to life and legitimately refuse a blood transfusion. However, obviously, the issue of the determination of competence will be crucial and the European Court will have to 'gang warily' here.

6 Conclusion

Is the refusal of blood transfusions by Jehovah's Witnesses, based upon religious belief, given too much, too little or just enough recognition in the courts? Evidence from European human case law, in respect of adults, and from English case law, in respect of children, indicates that the balance in law is 'right at times, wrong at times'. It has been shown that the ECtHR has given appropriate protection to the will-rights of competent patients and that competing rights, in the context of such adults, have been appropriately balanced. The situation for children is somewhat different. The ECtHR will need to think, not only about the

precise age of the child, but also about the child's specific competence to make such a grave decision.