



The Human Rights Act and Older People

An Evidence Paper

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The paper provides evidence of case law and practice highlighting how and why the protection offered by human rights legislation is so important for older people in the UK

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Background to Human Rights Legislation in the UK

The modern human rights legal framework stems from the response to the atrocities of the Second World War when the international community sought to define the rights and freedoms necessary to secure the dignity and worth of each individual. As a result, the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948.

International human rights treaties

In addition to the Universal Declaration are the UN human rights treaties which are at the core of the international system for the promotion and protection of human rights. Every UN member state is a party to one or more of the nine major human rights treaties. It is a universal and inalienable human rights system which applies to every child, woman or man in the world. The UK has ratified seven of the UN's international human rights conventions:

- International Convention on the Elimination of All Forms of Racial Discrimination 1965 (UK: 1969)
- International Covenant on Civil and Political Rights 1966, (UK: 1976)
- International Covenant on Economic, Social and Cultural Rights 1966, (UK: 1976)
- Convention on the Elimination of All Forms of Discrimination against Women 1979, (UK: 1986)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, (UK: 1988)
- Convention on the Rights of the Child 1989, (UK: 1991)
- Convention on the Rights of Persons with Disabilities and its Optional Protocol 2008, (UK: 2009)

It has not ratified the Convention on Enforced Disappearance (2010) or the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, the only convention which mandates against age discrimination.

It should be noted that although the UK has accepted international treaty obligations including that to protect economic and social rights, the UK's legal system means that treaties do not in general take any legal force in domestic law unless they have been incorporated in domestic legislation. It is only the UDHR, covering political and civil rights, not the conventions listed above, that has been so incorporated.

Older people are not recognised explicitly under international human rights laws and Age UK is one of the organisations that is calling for the creation of a new UN Convention on the Right of Older Persons.

The European Convention on Human Rights

The Council of Europe gave effect to the UDHR through the European Convention on Human Rights (ECHR) which was signed in 1950 and ratified by the United Kingdom in 1951. The Council of Europe now comprises 47 member countries all of which subscribe to

the ECHR. The Convention is divided into Articles and Articles 2 to 14 set out the rights that are protected by the Convention.

European Court on Human Rights

The European Court of Human Rights (ECtHR) was established in Strasbourg in 1959 to interpret and ensure compliance with the Convention. It is made up of judges nominated by each of the countries that are members of the Council of Europe

The UK has allowed an individual right of application to the Court since 1966. However before applying to the Court applicants are required to pursue any legal proceedings in this country that are capable of giving them redress for the violation of their Convention rights. This will therefore usually involve pursuing a claim under the 1998 Human Rights Act.

(The ECtHR is not to be confused with the European Court of Justice (ECJ) which is based in Luxembourg and is the highest court of the European Union in matters of European Community law, but not national law.)

The 1998 Human Rights Act (HRA)

The HRA incorporates the Articles of the ECHR into UK law. It did not create any new rights but made it clear that as far as possible the courts in this country should interpret the law in a way that is compatible with Convention rights. It also places an obligation on public authorities to act compatibly with Convention rights. If an Act of Parliament breaches these Convention rights, the courts can declare the legislation to be incompatible. This does not affect the validity of the law; the HRA maintains parliamentary sovereignty as it remains up to Parliament to decide whether or not to amend the law. This contrasts with the European Communities Act 1972 which allows UK law to be overridden if it conflicts with directly enforceable EU law.

Private individuals and bodies are not public authorities for the purposes of the HRA unless they are performing a public function. Age UK has campaigned to ensure that older people in private residential care homes or who are paying the costs of their residential care are protected by the HRA. It also believes that independent home care providers should fall under the remit of the HRA.

The HRA also gives people the right to take court proceedings in the UK Courts if they think that their Convention rights have been or are going to be breached.

What does the Human Rights Act add?

One of the Act's purposes is to grant the power to service users to hold public authorities accountable to respect Convention rights and to do this through the UK courts rather than having to pursue cases directly through the Strasbourg court, a long, costly and time-consuming process for anyone but even more difficult for older people who may be vulnerable.

A further purpose of the HRA is to provide a legal framework for public authorities to use when they are providing public services. By adopting this framework the services themselves should be improved for everyone. The HRA requires public bodies to act preventatively to ensure that the right systems are in place rather than, as is the case under common law,

seeking to take action after things have gone wrong. The Act therefore provides a framework to encourage good practice but, because it has the force of law, it also acts as a backstop in helping to make sure that a positive approach to respecting human rights becomes the norm.

The HRA also provides a legal basis for some concepts fundamental to the well-being of older people. For example, although dignity does not appear explicitly in the 1950 ECHR, the ECtHR has acknowledged that protection of dignity and human freedom is the very essence of the ECHR. The HRA now provides a legal framework for service providers to abide by and to empower service users to demand that they be treated with respect for their dignity

Another reason why the HRA is so valuable for older people is due to the lack of comprehensive legislation underpinning guidance on safeguarding adults. The Law Commission has stated that the legal framework for adult social care consists of an often incoherent patchwork of legislation. Although it has recommended that there be a unified single statute this is unlikely to come into force before 2015 and then will only apply to local authority social services. The HRA will therefore continue to provide older people with a valuable, legally enforceable safety net.

In its report *The Human Rights of Older People in Healthcare* the Joint Committee on Human Rights examined this question in some detail and concluded that “the HRA empowers users of public services who are often in vulnerable circumstances and who would otherwise be powerless in the face of inherently unresponsive systems.”

The importance of the Human Rights Act for older people

The Act has an important role in protecting older people and in the 12 years since the Act came into force Age UK and the legacy organisations have produced several reports on this as well as responding to consultations and providing evidence for Government committees and commissions. (See Annex H attached for further details of these).

As can be seen from the reports, strong and valid arguments have already been made demonstrating why the HRA is so important for older people. It is not intended to repeat the findings of these reports here but the following is a very brief summary of how the most relevant articles can be used to protect older people.

Article 2 – Right to Life

The most serious instances of malpractice and abuse in health and social care settings can result in patients’ deaths and may therefore constitute breaches of Article 2. Several high profile reports and investigations have continued to raise malnutrition and the abuse of anti-psychotic drugs in hospitals and care homes as areas of concern.

Article 3 – Right to freedom from inhuman and degrading treatment

At the core of this right are the concepts of dignity and respect. Some older people are subjected to abuse in institutional settings which is serious enough to be a breach of Article 3. Grave neglect can also breach Article 3, including serious pressure sores and older people being left in distress by ignoring calls for help.

Article 5 – Right to Liberty

Older people, particularly those with dementia, may be in a situation where they are prevented from leaving a residential care home or hospital. If this is done on an informal basis, without the procedural safeguards of the Mental Health Act or Mental Capacity Act, this may breach the right to liberty.

Article 8 - Right to respect for private and family life, home and correspondence

The protection offered by Article 8 is of particular importance to older people. For example inadequate care arrangements can have a severe impact on an older person's right to respect for private life. The right to respect for private life gives older people with capacity the right to make their own choices about whether they would like to accept or refuse medical treatment. It also can be used to ensure that older people are able to maintain fulfilling and active lives and make their own choices as far as possible when in residential care or hospital.

Human Rights in practice

Human rights have the potential to both improve services and provide redress once rights are breached.

Health and social care

The importance of the HRA for older people in health and social care in practice is well documented (See Annex H). There is also a growing body of case law both from the UK courts and the ECtHR demonstrating the role that human rights legislation has in defending or attempting to defend the rights of older people. A compilation of this case law which either directly involves older people or where there is a clear application for the health and social care needs of older people can be found at Annex A. In addition at Annex B there are examples of where human rights arguments have been used in specific cases either to provide redress or improve services outside the courts.

It is however not just through legal argument and cases that the Human Rights Act helps improve services for older people. One of the recommendations of the Joint Committee on Human Rights' report into healthcare was that the Government, other public bodies and voluntary organisations should publicly champion an understanding of how human rights principles can underpin a transformation of health and social care services. Some public bodies have already opted to use a human rights approach in commissioning, training and service delivery which has led to improved services. Examples of these can be found at Annex C. At Annex G there is an explanation of what constitutes a human rights approach.

Housing

This is an area where the impact of human rights legislation is less developed for the whole population not just older people. This is partly explained as the right to housing is a social rather than a civil or political right. The importance of housing is recognised in the International Covenant on Economic, Social and Cultural Rights, which includes 'the right of everyone to an adequate standard of living for himself and his family, including adequate housing'. As explained earlier although the UK has signed this convention unlike under the ECHR, it is not possible to bring cases in relation to this treaty in the UK courts.

There are 7.3 million older households in England (containing no-one under 55) living in either mainstream or specialist housing. Three-quarters of these households are owner-occupiers. About 7 per cent of older households (530,000) live in specialist housing where a lease or tenancy restricts occupation to people aged over 55, 60 or 65 and most of these schemes are provided by housing associations.

Despite this there have been instances where human rights legislation has been used in relation to housing in situations which could have significance for older people. These are included in the annex of case law. Furthermore in its guidance for social housing providers the Equality and Human Rights Commission provide a number of examples of how the HRA may have relevance for older people and housing. These are included at Annex E.

Pensions and Benefits

The relevance of human rights legislation to pensions and benefits is similar to that of housing. The International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out specific commitments on the right to social security including the obligation to develop a national strategy for the full implementation of the right to social security in old age, and allocate adequate fiscal and other resources at the national level. States cannot rely only on contributory systems for old age pensions, as all individuals do not have sufficient means to maintain an adequate standard of living.

There are some examples of how human rights legislation has been used in the area of pensions and benefits and this is also included in the case law Annex.

Whose Human Rights?

There are three groups of older people that provide Age UK with an entry point into the Human Rights debate.

Needs arising from ageing

The most obvious group are those whose need for the protection of human rights legislation arises directly from ageing. Essentially this is in the area of health and social care and to a lesser degree in social security, benefits and housing, as outlined above. **Needs arising from other characteristic than age**

The second group is those older people who are more likely to need the protection of the HRA because of a characteristic other than age but who are also older. This group would probably be most easily described as those who suffer from social exclusion and include prisoners, travellers, asylum seekers and refugees, the Lesbian, Gay Bisexual and Transgender (LGBT) community and homeless people.

Annex D gives more detail on the numbers of older people in these groups where known and the type of issues they may be facing in relation to human rights.

Need not arising from age

The third group of older people for whom the HRA has significance are those people whose need for the protection of the HRA is not specifically related to their age but who just happen to be older. Essentially this group is no different to the population at large and for whom age

is an irrelevant factor in their need for protection. It also illustrates that older people are part of the wider community with the same concerns, interests and needs as the population at large.

This can be illustrated by looking at some of the other main ECHR Articles and examining how they might impact on older people

Article 6 – Right to a fair trial

In 2011, there were 1.56 million defendants proceeded against in magistrates' courts and 1.30 million offenders were convicted and sentenced of a criminal offence at all courts. In addition a further 1.55 million civil cases were started. There are no statistics on how many of these were older people. Statistics on victims of crime are equally hard to obtain. Nonetheless even a cursory examination of the media shows it is evident that older people are both the perpetrators and victims of crime and therefore have a stake in ensuring that the right to a fair trial is protected.

Article 9 – Freedom of thought conscience and religion

According to the Office of National Statistics' 2010 /11 Integrated Household Survey, older people were more likely to state a religious affiliation than younger people. Eighty eight per cent of those aged 65 and over gave a Christian affiliation and 4 per cent other religious affiliations, compared with 68 and 8 per cent for the population as a whole.

Article 10 - Freedom of expression

Freedom of expression is as important to older people as anyone else. Freedom of expression is of particular importance to people who campaign who may find themselves speaking out on issues which are of importance to them. People may get involved in campaigning at any point in their lives and many continue to campaign throughout their lives. Others may come to campaigning once they have retired and have more time to become involved. Some older people may campaign on issues of particular relevance to them for example pensions or cuts to services they value. This often involves speaking out and expressing views contrary to the Government of the day.

Annex F provides some evidence of the type of situations in which older people's right to freedom of expression has been important.

Conclusion

There is a solid body of evidence showing that human rights legislation is important for older people both in principle and practice. Any future human rights legislation must protect the rights and freedoms in the ECHR and must not undermine the effectiveness or scope of the HRA or the potential for enforcing it.

Annex A - Case Law

The following is a summary of some significant European and UK human rights case law mainly in health and social care which either directly involves the care of older people or of analogous cases involving disabled people or children in the care of the local authority. There are also some housing and benefits cases

Article 2 Right to Life

There have been a number of cases regarding the right to life

Scialacqua v Italy (1998) 26 EHRR CD 164

In this case the ECHR held that it was prepared to assume that Article 2 could impose an obligation on the State to provide for the costs of certain medical treatments or medicines that are essential in order to save lives. However it also held that the duty to safeguard life was not absolute.

Pretty v UK 2003

The applicant was dying of motor neurone disease, and wished to be able to control how and when she died. Although it was not a crime in English law to commit suicide, assisting a suicide was. Because of her disease, Ms Pretty could not commit suicide alone and wanted her husband to help her. As the authorities refused her request, she complained that her husband had not been guaranteed freedom from prosecution if he helped her die.

The Court held that there was no violation of Article 2 as the right to life could not without a distortion of language, be interpreted as conferring the opposite right, namely a right to die. It also held there was no violation of Article 3 as the State was not required under the Convention to authorise actions intended to terminate human life.

R (on the Application of Burke) v GMC [2004]

Mr Burke suffered from a degenerative brain condition which would inevitably lead to his needing to receive nutrition and hydration by artificial means at some point. He contended that the General Medical Council's (GMC) guidelines on the withdrawal of treatment were fundamentally inconsistent with a patient's human right to be treated and for his wishes to be respected. His fear was that the GMC guidelines allowed doctors to withdraw treatment and allow a patient to die while he still wished to live.

The appeal raised the circumstances in which artificial nutrition and hydration (ANH) can be withdrawn from a patient. It was held that Article 2 of the Convention would not be infringed if the doctors ceased to provide ANH Burke contrary to his expressed wishes, but that Article 3 would be infringed because the effect would be to subject Mr Burke to acute mental and physical suffering and Article 8 would be engaged because Mr Burke's dignity and autonomy would have been flouted.

Alda Gross v. Switzerland (no. 67810/10)

The applicant, who did not suffer from any particular disease but merely desired not to grow old, complained that she was unable to obtain a lethal substance without a prescription, and that no physician would agree to issue her a prescription. She claimed that the State had a positive obligation to provide a means for her to commit suicide in a safe and painless manner. Ms. Gross claimed that this refusal constituted an infringement on her right to life (Article 2), since she had renounced life, as well as degrading treatment (Article 3), because she would have to endure old age. Her application failed.

Haas v. Switzerland,

Mr. Haas wished to commit suicide and filed applications with the domestic authorities to obtain permission to acquire sodium pentobarbital without prescription but his applications were rejected

He subsequently filed an application with the ECtHR, complaining of a violation of his right to respect for his private life. He argued that, due to the domestic courts' decisions, his right to decide the moment and the manner of his death had not been respected. The Court recognised that the right of an individual to decide the manner and moment at which his life should end is one of the aspects of the right to respect for private life, provided that the person in question is capable of forming his or her own free will in this regard and to act accordingly.

W v M & Ors [2011] EWHC 2443 (COP)

This was an application for authority to withdraw artificial nutrition and hydration from a patient in a minimally conscious state on the basis of that patient's previously expressed wishes and feelings. The Application was refused and guidance given as to the approach to be taken by the Court of Protection in determining the best interests of patients in this state.

Koch v. Germany 2011 (No. 497/09) – July 2012

Mr Koch's wife was paralysed and needed artificial ventilation and constant care from nursing staff. She wished to end what she saw as an undignified life by committing suicide. The applicant's request on behalf of his wife for a lethal dose of medication was refused, the authorities finding that authorisation could only be granted for life-supporting or life-sustaining purposes and not for the purpose of helping a person to end his or her life.

She and her husband appealed the refusal, but without waiting for the outcome, went to Switzerland where she obtained an assisted suicide. Her husband continued the proceedings, but was declared ineligible by the German courts because he was not himself a victim of the refusal at issue. He then petitioned the European Court, claiming first that the refusal violated both his and his wife's right to privacy, (Article 8), and second, the absence of an effective remedy, (Article 13), since he was declared inadmissible in his action.

In July 2012 the ECtHR held there was a violation of Article 8 because of the German courts' refusal to examine the merits of Mr Koch's complaint.

Tracey - Current case (May 2012)

Mr Tracey alleges medical staff at Addenbrooke's hospital unlawfully issued two do not resuscitate orders without the consent of his 63-year-old wife or discussion with her and that by doing so deprived her of her right to life and subjected her to degrading treatment. He also says that he was thereby denied respect for his personal and family life.

A High Court judge has granted permission to proceed with a judicial review of a hospital's Do not Resuscitate policy. The Cambridge University Hospitals NHS trust, to which Addenbrooke's belongs, and the Department of Health deny acting unlawfully under the 1998 Human Rights Act. The EHRC is intervening.

L v Pennine Acute Hospitals Trust - Court of Protection August 2012 Continuing

The family of a man in a vegetative state has argued in the Court of Protection that due to his Muslim faith he would want to be revived if his condition deteriorated. Doctors say resuscitation would not be in the best interests of Patient L and do not want to revive him if his condition worsens

The family argue that a Do Not Resuscitate notice was placed in his notes without consulting them in contravention of the trust's own policy and it was later taken out following objections. The family have asked the judge to rule that "all steps" should be taken to preserve patient L's life.

R on the application of Nicklinson v Ministry Of Justice and R on the application of AM v the DPP, SRA and GMC August 2012

Tony Nicklinson sought a declaration of immunity from prosecution for a doctor who would give him a fatal dose of painkillers to end his life in Britain. He also sought a declaration that the current law is incompatible with his right to respect for private life under article 8, contrary to s1 and 6 of the Human Rights Act 1998, in so far as it criminalises voluntary active euthanasia and/or assisted suicide.

Martin's claim was slightly different as his wife does not want to do anything which will hasten his death. He therefore asked for permission for volunteers to be able to help him get to the Dignitas clinic in Switzerland (under recent guidelines from the Director of Public Prosecutions only family members or close friends who are motivated by compassion are unlikely to be prosecuted for assisting a suicide). As an alternative he sought a declaration that section 2 of the Suicide Act is incompatible with the right to autonomy and private life under Article 8 of the European Convention.

The court rejected both challenges.

Article 3 Freedom from inhuman and degrading treatment

Herczegfalvy v Austria (1993) 15 EHRR 437,

As a general rule, a method which is deemed a therapeutic necessity cannot be regarded as inhuman or degrading. However in order for treatment given without consent to be lawful under Article 3 and Article 8 it must be convincingly shown to be medically necessary

Z and others v UK 2001

This case concerned the decision of the House of Lords in *X. v. Bedfordshire County Council* that a local authority did not owe a private duty of care to children in need of protection, despite knowledge of abuse and gross neglect over a number of years and had failed to take any effective steps to bring it to an end.

A majority of the ECHR held that the decision on the duty of care did not violate the plaintiffs' access to justice under Article 6, but that the plaintiffs' rights not to be subjected to torture and degrading treatment under Article 3 had been violated. It is argued that the retention of public authority 'immunity' for decisions not to intervene will make public authority intervention less likely even in cases of gross negligence.

R(N) v Dr M and Another [2002] EWCA Civ 1789

The central issue in this case is how domestic courts should deal substantively with challenges made by mental health patients to decisions to treat them against their will under the Mental Health Act read in accordance with Articles 3 and 8 of the Convention.

The claimant had been a patient at Broadmoor Hospital since January 1999. She sought in this application to judicially review the decision by the Consultant Psychiatrist at the hospital to administer anti-psychotic medicine without her consent. She contended, that any proposed medication would be unlawful, being in breach of Article 3 and Article 8 of the Convention.

On the material before him, the judge concluded that the medical necessity for the proposed treatment had been "convincingly" shown. Thus the proposed treatment did not constitute a breach of Article 3. For the same reasons he decided that the treatment was necessary in a democratic society both for the protection of the claimant's health and the safety of others.

R (A and B, X and Y v East Sussex CC 2003

In this case the judge looked at the "core value of human dignity as a component of Article 3 of the convention." In his opinion "thoughtless, uncaring and uncharitable behaviour" was a relevant factor in assessing the threshold at which action or inaction engaged Article 3.

Price v United Kingdom

Ms Price alleged that her treatment within prison and the failure to provide appropriate provisions amounted to degrading treatment under Article 3 (freedom from degrading treatment). It was held that Ms Price's treatment constituted degrading treatment. The Judge noted in her separate opinion that "the applicant is different from other people to the extent that treating her like others is not only discrimination but brings about a violation of Article 3." She further held that "compensatory measures come to form part of the disabled person's physical integrity", such that to deprive Ms Price of these measures was a violation of her right to freedom from degrading treatment.

Detainees

Papon v France 2001

Maurice Papon, who was serving a prison sentence for aiding and abetting crimes against humanity, was 90 years old when he lodged his complaint. He maintained that keeping a man of his age in prison was contrary to Article 3 and that the conditions of detention in the prison where he was kept were not compatible with extreme old age and with his state of health.

In this case the Court held that in view of Mr Papon's general state of health and his conditions of detention, his treatment had not reached the level of severity required to bring it within the scope of Article 3. While he had heart problems, his overall condition had been described as good by an expert report. The court emphasised that for treatment to be degrading it must reach a minimum threshold of severity, although it indicated that this may be significantly lower for older people

Sawoniuk v United Kingdom 2001 Application no. 63716/00

The applicant, a 79-year-old war criminal, complained that the imposition of a mandatory life sentence violated Articles 3 and 5 of the Convention as being arbitrary and disproportionate. In particular he alleged that the conditions of detention imposed on him caused him exceptional hardship and prejudice. He was advanced in years and suffered from a number of complaints, such as diabetes, incipient blindness and deafness, a heart condition, progressive degenerative disease in his joints, and severe depression. None of these, and other equally severe conditions, were being properly treated in prison.

The ECtHR held that his imprisonment of was not, in the absence of other evidence of ill treatment or exceptional hardship, in violation of Article 3 or 5.

Henaf v France 2003 Application 65436/01

In this case it was held that there had been a violation of article 3 when a 75-year-old prisoner had been handcuffed on his way to hospital to undergo an operation and had been chained to the bedpost the night before the operation. Having regard to his health, age and the absence of any previous conduct suggesting that he was a security risk, the restrictions on his movement were disproportionate to any security requirements.

Matencio v France 2004 (Application No 58749)

The Court held that there had been no violation of article 3 when a prisoner suffered a stroke in prison and claimed that his detention and conditions of detention violated the Convention. In the Court's view he was offered adequate medical assistance and thus the threshold in article 3 had not been reached.

Mouisel v France (2004) 38 EHRR 34.

The Court held that the failure to release a seriously ill prisoner from prison amounted to a violation of article 3 of the Convention. In that case the prisoner had contracted leukaemia and complained of the standards of his treatment before his ultimate release. The Court noted that the prison was scarcely equipped to deal with illness, and had failed to transfer

him to another institution. Consequently, the Court found that the authorities had failed to take sufficient care of the prisoner's health to ensure that he did not suffer treatment contrary to article 3.

R (Spinks) v Secretary of State for the Home Department [2005] EWCA Civ 275

In this case it was held that the refusal of the Secretary of State to grant compassionate release to a prisoner serving a life sentence and who had been diagnosed with terminal cancer, and whose life expectancy was estimated at between three and six months, was not in breach of Article 3.

The Court of Appeal held that it was important that the claimant was a serving prisoner and that it is in general in the public interest that the allotted sentence is served. Equally, the risk of reoffending was a material factor for the Secretary of State to consider. The Court of Appeal noted that there had been no recommendation to move the claimant to a hospital, and he had, despite his condition, remained reasonably fit and mobile. Further, although he had been handcuffed when in hospital, this was after a suitable risk assessment had been carried out with respect to the risk of him committing acts of violence.

Farbthus v Latvia, App No 4672/02 2004

The court found that a delay in releasing the applicant from prison on licence had violated article 3, since the applicant, who was 84 years old and in extremely poor health when sent to prison for crimes against humanity and genocide, had become even more seriously ill while in prison. Inadequate medical treatment also led the court to find violations of article 3 in ***Pantea v Romania [2005] 40 EHRR 26, Melnik v Ukraine, App No 72286/01, 28 March 2006 (failure to treat tuberculosis), and Khudobin v Russia, App No 59696/00, 26 October 2006.***

Article 5 – Right to Liberty and Security

HM v Switzerland (2002) 38 EHRR 314

The applicant submitted that she had been placed in a nursing home against her will and it was irrelevant that she had later agreed to stay in the nursing home, since she disagreed with the original decision which had deprived her of her liberty.

She emphasised that Article 5 of the Convention did not list neglect as a ground of detention. The applicant claimed that she had had a fixed domicile with her son and drew a regular pension and none of the justifiable grounds of detention under Article 5 was met in her case.

However the Court concluded that the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5, but was a responsible measure taken by the competent authorities in the applicant's interests in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene.

HL v UK 2004

A 48-year-old man with learning disabilities lacked the ability to communicate and consent or dissent to treatment. He lived with a couple who took responsibility for his care. He had a

challenging episode at a day care centre, and because his carers could not be contacted, he was taken to Bournemouth Hospital, sedated and detained. When his carers went to collect him, they were informed that this was not possible and that they could not see him as this might upset him.

Because he lacked the capacity to object, he did not need to be formally sectioned under the Mental Health Act. However, he was effectively detained without the safeguards and review procedures that are required by the Mental Health Act. The European Court of Human Rights found this lack of procedural safeguards to be a breach of the right to liberty. As a result, the Government took steps to address this through amending the Mental Capacity Act.

Storck v Germany 2005

The applicant had spent almost 20 years of her life in psychiatric institutions and hospitals including being placed in a locked ward of a private psychiatric clinic for almost two years. She had never signed a declaration that she had consented to her placement in the institution and there had been no judicial decision authorising her detention in a psychiatric hospital. The applicant repeatedly tried to flee from the clinic and was brought back by force by the

The applicant complained under Article 5 and Article 8 concerning her placement and medical treatment in the private clinic. The Court found that the applicant had not agreed to her continued stay and had therefore been deprived of her liberty within the meaning of Article 5. It also found that the applicant's medical treatment, which had been carried out against her will, interfered with her right to respect for private life and there had been a violation of Article 8.

The law requires that there be effective supervision and review of decisions to deprive of liberty and to treat without consent.

JE v DE, Surrey CC and EW [2006] EWHC 3459 (Fam)

A man of 75 who, following a stroke suffered from short term memory loss and dementia, was placed in a residential care home. The question was whether he had been deprived of his liberty to leave the care home in order to live where and with whom he chose.

It was held that a person placed in a residential care home by the local authority was deprived of his liberty, within the meaning of Article 5 if he was not free to leave. Deprivation of liberty under Article 5 had an autonomous meaning and it was possible for a person to be deprived of his liberty even though he might not have been "imprisoned" for the purposes of the tort of false imprisonment. The starting point was the actual physical situation, taking into account a broad range of criteria such as the type, duration and effect of the restraint and bearing in mind that deprivation of and restriction upon liberty differed only in degree and not in substance. In order to amount to deprivation of liberty an objective element of actual confinement for which the state was responsible had to be coupled with a subjective element of lack of valid consent.

LLBC v TG, JG, KR [2007]

A 78 year old man with dementia and cognitive impairment was placed in a care home, contrary to the wishes of close relatives, under an order of the court made without notice. As well as containing important guidance on principles and procedure in relation to without notice applications of this nature, the judgment contains an analysis of whether the person was deprived of his liberty under Article 5 when in the care home, concluding that he was not, for reasons, among others, that he was objectively content and that it was an ordinary care home with ordinary restrictions.

Sunderland CC v PS and CA [2007] EWHC 623 (Fam)

PS, a woman of 83, was ready for discharge but her daughter informed the hospital that she was intending to discharge her mother into her own care rather than into the care of the residential unit, where PS had lived for the past six months and which had been identified as suitable for meeting PS's permanent needs.

The local authority was concerned that if it took steps itself to prevent PS leaving or being removed from the unit without the protection of an appropriate order of the court it might be unlawfully 'depriving PS of her liberty' in breach of Article 5

The court held it could make the orders preventing her discharge from the care of the treatment unit preferred by the local authority and appoint a receiver to prevent the daughter from dissipating her mother's savings and pension rather than require the local authority to make an application under the Mental Health Act 1983.

A County Council v MB, CoP 2010

Finding an older patient had been deprived of her right to liberty (Art 5) at a residential home, the court offered guidance on the Deprivation of Liberty Safeguards in the Mental Capacity Act 2005.

P & Q v Surrey County Council [2011] EWCA Civ 190

P and Q are sisters and both have learning difficulties. They lack mental capacity in relation to making decisions on anything other than day-to-day trivialities and their incapacity is almost certainly permanent. Their previous home life had been dysfunctional and abusive and they had been removed from the family home.

The Court of Appeal agreed that neither P nor Q were being deprived of their liberty, and reviewed the factors that are relevant when considering whether there is an objective deprivation of liberty.

Hillingdon London Borough Council v Neary [2011] EWHC 1377*

A 21 year old man with autism and a severe learning disability who lived with his father moved into his local authority's support unit for a couple of weeks when his father was ill, as part of his respite care regime. The local authority then kept him there for nearly a year, against his and his father's wish whilst it considered a long-term residential placement. The Court of Protection ruled that the positive obligation under Article 8 (the right for respect for family life) meant that the removal of vulnerable adults from their relatives or carers could

only be justified when the state would provide better quality of care. Keeping this man away from his home for almost a year was a breach of Article 8 and also Article 5.

Article 8 – Right to respect for private and family life

MS v Sweden (1997) 28 EHRR 31.

The court held the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention

Re F (Adult Patient: Court's Jurisdiction) (2000) EWCA Civ 192

This established that the courts and social services are obliged to use their powers to protect vulnerable adults. ***A Council v X (2010) EWHC B10 (COP)*** and its sequel ***HBCC v LG (by her Litigation Friend the Official Solicitor)*** illustrate how this can apply to older people in care.

These cases, considered whether a 96 year old woman should remain at a residential home or be returned home to live with her a daughter and having decided she should remain in residential care considered whether supervised contact visits should continue with the daughter. In reaching her conclusion the judge made it clear that she had considered the Article 8 rights of both Y and X.

A Health Authority v X 2001

In this case the Court had to determine whether it was permissible to order the disclosure of personal health records held by a GP practice to a health authority. It subsequently established grounds for when it would be justified under Article 8.

R (Bernard) v Enfield LBC 2002

Not every breach of a community care obligation results in a breach of the convention. However Article 8 obliges councils to take positive measures to enable them to enjoy as far as possible a normal private and family life.

Sentges v The Netherlands 2003 (Application No 27677/02) [6]

The applicant had muscular dystrophy and the Dutch health authorities refused to fund an expensive robotic arm which would have enabled him to live at home for longer and with much greater autonomy. The applicant submitted that the refusal to be provided with a robotic arm infringed his Article 8 rights.

The complaint was rejected by the ECHR, which noted that regard must be had to the fair balance that has to be struck between the competing interests of the individual and those of the community as a whole and to the wide margin of appreciation enjoyed by states in this

respect in determining the steps to be taken to ensure compliance with the European Convention on Human Rights. This margin of appreciation is even wider when the issues involve an assessment of priorities in the context of the allocation of limited state resources, i.e. there is no guarantee of a specific level of care, and lack of resources may influence this.

R (Goldsmith) v Wandsworth LBC 2004

In this case the decision to move an older person from residential to nursing care was quashed as the service user could have remained there, as she and her family wished, providing resources were made available. It was held that the local authority had not considered available assessments, proportionality or the right to private and family life. Those deficiencies were sufficiently serious to vitiate the decision under review and the decision was quashed.

R (Johnson and others) v London Borough of Havering [2007] 2 WLR 1097

The Court of Appeal held that in terms of the substantive protections for residents, the combination of the National Assistance Act, Care Standards Act, Care Homes Regulations, National Minimum Standards, Commission for Social Care Inspection and the Secretary of State “well exceeded in terms of day-to-day protection for residents anything that they could gain through the application of article 8”. It followed that the residents lost nothing in Article 8 terms by the transfer, and certainly nothing of the order of seriousness required to engage Article 8.

The Court of Appeal’s ruling greatly restricts the scope for claims of breach of Article 8 by care home residents whether on the occasion of a transfer to the private sector or otherwise. It would seem difficult, save in extreme circumstances, for a resident to argue that the Article 8 rights to respect for private and family life entitled them to a particular form of care, or indeed any care at all from the state.

Brent LBC v SK and HK, Fam Div, 2007

Where a care worker looking after vulnerable older people had carried out an assault on her child, the court ruled that a local authority was allowed to disclose this to the care home, as there was a real risk of harm to vulnerable adults if disclosure was not ordered. The need for public safety outweighed the individual rights to privacy under Article 8.

Roche v United Kingdom 2009

Mr Roche, aged 70 had been registered as a person with disabilities since 1992. He was suffering from health problems as a result of his exposure to toxic chemicals during tests carried out on him in the early 1960s while he was serving in the British army. He complained that he had not had access to all relevant and appropriate information that would have allowed him to assess any risk to which he had been exposed during his participation in those tests.

The Court found a violation of Article 8 because a procedure had not been available to Mr Roche making it possible to obtain information about the risks related to his participation in the tests organised by the army.

R (McDonald) v Royal Borough of Kensington and Chelsea 2010

The Court of Appeal held that a local authority was entitled to reduce the care package provided to one of its resident following a re-assessment of her needs, even though this had the effect of forcing her, against her wishes, to use incontinence pads and/or absorbent sheets at night. In doing so, the authority did not breach Article 8 or the relevant disability discrimination legislation. The judgment suggests that the courts will only intervene in disputes about the level of care being provided by local authorities in limited circumstances, something that may be significant in an environment of public spending cuts.

In respect of Article 8, the Court rejected M's arguments that requiring her to use pads was a breach of her right to respect for her private and family life. The Court noted that a failure by a state body to provide support in such situations would only breach Article 8 in "exceptional cases". A fair balance had to be struck between the needs of the community and the needs of the individual, and the margin of appreciation left to states when allocating priorities in the context of limited resources was wide.

Christine Timbrell v Secretary of State for Work and Pensions [2010] EWCA Civ 701

In this case the appellant had undergone male to female reassignment surgery. In 2002 she applied for a state pension, to be backdated to her sixtieth birthday. The Secretary of State decided that she was only entitled to a state pension from her 65th birthday. On appeal to the tribunal it was found that she had not obtained a full gender recognition certificate under the Gender Recognition Act 2004 ("the GRA") and therefore she was not entitled to legal recognition of her new gender.

She argued that the failure of the UK to make changes to a number of official records which still listed her as male, such as her social security and national insurance records and her pension and retirement age records, constituted a violation of her rights under Article 8 of the ECHR. The ECtHR concluded that the UK government could no longer claim that the matter fell within its "margin of appreciation". Therefore the failure of the UK to provide means whereby the applicant could obtain legal recognition of her gender re-assignment meant that there had been a breach of her Article 8 rights to private life. It was therefore held that a person who had acquired a different gender was entitled under European law to obtain the legal rights, such as an earlier pension, associated with the acquired gender

P v M (also known as FP v GM), Court of Protection, 2011

Where a person in a care home had a relatively short life expectancy (1-2 years), and would have wanted to be with their family if they had the mental capacity to decide, they should spend their remaining time with their family, rather than in a care home.

DL v A Local Authority & Others 2012

Article 8 arguments were used to protect an older couple where there were allegations that their son was abusing them. The court used their powers to protect the couple – who did not lack capacity to take decisions for themselves under the Mental Capacity Act 2005, but who were subject to coercion or undue influence from their son – in order to 're-establish their autonomy of decision-making'.

The Local Authority argued that the ECHR and the HRA 1998 required the court to retain the inherent jurisdiction to comply with its obligations, in particular under Articles 3 and 8. The submission was that the common law has to develop for the positive obligations imposed by the HRA to be given effect.

Residential Home and day centre closures

R v Devon Health Authority Ex p Coughlan 2000

This case concerned Ms Coughlan, a severely disabled resident in a nursing home. When she moved into the nursing home she was promised that it was a home for life. However later the health authority believed the home had become uneconomic and proposed to close it and move Ms Coughlan elsewhere.

The Court of Appeal decided that because of its promise of a home for life in this instance the health authority had breached Article 8 and the interference in this case was not necessary in a democratic society.

R (on the application of Cowl and others) v Plymouth City Council (2001)

A local authority in Plymouth was considering closing a residential care home for older people, for financial reasons. The residents brought a case against the authority claiming that the closure of the home would be a breach of Article 8. They argued that they had a reasonable expectation that the home would be their home for life. The panel deciding their case agreed and the home was not closed. The panel said that people's age should not be used as a justification for restricting their rights.

R (Madden) v Bury MBC 2002

The claimants' application for judicial review of the defendant authority's decision to close two of its residential homes was allowed on the ground that the authority had not, inter alia, acted fairly by inadequately consulting the claimants. Accordingly, its decision to close those homes was unlawful and would be quashed.

The court held that in such cases Article 8 was engaged and the decision to close the home was unlawful.

R (Dudley, Whitbread and others) v East Sussex CC 2003

This was another case challenging the closure of a care home based on Article 2 and 3 grounds. In this case, although the judge accepted that Article 2 had been given an extended meaning, ultimately neither ground succeeded and the challenge failed.

R (Haggerty and others) v St Helens Council [2003] EWHC 803 (Admin)

Residents of a private nursing home applied for judicial review of the Council's decision to close the home as the operators of the home wished to increase the fees. The council were aware that the move would seriously disrupt the residents' lives but concluded that the fees sought were disproportionate, the residents' needs could be met elsewhere and that to agree to the fees sought would place an improper burden on the social services budget. The residents contended that the council's decision infringed their rights under Articles 2, 3 and 8 of the Convention.

It was held that there was insufficient evidence that the council's decision had either put the residents' lives at risk so as to engage Article 2, nor was there medical evidence to suggest that the prohibition on degrading treatment under Article 3 had been infringed. As far as Article 8 was concerned, the council enjoyed a broad area of discretion in deciding a fair balance between the interests of the individual and the community. The financial resources of the council were an important element to be considered in the balancing exercise required in the application of Article 8(2).

R (Wilson and others) v Coventry City Council [2008] EWHC 2300 (Admin),

R (Rutter) v Stockton on Tees Borough Council [2008] EWHC 2651 (Admin)

R (Turner and others) v Southampton City Council [2009] EWCA Civ 1290

R (on the application of Thomas) v Havering London Borough Council: R (on the application of W) v Coventry City Council [2008] EWHC 2300 (Admin)

All the above cases cover similar grounds and in all cases the homes closures went ahead

Gunter v South West Staffordshire PCT 2005

A disabled woman who required 24 hour care wanted to be cared for at home with her family, through an extensive care package. However, her local Primary Care Trust (PCT) wanted to place her in residential care due to the high cost of home care, and because of the higher quality of care in the residential care home in the event of a crisis. The High Court found that the PCT had not properly considered the impact of this on her family life. They had not taken into account her improved quality of life at home, or her own wishes to be placed at home. The PCT was therefore told to remake their decision, taking her right to respect for her family life into account.

J & Others v Southend Borough Council [2005] EWHC 3457 (Admin)

This was a challenge to Southend Borough Council's proposal to close a day centre for adults with learning disabilities. The claimants argued that their rights under Article 8 ECHR, the right to respect for private and family life, prevented Southend from proceeding with its closure plans. They also argued that under Article 8 a public body can be obliged to ensure that disabled people are not deprived of the possibility of developing social relationships with others and thereby developing their own personalities.

The court was satisfied that Southend's decision was taken in pursuit of a legitimate aim and that the ECHR had recognised that in areas involving difficult social policy considerations, a public authority was entitled to strike a fair balance without the necessity to consider individual circumstances. In doing so it had a wide margin of discretion and the court should be slow to interfere with the judgment of a democratically elected authority about how best to manage its resources. Reasonable steps were being taken to minimise the impact of any interference with the claimants' private lives and therefore it could not be said that Southend's decision to close, if it was an interference with the claimants' rights, was disproportionate.

R (Bishop) v Bromley LBC [2006] EWHC 2148 Admin

The High Court held that the decision by a local council to close a day-care centre in order to release funds for additional domiciliary services did not breach Article 8. The judge expressed doubt as to whether the impact of the proposed closure was sufficient to engage Article 8 at all. Assuming that Article 8(1) was engaged, he held that any interference with the users' private lives could be justified as being necessary for the economic well-being of the council and those in need of services. This was on the basis that the decision had been taken because of the high unit cost of providing day care in a number of facilities with relatively low occupancy and because the savings made from the closure were released for domiciliary care.

Watts v the United Kingdom 2010

A 106 year-old resident of a care home owned and managed by Wolverhampton City Council challenged the Council's decision to close the home and move her to alternative accommodation. Her application for judicial review was refused, as was her appeal against that decision to the Court of Appeal. As a last resort, she took her case to the European Court of Human Rights on the basis that her Convention rights under articles 2, 3, 6, 8 and 14 had been breached but ECtHR unanimously declared all of her complaints inadmissible.

Housing

Weaver v London & Quadrant Housing Trust 2009

In November 2009 it was announced that the Supreme Court had decided not to review the decision of the Court of Appeal in the case of *Weaver v London & Quadrant Housing Trust* (LQHT). The Court of Appeal had upheld the decision of the High Court that the provision of social housing is a function of a public nature for the purposes of the Human Rights Act.

This does not mean that housing associations are public bodies. It does mean, however, that the function of providing social housing is likely to be "of a public nature", which means there will be an increased likelihood of legal challenge.

Kay and Others v United Kingdom 2010

The ECHR ruled that the UK violated the Article 8 human rights of short-term tenants of council property whose leases had been terminated. Unfortunately because the facts of this case are extremely specific the decision will not, prove much help to evicted tenants in similar situations in the future., However it should encourage courts to take their personal circumstances into account when deciding if they should be evicted

X, Y & Z v UK Application no. 32666/10

In this case the ECtHR was due to be asked to determine the extent to which a local authority is under a duty to protect victims of antisocial behaviour and prevent a breach of a person's rights under Articles 3 and 8.

The case involved was settled before it was heard in the ECtHR but raised a number of issues which are likely to need resolving by future cases. These included: the local authority's failure to take reasonable measures that could have prevented or mitigated the

harm was a breach of Article 8; and in finding that the local authority did not owe them a duty of care, the domestic courts deprived them of an effective remedy with the national legal system for violations of Articles 3 and 8 contrary to Article 13

LB Hounslow v Powell [2011]

This case gave guidance as to when eviction from local authority housing amounts to a breach of a tenant's human rights specifically Article 8.

Article 14 Prohibition on Discrimination

Wessels-Bergervort v the Netherlands 2002

The applicant and her husband had lived all their lives in the Netherlands. The applicant's husband worked and paid social security contributions in Germany for 19 years. He was granted a married person's old-age pension in the Netherlands which was reduced by 38% to allow for the 19 years in which he had not paid contributions in that country. The applicant's pension was reduced by the same proportion. She complained of the fact that her pension was defined by reference to the length of time for which her husband had contributed, whereas the reverse would not apply (if she had been the one paying contributions abroad).

The Court accepted that there had been no objective and reasonable justification for the difference in treatment between the applicant and a married man in a comparable situation. It held there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 1 of Protocol No. 1 (protection of property).

R(RJM) v Department of Work and Pensions [2009] 2 All ER 556

The EHRC's submissions that a disability premium falls within the scope of the right to property under the First Protocol of the ECHR; that being homeless is capable of being a ground protected from discrimination under article 14 and about the circumstances in which the Court of Appeal may depart from a decision of its own when it is superseded by a decision of the European Court of Human Rights were accepted by the House of Lords.

However in the appellant's case it found that there was no breach of Article 1 of Protocol 1 or Article 14 and that the non-payment of disability premium was justified.

Burnip v. Birmingham City Council, Trengrove v Walsall Metropolitan Council, Gorry v. Wiltshire Council [2012] EWCA Civ 629

The three claimants in this case all had severe disabilities meaning they needed the presence of carers throughout the night in the rented flats in which they lived. This meant that they needed a bedroom for a carer

All three claimants were entitled to receive housing benefit but the amount of HB they received did not take into account the need for an additional bedroom because of disability.

Article 1 Protocol 1 Protection of Property

This Protocol contains three different rights in which the signatories could not agree to place in the Convention itself. Article 1 provides for the right to the peaceful enjoyment of one's possessions

Carson and Others v The United Kingdom (Application no. 42184/05)2008

The case concerned an application brought by 13 British nationals: all of whom had spent some of their working lives in the United Kingdom, paying National Insurance Contributions, before emigrating or returning to South Africa, Australia or Canada.

The applicants alleged, in particular, that the United Kingdom authorities' refusal to up-rate their pensions in line with inflation had been discriminatory and that some of them had had to choose between surrendering a large part of their pension entitlement or living far away from their families. They relied on Article 8, Article 14 and Article 1 of Protocol No. 1

The applicants' complaint under Article 14 taken in conjunction with Article 8 was declared inadmissible as it had never been raised before the domestic courts. It was further held that there had been no discrimination and no violation of Article 14 taken in conjunction with Article 1 of Protocol No.1. Rights as the Court did not consider that the applicants, who live outside the United Kingdom in countries which are not party to reciprocal social security agreements with the United Kingdom providing for pension up-rating, were in a relevantly similar position to residents of the United Kingdom or of countries which were party to such agreements.

Mauriello v Italy 2009 (Still undetermined)

The applicant worked as a court typist between 1990 and 2000 and paid a total of almost 45,000 euros into the National Civil Servants' Insurance Fund. She was obliged to retire at the statutory maximum retirement age. As she had not paid contributions for long enough to qualify for a retirement pension, the applicant applied to the domestic courts seeking permission to carry on working until the age of 70. Her application was turned down. The contributions she had paid were transferred to the National Social Insurance Fund with a view to the setting-up of an account under the compulsory old-age, invalidity and survivors' insurance scheme. She now receives only a survivor's pension. The main issue to be determined is whether the deduction by the State of retirement pension contributions without any effective benefits in return was in breach of Article 1 of Protocol No. 1 (protection of property).

Annex B - Cases outside the courts

Care in hospital

In March 2009, the Healthcare Commission published a report into the care and treatment being provided at Stafford Hospital. It was estimated that between 400 to 1200 people had died unnecessarily between 2005 and 2008 due to the “appalling” standards of care provided at the Hospital and detailed many stories of patient abuse and neglect.

Legal representatives of the families argued claims against the Mid Staffordshire NHS Trust under the Human Rights Act, specifically under Articles 2, 3 and 8. They alleged that the poor treatment that, mostly older, people received at Stafford Hospital directly caused, or hastened their deaths, or hastened their deaths through gross and degrading treatment. The families’ solicitor stated “These claims were about basic neglect; food and drink placed out of reach, buzzers unanswered and people left for extended periods of time after soiling themselves. For the families it was never about money, but more a recognition that their relatives should never have been left to suffer in this degrading way.”

Whilst it did not accept that there had been any breaches of human rights, the Mid Staffordshire NHS Trust settled 97 individual claims from family members of clients who experienced ill-treatment at Stafford Hospital at a total cost of £1.2m.

Leigh Day (solicitors in the Stafford case) is also acting for 23 families in taking a class action against Alexandra Hospital Redditch on grounds of breaches of Articles 2, 3 and 8. They are also looking at the possibility of doing something similar in relation to Eastbourne District General Hospital.

Hospital Discharge

An older woman was staying in hospital following a number of strokes. She suffered a range of trauma related mental health problems following her internment as a prisoner of war in WWII and was observed re-enacting various behaviours from this period. Against her wishes, the hospital sought to discharge her and move her into residential care on cost grounds. Her advocate was concerned that being in an institution was causing her regression and used human rights arguments that she should not be placed in residential care but allowed to return home as she wanted. As a result, funding was secured to support her care at home.

Care homes

A husband and wife had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he fell ill and was moved into a residential care home. She asked to come with him, but was told by the local authority that she did not fit the criteria. Speaking to the media, she said: ‘We have never been separated in all our years and for it to happen now, when we need each other so much, is so upsetting. I am lost without him – we were a partnership.’ A public campaign launched by the family, supported by the media and various human rights experts and older people’s organisations, argued that the local authority had breached the couple’s right to respect for family life. The authority agreed to

reverse its decision and offered the wife a subsidised place so that she could join her husband in the care home.

Home care

The Equality and Human Rights Commission used its regulatory powers to undertake an inquiry into older people and human rights in home care. It published its results in Dec 2011.

The Commission gathered a broad evidence base from 1,254 individuals and organisations across England. The evidence was provided by older people, their friends and families, organisations that provide home care and their staff, local authority staff and elected councillors, as well as people from government, the voluntary sector and regulatory bodies.

Around half of the older people, friends and family members who responded to the Inquiry's call for evidence reported that they are satisfied with the service received. However, the Inquiry's findings in relation to the protection of older people's human rights in home care also revealed some very poor practice. The human rights most likely to be relevant to home care are Article 3 and 8. Much of the evidence submitted by older people, and their families and carers, drew attention to concerns relating to their physical and emotional wellbeing, including support with food preparation, eating and drinking, physical abuse, neglect of personal care, financial abuse, lack of autonomy and choice, inflexibility of services, lack of respect for privacy, lack of personal security and insufficient attention to diverse needs.

Concerns were also expressed in relation to older people's social and civic participation, the impact of isolation and the difficulties for many in maintaining family relationships.

The purpose of the Inquiry was not to assess whether human rights had been breached in individual cases, but it became clear to the Commission that some older people were likely to have been victims of breaches of their rights under the ECHR. In the worst cases, the Inquiry heard of older people not being fed, or being left without access to food and water, or in soiled clothes and sheets. In numerous other instances, older people were ignored, strip-washed by care workers who talked over them, confined to their home or bedroom, put to bed in the early afternoon and unable to participate in their community.

Inherited Serps

Age Concern used human rights arguments to help persuade the Government to announce major changes to the rules for inheriting pension under the state earnings related pension scheme (SERPS). Changes to the law in 1986 would have halved the amount of SERPS a husband or wife could have inherited if their spouse died on or after 6 April 2000. However it became clear that this information had not been made public and many people had been received wrong or misleading individual information. It was accepted that there had been a major case of maladministration by the then DSS.

Age Concern obtained a legal opinion and appealed to the ECHR on the grounds that the changes were a breach of Article 1 of Protocol 1 because the change was not 'subject to the conditions provided by law'. Articles 8 and 14 were also cited. This case was likely to have been one of the important factors that convinced the Government to announce in November 2000 a major policy change costing £12 billion over 50 years which provided far better protection.

Annex C - Examples of Using Human Rights Principles to Improve Practice

Department of Health

The Department of Health has developed *Human Rights in Healthcare – A Framework for Local Action* to assist NHS Trusts to develop and use a human rights based approach to support their core business of planning and delivering high quality and accessible health services.

For the past five years, the Department of Health, British Institute of Human Rights (BIHR) and four NHS Trusts have been working together to develop examples of how a human rights based approach can be put into practice in healthcare

The Department of Health has now asked Mersey Care NHS Trust to lead the next phase of the Human Rights in Healthcare Programme and aims are to make human rights in healthcare real by:

- Establishing and maintaining a network of statutory and independent sector organisations that are interested in, or preferably passionate about, a human rights based approach to health and social care.
- Finding and sharing great examples of how a human rights based approach to health and social care has been put into practice.
- Arranging network events where people can come together and share best practice in human rights in health and social care.
- In partnership with BIHR, supporting a small number of Trusts, to develop a range of new, practical tools which enable a human rights based approach to different aspects of healthcare.
- Working with key stakeholders to try and develop a more strategic approach to human rights in healthcare.

As part of this the NHS has established a website

<http://www.humanrightsinhealthcare.nhs.uk> which provides information and guidance

The projects include:

Southwark Health and Social Care - a Human Rights Based Approach in Residential Care For Older People

Southwark Health and Social Care has been involved in the national Human Rights and Healthcare Project since it began in 2006. The main focus has been developing a core human rights and equality learning and development programme. The pilot project enabled Southwark Health and Social Care to build on existing equality and diversity strategies to make human rights central to the way health and social care services were commissioned and delivered and to protect vulnerable people from abuse.

In 2009/2010, the project focused on two residential care homes for older people – Burgess Park and Camberwell Green. Its objectives were to develop a human rights ethos among staff at the two homes and ensure that human rights based improvements form the basis of a comprehensive patient and staff experience improvement plan at the homes

Since summer 2010, the care homes have been implementing some of these changes and Southwark Health and Social Care are working with them to develop a strategy for taking this work further forward. One home manager has remarked that he has seen a marked change in the attitude of his staff since the training and the quality of the service they provide. He felt staff were communicating better with each other and with residents and were making clear efforts to ensure residents had more choices available to them.

Surrey and Borders Partnership NHS Foundation Trust

Human Rights, Emotional Labour and Leadership

Surrey and Borders Partnership NHS Foundation Trust has been involved in the Human Rights in Healthcare Project since it began in 2006. With support from the British Institute of Human Rights (BIHR), the Trust put together a human rights learning programme and developed materials which are now used across the Trust.

Surrey and Borders identified three care homes for people with a learning disability and devised a two day programme of training with support from BIHR focusing on three core aspects – human rights, emotional labour and leadership. Participants found the training inspiring, enjoyable and challenging and there have already been positive results with staff feeling engaged, inspired and motivated to continue this work.

Heart of Birmingham Teaching Primary Care Trust - Human Rights and End of Life Care

Heart of Birmingham teaching Primary Care Trust (PCT) has been involved in the Human Rights in Healthcare Project since it began. In 2009/2010 the PCT decided to focus on its end of life care programme, specifically the development of a new internal service – Hospice at Home. There was an opportunity to work in partnership with professionals, staff and patients who had a real passion for improved end of life care and the aim was to integrate a human rights based approach to make a positive impact on the patient's and carer's end of life experience.

The Equality and Human Rights team began a series of human rights training sessions for staff. The training helped staff understand what was meant by a human rights based approach and how it was relevant to their work. The training also led to the project being refocused on the District Nursing Assessment Process, Care Plans and the District Nursing Service as a whole – the largest staff group in the PCT who regularly care for patients at the end of life.

Betsi Cadwaladr University Health Board

This project aims to develop a toolkit for ward managers to put human rights at the heart of nutrition and hydration in the ward environment.

City Hospitals Sunderland

This project aims to develop an evaluation tool so that health organisations can positively protect and promote the human rights of older people and ensure high quality care.

NHS Blackburn with Darwen Teaching Care Trust Plus

The Care Trust Plus takes a human rights based approach to all decision making. As the role of the Trust changes in line with the proposed NHS changes there is scope for the Care Trust Plus to support the adoption of a human rights based approach to the remit of the existing LINKS, emerging Health Watch and to the working of the shadow Health and Wellbeing Board. The aim is to develop a toolkit to support other pathfinder Health Watch and shadow Health and Wellbeing Boards and pilot the development of a human rights based health and Wellbeing Strategy.

Mersey Care NHS Trust - For People with Dementia

This project aims to enable staff and service users with dementia to learn about human rights and develop a human rights way of working on an in-patient ward. It will build on from a person centred approach to dementia care and look at how the underlying principles and Articles of the Human Rights Act can be used to protect vulnerable people and promote their quality of life in a ward environment.

Equality and Human Rights in the NHS - A Guide for NHS Boards

The NHS has produced a guide to assist Board members of NHS organisations to:

- Understand the statutory Board responsibilities as they relate to matters of equality and human rights;
- Understand board members obligations under the law;
- Make the connections and inter-dependencies between equality and human rights and the core business and governance for NHS organisations; and
- Consider how these obligations may have a different expression, depending upon the type of NHS organisation

The State Hospital Carstairs

Staff involved in implementing the HRBA at The State Hospital, a high security forensic mental health hospital in Carstairs, Scotland, noted that, as the hospital set about transforming a “custodial and punitive” regime into one in which staff “weave the human rights dimension into the fabric of daily decision-making”, human rights had provided „an immensely practical framework which with to consider the very difficult decisions to be made each day” (Donald et al, 2009: 81).

An evaluation of the Care About Rights training and awareness raising programme which aims to embed a human rights based approach in the delivery of care for older people in Scotland found evidence that using human rights as a 'clear rationale for decision making ... is instrumental in increasing the confidence of care workers, and outreach participants to speak out and challenge in cases where they feel rights are being infringed'. Access to

human rights as a tool for decision-making was also considered 'significant in bringing about delivery of more effective person-centred care'.

<http://www.humanrightsinhealthcare.nhs.uk/Library/az/Evaluatingtheimpactofhumanrightsinterventions.pdf>

Macmillan Cancer Support - Human Rights Framework for Cancer Care

In 2009 Macmillan Cancer Support commissioned brap (formerly Birmingham Race Action Partnership) to undertake the first phase of a project to develop and evaluate the practical application of a human rights framework for cancer services. The aim of the first phase of this work was to test how human rights principles can be given practical expression in the context of service-user and staff experience in three cancer care settings– Bury NHS; Merseyside and Cheshire Cancer Network; and South East London Cancer Network. In doing this we have sought to examine how a human rights framework for equalities in cancer care can be developed and populated over time.

<http://www.macmillan.org.uk/Documents/AboutUs/WhatWeDo/HumanRightsFrameworkForCancerCareReport.PDF>

Local Authorities

Halton Borough Council

In its inquiry into homecare The Equality and Human Rights Commission identified Halton Borough Council approach as an example of good practice. In its evidence to the Inquiry Halton wrote that it has taken steps to embed a human rights based approach using the Department of Health's Dignity in Care model. When commissioning and contracting it includes the 10-point Dignity Challenge in its service specifications for block contracts and within the outcomes required for spot contracts. Dignity and human rights are underlying in its Quality Assurance Framework [QAF].

In the procurement of services prospective providers have to evidence how they meet these underlying themes prior to the award of a contract and this becomes part of the contract monitoring process. It also publicises the annual Dignity Day to providers to highlight its importance and to give providers the opportunity to showcase good practice.

Examples from British Institute of Human Rights Project with Local Government

Hackney Council: A human rights and local government case study

Hackney Council has endeavoured to make human rights an integral part of its social care provision. It has identified Human Rights with Dignity Champions, including a cabinet member, staff and service user representation, who are key to ensuring that everyone is involved in discussions about how to address spending cuts whilst maintaining a high standard of services provided with dignity and respect.

The hub for information sharing and consultation is the Champions Forum, led by management representatives. Staff meetings have human rights on their agenda and facilitate discussions with team members. User Champions bring the discussion to user meetings in services. Cascading in this way ensures that every service user has

opportunities to improve their understanding of their human rights and enables them to express any issues they have and make sure they are addressed. Staff have a greater understanding and are able to integrate human rights into their everyday practice.

They have also developed a Hackney Human Rights with Dignity Audit Tool for both staff and service users. Staff use it as a means for development of good practice, and service users to aid understanding and as a means of challenging poor services. The audit tool has been shared with commissioned providers, who are in the process adopting the model and appointing champions.

Herefordshire Council

Herefordshire Council is focusing on how a human rights approach could broaden the way equality work was approached in the county, enabling a move away from a 'tick box' approach. They have worked in partnership with NHS Herefordshire to produce an Equality and Human Rights Charter which created a single set of underlying principles, commitments, and values for both organisations. This Charter forms the basis for taking human rights work forward and they will be developing a tailored human rights and equality training package to communicate the vision of the Charter to all staff.

London Borough of Tower Hamlets

London Borough of Tower Hamlets is working to improve the way they work with people who have no recourse to public funds. Through a participative process with local third sector organisations and different teams within the Council they are creating a set of human rights based guidelines to underpin their support and services to people with no recourse.

Oxfordshire County Council

Oxfordshire County Council is working with their Best Interest Assessors, who safeguard vulnerable adults under the Mental Capacity Act, to support them to become Human Rights Champions across the Council. They are developing a training package on human rights for the Assessors to use in their teams.

Wiltshire County Council

Wiltshire County Council is focusing on implementing a human rights approach in three areas of their Community Services department, including a social inclusion community project, their equality impact assessment process and adult social care program. BIHR has provided training to staff and key stakeholders in each area and they are reviewing their work to better and more explicitly highlight human rights issues.

The following two examples are from the EHRC's report Impact of Human Rights Culture on the Public Sector: Lessons from Practice 2009

The Welsh Assembly

The Welsh Assembly has made progress in integrating human rights into its policies and decision-making processes with the aim of both improving the quality of services and ensuring the people of Wales get the best deal. The Assembly Government has made particular progress in the following areas:

- Integrating human rights into the work of the Children, Education, Lifelong Learning and Skills Department – including activities to engage with children and young people about their rights
- Integrating human rights into policy making processes across other departments – notably health and social care
- Raising awareness about how the Human Rights Act and human rights principles can influence public service delivery and building capacity

Priorities for the immediate future include: collecting and sharing up to date examples of notable practice across the Welsh public service context; and education and training on human rights, both dedicated support and integrating human rights into existing training programmes – for example those relating to equality and diversity.

London Borough of Southwark

In 2001 the council agreed to participate in some Audit Commission research to develop an audit/performance toolkit on the Human Rights Act. By participating in this research, Southwark benefited from an independent assessment of how well they were implementing the HRA and a series of detailed recommendations to take forward. These recommendations formed the basis of an early human rights action plan, which was used to begin to embed human rights across the council.

The main focus of Southwark's work has been on piloting and rolling out a programme of tailored training for departments. More recently, it has begun to embed human rights into corporate policies and procedures and impact assessment processes and has created some useful tools to help front line staff use human rights principles in their every-day work

Southwark's priorities are to ensure that new processes for integrating human rights into impact assessment processes are working effectively; training programmes continue to develop to tackle some of the complicated delivery issues; there are robust processes in place to ensure that issues raised in the 'action learning' elements of the council's training programme are taken forward and new decision making tools which incorporate human rights are being used appropriately.

Annex D - Human rights implications for older people as members of socially excluded groups

Travellers

According to Amnesty International UK there are around 300,000 Gypsies, Roma and Travellers living in the UK. There are currently no reliable estimates of gypsy and traveller numbers by age. These will become available when the 2011 Census data are released as there is a new ethnicity category for this group which can be broken down by age.

In terms of convention rights Article 14 is of particular relevance for traveller and gypsy communities. Article 14 of the Convention prohibits discrimination in respect of the enjoyment of some other Convention right. Before showing that Article 14 has been breached, it is necessary to show that the treatment considered discriminatory engages some other Convention right. Therefore a decision to evict a person is likely to engage the right to respect for a person's home or private life under Article 8, or a decision to refuse to admit someone to a school will engage the right to education under Article 2 of the First Protocol.

If such a decision treats someone less favourably on the grounds of race, nationality, religion or some other status, then it will be discrimination under Article 14. This protection is therefore not limited to recognised racial or national groups but includes discrimination on the grounds of 'some other status'. Other status can include the status of persons who have a nomadic lifestyle, even if they do not belong to a particular racial group. Article 14 can therefore be relied on by Gypsies and Travellers.

The lack of suitable, secure accommodation underpins many of the inequalities that Gypsy and Traveller communities experience. The HRA has been cited in some planning cases involving Gypsies and Travellers due to the national shortage of Traveller sites. In *Connors v The United Kingdom* Application No. 66746/012004, the European Court of Human Rights held that the United Kingdom has a positive obligation by virtue of Article 8 of the European Convention on Human Rights to facilitate the Gypsy way of life.

Although the court's decision in this case was expressly limited to the issue of the availability of procedural protection for gypsies on local authority caravan sites, the case is significant in that it reverses the position in domestic case-law and necessarily raises wider questions about issues of planning and economic policy in relation to gypsies.

Prisoners

On 31 March 2011, there were 8,804 prisoners aged 50 and over in England and Wales, including 2,975 aged 60 and over. This group makes up 10 per cent of the total prison population. The oldest person is 92 and there are almost 50 people over 80. Approximately 100 people died in prison of natural causes in 2010. Prisoners aged over 60 are the fastest growing age group in prison. Advances in evidence gathering such as DNA testing have resulted in older people being imprisoned for crimes they committed many years ago. In the past 10 years, the number of people serving a life sentence has increased from just under 4,000 to 13,200, a figure higher than the rest of Europe combined.

Further the growing use of whole life tariffs (25 in 2002 to 41 people in 2012) will see increased numbers of older people ageing and dying in prison. In January 2012 in *Vinter and Others v. United Kingdom* (Application nos. 66069/09) it was argued that a whole life sentence without review not only resulted in lifelong imprisonment but the denial of any hope which was inhuman and degrading and thereby a violation of Article 3. The Court recognised that such sentences were not available anywhere else in Europe, except in a very small number of cases in the Netherlands, and were contrary to the trend in penal culture and various international instruments. Nevertheless, whole life prison sentences were not of themselves inhuman or degrading and it held by a 4-3 majority that there had been no violation.

Prisoners retain certain basic rights, which survive despite imprisonment. The rights of access to the courts and of respect for one's bodily integrity, i.e. not to be assaulted, are such fundamental rights. Others may be recognised as the law develops. Prisoners lose only those civil rights that are taken away either expressly by an Act of Parliament or by necessary implication. For example, one right taken away by statute is that prisoners detained following conviction do not have a right to vote, although this is under consideration following criticism by the European Court of Human Rights. The test in every case is whether the right is fundamental and whether there is anything in the Prison Act 1952, the Prison Rules 1999 or elsewhere which authorises the prison authorities to limit such a right.

Broadly speaking, the State is allowed to place limits on prisoners' rights if it is considered necessary for the prevention of crime, for prison security or to protect the safety of the prisoner or others. Any limitations placed upon such rights must be proportionate to the aim that the authorities are seeking to achieve. There are a large number of cases that have been heard by the ECtHR which help clarify the extent to which limitations can be imposed.

The European Court of Human Rights is also developing a body of case law on standards of medical care under Article 3. (See case law Annex for some examples of this). This has implications for the UK as prison healthcare is often characterised as poor, and many older people in detention may have complex health needs. The detention of older prisoners may give rise to claims under article 3 and the case law thus far suggests that the courts will attempt to conduct a balance between the functions of the criminal justice system and the human rights of the prisoners.

Research by John Williams at Aberystwyth University suggests that older prisoners are often unable to access social care services within prison in breach of international obligations and potentially breaching the ECHR. Mental health, physical disability, and incontinence are all areas where older prisoners lack access to services available to older people outside of prison.

The European Court is most likely to find a violation of article 3 when prisoners cannot be guaranteed adequate medical and other care while serving their sentence. The European Court is prepared to find a breach of article 3 in cases where the prisoner has been deliberately mistreated and the prisoner's age and state of health have exacerbated that situation.

Age UK has an agreed policy position, supports a national body, the Older People in Prison Forum, and is represented on the Older Prisoners' Action Group at the Department of Health.

Lesbian Gay Bi-sexual and Transgender

Approximately 5-7% of the UK population is estimated to be lesbian gay bisexual or transgender (LGB and T). It is therefore reasonable to expect the same percentage of all older people to also be LGB and T.

None of the articles of the ECHR refer specifically to the rights of lesbians, gay men and bisexuals. However, the ECHR regards the Convention as a living instrument and demonstrate that Convention rights can be interpreted widely according to the social and attitudinal developments and changes in the member states of the Council of Europe to include lesbian, gay and bisexual rights.

Until recently, lesbians, gay men and bisexuals could not use the protection of Article 14 of the Convention against the discrimination they faced. This was because the creators of the Convention designed the Article in such a way that it did not specify sexuality and could only be used in conjunction with other articles of the Convention.

This situation improved when Protocol 12 of the European Convention on Human Rights was agreed in 2000. This created an independent right not to be discriminated against and placed a duty on public authorities not to discriminate. Although sexual orientation is again not mentioned among the prohibited grounds of discrimination, the case-law of the European Court of Human Rights has established that sexual orientation can be included in 'other status' in the list of prohibited discrimination. Unfortunately, the UK has neither signed nor ratified this protocol and lesbians, gay men and bisexuals in the UK cannot directly rely on its provisions.

Some of the areas covered by human rights case law in relation to issues affecting the LGB and T community in the UK and the rest of Europe are the age of consent, sadomasochism, child custody, child support, adoption and the rights of same sex couples to succeed to a tenancy in the event of the death of a partner. The current debate on civil marriage also raises some human rights issues. For example it has been mooted that any change would lead to a challenge to allow marriage in church. This would need to balance the rights of a same-sex couple and a religious organisation's rights under Article 9.

Refugees and Asylum Seekers

There does not appear to be any data on the number of older asylum seekers and refugees in the UK. Among practitioners in the refugee sector there is an implicit recognition that a base age of 60 or 65 is too high when considering older refugees, and that 50 or 55 might be more appropriate. Among the reasons given is the likelihood that refugees may become physically and/or mentally frail at an earlier chronological age due to experiences in their country of origin, en route to the UK or after arrival. While no sound evidence appears to exist, these assumptions are based on the experiences of people working with refugees.

Therefore who falls into the category of an older person amongst refugees and asylum seekers is complex requiring many factors to be taken into consideration. Some people

come from countries where a date of birth is not considered important and others will not have confirming documentation. In some countries age is defined by status such as becoming a grandparent.

The United Nations High Commissioner for Refugees states there is no fixed age to define an older refugee as older, largely because life expectancy differs among groups, and the process of ageing is affected by a number of factors, such as an individual's physical and psychological health, along with family and social support, cultural background, living conditions and economic situation.

While it is not possible to quantify the UK's population of asylum seekers and refugees who are over 50 years of age, some figures are available through the Home Office's asylum statistics (although these are proving quite difficult to access).

Between 2008 and 2010, of a total of 68,335 asylum applications, 583 were from people aged 65 or over. Older people also submit applications as dependants, with around two percent of dependants' applications coming from people over 50. Hence, while the percentage of older asylum seekers is small, and presumably considerably smaller than the number of older people with refugee status, there appears to be a sizeable presence of older asylum seekers. This has not yet been fully analysed for practical or policy purposes.

Asylum seekers' need for human rights protection covers two distinct areas. Firstly their asylum claims itself which will stem from the UDHR. The second area in which human rights are an issue is in meeting asylum seekers' care and support needs whilst pursuing their asylum claim in the UK, including their needs should their asylum claim fail and they pursue an appeal.

Asylum seekers were removed from the mainstream benefit system by successive immigration legislation since 1996. They still retain their rights to health and social care but as numerous reports from organisation such as the Red Cross, the Refugee Council and the Joseph Rowntree Foundation point out, access to these services can be problematic. There is also an issue with asylum seekers whose application has failed but who pursue an appeal or who are awaiting removal as many are ineligible for any form of support and find themselves destitute. There is a little evidence that suggests there are some older asylum seekers in this position. For example a report from the Joseph Rowntree Foundation on destitution in Leeds (More Destitution in Leeds 2008) found there were growing numbers, albeit still very small, of older destitute asylum seekers.

In 2008 Age Concern worked with the Refugee Council to produce "Older refugees in the UK - A literature review and interviews with refugees."

Immigration

An example of how human rights considerations in immigration can be important for older people can be seen from the recent changes to the family migration rules in the UK. which came into force in July 2012. These include new restrictions on the ability of non-EEA adults and elderly dependent relatives to enter and settle in the UK. Now people wishing to bring elderly dependent relatives to the UK will only be able to settle in the UK if they can demonstrate that, as a result of age, illness or disability, they require a level of long-term personal care that can only be provided in the UK by their relative here, and without

recourse to public funds. Aunts and uncles will no longer be eligible to come under this route, and applications will have to be made from overseas rather than the UK.

Homelessness

According to Homeless Link it is not easy to get accurate figures for numbers of older people who are homeless. Different agencies use different age bands, not all agencies monitor age and some forms of homelessness are hidden. Research into the causes of homelessness in older people found that two thirds of the respondents had never been homeless before, and 50% did not seek advice when threatened with homelessness.

This research identifies a number of triggers for homelessness in older age, bereavement, relationship breakdown, financial problems and debt, ill health and problems with landlords, co-tenants and neighbours. For most people it is a combination of these events and underlying vulnerabilities that lead to an increase in housing instability.

Of the 53,430 households accepted as homeless and in priority need in England in 2008/9 an estimated 4,840 of the applicants were over the age of 50 years. This is 9% of the total acceptances. However, of total acceptances only 2% of people were accepted as in priority need due to old age. The rest of the 9% of will mainly have additional vulnerabilities such as physical or mental health problems.

Broadway (a London based homelessness charity) produce reports quarterly with accurate figures broken down for people contacted sleeping rough in London. In 2009/10 3673 people were seen rough sleeping in London. Of those 545 people contacted by outreach 21% were aged between 46 years and 55 years and 10% were aged over 55 years, consistent with the previous three years.

Among those rough sleepers in London that have been recognised as the most entrenched and hard to reach, the average age is 50 years and the group have had an average duration of street homelessness in excess of 8 years.

Homeless Link's annual research on the homeless sector shows that around 40% of hostels do not accept older people (as they are for young homeless people). In projects that do accept older people around 17% of the population is over the age of 50 years. There is some evidence from older people's needs audits carried out by a small number of local authorities that a significant percentage of this population have had long stays in temporary accommodation, often the same hostel for years.

There are a limited number of cases in which homeless individuals or homelessness agencies have used the Human Rights Act to challenge poor public services. The main Articles that could be relevant for homelessness are:

Article 3 - Homeless people may be treated in a degrading way by services that they access or are attempting to access. Case law suggests that extreme cases, such as treatment that 'humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance' may be a breach of article 3.

Such treatment could occur in a range of services, but a key example may be older people living long-term in hostels that may not be appropriate for their needs. It may also include

the facilities available to homeless people in accommodation and the way that they are treated by staff and in some cases, fellow residents. It may have particular relevance to homeless people with mental health needs, who are particularly at risk of treatment that may contravene it.

Article 6 - The right to a fair hearing applies to all civil proceedings and may therefore be relevant to a range of decisions around support and assistance for homeless people. Homeless agencies report that on occasion when homeless people approach local authority Homeless Persons Units they have been turned away without a full statutory assessment being carried out which may breach article 6.

Article 8 - There may be potential under this Article to argue that offers of accommodation to homeless people should ensure that families and couples are not split up. Article 8 also protects a person's right to privacy, a right that is not lost once a person becomes homeless. Further, when imposing limits on a person's liberties, for example by rules in temporary accommodation, this must be objectively justifiable. It may also be possible to argue that if the level of a benefit (for example, housing benefit) is too low to maintain a home, that this goes against Article 8.

Homelessness is another area where Age UK has done sporadic work. For example Help the Aged with HACT and Homeless Link supported the UK Coalition on Older Homelessness but long term funding was not secured.

Annex E - Housing

Examples from the Equality and Human Rights Commission guidance of how the HRA may be applicable for housing providers in relation to older people

Example 1

A social housing provider encourages an older resident to relocate to new accommodation on giving an express indication that she can remain in her new home 'for the rest of your life'. If the provider then some years later decides to displace the resident again, to yet another unit of accommodation, the resident may well assert that there has been an unlawful failure to afford her 'respect' for her home under Article 8.

Example 2

An older disabled person who has an assistance dog lives in retirement accommodation. Through its tenancy agreement, the housing provider prohibits anyone living in its accommodation from keeping an animal in the property. The enforcement of this tenancy term may amount to an unlawful breach of Article 14.

There is no human right to the provision of a home with particular aids or adaptations any more than there is a right to the provision of any home at all. However, once a person has a home then they are entitled to respect for it and to respect for their private lives in the enjoyment of it. The social housing provider may in some circumstances become obliged to address difficulties that arise for particular residents which prevent them from enjoying their homes.

Example 3

A social housing provider agrees to supply and fit grab-rails within a tenant's home on the recommendation of an occupational therapist (OT) that such aids are essential. If the fitting has been delayed for nine months (for example, five months waiting for an OT visit, one month waiting for the OT to produce a report, and three months waiting for the fitting) that might well amount to a failure to accord respect for the tenant's home.

Example 4

A disabled social housing tenant is increasingly unable to use the communal stairs. He asks for permission to install a stair lift along the staircase. In deciding the application, the housing provider should consider both the interests of other users of the communal stairway and the particular tenant's human right to 'respect' for his home (which would include a reasonable expectation to be able to readily leave it and return to it).

Example 5

Following a period of very severe weather, the paths and other walkways on a housing estate have been made impassable by the accumulation of snow or the freezing of ice. Many tenants, particularly the frail elderly, are unable to leave their homes. If a social landlord responsible for maintaining these 'common parts' failed to take reasonable steps to grit or clear the paths that might infringe not only the contractual obligations it has to the tenants but possibly also the Article 8 rights of all its residents to respect for their homes.

Annex F - Case studies highlighting importance of Article 10 for older people

A quick trawl of the internet quickly demonstrates the importance of free speech for older people. The excerpts are all lifted from local or national newspapers or other media outlets.

July 2012 - Two groups of pensioners held protests in Westminster, the National Federation of Occupational Pensioners (NFOP) at the Dept. of Health and the Equitable Members Action Group (EMAG) outside Parliament. The NFOP is campaigning for reform to funding social care following the cross party consensus in favour of the Dilnot Report. Their 'Funding for Social Care' campaign aims to tell the Government that it is time to address the Elephant in the room that is social care funding, and they had brought a paper elephant covered with their petition postcards along with a stack of boxes containing the signed petition cards with them to Richmond House.

April 2012 - Around a dozen OAPs picketed Liberal Democrat John Hemming's Yardley base angry over changes to age-related personal allowances – the amount of income that is tax-free.

April 2012 - Senior citizens took to the streets of Shrewsbury dressed in bin bags in protest at being treated 'like rubbish'. Members of the town's Senior Citizens' Forum marched up Pride Hill, where they handed out hundreds of leaflets. Ann Wilde, branch chairman, said: "We are trying to raise awareness of senior citizens as we feel we are being treated rather like rubbish. We would like to be treated decently in hospitals, not ignored because we are older. Transport is a problem for us with the rising costs. "We would like bus passes to be brought back and meals on wheels'.

HEALTH Secretary Andrew Lansley was heckled by protesters as he arrived at Downing Street for a meeting on the future of the NHS. Protesters shouted "shame" at him and union rep June Hautot, 75, refused to get out of his way shouting: "I've had enough of you and of Cameron".

In March 2012 87 year old John Catt was granted permission to seek a judicial review against the police who have systematically logged his presence at more than 55 peace and human rights protests over a four-year period. Despite having no criminal record he has been labelled as domestic extremist.

More than 1,000 pensioners gathered at the House of Commons for a mass lobby to demand higher state pensions. The event, organised by the National Pensioners' Convention (NPC), brought together OAPs from all over the country, who attended private meetings with their local MPs at Westminster Hall.

Four pensioners were arrested at the Faslane naval base protest. They were protesting against the presence of 100 megaton warheads at the armaments depot on Loch Long, Scotland. The group sat in the road at the main gate of the depot holding placards which jointly spelled out the slogan, 'Shift to peace work'.

Three pensioners were arrested at the Pensioner's for Peace Valentine's Day demonstration at Faslane naval base in protest against government plans to upgrade the Trident nuclear missile system. They were arrested when they lay down in the road and blocked the North

gate of the base. Each of them was carried out of the road by 4 or 5 police officers when they refused to move.

In November 2011 a 77 year old man scaled the front of the UBS bank headquarters in London, prompting the police to come to the scene and force him down. A further group of pensioners held a protest outside the UBS building – against the Shared Appreciation Mortgage schemes.

In May 2011 pensioners held up London traffic for almost an hour protesting at government cuts. Members of the Greater London Pensioners' Association stood in front of the bus holding placards and Terry Hall, 76, handcuffed himself to the doors of the bus.

In October 2011 pensioners and supporters staged a protest outside the BBC studios in Salford against Question Time not allowing pensioners' leaders a platform on one of the programme's panels.

In May 2010 a 77 year old Dorset man angry at lorries driving through his village blocked traffic for an hour by making sure a pelican crossing was in constant use. Traffic on the A35, the main coastal road between Bournemouth and Exeter, backed up within minutes.

In 2006 two of the first individuals arrested under a clause in the Serious Organised Crime and Police Act, were peace campaigners Helen John aged 68, and Sylvia Boyes aged 62. They were arrested on 2 April while crossing the sentry line at Menwith Hill, the US communications base in the Yorkshire Dales

In 2005 Walter Wolfgang An 82-year-old activist was ejected from the Labour party conference for shouting “nonsense” during Jack Straw’s speech on the Iraq war and was briefly arrested under the Terrorism Act.

Annex G - What is a Human Rights Based Approach?

Although many organisations emphasise the importance of taking a human rights based approach (hrba), there is no universally accepted definition of what this means. The Department of Health has described it as one where the realisation of human rights principles is a central aim in policy and planning, where staff and patients are empowered and involved in achieving these, where accountability is clear and the most vulnerable groups are prioritised.

In 2012 in her paper “Evaluating the Impact of Human Rights Based Interventions in Healthcare” Alice Donald of London Metropolitan University identified the common elements of a HRBA, drawing upon the evidence of previous evaluations in different contexts.

Her conclusion is that there are five broad principles which are widely recognised as core elements of a HRBA known as the PANEL principles; participation, accountability, non-discrimination, empowerment and legality

Participation

This means people have a right to participate in decisions that affect their own lives. A process of change is more likely to be effective if all relevant stakeholders are engaged – especially those whom it is meant to benefit.

Accountability

Once goals for respecting, protecting and fulfilling rights are set, clear mechanisms need to be created that allow people to hold to account those with responsibility for ensuring these goals are met.

Non-discrimination and prioritisation of marginalised or vulnerable groups

This principle recognises that some people and groups in society, at different times and in different circumstances, face discrimination in the enjoyment of their human rights. Targeted action is needed to address these inequities. Underpinning this principle is the idea that human rights are universal: everyone has rights regardless of their identity or background and rights are not privileges to be earned or a matter of discretion

Empowerment of rights holders and duty bearers to ensure that human rights are respected, protected and fulfilled.

This principle recognises that rights can be meaningless if we are not aware that we have them or lack the ability or means to claim them. Similarly, those with a responsibility to prevent or respond to human rights cannot reasonably be expected to undertake this role if they are not supported to embrace it.

Legality

This principle refers to the express application of the principles and standards of human rights in policy and practice. This can be described as using a human rights lens to view and reframe particular problems, experiences and relationships. For example, washing or

dressing a person without regard to their dignity may in some circumstances amount to a breach of the right not to be subjected to inhuman or degrading treatment.

Annex H - Age UK, Help the Aged and Age Concern reports and submissions on Human Rights and older people

Reports and Briefings

Older People and Human Rights Expert Series BIHR 2009 update 2011

Older People and Human Rights Project evaluation report 2011

Strengthening Older People's Rights - Towards a UN Convention 2010

Key human rights developments affecting older people 2010

Older People and Human Rights

On the Right Track - A progress review of the human rights of older people in health and social care 2008

Human Rights Policy Position 2008

Equality, human rights and good relations – the age dimension 2007

Rights for Real Human Rights Older People and the CEHR 2006

Rights at Risk Older People and Human Rights 2005

Memorandum on older people and human rights 2003

Submissions and Responses

Response to Bill of Rights Consultation 2011

Response to the UN Human Rights Council's Universal Periodic Review 2011

Evidence to Older People and Human Rights in Home Care Inquiry 2011

Submission to JCHR on the human rights compatibility of the Equality Bill 2009

Evidence to the inquiry of the Joint Committee on Human Rights into the meaning of 'public authority' under the Human Rights Act 2009

Submission to the Joint Committee on Human Rights' inquiry into the human rights of older persons in healthcare 2007

Other non- Age UK reports

Specific human rights for Older Persons - European Human Rights Law Rights – Professor Dr Paul De Hert 2011

Close to Home – an inquiry into older people and human rights in home care Equality and Human Rights Commission 2011

Your Human Rights – A Guide for Older People – British Institute for Human Rights 2008

