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HUMAN RIGHTS AND OLDER PEOPLE

This research note discusses human rights that appear most relevant to particular difficulties potentially faced by older people, i.e. persons aged 65 years and older

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CONTENTS

1. Introduction	1
2. Key Areas In Which Older People May Face Particular Difficulties	1
3. Human Rights Act 1998	1
4. Human Rights Of Older People	2
5. Key Principles Governing Human Rights.....	4
6. Recent Developments That Concern Human Rights Of Older People	5

1. INTRODUCTION

This research note discusses human rights that appear most relevant to particular difficulties potentially faced by older people, i.e. persons aged 65 years and older.¹ Section 1 highlights key areas in which older people may face particular difficulties. Section 2 explains that older people have human rights under the *Human Rights Act 1998* that potentially protect their interests when facing difficulties in these areas. Section 3 compiles a list of human rights that appear most relevant to older people, and provides examples illustrating when they could be applied. Section 4 highlights key principles that govern the scope of these rights. Finally, section 5 highlights recent Northern Ireland, European and international developments that concern human rights of older people.

2. KEY AREAS IN WHICH OLDER PEOPLE MAY FACE PARTICULAR DIFFICULTIES

Older people may face particular difficulties in the following key areas:

- physical and mental health;
- community care;
- social care;
- housing;
- transport;
- employment;
- income;
- education and leisure;
- utilities and consumer protection;
- access to information; and
- decision-making.

3. HUMAN RIGHTS ACT 1998

Older people are afforded protection of their human rights under the *Human Rights Act 1998* (the *HRA 1998*), which incorporates the *European Convention on Human Rights (ECHR)* into domestic law. These rights may be asserted when facing difficulties in the areas outlined in the previous section.

Important provisions of the *HRA 1998* include:

- Section 6, which imposes an obligation on “public authorities” to act in a way that is compatible with the *ECHR* and makes it unlawful for a “public authority” to act in a way that is incompatible with the *ECHR*.

¹ This research note heavily draws on two documents, i.e.:

- (i) an October 2001 publication of the Northern Ireland Human Rights Commission (NIHRC) entitled *Enhancing the Rights of the Older People in Northern Ireland*, (which is available at www.nihrc.org/files/combined_publications.htm); and
- (ii) a September 2000 presentation delivered in London by Murray Hunt, a practising human rights barrister at a Help the Aged seminar entitled “The Human Rights Act – what are the implications for older people?”, (which is available through a link on http://libwww.essex.ac.uk/Human_Rights/ELDER_RIGHTS.htm).

- Section 3, which imposes an interpretative obligation, i.e. to interpret legislation in a way that is compatible with the *ECHR*.
- Section 2, which requires courts and tribunals to take relevant *ECHR* case law into account when making decisions.

Collectively these provisions should help to protect the human rights of older people.

4. HUMAN RIGHTS OF OLDER PEOPLE

This section compiles a list of human rights that appear most relevant to older people, and provides examples of their potential application.

They include the following:

- **the right to life under Article 2** of the *ECHR*, which states that: “Everyone’s right to life shall be protected by law.” For example, in the area of housing, specifically where an elder person is living in a residential home that is to be closed, but closing the home and moving the person would be life threatening to him or her – his or her right to life under Article 2 may have been violated. But Article 1, Protocol 1 may provide a defence to such a claim.²
- **the right not to be subjected to inhuman treatment under Article 3** of the *ECHR*, which states that: “No-one shall be subjected to torture or to inhuman or degrading treatment or punishment”. For example, in the area of health, specifically where an elder patient has a living will stating that he or she does not want to be resuscitated or have his or her life maintained through enforced treatment and the right not to be treated – his or her right not to be subject to degrading treatment under Article 3 may have been violated.³
- **the right to liberty under Article 5** of the *ECHR*, which states that: “Everyone has the right to liberty and security of person”. For example, in the area of mental health, specifically in relation to informal admissions where hospital policies do not provide an elderly patient with adequate procedural rights – his or her right to liberty under Article 5 may be violated.⁴
- **the right to a fair hearing under Article 6 (1)** of the *ECHR*, which states that: “In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. For example, in the area of social care, there is an issue as to whether the complaints system concerning social care decisions complies with Article 6, assuming of course that the issues involved are “civil rights and obligations”. It appears that the internal procedure can be lengthy; and a case may get as far as an independent review or the Ombusman (the Commission for Complaints); but there is no power to compel a course of action or a remedy for the complainant. The complainant therefore may not have an adequate appeal system, which may violate his or her right under Article 6(1).⁵

² NIHRC. October 2001, 2.5.5.

³ Hunt, Murray. September 2000, 6.

⁴ Id.

⁵ NIHRC. October 2001, 2.5.8.

- **the right to respect for home, family and private life under Article 8** of the *ECHR*, which states that: “Everyone has the right to respect for his [or her] private and family life, his [or her] home and his [or her] correspondence”. For example, in the area of health, specifically where an elderly patient is denied access to officially held information about his or her health that may help him or her in relation to some other right – his or her right may have been violated under Article 8.⁶
- **the right to freedom of thought, conscience and religion under Article 9** of the *ECHR*, which states that: “Everyone has the right to freedom of thought, conscience and religion”. For example, Article 9 is interpreted to impose a positive obligation, so in the area of transport, where an elderly person cannot use public transport and cannot afford private transport to his or her place of worship, and the state fails to provide such transport and cannot justify its interference with the person’s rights – such a person’s rights may have been unlawfully interfered with by the state under Article 9.⁷
- **the right not to be discriminated against under Article 14** of the *ECHR*, which states that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Age is not expressly included in the current list of impermissible discriminatory grounds. However, the list significantly includes “and other status”. The European Court on Human Rights in Strasbourg has interpreted this concept as deliberately leaving the list open for the Court to recognise further grounds in future. But at present, it does not appear that the *ECHR* includes age.⁸

It must be further noted that Article 14 has further significant limitations in its potential application. It is not a free-standing equality clause and does not stand on its own as an anti-discriminatory provision. An individual can complain only about discrimination under Article 14 if other *ECHR* rights are being alleged.

Moreover, Protocol 12 to the *ECHR* is supposed to strengthen Article 14 and bring in a free-standing anti-discrimination provision that does not have to be linked to another *ECHR* right if it is to be asserted. However, following a debate about whether age should be expressly included in Protocol 12, it ultimately was decided that it would be better to leave it open to future development.⁹

Protocol 12 has been signed to date by the United Kingdom, but not ratified; and there are no plans at present as to when it will be ratified.

An example of the application of these provisions in the area of employment concerns an employer’s application of a mandatory retirement age, which

⁶ Hunt, Murray. September 2000, 7.

⁷ NIHRC. October 2001, 4.3.2.

⁸ Hunt, Murray. September 2000.

⁹ Id.

results in an individual's retirement – the individual's rights under either under Article 14 or potentially Protocol 12 may have been violated.¹⁰

- **the right to property - everyone is entitled to the peaceful enjoyment of his possessions under Article 1, Protocol 1** of the *ECHR*, which states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and to the conditions provided for by law and by the general principles of international law". For example, in the area of social care, specifically in the assessment of resource regulations which take into account the home of a person entering care, but the property is no longer the individual's home; in such a situation, the taking of the value of the home is arguably unlikely to amount to an interference with the individual's peaceful enjoyment of possessions under Article 1, Protocol 1. However, it may constitute an interference under different circumstances.¹¹
- **the right to education under Article 2, Protocol 1** of the *ECHR*, which states that: "No-one shall be denied the right to education". For example, in the area of education, where an older person could not access a particular course due to a lack of accessibility and a lack of alternative arrangements – his or her rights under Article 2, Protocol 1 and Article 14 may have been violated.¹²

5. KEY PRINCIPLES GOVERNING HUMAN RIGHTS

This section briefly highlights key principles that have been developed by the European Court on Human Rights to govern the scope of the rights outlined in section three, i.e.:

- Rights and limitations – the **'Principle of Proportionality'** – the above rights are not absolute. Their application requires striking a balance between the competing interests in a particular situation. One should ask if a right is at stake. If there is, was it interfered with? If it was, is the interference justifiable, meaning is it proportionate? This requires the application of a balancing test to see if the extent of the interference is justified, i.e. does it serve a legitimate aim of the decision-maker?
- The **'Margin of Appreciation'** - this principle allows the European Court on Human Rights to make a decision that it is inappropriate for it to interfere in the actions of national decision-makers, usually because the Court cannot be confident that imposing a specific standard will gain acceptance across all the member states of the Council of Europe. It therefore is important to realise that existing judgments that were made under the Margin of Appreciation leave that issue "up for grabs" locally because the courts in the United Kingdom could revisit case law that is based on this principle.¹³ The law therefore could develop in these areas, possibly broadening.

¹⁰ Ibid, 5.

¹¹ NIHRC. October 2000.

¹² Ibid, 7.4.1.

¹³ Hunt, Murray. September 2000, 4.

6. RECENT DEVELOPMENTS THAT CONCERN HUMAN RIGHTS OF OLDER PEOPLE

This section highlights recent Northern Ireland, European and international developments that concern human rights of the elderly in Northern Ireland. They include the following:

Northern Ireland

- The forthcoming draft Single Equality Bill, which is being conducted by the Office of First Minister and Deputy First Minister. It is anticipated to enter its second consultation phase in 2002, which will request comments on a proposed draft Bill.
- At present, there is an on-going consultation on the *Bill of Rights for Northern Ireland*, which is being conducted by the NIHRC. It presently appears from the consultation document that it will not include a section expressly prescribing rights for older people; but its provisions generally will apply to them.

European

- The Commission on the European Communities issued a communication in 1999 entitled *Towards a Europe for All Ages*, which set out the implications for the ageing population of Europe in employment, social protection, health and social services.
- The *European Charter of Social Rights and the Revised Social Charter* enshrines a number of social rights that apply to the elderly, including social welfare service rights, social protection and protection against poverty and social exclusion. To date the United Kingdom has ratified the original *Charter*, accepting 60 of its 72 numbered paragraphs, (which is a fairly low comparative acceptance level); but has not ratified the additional protocols nor the revised *Charter*.¹⁴
- Article 13 of the *EC Treaty* (ex Article 6a), as amended by the *Treaty of Amsterdam*, which came into force on 1 May 1999, empowers the Council of Ministers to take appropriate action to tackle age-based discrimination.
- The European Union Framework Directive requires the United Kingdom to introduce age into its anti-discrimination law by 2 December 2006. It further requires by 2 December 2006 that the law include disability protections that necessitate modification of the existing disability discrimination law in Northern Ireland.
- The European Union Race Directive establishes a set of minimum standards for legal protection against discrimination or harassment for the protected categories of racial/ethnic origin in employment and training and social protection, e.g. social security. The United Kingdom must implement by July 2003.
- The *European Union Charter of Fundamental Rights* is a very recent document that may set new standards at European level and impact on older

¹⁴ NIHRC. October 2001, 2.6.2.

people's rights, when taken into account in the jurisprudence of the European Court of Justice.

International

- The *United Nation's International Plan of Action on Ageing* sets out standards concerning ageing.
- There are other existing international instruments that protect the rights of older people, e.g. *International Covenant on Economic, Social and Cultural Rights*.