
The Human Rights of Older People during Covid-19: Social Wellbeing and Access to Care and Support for Older People in the United Kingdom

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Abstract

To date, the vast majority of Covid-19 deaths have been those over the age of 65. The vulnerability of older people to the impacts of Covid-19 were recognised early and have featured prominently in policy discussions and decision-making of governments around the world. While the risks posed by Covid-19 to the health and wellbeing of older people are significant, the impact of policies introduced in response to the public health crisis raise several critical human rights issues.

This article addresses two broad areas of concern regarding the rights of older people which have emerged in the United Kingdom as a consequence of Covid-19. Firstly, this article discusses the risks posed by the suspension of several Local Authority duties under the Care Act, and proposes amendments aimed at ensuring the rights of people in need of care and support are maintained during this period. Secondly, the social wellbeing of older people is discussed with reference to Article 8 of the European Convention on Human Rights, which establishes the right to respect for private and family life. For older adults living in the community, it is argued that Article 8 imposes a positive obligation on Local Authorities to identify and support those older adults experiencing significant isolation or loneliness as a consequence of measures introduced in response to Covid-19. In care home environments, Article 8 is considered with reference to the suspension of care home visitation rights, which is argued to be a disproportional and overly restrictive measure which imperils the rights and social wellbeing of older people.

I. Introduction

Older people are at the highest risk of Covid-19, owing to age-related physiological changes which increase infection susceptibility, and a higher incidence of underlying conditions. As a result, older people are more likely to contract Covid-19, and at greater risk of complications and morbidity when they do.¹ Those over the age of 65 have accounted for 93% of all Covid-19 deaths in England and Wales, with a death rate of 286 per 100,000, compared with 8.4 among those aged under 65.² Globally, fatality rates from Covid-19 among those over the age of 80 are five times greater than the population average, with this rate expected to increase further as the virus spreads among older

¹ World Health Organization, Office for Europe, 'Statement: Older people are at highest risk from COVID-19, but all must act to prevent community spread', by Hans Henri P. Kluge, 2 April 2020, <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/statements/statement-older-people-are-at-highest-risk-from-covid-19,-but-all-must-act-to-prevent-community-spread> [accessed 8 May 2020].

² Office of National Statistics (ONS), 'Coronavirus related deaths by occupation, England and Wales: Deaths registered up to and including 20 April 2020', 11 May 2020, <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronaviruscovid19relateddeathsbyoccupationenglandandwales/deathsregistereduptoandincluding20april2020> [accessed 10 May 2020].

people living in developing countries.³ While the significant direct health risks posed by Covid-19 for older people demand clear and targeted responses, policies enacted must be proportional, measured and aimed towards the preservation of older person's dignity and fundamental human rights. This article focuses on two areas of concern with regard to the effect of Covid-19 on the rights and dignity of older people in the United Kingdom (UK): social wellbeing, and access to care and support.

II. Access to Care and Support

In recognition of the significant impact of COVID-19 on the social care workforce capacity, the Coronavirus Act 2020⁴ has modified or temporally suspended a range of local authority duties under the Care Act 2014 (CA). With an expected increase in social care referrals coinciding with a significantly reduced workforce, these changes were justified on the basis of enabling local authorities to 'continue to be able to deliver the best possible care services during the peak and to protect the lives of the most vulnerable members of society'.⁵ Among the most significant changes has been the suspension⁶ of the duty for local authorities to undertake a needs and financial assessment 'where it appears to a local authority that an adult may have needs for care and support,' irrespective of their view of the extent of the adult's needs, or their financial resources.⁷ The duty to provide support to meet eligible unmet needs has also been suspended, with the only requirement being that support be provided where it is necessary to prevent a breach of a person's rights under the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act.⁸ While this duty applies to potential breaches of any of the ECHR rights, those most relevant to the aforementioned CA duties are Article 2 (right to life), Article 3 (freedom from inhumane and degrading treatment), and Article 8 (the right to private and family life).

Regulations giving effect to the suspension of these duties have not yet been published, with the government advising that local authorities should only exercise these easements 'where this this is essential in order to maintain the highest possible level of resources'.⁹ Nonetheless, serious concerns remain as to the impact of these measures during a time when older people's needs for care and support are likely to increase, and informal support and care in the community is likely to be harder to access. First, while the intention of these easements is to enable a more efficient and effective use of resources, the scale of the revised provisions is likely to require local authorities to introduce new procedures and administrative systems that will delay the provision of critical care.¹⁰ Second, the lowering

³ World Health Organization, 'COVID-19 Strategy update', 14 April 2020, https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_19&download=true [accessed 7 May 2020].

⁴ Coronavirus Act, 2020, Schedule 11, Chapter 7.

⁵ Department of Health and Social Care, 'Guidance: What the Coronavirus Bill will do, Easing the burden on frontline staff both within the NHS and beyond,' 26 March 2020, paragraph 5 <https://www.gov.uk/government/publications/coronavirus-bill-what-it-will-do/what-the-coronavirus-bill-will-do> [accessed 6 May 2020].

⁶ Coronavirus Act, 2020, Chapter 7, Part 1 (Main Provisions).

⁷ Care Act, 2014, Section 9 (1-7).

⁸ Human Rights Act, 1998, Section 1.

⁹ Department of Health and Social Care, 'Care Act easements: guidance for local authorities,' Section 4, 1 April 2020, <https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities> [accessed 2 May 2020].

¹⁰ British Association of Social Work, 'Briefing paper on Coronavirus Bill,' 25 March 2020, <https://www.basw.co.uk/media/news/2020/mar/basw-england-briefing-paper-coronavirus-bill> [accessed 4 May 2020].

of the duty threshold to circumstances of anticipated ECHR breaches assumes a high level of knowledge and expertise on the part of the assessor and gives an unprecedented level of discretion to local authority decision makers. With the vast majority of CA assessments undertaken by social workers, the British Association of Social Worker's (BASW) response to the CA easements cautions against the assumption of the requisite ECHR knowledge and competency:¹¹

...social workers are not experienced in applying human rights law in the specific way that is envisaged and this would involve a steep learning curve. The Care Act 2014 operationalises the principles of human rights into the concept of wellbeing and provides a well understood means of social workers applying professional judgment to assessing and meeting needs.

While recognising the unique circumstances posed by Covid-19, and the speed at which the Coronavirus Act needed to be developed, changes are needed to ensure that older people's needs continue to be met over this period. Reflecting the limitations discussed above, the following amendments proffered by public law experts, and the BASW, are worthy of serious consideration:¹²

- Amending the application of local authority duties under the CA to require that they be implemented “as far as reasonably practicable”, rather than the wholesale suspension of duties to undertake needs and financial assessments. The “reasonably practicable” provision would not apply in circumstances of anticipated ECHR breaches, such as where a failure to undertake an assessment could conceivably lead to the loss of life (ECHR Article 2), or subject a person to neglect, abuse or indignity (ECHR Article 3). In such circumstances, undertaking a needs or financial assessment would remain a duty.
- The introduction of a provision which would require the local authority to be satisfied that compliance with pre-amendment CA duties is incompatible with other statutory duties, or the efficient use of resources, prior to treating the relevant duties as disappplied. In effect, such a provision would require local authorities to justify the suspension of duties by demonstrating a significance change to needs, or available resources. For example, suspending the duty to undertake routine needs re-assessments could be justified on the basis of a demonstrated increase in the number of new assessments needing to be undertaken.
- Amending the Act to include an express requirement that local authorities carry out an assessment in order to verify the risk of an ECHR breach. While local authorities are currently required to be satisfied that there would not be an ECHR breach, the corresponding suspension of the duty to undertake a needs assessment would make such a determination difficult, if not impossible.

¹¹ Ibid.

¹² Jenni Richards, Jonathan Auburn and Steve Broach, ‘The Coronavirus Bill – Schedule 11’, 20 March 2020, <https://www.11kbw.com/knowledge-events/article/the-coronavirus-bill-schedule-11/> [accessed 4 May 2020]; BASW (n. 10).

III. Social Wellbeing

f) a) Older people living in the community

The social and economic wellbeing of older people has been significantly and disproportionately disrupted as countries around the world instruct those vulnerable to Covid-19 to self-isolate within their own homes and arrange for the delivery of groceries, medicines and other essential items. At the time of writing, all people over the age of 70 in the UK have been advised to self-isolate within their own homes for two months, with no clear indication as to when this guidance will be amended.¹³ Changes associated with later life, such as retirement, declines in health or mobility, and the death of spouses and friends, leave many older people vulnerable to social isolation and loneliness.¹⁴ In the UK, approximately 2 million people over the age of 75 live alone,¹⁵ and 17% of people over 65 report less than weekly contact with family, friends and neighbours.¹⁶ With older people more likely to live alone and to rely on social networks within their immediate neighbourhood environment for social interaction,¹⁷ the physical distancing and self-isolation measures introduced in response to COVID-19 have been particularly onerous.

It is important to recognise that many older people with the means and capacity to adapt, have been proactive in using digital social networking technology to communicate and maintain relationships with family and friends. However, it remains the case that older adults are significantly less likely than younger people to have access to an internet enabled device, with 79% of all digital exclusion in the UK among those aged over 65.¹⁸ Considering that the rate of digital exclusion is highest among older people living alone and experiencing financial disadvantage,¹⁹ physical distancing and home isolation are exacerbating existing inequalities experienced by some older people. While the guidance provided to older people is intended to protect their health and wellbeing during this period, it is critical that local authorities are proactive in recognising and responding to the consequences of these measures for older people. As noted by the Equality and Human Rights Commission with respect to the obligations of local authorities under Article 8 of the ECHR:

¹³ Public Health England, 'Guidance on social distancing for everyone in the UK,' 30 March 2020, <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>; Cabinet Office, 'Guidance: Staying alert and safe (social distancing),' 11 May 2020, <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing> [accessed 4 May 2020].

¹⁴ Susan Davidson and Phil Rossall, 'Evidence review: Loneliness in later life', Report commissioned by Age UK, July 2015, https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/health--wellbeing/rb_june15_loneliness_in_later_life_evidence_review.pdf [accessed 8 May 2020].

¹⁵ Jennifer Thomas, 'Insights into loneliness, older people and wellbeing', Office of National Statistics, October 2015, <https://backup.ons.gov.uk/wp-content/uploads/sites/3/2015/10/Insights-into-Loneliness-Older-People-and-Well-being-2015.pdf> [accessed 8 May 2020].

¹⁶ Christina Victor et al., 'The prevalence of, and risk factors for, loneliness in later life: a survey of older people in Great Britain,' (2005) 25(6) *Ageing & Society* 357.

¹⁷ Ibid.

¹⁸ Digital exclusion is defined here as 'not having used the internet in the past 3 months.' [Susan Davidson, 'Digital inclusion evidence review 2018', Report commissioned by Age UK (November 2018), https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/age_uk_digital_inclusion_evidence_review_2018.pdf].

¹⁹ Ibid.

In some limited circumstances, this could mean that local authorities have a positive obligation to remedy extreme isolation experienced by individuals who depend on care services to maintain relationships with others by getting out of their homes.²⁰

During this period, such positive obligations should apply to those older adults experiencing the most significant forms of isolation and disadvantage as a consequence of physical distancing and self-isolation measures.

b) Older people in supported accommodation environments

There are 11,300 care homes for older people in the UK,²¹ responsible for the care and support of approximately 418,000 residents.²² As has been demonstrated since the advent of Covid-19, residential environments for older people are particularly susceptible to outbreaks of infectious disease, with management and containment hampered by close living quarters and the vulnerable health status of many residents.²³ In addition, isolating residents and limiting their interaction with staff is difficult to implement in an environment with high-level physical, mental and cognitive care needs.²⁴ The toll of Covid-19 on care homes in the UK and around the world has been undeniably devastating, having claimed the lives of almost 10,000 care home residents in the UK at time of writing.²⁵ In response to shifting government guidance, non-essential visits to care homes by family and friends have been restricted or completely suspended in many care homes across the UK. While alterations to normal practice and procedure are clearly warranted by the unique vulnerabilities of care home environments, these must be carefully balanced against the physical and mental health risks of loneliness and isolation from social support networks. As public authorities, National Health Service (NHS) Funded care homes have a legal obligation under Section 6 of the Human Rights Act to act compatibly with human rights. Article 8 of the ECHR protects the right to private and family life, home and correspondence.²⁶ This includes the right to live with one's family, or, where this is not possible, to right to maintain relationships through regular contact and the facilitation of visits from family and friends.²⁷ The protection against interference with the right to respect

²⁰ Equality and Human Rights Commission, 'Close to home: An inquiry into older people and human rights in home care', 2011, https://www.equalityhumanrights.com/sites/default/files/close_to_home.pdf [accessed 8 May 2020], 39.

²¹ Competition and Markets Authority, 'Care homes market study: summary of final report,' 30 November 2017, <https://www.gov.uk/government/publications/care-homes-market-study-summary-of-final-report/care-homes-market-study-summary-of-final-report#fn:4> [accessed 10 May 2020].

²² Laing Buisson, 'Care of older people: UK market report' (28th ed), May 2017, 12-13.

²³ Evonne Curran, 'Infection outbreaks in care homes: Prevention and management', (2017) 113 (9) *Nursing Times* 18-21. See also, for similar issues affecting prisons and other places of detention, the paper by Carla Ferstman on detention and pandemic exceptionality, in this publication.

²⁴ An estimated 69% of UK care home residents live with dementia. See, Martin Prince et al., 'Dementia UK: Update Second Edition', Report produced for the Alzheimer's Society, 2014, http://eprints.lse.ac.uk/59437/1/Dementia_UK_Second_edition_-_Overview.pdf [accessed 8 May 2020].

²⁵ Office of National Statistics, 'Deaths involving COVID-19 in the care sector, England and Wales: deaths occurring up to 1 May 2020 and registered up to 9 May 2020', 15 May 2020, <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/deathsinvolvingcovid19inthecaresectorenglandandwales/deathsoccurringupto1may2020andregisteredupto9may2020provisional> [accessed 16 May 2020].

²⁶ Health and Social Care Act, 2008, section 145.

²⁷ Eilidh Turnbull, 'Family visits and care home complaints: Getting it right', British Institute of Human Rights, 30 April 2019, <https://www.bih.org.uk/blog/family-visits-and-care-home-complaints> [accessed 6 May 2020].

the home under ECHR Article 8 has also been found to extend to contracts for accommodation in care home environments,²⁸ and is reflected in the Care Quality Commission's position that 'we must never forget that care homes are people's homes'.²⁹ Beyond protection against interference, Article 8 imposes positive obligations on government and those working on its behalf to ensure that private and family life, home and correspondence are respected.³⁰ As such, care homes are required to take reasonable steps to enable regular contact between residents and their family and friends, such as providing dedicated spaces for private visits, and facilitating contact through telephone, post or other means.³¹ These duties are reflected in guidance issued by the independent regulator of health and social care providers in England, the Care Quality Commission, who impose the following obligations on social care providers:³²

Regulation 10(2)(a): People's relationships with their visitors, carer, friends, family or relevant other persons should be respected and privacy maintained as far as reasonably practicable during visits.

Regulation 10(2)(b): People must be supported to maintain relationships that are important to them while they are receiving care and treatment.

The rights under Article 8 of the ECHR are qualified rather than absolute, meaning that they can be restricted where it is in pursuit of a legitimate aim set out in the Human Rights Act, and is both necessary and proportionate to the circumstances.³³ In satisfying the test for necessity and proportionality with respect to obligations under Article 8 of the ECHR, it has been argued that the 'care home must show it has considered all other options available and picked the least restrictive option'.³⁴ The risks posed by Covid-19 provide a clear justification under the ECHR Article 8(2) for temporary changes to care home visitation procedures to protect the health and safety of staff and residents. However, it is questionable whether the current balance struck by some care providers between staff and resident safety and residents' need for social connection meets the test of proportionality and the principle of the least-restrictive alternative. Guidance provided by the Department of Health and Social Care initially 'recommended that care homes limit unnecessary visits', while maintaining that 'visits at the end of life are important both for the individual and their loved ones'.³⁵ However, considering the average length of stay in a care home prior to

²⁸ See, *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2001] EWCA Civ 595.

²⁹ Care Home Professional, 'More care homes banning relatives who complain, charity warns', 23 April 2019, paragraph 4, <https://www.carehomeprofessional.com/more-care-homes-banning-relatives-who-complain-charity-warns/> [accessed 9 May 2020].

³⁰ *Marckx v. Belgium*, Appl. no. 6833/74, 13 June 1979, held that Article 8 'does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life', [para. 31].

³¹ Care Quality Commission, 'Information on visiting rights in care homes,' October 2019 https://www.cqc.org.uk/sites/default/files/20191017_visiting_rights_information_2019_update.pdf [accessed 8 May 2020].

³² Health and Social Care Act 2008 (Regulated Activities) Regulations, regulation 10.

³³ ECHR Article 8(2) holds that interference is justified only where it is in accordance with the law; in pursuit of a legitimate aim (national security, public safety, economic wellbeing, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others); and, necessary in a democratic society.

³⁴ Claire Burrows, 'To what extent can a care home restrict visitors' access?', (Dec. 2019) 22(1) *Nursing and Residential Care*, paragraph 11.

³⁵ Department of Health and Social Care, 'COVID-19: Our action plan for adult social care,' Section 3.11, 16 April 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879639/covid-19-adult-social-care-action-plan.pdf [accessed 2 May 2020].

death is approximately 26 months,³⁶ the absence of clear guidance as to what constitutes a ‘necessary’ visit, and who is responsible for determining this, continues to cause understandable concern among some residents and their loved ones.³⁷ In addition the social wellbeing of care home residents, the question of the ‘necessity’ should also be considered within the context of the accountability and oversight provided by external visitors to care home environments.³⁸ With visits suspended, there may be an increased risk, or at least decreased visibility, of inhuman or degrading treatment of older people, potentially in breach of Article 3 of the ECHR.

Differences in interpretation and implementation of the Department of Health and Social Care guidelines have also resulted in a myriad of different policies, ranging from enhanced visitor management, such as supervising handwashing and scheduling visits, through to the suspension of all social visits outside of a palliative context.³⁹ With guidelines for the management of Covid-19 in care homes under review at the time of writing, clear and unambiguous guidance on visitation procedures is needed to ensure that the rights and wellbeing of older people are uniformly protected. With respect to care homes’ obligations under Articles 3 and 8 of the ECHR, the least restrictive approach is surely one which allows for older people to receive visitors, while maintaining the health and safety of care home residents and staff. While the temporary imposition of no-visitor policies is perhaps appropriate during periods of an acute outbreak, it should not be the case that visitation is suspended as a defensive strategy across all care homes in the UK. Instead, reflecting their positive obligations under Articles 3 and 8 of the ECHR, local authorities should be proactive in providing care homes with the resources required to adapt their visiting policies and procedures during this period.

IV. Conclusion

The lives of older people have been significantly and disproportionately impacted by Covid-19. While all older people in the UK are likely to have been impacted in some way with the introduction of physical distancing and isolation measures, this paper has drawn particular attention to the unique vulnerabilities facing socially isolated older people living in the community, those in need of care and support, and those residing in care homes. In each of these settings, the rapid changes seen since Covid-19, whether as a consequence of the illness itself, or policies developed in response, have exacerbated underlying vulnerabilities and raised several human rights concerns. As this public health crisis continues to develop, the rights and wellbeing of older people must remain a visible and critical consideration.

³⁶ Julien Forder and Jose-Luis Fernandez, ‘Length of stay in care homes’, Report commissioned by Bupa Care Services, PSSRU discussion paper 2769 (January 2011), <https://www.pssru.ac.uk/pub/3211.pdf> [accessed 3 May 2020].

³⁷ See Relatives and Residents Association, ‘Coronavirus: Voices from the ground,’ <https://www.relres.org/voices-from-ground/> [accessed 10 May 2020].

³⁸ Alison Rahn, ‘Banning visitors to aged care during coronavirus raises several ethical questions – with no simple answers,’ 15 April 2020, <https://theconversation.com/banning-visitors-to-aged-care-during-coronavirus-raises-several-ethical-questions-with-no-simple-answers-134663> [accessed 10 June 2020].

³⁹ Care Home Professional, ‘Coronavirus: Care home visitor restrictions called into question,’ 16 March 2020, <https://www.carehomeprofessional.com/coronavirus-care-home-visitor-restrictions-called-into-question/> [accessed May 9 2020].