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**IRISH CENTRE
FOR HUMAN RIGHTS**

**Human Rights Norms Relevant to the Treatment of Care Home Residents
during the Covid-19 Pandemic in Ireland:**

A Preliminary Research Report for Care Champions

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About the Authors

The authors of this report were LLM candidates at the Irish Centre for Human Rights (ICHR), School of Law, University of Galway, during the 2021/2022 academic year, and Dr Maeve O'Rourke, Lecturer at the ICHR. The research presented in this report was conducted at the request of Care Champions, a voluntary family run advocacy group supporting relatives and carers of people living, and some of whom have died, in residential care and nursing homes in Ireland. The research for this report was one element of a partnership between the authors and Care Champions, arranged and supervised under the auspices of the Human Rights Law Clinic at the ICHR. The authors also carried out interviews with members of Care Champions, pursuant to University of Galway research ethics procedures. With the interviewees' informed consent, these interviews have been translated into written statements to be used by Care Champions for advocacy purposes.

About the Irish Centre for Human Rights

The ICHR is Ireland's principal academic human rights institute, undertaking human rights teaching, research and training, and contributing to human rights policy and legal developments nationally and internationally. The Human Rights Law Clinic at the ICHR was launched in 2019 under the direction of Dr Maeve O'Rourke. The Clinic introduces students to 'movement lawyering' theories and approaches and enables students to contribute their skills to community-based movements for social change.

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Overview

The Covid-19 pandemic has had a disproportionate impact on residents of care homes in terms of restrictions, isolation, and deaths.¹ By mid-2020, nursing home residents accounted for 40% of Covid-19 deaths in the United States, 56% in Ireland, 47% in the United Kingdom and 40% in Italy.² A May 2020 United Nations (UN) Policy Brief on the Impact of Covid-19 on Older Persons stated:

A particularly horrifying picture has emerged regarding the impact of Covid-19 on older persons in long-term care facilities... 4,260 residents of residential care facilities who were diagnosed with coronavirus or had associated symptoms have died in the Madrid region alone in March. The picture in other parts of the world...is equally grim. Nearly 7,500 residents of care homes have died of COVID-19 in France, making up almost a third of all coronavirus deaths,...similarly in the United States, one of every five deaths attributed to COVID-19 – more than 7,000 – have occurred in nursing homes.³

This report provides a preliminary overview of some human rights laws that are key to considering whether the human rights of people in Irish residential care settings have been violated during the Covid-19 pandemic. The research for this brief report was conducted at the request of Care Champions, a voluntary group of relatives of older people living, or who have died, in nursing homes in Ireland. Care Champions have called repeatedly for a public inquiry into apparent systematic violations of the rights of people living in residential care settings during the Covid-19 pandemic in Ireland.

National, and indeed global, emergencies present exceptional circumstances. As the Irish Council for Civil Liberties has highlighted, states may restrict certain rights for public interest reasons including in a public health emergency. Such restrictions, however, must be 'necessary, proportionate and consistent with [the state's] national and international legal obligations'.⁴ Ireland did not register any derogations from its ECHR obligations pursuant to Article 15 ECHR; therefore it is and was bound by the ECHR's ordinary provisions. The below sections discuss some of those key provisions, for example the requirement that—in addition to being necessary and proportionate—all deprivations of liberty and all interferences with

¹ Maria Pierce, Fiona Keogh and Eamon O'Shea, 'The impact of COVID-19 on people who use and provide long-term care in Ireland and mitigating measures' (International Long-Term Care Policy Network 13 May 2020). COVID-19 Nursing Homes Expert Panel 'Examination of Measures to 2021, Report to the Minister for Health', 28.

² Conan Brady and others, 'Nursing Home Staff Mental Health during the Covid-19 Pandemic in the Republic of Ireland' (2022) 37 *International journal of geriatric psychiatry*, 1.

³ UNGA, 'Policy Brief: The Impact of COVID-19 on Older Persons' (May 2020) 5.

⁴ Doireann Ansbro and others, 'Human Rights in a Pandemic: A Human Rights Analysis of the Irish Government's Response to Covid-19.' (May 2021) 14.

private and family life are based on clear and foreseeable domestic legal rules that guard against arbitrariness and protect the essence of the rights at stake. Crucially, too, this short report discusses the absolute right to freedom from torture and other inhuman or degrading treatment: which can never be subject to limitation even in emergency circumstances.

Marginalised groups become increasingly vulnerable during emergencies.⁵ It is essential to apply the law concerning permissible (and impermissible) interferences with rights carefully and strictly, to ensure that those who require the greatest protection of their rights in emergency scenarios are afforded those guarantees in practice.

This report analyses the Irish State's obligation to 'secure to everyone within [its] jurisdiction the rights and freedoms'⁶ contained in the European Convention on Human Rights (ECHR): a treaty that is implemented domestically via the European Convention on Human Rights Act 2003 (the Act). The Act requires every organ of the State to perform its functions in a manner compatible with the State's obligations under the ECHR⁷ and further provides that, in interpreting and applying any statutory provision or rule of law, an Irish court must, insofar as is possible, do so in a manner compatible with the State's obligations under the Convention provisions.⁸ Additionally, this report contains some references to relevant articles of other international treaties which Ireland has ratified: these include the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁹ the International Covenant on Civil Political Rights (ICCPR),¹⁰ ratified by Ireland in 1989, and the UN Convention on Rights of Persons with Disabilities (CRPD),¹¹ ratified by Ireland in 2018.

The report also considers in very basic detail Articles 40-44 of the Irish Constitution, which protect a number of fundamental human rights including the right to equal treatment (Article 40.1), the right to liberty (Article 40.4), and personal rights that may be understood to follow from the express right to protection of the person or are among the unenumerated rights

⁵ Covid-19 NGO Group 'Marginalised Groups; Promoting Equality, Inclusion and Human Rights in the Covid-19 Crisis A Joint Submission', 3.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('the Convention' or 'the ECHR'), Art 1.

⁷ *ibid* s 3(1).

⁸ European Convention on Human Rights Act 2003 ('ECHR Act') s 2(1).

⁹ *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85 ('CAT').

¹⁰ *International Covenant of Civil and Political Rights* (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

¹¹ *Convention on the Rights of Persons with Disabilities*, (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 ('CRPD').

protected more generally by Article 40.3, including the rights to life, to bodily integrity,¹² and to privacy.¹³

Crucially, the report refers to the State's positive obligations (otherwise known as its 'due diligence' obligations) to regulate, oversee and intervene in situations where people may be experiencing human rights violations in so-called 'non-state' or 'private' contexts. Given the extent to which Irish residential care settings are operated by non-state actors, it is essential to recognise that—as the European Court of Human Rights (ECtHR) has repeatedly held—a state cannot 'absolve itself from responsibility by delegating its obligations to private bodies or individuals'.¹⁴

The following sections explore:

- the right to life,
- the prohibition of torture and inhuman or degrading treatment,
- the right to liberty,
- the right to respect for private and family life, and
- the right to non-discrimination.

Where human rights have been breached, the right to a remedy arises under Irish constitutional, European and international law.¹⁵ An investigation is the most basic form of remedy. The ECtHR has firmly established, also, that a fundamental component of states' positive obligation to prevent and protect from serious human rights violations is the requirement to investigate alleged or apparent: suspicious or unexplained death, torture or other inhuman or degrading treatment, arbitrary detention, or serious infringements of the right to respect for private and family life.¹⁶

The ECtHR has emphasised that the obligation to investigate is not dependent upon the lodging of a formal complaint by the next of kin or their suggesting a particular line of inquiry or investigative procedure.¹⁷ The ECtHR has held further that an 'effective investigation' is one

¹² The right to bodily integrity was recognised in *Ryan v Attorney General* [1984] ILRM 355.

¹³ A general right to privacy was recognised in *Norris v Attorney General* [1984] IR 36 and in *Kennedy v Ireland* [1987] IR 587.

¹⁴ *Kotov v Russia* App no 54522/00 (ECtHR, 3 April 2012) para 92, citing *Costello-Roberts v United Kingdom* App no 13134/87 (ECtHR 25 March 1993) para 27.

¹⁵ *Byrne v Ireland* [1972] 1 IR 241; Article 13 ECHR; see also for example Article 2 of the International Covenant on Civil and Political Rights, and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁶ See Maeve O'Rourke, *A Human Rights Framework: Research for the Truth Recovery Design Process* (Truth Recovery Design Panel 2021), <https://aran.library.nuigalway.ie/bitstream/handle/10379/17277/ORourke-Background-Research-Report-27.9.21.pdf?sequence=1&isAllowed=y>.

¹⁷ *Nachova v Bulgaria* 2005-VII; 42 EHRR 933 GC; see also *Finucane v United Kingdom* (2003) 37 EHRR 29.

which conforms to the following requirements: independence,¹⁸ effectiveness,¹⁹ reasonable expedition,²⁰ thoroughness,²¹ public scrutiny,²² initiation by the state,²³ and involvement of victims to the extent necessary to safeguard their legitimate interests.²⁴

The right to life

Pursuant to Article 40.3.2 of the Irish Constitution and associated jurisprudence, the State must by its laws, protect as best it may from unjust attack, the life of every citizen,²⁵ and ensure that practical and effective safeguards are in place to protect the lives of those within its jurisdiction.²⁶

Article 2 ECHR states, meanwhile:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 is one of the most fundamental provisions of the ECHR. There are two obligations to consider within Article 2. First: the obligation to protect the right to life by law and the prohibition of intentional deprivation of life.²⁷ Second: the procedural component which entails the

¹⁸ See for example *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20; *Ergi v. Turkey*(2001) 32 EHRR 388.

¹⁹ See for example *Keenan v. United Kingdom* (2001) 33 EHRR 913; *Khan v. United Kingdom* (2001) EHRR 1016.

²⁰ See *Gulec v. Turkey* (1999) 28 EHRR 121; *McKerr v United Kingdom* (2002) 34 EHRR 20.

²¹ *El Masri v Macedonia* (2013) 57 EHRR 25, paras 183-185; See also *Assenov* (1999) 28 E.H.R.R. 652 at [103]; and *Bati v Turkey* (2006) 42 E.H.R.R. 37 at [136] (extracts); *Tanrikulu v Turkey* (2000) 30 E.H.R.R. 950 at [104]; and *Gül v Turkey* (2002) 34 E.H.R.R. 28 at [89]; *Boicenco v Moldova* (41088/05) 11 July 2006 at [123].

²² *Ibid.*

²³ *Ilhan v. Turkey* [GC] App No 22277/93, ECHR 2000-VII, para 63

²⁴ See for example *Güleç v Turkey* (1999) 28 EHRR 121; See also *El Masri v Macedonia* (2013) 57 EHRR 25 para 185; *Paul and Audrey Edwards v the United Kingdom* App No 46477/99 (ECtHR, 14 March 2002)

²⁵ *Bunreacht na hÉireann*, Article 40.3.2.

²⁶ *McCann and Others v United Kingdom* (1995) 21 EHRR 97, para 146.

²⁷ *Boso v Italy* [2002] ECHR 846.

obligation to carry out a comprehensive investigation into alleged breaches of the fundamental character of the right to life.²⁸

In addition to refraining from the intentional and unlawful taking of life, the State must ensure that an effective regulatory framework is in place to safeguard the lives of those within its jurisdiction.²⁹ As the ECtHR held in *Makaratzis v Greece*, Article 2 ECHR places a 'primary duty on the state to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'.³⁰

This positive obligation under Article 2 to safeguard lives within the State is applicable in various contexts, including healthcare and institutional facilities.³¹ According to the ECtHR, in the context of healthcare, states are required to regulate hospitals, regardless of whether they are public or private, and to adopt appropriate measures for patients' protection.³² An effective judicial system must also be in place to ensure that those responsible for causing deaths may be held accountable.³³

The fact that the regulatory framework is deficient in some respect is not in itself sufficient to raise an issue under Article 2 ECHR; it must be established that the regulatory framework operated to the patient's detriment.³⁴ Where the denial of life-saving emergency treatment is alleged, each of the following criteria must be met:

- (a) The acts and omissions of the healthcare providers go far beyond medical negligence or simple error by breaching their professional obligations and denying treatment while fully aware of the patient's life risk with the omission of treatment;
- (b) There is systemic or structural impugned dysfunction which is objectively and genuinely identifiable;
- (c) There is a correlation between the impugned dysfunction and the harm that surmounted;

²⁸ *Armani Da Silva v the United Kingdom* [2016] ECHR 314, para 229.

²⁹ *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [2014] ECHR 972, para 130

³⁰ *Makaratzis v Greece* 2004-XI; 41 EHRR 1092 para 57 (GC).

³¹ *Calvelli and Ciglio v Italy* [2002] ECHR 3, paras 48-57

³² *Ibid* paras 48-57.

³³ *Ibid*.

³⁴ *Lopes de Sousa Fernandes v Portugal* [2015] ECHR 1107 para 188.

- (d) The impugned dysfunction resulted from the State's failure to ensure that an effective regulatory framework was in place.³⁵

In addition to the requirement of general regulation and inspection, the ECtHR has held that Article 2 ECHR requires the state to take practical steps to prevent loss of life in specific situations where it knows or ought to know that there is a real risk of death.³⁶ In *Nencheva and Others v Bulgaria*, for example, the ECtHR found that Bulgaria had violated the right to life of fifteen children and young adults who died at a home for young people with disabilities as a result of cold and shortages of food, medicines and basic necessities. The manager of the home had tried without success on several occasions to alert all the public institutions which had direct responsibility for funding the home and which could have been expected to act.

The prohibition of torture and inhuman or degrading treatment or punishment

Article 3 ECHR states: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*³⁷

Article 3 is non-derogable: in other words, the rights protected by Article 3 are absolute and may not be restricted regardless of the circumstances, even in the event of a state emergency.³⁸ The prohibition of torture and ill-treatment also features in the CAT, ICCPR (Article 7), and CRPD (Article 15). Moreover, the prohibition of torture is firmly established as *jus cogens*, meaning that it has the highest standing in international customary law.³⁹

Ill-treatment can come within the scope of Article 3 ECHR if it satisfies any one of the following thresholds:

1. The ill-treatment amounts to degrading treatment or punishment; or
2. The ill-treatment amounts to inhuman treatment or punishment; or
3. The ill-treatment amounts to torture.

³⁵ Ibid paras 191-196.

³⁶ See for example *Oneryildiz v Turkey* 2004-XII, 41 EHRR 325; *Osman v United Kingdom* 1998-VIII, 29 EHRR 245; *Opuz v Turkey* Hudoc (2009), 50 EHRR 695.

³⁷ ECHR art 3.

³⁸ Rhona KM Smith, *Texts and Materials on International Human Rights* (4th edition, Routledge 2019) 89-92.

³⁹ Customary International Law is one of the primary sources of International Law as stated in Article 38 of the International Court of Justice Statute; *jus cogens* is a peremptory norm that cannot be derogated from.

The primary distinction between these thresholds is the severity of the ill-treatment.⁴⁰ To be considered under Article 3 a minimum level of severity must be reached. According to the ECtHR, '[t]he assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.⁴¹

The ECtHR has noted the following three other factors as relevant when assessing if ill-treatment reaches the threshold under Article 3: the purpose of the ill-treatment; the context within which the ill-treatment took place; and whether the victim of the ill-treatment was in a vulnerable situation at the time.⁴² Regarding individuals who are suffering from ill-health, the ECtHR has stated that: 'The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible'.⁴³

Treatment has been considered 'degrading' when: "it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience".⁴⁴ The cases of *Gafgen, Ilascu and others v Moldova and Russia* (2004) and *MSS v Belgium and Greece* (2011) provide further clarification of what constitutes degrading treatment or punishment.⁴⁵ Per the ECtHR in *MSS v Belgium and Greece*:

It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others... Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.⁴⁶
(emphasis added)

In *Price v United Kingdom*, the ECtHR found inadequate prison conditions to amount to degrading treatment despite there being 'no evidence... of any positive intention to humiliate or debase the applicant'.⁴⁷

⁴⁰ *Ireland v the United Kingdom* [1978] ECHR 1 para 16.

⁴¹ *Savran v Denmark* [2021] ECHR 1025, para 122.

⁴² *Khlaifia and Others v Italy* [2016] ECHR 757, para 160.

⁴³ *N v United Kingdom* App 26565/05 [2008] EHRR 39, para 29.

⁴⁴ *ibid.*

⁴⁵ *Gafgen v Germany* [2005] ECHR 480 para 89; *Ilascu and others v Moldova and Russia* (2005) 40 EHRR 46 para 425; *MSS v Belgium and Greece* [2011] ECHR 108, para 220.

⁴⁶ *MSS v Belgium and Greece* (n 45) para 220.

⁴⁷ *Price v United Kingdom* App No. 33394/96 [2001] 34 EHRR 53 paras 30 & 34.

Treatment has been considered 'inhuman' when: "it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering".⁴⁸

When defining what treatment amounts to 'torture,' the ECtHR has been heavily influenced by Article 1(1) of the CAT, which states that the term torture means:

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.⁴⁹

It is relevant to note that in the context of abuses occurring in healthcare settings, the UN Special Rapporteur on Torture has stated that 'intent' under Article 1 of CAT 'can be effectively implied where a person has been discriminated against on the basis of a disability'.⁵⁰

Deprivation of liberty

Individuals who are deprived of their liberty are understood by the ECtHR to be particularly 'vulnerable' to suffering torture or ill-treatment because of the control that others exercise over them.⁵¹ The international community's recognition of detainees' vulnerability is why Article 10 ICCPR states explicitly that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.⁵² According to ECtHR jurisprudence, states' omissions to provide basic resources to individuals in detention may amount directly to acts of ill-treatment.⁵³ States must ensure adequate sanitary facilities, clothing and food; minimum floor space, air and natural light; a separate bed; and opportunity for recreation and contact with the outside world.⁵⁴ States must also provide healthcare tailored to individual needs and provide for the needs of persons with disabilities (this is also

⁴⁸ *Gafgen v Germany* (n 45) para 89.

⁴⁹ CAT art 1 (1); *Ilascu and others v Moldova and Russia* (2005) 40 EHRR 46, para 426.

⁵⁰ UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (1 February 2013) UN Doc A/HRC/22/53 para 20.

⁵¹ *MS v United Kingdom* (2012) 55 EHRR 23; *Bouyid v Belgium* (2016) 62 EHRR 32 para 107.

⁵² HRC General Comment No 21, 'Article 10 (Humane treatment of persons deprived of their liberty)' UN Doc HRI/GEN/1/Rev 9 (Vol 1) (10 April 1992) para 3.

⁵³ *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 paras 86–87.

⁵⁴ *Nevmerzhitsky v Ukraine* App no 54825/00 (ECtHR, 5th April 2005) paras 86–87; APT and CEJIL, *Association for the Prevention of Torture and Center for Justice and International Law, 'Torture in International Law: A Guide to Jurisprudence'* (2008) 185.

an explicit obligation under Article 14 CRPD).⁵⁵ Notably, according to UN Human Rights Committee jurisprudence, arbitrary detention may amount to prohibited ill-treatment because of the psychological suffering arising.⁵⁶

Positive ('due diligence') obligations

Under Article 3 ECHR the State is not only obliged to refrain from perpetrating torture or ill-treatment directly; it must also 'provide effective protection in particular of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.⁵⁷

Looking domestically to Irish Constitutional law, the right to bodily integrity was recognised explicitly in the case of *Ryan v AG* in 1965 (the **Ryan case**). Initially seen as a negative right being protection against physical intrusion on a person's body, further caselaw explored a positive right to a certain minimum standard of health care. In a case relating to the conditions of confinement of a prisoner in an Irish prison, Finlay CJ accepted that the right to bodily integrity included a right to freedom from torture and inhuman or degrading treatment, and that those rights were engaged by the treatment of the prisoner. He saw no reason why the principle (of the right to bodily integrity) should not also operate to prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger'.⁵⁸ While in this case, the Plaintiff was unsuccessful, as the remedy he sought would have required the prison or the State to 'build, equip and staff a very specialised unit' which was recommended but only required by him and potentially 'four or five other persons', that is clearly distinguished from the requirements of the general population in residential care settings.

In other cases, the High Court also recognised that the right to bodily integrity extended to the 'integrity of the human mind and personality';⁵⁹ in a case concerning solitary confinement for the protection of the person in question, a prisoner, Hogan J held that such detention denied:

The opportunity of any meaningful interaction with his human faculties of sight, sound and speech – an interaction that is vital if the integrity of the human person is to be

⁵⁵ For example, *Renolde v France* (2009) 48 EHRR 42 para 128; *MS v United Kingdom* (2012) 55 EHRR 23 para 44; *Grimailovs v Latvia* App no 6087/03 (ECtHR, 25 June 2013) para 161.

⁵⁶ HRC, *C v Australia*, no 900/1999 (28 October 2002) UN Doc CCPR/C/76/D/900/1999 para 8.4.

⁵⁷ See for example, *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 73; *O'Keeffe v Ireland* (2014) 59 EHRR 15 para 144; *X and Y v The Netherlands* (1986) 8 EHRR 235 paras 21–27; *A v United Kingdom* (1999) 27 EHRR 611 para 22.

⁵⁸ *Ryan v Attorney General* [1965] IR 294 cited by Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Second edition., Dublin: Clarus Press 2019) 361.

⁵⁹ Gerard Hogan, 'Unenumerated Personal Rights: The Legacy of *Ryan v AG*' in *Judges, Politics and the Irish Constitution* (Cahillane & other Manchester University Press 2017, 55), cited by Doyle and Hickey *ibid* 363.

maintained... by solemnly committing the State to protecting the person, Art 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality... one does not need to be a psychologist to envisage the mental anguish which would be entailed by a more or less permanent lock-up under such conditions... It is impossible to avoid the conclusion that [these circumstances] compromise the essence and substance of this constitutional guarantee, irrespective of the crimes he has committed or the offences with which he is charged.⁶⁰

The right to liberty & security of person

The right to liberty and security of the person is enshrined in Article 5 ECHR and in Article 40.4 of the Irish Constitution.⁶¹ This right provides that people cannot be deprived of their liberty arbitrarily. The ECtHR has stated that human freedom is the very essence of the fundamental objectives of the ECHR.⁶² According to numerous international treaties and customary international law, the prohibition of arbitrary detention does not allow for any exceptions. Thus, the UN Working Group on Arbitrary Detention explains, 'a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end'.⁶³

Article 5 ECHR states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an

⁶⁰ *Kinsella v Governor of Mountjoy Prison* [2011] IECH 1 cited by Doyle and Hickey *ibid* 364.

⁶¹ *ibid*.

⁶² *SW v United Kingdom* (1996) 21 EHRR 363, para 44.

⁶³ *Ibid*, para 48.

offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

Restriction v. deprivation of liberty

A ‘restriction’ of someone’s liberty of movement is not the same as a ‘deprivation’ of liberty; the former falls under Article 2 of Protocol No 4 to the ECHR.⁶⁴ The distinction between an action constituting a restriction on movement and a deprivation of liberty is a matter of degree and intensity, and involves evaluating a range of criteria including type, duration, effects and

⁶⁴ Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, [1963] ETS 46.

manner of implementation of the measure in question.⁶⁵ The question of whether there has been a deprivation of liberty involves both an objective element (whether a person was confined in a particular restricted space for a not negligible length of time), and a subjective element (whether the person validly consented to the confinement).⁶⁶

Deprivations of liberty in care settings

The definition of deprivation of liberty under international and European human rights law is broad and does not in principle exclude any particular setting. As the ECtHR has repeatedly found, 'the difference between deprivation of liberty and restrictions of liberty of movement...is merely one of degree or intensity, and not one of nature or substance...In order to determine whether someone has been deprived of his liberty, the starting-point must be his specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question.'⁶⁷

In social care contexts, the ECtHR has found a deprivation of liberty to exist where a person is 'under continuous supervision and control and not free to leave',⁶⁸ and they have 'not validly consented to the confinement in question'.⁶⁹ Having entered a place voluntarily does not mean that deprivation of liberty cannot then arise. The ECtHR has stated repeatedly that 'the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention'.⁷⁰

The ECtHR has found deprivations of liberty to exist in the social care context even where premises are unlocked⁷¹ and where a person has previously gone on outings or visits away from the institution.⁷² Individuals have been found to be 'not free to leave' where permission to leave the premises is required,⁷³ where a person's guardian is required to consent to the person leaving,⁷⁴ where there are restrictions as to the length of time and destination to which

⁶⁵ *De Tommaso v Italy* (2017) 65 EHRR 19 [80]; *Guzzardi v Italy* (1981) 3 EHRR 333, para 93; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 para 314; and *Stanev v Bulgaria* App no 36760/06 (2012) 55 EHRR 22, para 115.

⁶⁶ *Storck v Germany* (2006) 43 EHRR 6, para 74 and *Stanev* (n 65), para 117

⁶⁷ *Stanev* (n 65) para 115.

⁶⁸ See *HL v United Kingdom* (2005) 40 EHRR 32 para 91; *DD v Lithuania*, App no 13469/06 (ECtHR, 14 February 2012) para 146.

⁶⁹ *Stanev v Bulgaria* (n 65) para 117.

⁷⁰ *Ibid* para 119 citing *De Wilde, Ooms and Versyp v Belgium* 18 June 1971 paras 64-65, Series A no. 12.

⁷¹ *HL v United Kingdom* (2005) 40 EHRR 32 para 92, citing *Ashingdane v the United Kingdom* (1985) 7 EHRR 528 para 41.

⁷² *Stanev v Bulgaria* (n 65).

⁷³ *Ibid* paras 124- 126.

⁷⁴ *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 57. The Court referred also to *Stanev v Bulgaria* (n 65) para 128.

a person may go,⁷⁵ where an institution restricts access to a person's identity documents or finances, which would enable them to travel,⁷⁶ where a person is returned—for example, by the police—when they leave,⁷⁷ or where it is clear that a person would be prevented from leaving if they tried or returned to the institution if they did.⁷⁸

Conditions for lawfulness of deprivation of liberty

Under the ECHR, a state may only deprive someone of their liberty on the basis of one of the grounds set out in sub-paragraphs (a) to (f) of Article 5(1) ECHR.⁷⁹ If the reason for detention is not based on one of the grounds defined within Article 5(1), the detention is contrary to the Convention.

The ground most relevant to residents of care homes, particularly during the Covid-19 pandemic, is stated at Article 5(1)(e): the 'lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants'.⁸⁰ When assessing whether detention for the prevention of the spreading of infectious diseases is lawful, the ECtHR has established that the following criteria must be met:

- the spreading of the infectious disease is dangerous to public health or safety, and
- the detention of the person infected is a 'last resort' to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.⁸¹

In the 2020 Covid-19-related case of *Terheş v Romania*,⁸² the ECtHR identified a restriction of liberty, rather than deprivation of liberty, where the person concerned was free to leave his home for various reasons, was not deprived of all social contact, and was not restricted to a small space.⁸³ There have not yet been any judgments from the ECtHR identifying a *deprivation* of liberty during the pandemic.

Even where a deprivation of liberty occurs for a permitted reason under Article 5(1) ECHR, in order to be lawful it must *still* have a 'clear and precise legal basis in domestic law' at all times

⁷⁵ *Stanev v Bulgaria* (n 65) para 124.

⁷⁶ *Ibid* para 125–26.

⁷⁷ *Ibid* para 127; *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 146.

⁷⁸ *HL v United Kingdom* (2005) 40 EHRR 32.

⁷⁹ *Khlaifia* (n 42), para 88.

⁸⁰ ECHR art 5(1).

⁸¹ *Enhorn v Sweden* (2005) 41 EHRR 30 para 44.

⁸² *Terheş v Romania* App no 49933/20 (ECtHR, 20 May 2020).

⁸³ *ibid*.

during the detention,⁸⁴ the grounds and conditions for depriving people of their liberty under that domestic law must be clearly defined, and the law must be foreseeable in its application.⁸⁵ Furthermore, the decision to detain a person must not be arbitrary, meaning for example that there must be no 'bad faith' element to the decision to detain, and domestic legislation allowing detention for a particular purpose must not be used as a smokescreen for detention serving another purpose.⁸⁶

All persons who are detained, for any reason, are entitled under Article 5(4) ECHR to 'take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.' A person being detained must know why they are being detained, be provided effective legal assistance and be able to apply to a court to challenge their detention.⁸⁷ Where people are detained indefinitely or for a long period in health or social care settings, this means that they must be enabled 'to take proceedings "at reasonable intervals" before a court' to challenge the lawfulness of their detention.⁸⁸

Notably, the ECtHR has stated that 'the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention'.⁸⁹

The requirement of a legal basis for detention is clearly set out, also, in Article 40.4.1 of the Irish Constitution which provides that 'no citizen shall be deprived of his personal liberty save in accordance with law'. As the Irish Supreme Court held in *The State (McDonagh) v Frawley*,⁹⁰ detention must be carried out in accordance with 'due process of law' in order to be permitted.

In *AC v Cork UH and HSE* [2019] the Irish Supreme Court established that a benevolent or protective motivation does not justify an otherwise arbitrary deprivation of liberty.⁹¹ This applies even if the individual is considered to have a mental impairment.⁹² In this case it was established that if the carer believes the person may lack capacity then they may briefly detain

⁸⁴ See for example *Quinn v France* App No 18580/91 (ECtHR, 22 March 1995); *Labita v Italy* App No 26772/95 (ECtHR, 6 April 2000).

⁸⁵ See for example, *Creanga v Romania* App No 29226/03 (ECtHR, 23 February 2012); *Medvedyev and Others v France* App No 3394/03 (ECtHR, 29 March 2010).

⁸⁶ *Saadi v United Kingdom* (2008) 47 EHRR 17 paras 67-74; *Khodorkovskiy v Russia* (2011) 53 EHRR 1103 para 142.

⁸⁷ *M.S. v Croatia* (no. 2) [2015] 2 WLUK 629, para 154; *Khlaifa* (n 42), para 115; and *Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157 para 40.

⁸⁸ *Stanev v Bulgaria* (n 65), para 171.

⁸⁹ *Kurt v Turkey* (1999) 27 EHRR 373, para 125.

⁹⁰ *The State (McDonagh) v Frawley* [1978] IR 131.

⁹¹ [2019] IESC 73 [335].

⁹² *ibid* [334].

them while they assessing their capacity, however they must seek assistance from the courts to detain them beyond the time necessary for the assessment.⁹³

Whether the Supreme Court's position in *AC v Cork UH and HSE* [2019] will survive the introduction of assisted decision-making rules and procedures in Ireland is unclear; importantly, Article 14 CRPD establishes that:

1. State Parties shall ensure that persons with disabilities, on an equal basis with others:

a) Enjoy the right to liberty and security of person;

b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Positive obligations

Under Article 5 ECHR the State is obliged not only to refrain from perpetrating arbitrary detention but also to protect from such abuse in private settings. In *Storck v Germany*, where the applicant was detained without any official authorisation in a private psychiatric clinic, the ECtHR held that the State is 'obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty, of which the authorities have or ought to have knowledge'.⁹⁴ Without such a positive obligation, the Court contended, there would be 'a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society'.⁹⁵

UN Committee Against Torture

The Concluding Observations of the UN Committee Against Torture following its periodic review of Ireland's compliance with the CAT in 2017 are of great significance, particularly in

⁹³ *ibid* [347].

⁹⁴ *Storck v Germany* (2005) 43 EHRR 96 para 102.

⁹⁵ *Ibid*.

demonstrating the deeply embedded flaws in Ireland's system of human rights protection (and prevention of arbitrary detention and consequent ill-treatment) in residential care settings in advance of the Covid-19 pandemic:

The Committee is concerned at reports that older persons and other vulnerable adults are being held in public and privately operated residential care settings in situations of de facto detention, and at reports of cases in which such persons were subjected to conditions that may amount to inhuman or degrading treatment, including the improper use of chemical restraints. The Committee regrets that although the State party has enacted new legislation — the Assisted Decision-making (Capacity) Act 2015 — that will substantially alter its procedures regarding involuntary confinement in such facilities, the substantive provisions of this law have not been commenced and, as a result, the Lunacy Regulations (Ireland) Act 1871 continues to be in effect. The Committee is further concerned at reports that the authorities currently entrusted with monitoring residential care facilities are not sufficiently independent nor adequately resourced to perform this function effectively, and at reports that the Ombudsman cannot receive complaints about clinical judgments in privately operated nursing homes.

The State party should prioritize the commencement of the Assisted Decision-making (Capacity) Act 2015 and provide adequate resources for its implementation and repeal the Lunacy Regulations (Ireland) Act 1871 as expeditiously as possible, and ensure that the capacity of persons who are presently deemed wards of the court is reviewed under the new legislation and that those undergoing such reviews are entitled to legal aid. The State party should also ensure that the Inspection of Places of Detention Bill provides for independent monitoring of residential and congregated care centres for older people and people with disabilities within the national preventive mechanism, and that people residing in such facilities can submit complaints, including regarding clinical judgments, to these independent monitors. The State party should also ensure that all allegations of ill-treatment in residential care settings are promptly, impartially and effectively investigated by its authorities, that the perpetrators are prosecuted and punished and that victims are provided with redress.⁹⁶

⁹⁶ UN Committee Against Torture 'Concluding observations on the second periodic report of Ireland' (31 August 2017) CAT/C/IRL/CO/2, paras 35-36.

The right to respect for private and family life

The right to privacy is an unenumerated right under the Irish Constitution.⁹⁷ Furthermore, as the Irish Human Rights and Equality Commission highlighted in its submissions in a 2019 Supreme Court case: 'The personal rights guarantee in Article 40.3 confers on the family's individual members rights to respect for their respective personal rights to each others' care and society.'⁹⁸

Article 8 ECHR states:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of other.*⁹⁹

In order for Article 8 ECHR to apply, it must be shown that the treatment in question falls within at least one of the four interests identified in the text of the Article, namely: private life, family life, home, or correspondence¹⁰⁰. It must then be demonstrated that there has been an interference with one or more of those interests, or that the State's positive obligations to protect the right have been engaged. The right to respect for private and family life is not absolute; however, the State is only permitted to interfere with privacy or family life in a manner that is necessary in a democratic society and proportionate to achieving one of the legitimate aims listed in Article 8(2).¹⁰¹

Article 8 ECHR protects the right to personal development, whether in terms of personality or personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees.¹⁰² In *Pretty v United Kingdom*, the ECtHR held that the right to decide the

⁹⁷ *McGee v Attorney General* [1974] IR 284; *Kennedy v Ireland* [1987] IR 587

⁹⁸ Irish Human Rights and Equality Commission, Outline Submissions of the Amicus Curiae in the cases of *MAM v MJE* and *KN, EM, FM and YM v MJE* (Supreme Court Record No S:AP:IE:2019:000113, https://www.ihrec.ie/app/uploads/2020/02/MAM-and-KN-v-MJE-2019111-and-113-Submissions-of-the-Amicus-Curiae-IHREC-filed-with-SCT-Office_181249_192841.pdf) citing *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795, 815 and *Chigaru and Others v Minister for Justice and Equality and Others* [2015] IECA 167, Hogan J, 27 July 2015, paras 29 and 30.

⁹⁹ ECHR art 8.

¹⁰⁰ Guide on Article 8 of the Convention on Human Rights, European Court of Human Right, European Council (2021).

¹⁰¹ Art 8 ECHR; *Kennedy v Ireland* [1987] IR 587.

¹⁰² *Bărbulescu v Romania* [2017] ECHR 742, para 71; *Botta v Italy* [1996] ECHR 83, para 32.

manner of one's death constitutes an element of private life under Article 8.¹⁰³ The right to respect for correspondence covers the private, family, and professional spheres.¹⁰⁴ In *Margareta and Roger Andersson v Sweden*, the ECtHR found a violation on account of the restrictions imposed on communications by letter and telephone between a mother and her child who was in the care of social services, depriving them of almost all means of remaining in contact for a period of approximately one and a half years.¹⁰⁵

The ECtHR has found that Article 8 imposes a positive obligation on States to secure their citizens' right to effective respect for their physical and psychological integrity.¹⁰⁶ States have a positive obligation under Article 8 firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage.¹⁰⁷

The right to equality and non-discrimination

Article 14 ECHR states:

*The enjoyment of the rights and freedoms set forth in [the] 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.*¹⁰⁸

Article 14 provides protection against discrimination in the enjoyment of rights and freedoms guaranteed by the other substantive provisions of the ECHR. Article 14 is applicable when the facts at issue fall within the ambit of one or more substantive provisions.¹⁰⁹ First, then, it must be established that the evidence falls within the scope of the substantive articles – for example, the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), etc. Even if it cannot be proven that a substantive right has been violated in and of itself, the Court may hold that there

¹⁰³ *Pretty v United Kingdom* [2002] ECHR 427, para 67.

¹⁰⁴ *Buturugă v Romania* [2020] ECHR 136, para 74.

¹⁰⁵ *Margareta and Roger Andersson v Sweden* [1992] ECHR 1, paras 95-97.

¹⁰⁶ *Milićević v Montenegro* [2018] ECHR 908, para 54; *Nitecki v Poland* App no 65653/01 (ECtHR 21 March 2002); *Sentges v the Netherlands* [2003] ECHR 718; *Odièvre v France* [2003] ECHR 86, para 42; *Glass v the United Kingdom* [2003] ECHR 719, para 74-83.

¹⁰⁷ *Vasileva v Bulgaria* App no 23796/10 (17 March 2016) para 63; *Jurica v Croatia* [2017] ECHR 396, para 84; *Mehmet Ulusoy and Others v Turkey* App no 54969/09 (25 June 2019) para 82.

¹⁰⁸ ECHR art 14.

¹⁰⁹ *Carson and Others v the United Kingdom* (2010) 51 EHRR 13 para 63; *EB v France* (2008) 47 EHRR 21 para 47; *Konstantin Markin v Russia* (2012) 55 EHRR 39 para 124.

has been a breach of that right in conjunction with Article 14 because of the discriminatory nature of the State's treatment.¹¹⁰

The test for unlawful discrimination involves the following questions:

1. Has there been a difference in treatment of persons in analogous or relevantly similar situations¹¹¹ – or a failure to treat differently persons in relevantly different situations based on an 'identifiable characteristic' or 'status'?¹¹²
2. If so, is such difference – or absence of difference – objectively justified?¹¹³ In particular,
 - a. Does it pursue a legitimate aim?
 - b. Are the means employed reasonably proportionate to the aim pursued?

The ECtHR has recognised that age constituted 'other status' for the purposes of Article 14 of the Convention.¹¹⁴ The Court has also confirmed that the scope of Article 14 includes discrimination based on disability, medical conditions or genetic features.¹¹⁵ In cases concerning disability, States have very little discretion to establish different legal treatment for people with disabilities.¹¹⁶

It is also helpful to note that the UN Office of the High Commissioner for Human Rights ('OHCHR') has described 'ageism' as being 'intimately related to violence and abuse in public and private spheres'.¹¹⁷ The Special Rapporteur on the right to health has noted that structural inequalities, which can be exacerbated by discrimination, can significantly compromise the voluntary or informed nature of consent.¹¹⁸ The Special Rapporteur also argued that prejudicial attitudes towards older adults that consider them 'incapable of contributing to society,

¹¹⁰ *National Union of Belgian Police v Belgium* (1979) 1 EHRR 578 para 44.

¹¹¹ *Molla Sali v Greece* [2018] ECHR 1048 para 133; *Fábián v Hungary* [2017] ECHR 741 para 113; *Khamtokhu and Aksenchik v Russia* (2017) 65 EHRR 6 para 64.

¹¹² *Biao v Denmark* (2017) 64 EHRR 1 para 89; *Carson* (n 109) para 61; *DH and Others v the Czech Republic* (2006) 43 EHRR 41 para 175.

¹¹³ *Molla Sali* (n 111) para 135; *Fabris v France* (2013) 57 EHRR 19 para 56.

¹¹⁴ *Schwizgebel v Switzerland* App no 25762/07 (ECtHR, 10 June 2010) para 85; *Carvalho Pinto de Sousa Morais v Portugal* [2017] ECHR 719 para 45.

¹¹⁵ *Glor v Switzerland* [2009] ECHR 2181 para 80; *GN and Others v Italy* App no 43134/05 (ECtHR, 1 December 2009) para 126; *Kiyutin v Russia* (2011) 53 EHRR 26 para 57.

¹¹⁶ *Glor v Switzerland* para 84.

¹¹⁷ UN Economic and Social Council, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons' (20 April 2012) UN Doc E/2012/51 para 18.

¹¹⁸ UN General Assembly, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on informed consent' (10 August 2009) UN Doc A/64/272 para 45.

chronically ill and/or frail' are 'pernicious and deeply ingrained' and 'often lead to a conclusion that not much can be done to help them'.¹¹⁹

¹¹⁹ UN Human Rights Council, 'Thematic study on the realisation of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' para 38.