

# Care Homes closures, the Law, its practice and the implications

## 1. Brief

- 1.1 This is a paper commissioned by RAGEnational (Relatives Action Group for the Elderly) to cascade knowledge about the reasons for and effects of Elderly Peoples Home closures and implications for the future. Although the document necessarily contains Law it is intended that this should be a document accessible to non-lawyers. The cases referred to, following *Madden v Bury MBC* (2002) EWHC (Admin) 1882, are those in which RAGEnational has been involved

## 2. The Author

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- 2.2 The author is a solicitor (admitted 1981) who has acted for disabled people in a number of roles since 1997. She was a founder member of a national charity Elderly People in Crisis – Epic – set up to educate on the health effects, including earlier mortality, on elderly people following care home closures. She has studied all known research in that field and conducted her own original research on mortality in a twelve month period following the closure of an Elderly Peoples Home ('EPH') in Kettering
- 2.3 From 2001 to 2002 she was in-house solicitor, later a partner, in a care firm providing care in the community for profoundly disabled people.
- 2.4 Her political experience includes serving as a Borough Councillor and a political research assistant (for 2 major political parties).
- 2.5 For the last 4 years Yvonne been the only solicitor who has litigated multi-party challenges to cuts in care for disabled people and care home closures. Her caseload has been cross-country from Yorkshire and Lancashire in the North to Bristol and East Sussex in the south, including 13 London Boroughs.

## 3. Political Background

- 3.1 Elderly care has long been recognised as a problem and this has probably been exacerbated by the following factors:
  1. longer life expectancy
  2. changes in social trends so that families are smaller and less socially cohesive
- 3.2 Until the 1960's and 1970's elderly care typically was in geriatric hospitals or hospital wards.
- 3.3 In or around 1980 policy changed as it was recognised that elderly people could be managed in residential homes and that these facilities, being more 'family like', were more humane. The policy change also reduced reliance on NHS resources. The private care sector boomed. Melzer, Pearce, Cooper and Brayne note in 'Alzheimers Disease and Other Dementias' that "over a period of some 11 years (1982/83 to 1993/94), geriatric hospital bed numbers fell by 33% and local authority home places by 41%, whereas 'independent' (chiefly private) nursing homes increased their capacity by over 700%". (See Appendix 1)
- 3.4 From 1997 onwards there has been an ever increasing closure of Local Authority Elderly Peoples Homes. This coincided with a change to regulations. Prior to 1997 Local Authorities were obliged to use the proceeds of sale of capital assets for capital acquisitions. In 1997 this changed so that only half the proceeds of such sales had to be used for capital purchases.
- 3.5 Local Authorities are funded by grants from Central Government, collected from general taxation, and their local Council taxes. Where central grants are insufficient local taxation has to increase and this is politically sensitive.
- 3.6 Central Government funding to Local Authorities is based on a Standard Spending Assessment or SSA. This incorporates matters such as the cost of care. The funds allocated by central government for any area of expenditure are not, however, ring-fenced for such care nor can they be under current legislation.

- 3.7 Funding for private care providers is from two sources, privately funded residents, and Local Authorities. Each Local Authority will set its own fee levels for the residents it funds. From at least 2002 fee levels have been suppressed. This has led to a multitude of closures in the private sector. Laing and Buisson report that in the 15 months leading up to the 1st April 2003 745 independent sector homes closed with a loss of 15,100 places. This equates to a loss of 1000 placements per month. (See Appendix 20)
- 3.8 Whether, and when, a placement into a residential care setting takes place is, for Social Services funded people, the decision of their Local Authority. From 1997 until 2006 the level of frailty at which such people enter care has greatly risen. Care providers report that they have reason to believe that Local Authorities have rationed entry into care. (See Appendix 5, 15, 17)
- 3.9 In each year Local Authorities are inspected by the Audit Commission. This reports, amongst other matters, on how well they are doing in provision of care for the elderly. Failure to respond positively to Audit recommendations bring the Local Authority into difficulty. Such inspections are therefore a powerful tool to bring about change in provision if this is the will of central Government. (See Appendix 5, 15, 17)
- 3.10 From 1997 until 2002 across country the following recommendations have been made by Officers to Local Authority Committees in respect of closure of care homes:
- 3.10.1 Elderly people need dignity and rooms do not have en-suite facilities
  - 3.10.2 The private sector provides equally good care but more economically
  - 3.10.3 The National Minimum Standards (when in effect) required room sizes to be bigger
  - 3.10.4 When the NMS were revoked, that room sizes were too small for hoisting equipment to be used safely
  - 3.10.5 The Authority over-relies on residential care and needs to provide more care in the community
- 3.11 In 2003 the Government appointed 'change agents' to bring about a change in provision with the ostensible purpose of empowering elderly people to live in their own homes "because this is what people want". Government adopted a star system to grade the performance of Local Authorities. Where Local Authorities "over-rely on residential care" they are graded as poor with 1 or 0 stars. Where there is scarce provision of residential care they are graded higher, up to 5. The ultimate sanction where an Authority "does not improve" is that the Government take over the "failing" Authority.
- 3.12 If the purpose of Government is truly to enable elderly people to live in their own homes then this is inconsistent with its contemporaneous actions in the last 3-4 years in not dissuading the closure of Day and Respite Centres. Advice to Committees on these closures is that such care is "old-fashioned" and that "people should receive person-centred care at home"
- 3.13 In 2006 the DoH has issued guidelines to Local Authorities on raising eligibility criteria for any care at all. In Northamptonshire the proposal is to raise eligibility criteria so that only those with critical or greater substantial needs will receive any care. It is estimated by Unison that 1,500 will lose all care in the community if this proposal is ratified in August/September 2006

#### **4. Health effects, including mortality, of involuntary transfer**

- 4.1 Professor David Jolley a Consultant in the Psychiatry of Old Age, was instructed as a Court appointed witness in Jackson -v- Lancashire County Council. Leave was given by Sullivan J in those proceedings for Professor Jolley's Report to be released for other proceedings and for educative purposes. In his Report Professor Jolley says:

"From common experience, from my clinical experience, and from an informed review of the literature, it is an inescapable truism that relocation is a stressful event and can precipitate problems of mental health, physical health and even bring forth death"

- 4.2 In Haggerty -v- St Helens Council 7 residents died within three months of involuntary transfer. The Author asked Mr Rheinberg HM Coroner for Cheshire to investigate these deaths. Mr Rheinberg appointed Professor Alistair Burns of the University of Manchester to report on the effects of those residents of moving from Delamere House Nursing Home. In his Report Professor Burns says:

"Taken as a group, the deaths of the seven residents are most probably in keeping with the demonstrated excess mortality that occurs when older frail people, particularly those with advanced dementia are moved from one institution to another"

(See Appendix 10)

- 4.3 The ill effects of involuntary transfer cannot be eradicated. For some, careful preparation under psychiatric oversight can ameliorate the risk. Such preparation cannot be achieved for those with

moderate or severe dementia because the process has to build on retained knowledge, the first of which is that the home will be closing.

- 4.4 In the USA the trauma of involuntary transfer has been recognised and is known as “relocation stress syndrome”. Guidance on preparation for transfer can be found in the research of David Dickinson and Pamela S. Manion/ Marilyn J. Rantz and in a protocol document prepared by the author with the assistance of Northamptonshire County Council. (See Appendix 2, 3)
- 4.5 As Professor Jolley recognises, morbidity and mortality increase, prior to transfer during the process of Consultation. In RAGE cases the following deaths occurred:
  - 4.5.1 *Madden v Bury* – Margaret Hill, the Second Claimant, died of a stroke soon after Bury MBC entered into a second Consultation after the case succeeded. (See Appendix 8)
  - 4.5.2 *Jackson v Lancashire County Council* - The original Claimant Gladys Riding died during the proceedings and was replaced as First Claimant by Jessie Jackson. Within weeks of the Jackson case being concluded Norman Hickey’s wife Phoebe died. Norman died soon after.
  - 4.5.3 *Haggerty v St Helens Council* – Hilda Finch, Ellen Hartley, Norman Eden, Colin Nuttall, John Jaundrill, Eileen Pilkington and Maria Richards died within three months. (See Appendix 10)
  - 4.5.4 *Dudley v East Sussex County Council* – Clara Dudley was provided with a sensitive transfer plan. Her unreasonable fears – that no-one would know where she had gone – were addressed. Her reasonable fear that she would lose contact with her Keyworker was worked through so that contractual arrangements were made for frequent visits during the weeks after transfer and thereafter weekly visits. Clara was fully involved in choosing soft furnishings for her room and appeared to enjoy that process. Nevertheless Clara suffered a catastrophic stroke upon returning from her first visit to her new home. That the stroke was brought about by the visit is assumed from Clara saying “don’t move me, please don’t make me go, I don’t want to move” immediately preceding the stroke. Clara lost sight, speech and the ability to swallow. She was PEG fed to her stomach until she died 15 months later. (See Appendix 11)
  - 4.5.6 *McKellar v LB Hounslow* – William Leaver died within a few weeks of transfer despite careful preparation with medical oversight. (See Appendix 14)
  - 4.5.7 *Johnson v LB Havering* - Ivy Tabberer, who had been First Claimant, died during the proceedings and was replaced as First Claimant by Elspeth Johnson. Ivy had been to Downing Street during a previous Consultation. To no avail.
  - 4.5.8 *Trim v Sue Ryder Care* – Laurie Marshall died within 2 weeks of involuntary transfer
- 4.6 The author carried out her own research on mortality following the closure of Northam House EPH in Kettering, Northamptonshire at the end of February 1998. In the 12 months following the closure 15 out of 41 former residents died. This was a mortality rate of 37%. Using 25 Local Authority homes over a 4 year period as a control group I noted that mortality in this group averaged 18.4%. Moving people in friendship groups did not appear to have any outcome on mortality. It was not possible for a non medically qualified person to assess risk of apparently well residents. Residents whose upbringing was unstable have less resilience to traumatic change. (See Appendix 4, 17, 12, 13)
- 4.7 Analysis of previous research since 1963 shows that there is no statistical increase in mortality where residents and carers are moved en famille. Where residents and carers are ‘disposed and dispersed’ mortality typically doubles. (See Appendix 4, 17, 12, 13)

## **5. Actions of Local Authorities**

- 5.1 Local Authorities enter into a period of Consultation where they are considering closing a care home. Such consultation is required by law to take place at a formulative stage of decision making. (See Appendix 10, 11)
- 5.2 In practice the question of whether a care home is to close is driven by Budgetary considerations so that a decision will be made between December and February in order to allow the Council to set its budget in the February. Analysis of draft budgets of Local Authorities shows that the precept, which is the rate of Council tax, is predicated on the receipts and savings to be raised on the sale of the home.
- 5.3 Campaign leaders will believe that if they can mount effective opposition to a closure then they will persuade a Council Committee not to close the home. In practice during the last four years since the Author and RAGE worked together campaigns, however organised, have only resulted in the saving of care homes in Wakefield and Kirklees where there was strong and persistent Union opposition to closure.
- 5.4 The activities of RAGE and the Author have done much to educate Local Authorities that the result of a care home closure is suffering and earlier mortality for several of the residents. Councils answer this

by using a protocol document similar to the one compiled by the Author and Northamptonshire County Council to show that they are taking every step to reduce that risk.

- 5.5 Although a Local Authority would generally not take any steps to implement a closure prior to an 'in principle' decision being made, the position is totally different immediately after the decision is taken, whether or not the Council is aware that the decision is to be challenged in Judicial Review. The experience of the Author and RAGE across country is that the following steps will be taken:
  - 5.5.1 Union support to oppose the closure evaporates and staff are actively engaged in discussions about redeployment and redundancy.
  - 5.5.2 Staff are told not to speak to residents, relatives or the press about continuing opposition to closure.
  - 5.5.3 Relatives and residents are given the message by the Local Authority that opposition to closure cannot possibly win.
  - 5.5.4 The Local Authority will assure relatives that risk will be minimised.
  - 5.5.5 The Local Authority tell relatives that they are extremely concerned that the resident is becoming stressed and it is better to find them a new home immediately so as to bring this stress to an end.
  - 5.5.6 Relatives are told that their resident can move to another home with their friendship group but that the places cannot be held open so that if they do not accept immediately they are at risk of being isolated from their friends.
  - 5.5.7 Often residents will be reassessed as needing nursing care or specialist dementia care so that even if a Judicial Review were to succeed the resident could not remain in the home.
  - 5.5.8 Subliminal or overt messages will be given to relatives and residents to undermine their confidence in their Solicitor.
  - 5.5.9 Although clearly the motives of a Local Authority are known only to them it is notable that if few residents are left by the time the matter has a hearing the Courts are much less likely to Quash the decision to close.

## **6. Grounds of Legal Challenge**

- 6.1 A Local Authority will have its own internal complaints procedure. Following this route cannot change the decision to close the home. The Local Government Ombudsman cannot change the decision to close the home. The residents have no right of security of tenure. They have no right of Appeal to an independent Court against a decision to close the home.
- 6.2 Following R(Heather) -v- Leonard Cheshire Homes the residents of private homes did not have the right to Judicially Review a closure decision. In their case the only possible proceedings are to apply for a pre-emptive injunction in Personal Injury and/or under the Human Rights Act.
- 6.3 Bodimeade -v- LB Camden 2001 established that where a resident had been given the right to a "home for life" the Local Authority could not close it. In fact such rights are rare and probably only confined to Bodimeade.
- 6.4 The main ground of legal challenge which the Courts are likely to consider is that the Consultation was flawed. It is a matter of regret that the better the campaign the less likely it is that the Court will consider Consultation to be inadequate. This is because a Local Authority merely needs to show that it has considered matters and not that it has made the "right" decision based on the information it has received. Relatives and residents, being laymen, do not understand the complexities of the law. They believe that if they put forward a powerful argument, particularly if this contains details of where the Council is "going wrong" then this will make a difference to the decision. In practice it does not but does severely impact on the prospects of success of a legal challenge.
- 6.5 It is vital to carefully read all background documents including Reports to Committee, any Best Value Report on the future of the home however apparently out of date, correspondence to and from relatives and residents, any press reports, correspondence with others including staff and Unions. In most cases correspondence with staff and Unions will not be readily available.
- 6.6 The purpose of the research into the background documentation is to try to find how adequate the Consultation has been and whether the Council has acted unlawfully or irrationally. Despite wide spread dissemination of knowledge of legal challenge across Local Authorities, grounds for legal challenge on adequacy of Consultation can still be found. For example in February 2006 officers of Northamptonshire County Council advised members that there were no Human Rights implications of a care home closure.

- 6.7 Local Authorities will often fail to adequately consult residents who are mentally incapacitated and who do not have relatives or friends to speak for them. This gap in Consultation is now generally addressed by a Council appointing “independent advocates” from, typically, Age Concern. (See Appendix 16)
- 6.8 A study of Age Concern’s information leaflet shows that they make the statement “the closure of a care home may not necessarily be a problem, particularly if the home cannot meet the needs of its residents.” Although the leaflet touches on a Local Authority possibly being in contravention of the right to life it does not advise on how life maybe threatened nor that it is vital to have expert medical advice to identify and ameliorate the risk and/or provide grounds for legal challenge. The leaflet does not advise that expert legal advice should be obtained at the earliest possible point but does advise, wrongly in terms of preventing a closure, that the Local Authority complaints procedure should be utilised before a legal challenge. The leaflet does not advise on the right to Legal Aid but instead confines itself to saying “Judicial Review can be an expensive process and may not be appropriate unless assistance with legal costs can be obtained”. In fact Legal Aid will be available to most residents of Local Authority homes and where it is given the legal process is free. (See Appendix 16)
- 6.9 Often a Local Authority will state that the home is not fit for its purpose. Although the Council will say that the rooms are not large enough for hoisting equipment - which may be correct - it is important to remember that unless hoisting will create a danger then the difficulties must be weighed against the risk to health and life if the resident is moved.
- 6.10 A Local Authority will typically say that the home needs hundreds of thousands of pounds spent on it for maintenance. This argument is persuasive. However the maintenance budget for the home for the last five years should be sought together with details of sums actually spent. Typically Local Authorities will be considering home closures over a long period of time and not maintain the home properly for a period of three years prior to a formal Consultation.
- 6.11 Where a Local Authority says or implies that there are structural defects the document on which such assertion is based must be sought together with facilities for an independent survey to be carried out. The Local Authority may well refuse such facilities.
- 6.12 Apart from defects in Consultation or incorrect advice (including Legal Advice) being given to Committee the main grounds of a challenge are under the Human Rights Act. The Articles relevant are 2, 3 and 8. These are right to life, right to freedom from inhuman and degrading treatment and right to respect for private and family life. (See Appendix 19)
- 6.13 The HRA grounds for challenge and their prospects of success are explored in the case analyses which follow.

## **7. Case Analyses**

### **7.1 R (Madden) -v- Bury MBC [2002] EWHC (Admin) 1882 - (See Appendix 8)**

- 7.1.1 In this matter the Authority made a decision to close two elderly peoples homes namely Warthfield and Whittaker Houses. The Claimants were James Madden and Margaret Hill one resident from each home. There was a third home which the Council also decided to close but no resident came forward to challenge that decision.
- 7.1.2 James Madden had a history of depression and Margaret Hill had a history of strokes. Their medical history made them at risk from any home closure.
- 7.1.3 Bury MBC stated that there was a structural fault concerning the foundations of Warthfield House. No balancing exercise was made under Article 8 of the HRA.
- 7.1.4 Research showed that the survey report did not in fact show any structural fault to the foundations of Warthfield. The difficulties were in cracking to the plaster on internal walls. This was a minor problem. Therefore in coming to their decision members relied on false information.
- 7.1.5 The matter came before Richards J. The Claimants relied on R -v- Devon County Council [1995] 1 All ER 73 and said that Bury had failed to meet its duty regarding care home closures and that fairness had required Consultation whilst the proposals were in the formative stage. As well as Article 8 they said that their Article 3 rights were engaged and challenged.
- 7.1.6 Richards J held that this specific reasons where the proposed closures were “incorrect or misleading”. He found that Bury had not addressed Article 8 at all.

### **7.2 R (Jackson) -v- Lancashire County Council 2003**

- 7.2.1 In this matter the First Claimant Jessie Jackson was 103. Lancashire County Council had resolved to close 16 of its elderly peoples homes and to temporarily close a further 16 for refurbishment. In effect the elderly residents of 32 homes faced displacement.

- 7.2.2 The residents of the homes marked for temporary closure were not as alarmed as those marked for permanent closure. Accordingly one representative resident came forward for each of the "closure" homes but only 8 from the "temporary closure" homes.
- 7.2.3 Lancs County Council were represented by Matrix. The Claimants were represented by Phillip Havers QC and Jeffery Jupp.
- 7.2.4 The Claim proceeded on the premise that the involuntary transfers would impact on life and health in breach of Articles 2 and 3. In order to prove this it was the Author's view that individual Consultant medical reports should be obtained in respect of the individuals.
- 7.2.5 Counsel advised that the Court's permission should be sought to adduce the medical evidence and that the Court should appoint its own expert. The Claimants choice of medical expert was Dr Peter Jefferys who had been involved as a medical expert in R (Cowl) -v- Plymouth County Council.
- 7.2.6 Initially the appointment of any Court expert was opposed by Matrix. Stanley Burnton J acceded in part to the representations made. His view was that individual medical reports would not enable the Court to understand the effect of closure on the hundreds of individuals who would be affected. Further that any such report would only provide a snapshot of the risk for that individual at that moment in time.
- 7.2.7 Accordingly Stanley Burnton J ordered that the Court appoint an expert to advise in general terms whether there were risks of transfer, to consolidate all previous research and to give the expert's own view. Matrix opposed the appointment of Dr Peter Jefferys, referring to him as "a Claimant hack".
- 7.2.8 The Country was trawled to find a further expert. There are few such and on the initial trawl no other expert willing to undertake the task could be found by the Claimants. Accordingly the Court appointed the choice of Matrix namely Dr Gillian Dalley. Dr Dalley is a gerontologist and not medically qualified. She played a crucial role in the compilation of the National Minimum Standards working closely with the Government on this task.
- 7.2.9 The Claimants were concerned that Dr Dalley did not have the qualifications to advise on the medical risk and therefore asked the Court to appoint a further expert who did have medical qualifications. By this stage the Claimants had found Professor David Jolley who was able and willing to report to the Court. He was duly appointed.
- 7.2.10 Dr Jolley advised that there was indeed a risk to life and the case was due to proceed to hearing at the beginning of May 2003. The week before the hearing Sullivan J wrote to both parties telling them to settle. The Claimants did not want to settle but to be heard and the Author's view was that the case had such public policy impact that it should be heard in order to influence central and local Government policy on closing elderly peoples homes.
- 7.2.11 Counsel advised that the Author's duty as a Solicitor required her to consider only the best interests of the Lancashire Clients and that settlement could achieve more than proceeding with a fraught hearing. This was because even if the decision was Quashed it would be open to the Defendant to move forward to a further decision which may be bullet-proof against Judicial Review.
- 7.2.12 Accordingly the case settled on the best terms for the residents which was that the residents and staff would be moved en famille in what were effectively mergers of homes. The process of moving was carefully timetabled and slow so as to ensure careful preparation. The process was overseen and guided by Professor Jolley. The settlement was seen as a breakthrough in the humane closure of homes.
- 7.2.13 Professor Jolley's report was released by Sullivan J to the use of other proceedings "so as not to re-invent the wheel" and also for the purposes of education on the effects of involuntary transfer of elderly people.

### **7.3 R (Birmingham Care Consortium) -v- Birmingham City Council - (See Appendix 9)**

- 7.3.1 In this matter the Author acted for private providers within Birmingham Care Consortium together with some of their residents. The presenting problem was that fee levels had been suppressed so that 200 small care homes had closed or been forced into bankruptcy in the preceding 18 months causing the loss of the homes of the elderly residents.
- 7.3.2 There were 86 providers attending a meeting with the Author. They relied on a Laing & Buisson report which stated the fee levels required in order to sustain a care home business financial viability. They did not seek the full extent of the fee levels which Laing & Buisson recommended and were content with a lower level. However the fees paid by Birmingham City Council fell far short even of these.

- 7.3.3 The three year Contract with Birmingham City Council was due to expire shortly. The case plan was that the providers would not accept BCC's new Contract but instead put forward their own which was identical in almost all respects save for the level of fees. If all the providers insisted on their own new Contract then they would have had an almost complete market advantage vis-à-vis BCC.
- 7.3.4 The new Contract was signed by all providers and served on the Council. Within a very short space of time 60 of those providers came to different terms with BCC and the Council refused to make placements to the remaining 26. They issued proceedings in Judicial Review claiming that BCC was in breach of the Choice Directive.
- 7.3.5 The matter came before Stanley Burnton J and failed with the Judge finding that "No perversity has been shown. Lastly, it is clear from the Defendant's internal documents that it took into account the need to make such provision and the risk of loss of capacity to meet demand for care homes (involving the possibly of its inability to comply with its duties under Part III of the 1948 Act) in the future. In these circumstances this case is to be distinguished from the decision of Potts J in R v Cleveland County Council, ex parte Cleveland Care Homes Association (1994) 158 LG Rev 641, 645. 17. Out of deference to the arguments put before me, however, I mention some general considerations. First, this case concerns the affordability of social services provided by the local authority."
- 7.3.6 Some two years later the Author spoke to the leader of the group during the Claim to ascertain the outcomes for all concerned. A number of the providers who had departed from the new Contract had ceased to trade. The result of this was that care home placements became scarce. Following the hearing all BCC placements had been made with providers who had been willing to sign the Local Authority's Contract. This meant that private paying residents were forced to use the 26 homes as these were the only ones with spare places. The fee levels for the private paying residents were at a sufficient level for the businesses to thrive.
- 7.3.6 As the contracted private providers ceased to trade BCC were forced to use non-contracted suppliers. They insisted that any such placements would only be taken at their own fee levels.

**7.4 R (Haggerty) -v- St Helens Council [2003] EWHC 803 (Admin) - (See Appendix 10)**

- 7.4.1 In this matter the Claimants were elderly people with severe dementia who were the residents of Delamere House a private home owned by Southern Cross Healthcare. The residents were so severely affected that none had mental capacity, some did not respond to voice, some not even to touch. Several residents had violent episodes such that 4 members of staff were needed to change their incontinence pads. The cost of such labour intensive care was very high. Fee levels by the Local Authority fell far short of the cost of care so that the provider was suffering serious losses. The provider resolved to close the home.
- 7.4.2 The Claimants had severe legal difficulties in proceeding. Following the Leonard Cheshire case they were unable to Judicially Review the provider. Accordingly it was resolved to Judicially Review the Local Authority's decision to suppress fee levels.
- 7.4.3 Although it was clear that in such a difficult case medical evidence on risk would be needed for the individuals it was not possible for any Consultant to advise within the time scales. Accordingly Professor Jolley compiled a further general report in relation to the Delamere House resident.
- 7.4.4 The matter appeared before Silber J three weeks after Jackson. Silber J held that "Professor Jolley's report is not based on any analysis of the effects of the transfer on these particular claimants. As I have explained in paragraphs 45 and 47 above, he accepts that if appropriate steps are taken, the damaging effects of a move for elderly frail patients can be mitigated. There is no evidence from him commenting on the measures proposed by or carried out by the Council and which are set out by Mr. Stoker and Mr. Wakefield. Those measures would appear to show consideration by the Council of the material relevant issues. Thus, I do not consider that any great weight can be attached to anything that Professor Jolley states when I am appraising the actual way in which the Council actually proposes to carry out the move of the claimants".
- 7.4.5 Further Silber J decided that the Article 2 challenge failed "because the Courts accord a broad area of discretionary judgment to a public authority in deciding what is a fair balance between the interests of an individual and of the community (R (Pretty) v. DPP[2002] 1 AC 800 at 816 [15] and 843 [90]). This would prevent the Council's decision being impugned on Article 2 grounds. Thus, I conclude that the claimants' rights under Article 2 will not be infringed by the move".
- 7.4.6 Therefore Silber J decided in fact firstly that an individual expert report was a requirement to successfully plead Article 2 and secondly the right to life is not an inalienable right but one which should be balanced against the interests of the community.

- 7.4.7 Leave to Appeal was refused. The case was forwarded to the ECHR but fell at the first hurdle as not showing a cause of action.
- 7.4.8 Seven died within three months.

**7.5 R (Dudley) -v- East Sussex County Council [2003] EWHC 1093 Admin - (See Appendix 11)**

- 7.5.1 In this matter the Claimants were residents of the Moreton Centre in St Leonards-on-Sea near Hastings in East Sussex. Clara Dudley relied on Professor Jolley's report in Jackson. Clara Dudley had come into care after having suffered a serious stroke. She was wheelchair bound, her hearing was impaired and she had lived at the Moreton Centre for some years. It was considered that having previously suffered a stroke event she was at risk of a further stroke.
- 7.5.2 In a remarkably similar reasoning to Silber J, Maurice Kay J said "The evidence does not point to a breach of Article 2 in this case. No particularised medical evidence has been filed showing that the life of any particular resident is seriously at risk. What the claimant needs to establish is that 'the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge' -- see Osman. The claimants have not established that in this case".
- 7.5.3 Clara Dudley appealed and by this time had a medical report specifying the risk to her of further stroke event and of earlier mortality. The Appeal failed as this evidence had not been before the trial Judge.
- 7.5.4 An Appeal to the ECHR failed to cross the first hurdle and was dismissed as not showing a cause of action.
- 7.5.5 Clara Dudley made a direct Appeal to the Prime Minister Tony Blair at Downing Street on the 9th June 2003. No action was taken by the Prime Minister to assist Clara.
- 7.5.6 The Defendant Local Authority and the Author met with Clara's daughter in a multi-disciplinary meeting whose object was to carefully plan Clara's move and to minimise risk. Clara had unreasonable fears that "no-one will know where I am" which were addressed by constant reassurance and cards stating that Clara's family knew where she would be going and would continue to visit.
- 7.5.7 Clara had a reasonable fear that she would lose contact with staff. Her particular sense of loss was in respect of her Key worker. This was recognised and it was agreed that the Authority would continue to employ the Key worker in a redeployed capacity and would contractually bind her to visit Clara frequently in the first weeks post transfer and thereafter weekly.
- 7.5.8 It was agreed that Clara would be encouraged to take part in choosing a colour scheme and soft furnishings for her room in the new facility. The new facility had been carefully chosen, was well run, caring and in a beautiful setting in an area very familiar to Clara as this was where she courted her late husband. Clara seemed pleased to take part in choosing her colour scheme and soft furnishings and to enjoy the process.
- 7.5.9 For the day of Clara's first visit to her new home it was agreed that she should be accompanied by her Key worker and that the day should be as stress free and enjoyable as possible. The plan was that Clara would be taken to re-visit places where she had been with her husband and enjoyed so that she would have good and positive feelings.
- 7.5.10 Further it was agreed that the professionals most charged with Clara's care and closest to her, including the Author and Clara's daughter would spend time together with Clara explaining the plans to her in a positive way so that Clara did not have any conflict around the plans.
- 7.5.11 Despite the most careful of preparations Clara suffered a catastrophic stroke on her return to the Moreton Centre after having visited her new home for the first time. Just prior to the stroke Clara was very upset and begged not to be moved.
- 7.5.12 Clara lost her sight, her speech and her ability to swallow. For most of the time until her death Clara was sedated as when she reached consciousness she wailed. She died 15 months later.

**7.6 R (McKellar) -v- LB Hounslow [2003] EWHC 3145 (QB) - (See Appendix 14)**

- 7.6.1 In this matter the Claimants were elderly residents of John Aird House. All Claimants had reports by Dr Peter Jefferys regarding the likely outcome if they were moved. In respect of the first Claimant Amy McKellar Dr Jefferys said that "there are serious implications for her physical health and her survival physically. In my opinion, there is a 75 per cent chance that a move to new accommodation would exacerbate her depression to such a degree that she might make a suicide attempt or require emergency psychiatric admission. The chance of premature death from Malnutrition or suicide in the 6 months following that move is likely to be about 33 per cent".

- 7.6.2 In the case of Kathleen Atwell Dr Jefferys said that there was a 90 per cent chance of her becoming more depressed; An additional risk of 25 to 30 per cent that depressive illness could be triggered in the first weeks after transfer, risk of premature death because of her emotional distress in the first three months, properly 25 to 30 per cent.
- 7.6.3 Heppel J said "in my judgment, the claimants have not established a prima facie case in respect of Article 2... In my judgment in the case of neither of these claimants does the evidence upon which they rely demonstrate a real risk but even if it did, in my judgment, the protocol that the Defendant proposes to adopt would constitute a proportionate response to that risk".
- 7.6.4 The Claimants were all entitled on financial grounds to be Legally Aided. However Legal Aid was refused on the merits. There were appeals to the LSC but these were unsuccessful. Accordingly the Claimants Judicially Reviewed the decision to refuse them Legal Aid and the LSC answered that review by holding a further Committee Meeting in Nottingham. This meeting also dealt with the refusal of Legal Aid in the Glenmore House case which follows.
- 7.6.5 The result of the Nottingham Committee was that Legal Aid was granted to both cases without restriction or limitation. Following the Committee the LSC's Clerk asked to speak privately with the Author and advised her not to rely on the grants of Legal Aid as he anticipated that the Head Office of the LSC would declare the grants ultra vires. Nevertheless both cases proceeded.
- 7.6.6 The John Aird House Claimants were by this time beyond the time limit to Judicially Review the decision to close the home. Therefore the case proceeded as a stand alone Claim under the Human Rights Act.
- 7.6.7 In dismissing the Claim Heppel J said "I got the strong impression throughout this hearing this action was calculated to be an indirect attack on the decision to close the home or to delay its closure for as long as possible, in effect, a public law attack by the vehicle of private law proceedings. In my judgment, these proceedings should never have been brought. The fact that they have been brought at public expense and have had to be defended from like resource is a matter in my judgment not merely of regret, but also of concern".

#### **7.7 Loughlin -v- Southern Cross Healthcare 2003**

- 7.7.1 In this matter the Claimants were elderly residents in Glenmore House Corby which was owned by Southern Cross Healthcare. They were funded by the Local Authority and a dispute had arisen over fees that the Local Authority were willing to pay. After 18 months the dispute had not resolved and Southern Cross Healthcare served notice to quit on the Social Services funded residents.
- 7.7.2 The Claimants had the advantage of individual medical reports from Dr Enrique Zapata-Bravo a Consultant in the psychiatry of old age. All were at risk of adverse health effects some extremely so.
- 7.7.3 Following the Leonard Cheshire case the Claimants were not able to Judicially Review the private provider. Following Haggerty it was clear that the Courts would not be amenable to Judicial Review of the Local Authority on fee levels.
- 7.7.4 Accordingly and bearing in mind the risk of death the Claimants proceeded to Claim for a pre-emptive injunction in Personal Injury and under the HRA. They had enormous difficulty in obtaining Legal Aid and were forced, as in McKellar to Judicially Review the LSC before they could proceed.
- 7.7.5 Within 24 hours of their Claim being issued Southern Cross Healthcare came to terms with Northamptonshire County Council regarding fee levels and their placements were secured.

#### **7.8 R (Chapman) -v- LB Havering, R (Thomas) -v- LB Havering, R (Johnson) -v- LB Havering**

- 7.8.1 From 1999 LB Havering resolved to close care homes and closed Maybank Lodge displacing its residents. There followed a local election in 2002 during which campaign the Conservative opposition group said that if elected it would save the remaining homes and reverse the policy.
- 7.8.2 In 2003 it became apparent that the Conservative group, which now held the Administration, may be reconsidering its position. The Author was requested by RAGE to attend an Alternative Dispute Resolution meeting to try to resolve matters.
- 7.8.3 At the meeting the Author asked what the Authority intended to achieve and stated that in other ADRs' she had worked with the Authority so that the result did not harm the residents. Typically this could include merging homes so that resident and staff groups could move en famille. The Authority's position was that they were holding an open Consultation and did not at that time want to fetter their discretion.

- 7.8.4 Soon after that meeting the Authority put to Cabinet a proposal that a purpose built private home be constructed and replace the Authority's elderly peoples homes. The proposed provision of residential care (as opposed to nursing or dementia care) was far below current provision.
- 7.8.5 The overall case plan was to delay the implementation of any decision - if it could not be Quashed - until the next Local Authority election.
- 7.8.6 The first challenge was on the basis that cognitively impaired residents were those most at risk from an involuntary transfer but that the Authority had not found a way to actively engage them in Consultation or to consider the risk to them. For the purposes of this challenge our cognitively impaired Clients became the Claimants. This Judicial Review was compromised by the Authority agreeing to have a new round of Consultation ordered at its next Cabinet meeting. The Order was therefore for dismissal of the proceedings but only after the next Cabinet meeting had taken place and only if that Cabinet resolved to enter a further period of Consultation.
- 7.8.7 The further period of Consultation was duly entered into and this resulted in a further decision to out source residential care provision to the Private Sector. Victor Thomas had been moved to Elmhurst Lodge from Maybank Lodge following the closure of that home. He recalled that he was promised that he would always be cared for by the Authority and on the basis of this promise he had moved from Maybank to another Local Authority home rather than a Private Sector home. His Judicial Review was based on legitimate expectation flowing from two factors. One was the promise that he would always be cared for by the Local Authority. The other was that for two years prior to the last local election the Conservative group had campaigned against closure of the homes. This Judicial Review failed at the Permission stage as the Court considered itself bound by previous authorities which said that promises made in the heat of a election could not bind an incoming Authority. The attempts to distinguish a two year campaign from heat of the battle promise were unsuccessful.
- 7.8.8 Johnson -v- LB Havering was predicated on advice to the Local Authority's Cabinet on the 20th July 2006 that residents in the Private Sector have no less rights than those in the Public Sector and that HRA and Public Law rights can be protected by Contractual provision. ADR was attempted by the Author. She was unable to consider any way in which Public Law rights could be preserved unless the Authority was the decision maker on any Public Law issue affecting the residents. Accordingly she suggested that the Authority should so draw its Contract to make it the final decision maker on any such issue. The detail was that the Authority would contract with any provider to have a committee dealing with any Public Law issue to which the Authority would be a member. If a matter arose which would affect the Public Law rights of any resident then the Authority's nominee would be contractually stated to be the decision maker. It is not known whether this would have worked. In any event the Authority refused.
- 7.8.9 The Author drafted the papers for the Judicial Review. The Permission application was adjourned to Open Court and Jessica Simor of Matrix was instructed and briefed by the Claimants. Interestingly Miss Simor informed the Author that the British institute of Human Rights and Age Concern had been led to believe by the Department for Constitutional Affairs that government had been seeking a "test case" to overturn Cheshire for the last four years. This was a matter of some surprise to the Author as she was the only Solicitor litigating care home closures since 2002, many of her cases would have been suitable as "test cases" and no-one had made any approach to her.
- 7.8.10 Following the instruction of Counsel the grounds were amended so as to allow the Court to consider not only whether the Authority was wrong to give the advice it had but also to consider whether Public Law rights should be afforded to residents of private homes.
- 7.8.11 The Department for Constitutional Affairs duly intervened in the proceedings as did the Disability Rights Commission. The BIHR and ACE provided Witness Statements after first seeking Government assurance regarding this. The matter came before Forbes J 8th and 9th May 2006. The Government's position was that ECHR judgments post Cheshire would allow the Court to grant the application. At the time of writing this research the handed down judgment is awaited.

**7.9 R (Trim) -v- Sue Ryder Care [2006] EWHC 1209 (Admin) - (See Appendix 18)**

- 7.9.1 In this matter the Claimants were residents in a private care home owned by Sue Ryder Care. The first Claimant had for many years worked for Sue Ryder Care. In or around November 2005 the charity informed residents that it was considering closing their home in Snettisham Norfolk. At the end of March 2006 Norfolk County Council wrote to residents to inform them that the charity would be closing the home by the end of June 2006 and that the Council would be assisting them to find new accommodation.

7.9.2 On receipt of the letter the Claimants through their relatives contacted the Author to ask for her advice. The meeting took place on the 5th April 2006 i.e. prior to the hearing of Johnson. The author has express consent of those present at that meeting to disclose the advice that she gave. The advice was pessimistic because of Cheshire. The Claimants relatives and friends were advised that the only possible way of proceeding was for a pre-emptive injunction in Personal Injury and under the HRA as was issued in the Glenmore House case above. Further that the law in those proceedings had never been tested. Nevertheless those that were entitled to Legal Aid wished to proceed. One resident had died since the closure possibility had first been announced and his widow believed that the events were related. For the others their view was that if there was any possibility at all of preventing the transfer then this should be tried and that the obtaining of a Consultant's report on risk through the proceedings may result in a more humane transfer than would otherwise be the case.

7.9.3 A Letter Before Claim was written on the 10th April 2006 giving 14 days. By the 25th April 2006 no response to the LBC had been received and on that day Dr Zapata-Bravo was instructed. He was willing to see the Claimants at once in view of the emergency nature of the Claim but could only see three people. He agreed to produce the reports within a period of 2 weeks.

7.9.4 Prior to receipt of the reports the friends of Mollie Trim decided that it was in her best interests to move and to do so immediately. The Consultant's verbal advice was received which was that Miss Trim was vulnerable in every way, was at risk if she were moved and that friends, however well meaning, should not put pressure on her to move as she was unable to weigh the competing arguments. This advice was duly conveyed to the friends who considered it. On Sunday the 7th May 2006 the author was contacted by Miss Trim's friends to say that they had considered the advice of the Consultant, did not agree with it, and were moving Miss Trim "forthwith". Enquiries of the Care Home showed that Miss Trim would be moved in just over an hour, there was not time to travel to Miss Trim, that the senior nurse believed that Miss Trim did not wish to move and that it was not in her interests to do so.

7.9.5 In such circumstances a solicitor must consider two principles:

7.9.5.1 **Principle 12.04 Duress or undue influence: A solicitor must not accept instructions which he or she suspects have been given by a client under duress or undue influence.**

In such a case the client must be seen alone. Particular care may need to be taken where a client is elderly or otherwise vulnerable to pressure from others.

And

7.9.5.2 **Principle 12.05 Third party instructions. Where instructions are received from a third party, a solicitor should obtain written instructions from the client that he or she wishes the solicitor to act. In any case of doubt the solicitor should see the client or take other appropriate steps to confirm instructions.**

In the case of elderly clients, a solicitor is sometimes put under pressure by the client's family to accept instructions which are not in accordance with the client's own intentions. In this case the solicitor should see the client.

7.9.6 As it was not possible to meet with Miss Trim, there were concerns of duress or undue influence and the client's life was at risk it was vital to attempt to secure an Injunction. As previously stated the only possible proceedings in such a case are in Personal Injury. It is necessary to have a medical report for such proceedings and the reports had not yet been drafted. Therefore, relying on the arguments of the Secretary of State in R (Johnson) –v- Havering, the author sought an Injunction in Judicial Review. Bearing in mind the risk to life Holland J gave a stay of the move until the next day on the author's undertaking to use her best endeavours to persuade Dr Zapata-Bravo to write to the Defendant informing it of the risk. Miss Trim's friends were informed and asked to inform Miss Trim. Dr Zapata-Bravo duly wrote but the Defendant took no steps to stay the move further.

7.9.7 On Monday the 8th May 2006, whilst Johnson was being heard, Sullivan J gave a further Injunction until the next day for the parties to be heard. On the 9th May 2006 by consent the Injunction was continued until the 16th May 2006 when a Permission hearing would take place. Leave was given to add further Claimants. Dr Zapata-Bravo reported on 3 Claimants and said there was a risk of death to 2 of them and of ill-health to the third.

7.9.8 On the evening of the 15th May 2006 Philip Luxford, the Defendant's Deputy Chief Executive, filed and served a Witness Statement in which he made serious allegations about the advice that the author had given and whether Miss Trim wished to move. In such circumstances a solicitor is bound by a duty of confidentiality and cannot disclose her advice or any communications between her and her client. Mr Luxford had not been present at any meeting the author had with the Claimants or their friends and relatives. Clearly such attendance would have been improper in view of Mr Luxford's position vis-à-vis the Claimants opponent.

- 7.9.9 The judgment in Trim is very concerning. Notwithstanding Johnson Holman J said "It is simply not realistic that a charity (the position of a local authority may be different) can be required or expected to continue indefinitely to run a home such as this if it is uneconomic or leeching away its funds, which are preciously gained from individual members of the public".
- 7.9.10 Therefore R (Johnson) –v- LB Havering, whenever it eventually succeeds, will not change the practice of the law. The position remains as in Cheshire. The residents rights to life and freedom from inhumane treatment will not be paramount.
- 7.9.11 Holman J referred Mr Luxford's allegations to the Law Society and the Legal Services Commission for them to investigate the conduct of the author.

#### **7.10 R (Fordham) –v- Northamptonshire County Council CO/4966/2006**

- 7.10.1 In this matter the Claimants are two elderly ladies who have lived at Nichols House EPH in Northampton for 11 years. The author was instructed by them in February 2006 when a Judicial Review proceeded challenging a budgetary decision of the Defendant Local Authority to close their home. The Defendant answered that Claim, which was heard on the 14th and 15th March 2006 by saying that "no decisions have yet been made". On the 22nd May 2006 the Authority proceeded to make an "in principle" decision to close the home.
- 7.10.2 The author sought to ascertain the views of the Claimants as to whether or not they wished to challenge the 22nd May 2006 decision and was assured by a senior member of the Defendant's care staff that they did and that "the staff will back them all the way". A member of the author's staff took instructions, assessed mental capacity, obtained the consent of the First Claimant to speak to the media about her case and signed them up to legal aid. The Defendant's care staff were informed about all forms signed by the Claimants, steps to be taken and that mobile telephone numbers had been given to the Claimants for ease of contact with their legal team so as to reassure, should it be necessary, inbetween visits and correspondence.
- 7.10.3 Within 24 hours the Claimants and their friend had been advised that their legal team were acting against their best interests and that a member of Age Concern should be appointed "independent advocate" and no visit should take place without that person present. Further their friend was informed that no action could possibly prevent a closure and that the Claimants should be taken to view new homes. In these circumstances it was not possible for the author to take instructions privately, the solicitor/client relationship had been irreparably impaired and the author could not continue to act. (See Appendix 16)
- 7.10.4 The author commenced her own Judicial Review against the Defendant Authority. The threshold for locus standi is low. The author requested the Court to order a medical report from a Consultant in the Psychiatry of Old Age as to the wishes of the residents and any risk that there may be to them of a move and take no further steps to move the residents until that report was to hand and considered.
- 7.10.5 The Court have ordered the author's attendance at an Open Court hearing, represented by Counsel with the residents separately represented

#### **8. Barriers to representation for elderly people facing closure of care homes**

- 8.1 It is rare indeed, and has not happened in the author's own experience, for those controlling the assets of elderly people to utilise these where the resident is not eligible for legal aid.
- 8.2 Judicial Review, the only proven avenue of challenge, are complex proceedings unknown to most lawyers.
- 8.3 There is no duty on a Local Authority to inform residents of their right to challenge nor that they should take independent legal advice. From which it follows that none are helped or enabled to take such advice.
- 8.4 Most solicitors will not proceed until such time as funding is certain. Legal aid is difficult to obtain and to sustain. Solicitors are paid for only 30 minutes of time to appeal an adverse legal aid decision. Travelling to LSC appeals committees and advocating before them therefore has to be undertaken pro bono or not at all.
- 8.5 Increasingly the Courts are questioning the actions of solicitors who take these cases placing them at severe professional and personal risk. The stress of such actions by the Courts can challenge the life and health of the solicitor.

#### **9. The Governments desire that elderly people be enabled to live independently**

- 9.1 Care on a 1:1 basis would be hugely expensive to the State. Typically such packages cost £140,000 per annum. Save in exceptional cases, and never for the elderly, such care is not provided by the State. Elderly people living alone in the community are under provided for.

9.2 Local Authorities can use the “lack of resources” argument in under providing for care

9.3 Monies given by Govt as disability benefits are often seen as compensation for the disabled person/carer rather than funds to buy care. Accordingly there is great resistance to any charging policy and care can be sacrificed in favour of money.

## **10. The future of elderly care**

10.1 The system should be changed so that the disabled person has a right to a basic level of security of tenure in a care home. Those that live in the community should have the right to the care they need. Both groups should have a right of appeal to a Court. This should be paid for from drastically reducing the benefit monies

10.2 Where life is at risk, which it is in cases of involuntary transfer of elderly people, the following additional steps must be taken:

10.2.1 all affected residents should be enabled to privately seek advice from an independent and expert solicitor

10.2.2 legal aid should be given, and sustained, for representation without consideration of the resident's means

10.3 The deaths that Government policy has caused should be acknowledged

1st July 2006

Yvonne Hossack

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## Appendix

- 1) Alzheimer's Disease and Other Dementia (para 3.3)
- 2) David Dickinson - Journal of Clinical Nursing 1996  
04.04.96
- 3) Relocation Stress Syndrome by Pamela S. Manion/ Marilyn J. Rantz  
May 1995
- 4) Working Party Report - Management of the Older Medical Patient (para 4.6, 4.5)  
05.09.00
- 5) Fear Grips Old as Care Home Closures Rise by Ben Summerskill (para 3.7, 3.8, 3.9)  
25.03.01
- 6) Cowl & Others -v- Plymouth County Council (para 7.2.5)  
14.09.01  
(Scott Baker J)
- 7) R (Cowl) -v- Plymouth County Council (para 7.2.5)  
14.12.01  
(Mummery J)
- 8) R (Madden) -v- Bury Metropolitan Borough Council (para 7.1, 4.5.1)  
16.08.02  
(Richards J)
- 9) R (Birmingham Care Consortium) -v- Birmingham City Council (para 7.3)  
17.10.02  
(Stanley Burnton J)
- 10) R (Haggerty) -v- St Helens Council (para 7.4, 4.2, 4.5.3)  
11.04.03  
(Silber J)
- 11) R (Whitbread and Dudley) -v- East Sussex County Council (para 7.5, 4.5.4)  
16.04.03  
(Maurice Kay J)
- 12) Home Closures and Delayed Charges Article (para 4.6, 4.7)  
08.09.03
- 13) PSSRU Closures of Care Homes for Older People (para 4.6, 4.7)  
Oct 2003
- 14) R (Mckeller & Ors) -v- Mayor & Burgesses of the (para 7.6, 4.5.6)  
London Borough of Hounslow  
28.10.03  
(Heppel QC)
- 15) The Public Whip - Extract from the Debate (para 3.7, 3.8, 3.9)  
07.01.04
- 16) Age Concern - Care Home Closures (para 6.7, 6.8, 7.10.3)  
Apr 2004
- 17) Statistics Release: Care Homes, Scotland September 2005 (para 3.7, 3.8, 3.9, 4.6)  
Sep 2005
- 18) R (Trim) -v- Sue Ryder Care (para 7.9, 4.5.8)  
16.05.06  
(Holman J)
- 19) Letter British Institute of Human Rights to Ceri Goddard (para 6.12)  
22.06.06
- 20) Laing & Buisson, Long Term Care - Value of the Care Home Market (para 3.7)  
24.06.06