

## Explanatory Memorandum of Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons

### I. Introduction

1. Europe is currently undergoing demographic changes through growing life-expectancy and reduced birth rates. The increasing number of older persons in European societies<sup>1</sup> augments the need to address the issue of their position in societies, including the need to promote their autonomy and to ensure their protection from a human rights perspective. Even though the Convention for the Protection of Human Rights and Fundamental Freedoms obviously applies also to older persons, and some general human rights provisions are particularly relevant for them, it is important to highlight possible barriers to the full enjoyment of human rights by older persons and measures to be taken to eliminate them.

2. The starting point of the Recommendation is the recognition that all human rights and fundamental freedoms apply to older persons, and that they should fully enjoy them on an equal basis with others. This instrument calls to respect their autonomy and legal capacity in daily life. The Recommendation aims at promoting older persons' protection in societies where the ageism is rising or in situations where they may be vulnerable. Older persons may face domestic violence, abuse, neglect or poverty; they may lack adequate care or be discriminated against because of their age. The Recommendation responds to those concerns and aims at finding the right balance between the autonomy and the protection of older persons.

3. The Drafting Group on the Human Rights of Older Persons (CDDH-AGE), which was set up by the Steering Committee for Human Rights in February 2012, with a view to elaborating a non-binding instrument on the promotion of the human rights of older persons, met four times in order to draft the Recommendation.

### II. Comments

#### *General considerations*

4. The Recommendation outlines principles with a view to reinforcing the autonomy and, at the same time, the protection of the human rights of older persons. These principles are based on existing international human rights standards with particular emphasis on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the "Convention") and the European Social Charter (hereafter "the Charter", or, where appropriate, "the revised Charter"), as interpreted in the relevant case-law of the European Court of Human Rights and conclusions of the European Committee of Social Rights. Most principles are further illustrated with examples of good practices from national systems. The Recommendation also draws inspiration, *inter alia*, from different texts adopted by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, which are specifically aimed at the situation of older persons in Europe, as well as from the provisions relevant to older persons of the United Nations Convention on the Rights of Persons with Disabilities and of other relevant instruments, in particular the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

5. The Recommendation is not a legally binding instrument. Member states are only bound to the extent that they have ratified the instruments on which the principles are drawn. However governments of member states are invited to ensure compliance with the principles set out in its appendix in national legislation and practice relating to older persons. Governments are also encouraged to ensure, by appropriate means and action, a wide dissemination of this instrument among competent authorities and stakeholders. Where appropriate, such dissemination may be achieved by translation of the text into a national language.

6. Concerning follow-up to the Recommendation, governments are invited to continue providing examples of good practices related to its implementation with a view to their inclusion in a shared information system accessible to the public, and to examine its implementation within the Committee of Ministers five years after its adoption.

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<sup>1</sup> *Recent demographic developments in Europe 2005, (2006)*, Council of Europe Publishing. This study estimated that by 2050 the population aged between 65-79 years will have grown by 41%. The population of the oldest, 80 years or older, will have increased by 155%. This means that the old-age dependency ratio will have more than doubled from 22% to 45% by 2050.

## I. Scope and general principles

1. The purpose of the present recommendation is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all older persons, and to promote respect for their inherent dignity.
  2. The present recommendation applies to persons whose older age constitutes, alone or in interaction with other factors, including perceptions and attitudes, a barrier to the full enjoyment of their human rights and fundamental freedoms and their full and effective participation in society on an equal basis. It takes note that Council of Europe member States have identified chronological ages at national level whereby persons enjoy specific rights and advantages by reason of their older age.
  3. Older persons shall fully enjoy the rights guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the European Convention on Human Rights") and the protocols thereto, the European Social Charter, opened for signature in 1961 and revised in 1996, and other relevant international human rights instruments, to the extent that member States are bound by them.
  4. Older persons should have access to sufficient information about their rights.
  5. Older persons should be appropriately consulted, through representative organisations, prior to the adoption of measures that have an impact on the enjoyment of their human rights.
7. In the light of the European and universal human rights treaties quoted above, the overall aim of the Recommendation is to promote the human rights and fundamental freedoms of older persons and their effective participation in society, as well as to protect those whose older age constitutes a barrier to the full enjoyment of the rights.
8. To date no commonly agreed legal definition of "older persons" exists. Older persons are not a homogeneous group.<sup>2</sup> The Committee of Ministers asserted in its Recommendation R(94)9 concerning elderly people that it is "useless to attempt to define exactly when old age begins" and that "ageing is a process: being old depends on the individual's circumstances and the environment". The Parliamentary Assembly noted in its Recommendation 1796 (2007) on the situation of elderly persons in Europe that "a person's age is no longer an indicator of health, wealth or social status". The World Health Organisation defined ageing as the "process of progressive change in the biological, psychological and social structures of individuals".<sup>3</sup>
9. For these reasons, the Recommendation adopts a flexible and illustrative approach and does not include an exhaustive definition of older persons, for example by setting a minimum age for a person to be considered as being of old age.<sup>4</sup> Nevertheless, the Recommendation recognises that Council of Europe member states have identified chronological ages at national level whereby persons enjoy specific rights and advantages by reason of their older age.
10. The information of older persons about their rights and their participation in the decision-making process on measures having an impact on the enjoyment of their rights play a crucial role in achieving the aim of this Recommendation. In order for those rights to be enforced, visibility and awareness raising should be ensured among older persons and they should have access to sufficient information. In this regard, Article 23 of the revised Charter recognises that states should "enable elderly persons to remain full members of society for as long as possible, by means of: [...] b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them." In its Recommendation R(94)9 concerning elderly people, the Committee of Ministers also recognised, the importance of information and education for older persons themselves, as well as for families, for professional and voluntary workers, and for the community as a whole, in order to increase sensitivity to the issues of relevance to older persons. Moreover, prior to the adoption of measures that have an impact on the enjoyment of their human rights, older persons should be appropriately consulted, through those representative organisations which would be relevant in the light of the issue under discussion.

<sup>2</sup> *Normative standards in international human rights law to older persons, Analytical Outcome Paper*, United Nations Office of the High Commissioner for Human Rights (August 2012), p. 7.

<sup>3</sup> *A life course perspective of maintaining independence in older age*, World Health Organisation, Geneva, 1999, p.4.

<sup>4</sup> The Regional Office for Europe of the World Health Organisation defined older maltreatment as regards "people aged 60 years and older", *European report on preventing older maltreatment*, 2011

## II. Non-discrimination

6. Older persons shall enjoy their rights and freedoms without discrimination on any grounds, including age.
7. Member States should consider making explicit reference to “age” in their national anti-discrimination legislation.
8. Member States should take effective measures to prevent multiple discrimination of older persons.

11. The Recommendation reaffirms the principle of the full enjoyment of all human rights and freedoms by older persons without any discrimination. This principle is inspired by Article 14 of the Convention and Article E of the revised Charter prohibiting 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. The list of grounds for discrimination is not exhaustive, but rather illustrative, and age can be included in “others status” referred to in these Articles.<sup>5</sup>

12. The Recommendation invites member states to make reference to “age” when passing new or amending existing anti-discrimination legislation. In its Resolution 1793 (2011) on promoting active ageing: capitalising on older people’s working potential, the Parliamentary Assembly considered that the phenomenon of age discrimination is “often unconscious, but it undermines older people’s dignity, their human rights and self-esteem and is a huge waste of talent”. The Assembly acknowledged that ageism “is a harmful prejudice that results in widespread lack of respect for older people [...] they are the victims of physical and financial abuse, in the workplace, where they are subject to unequal treatment, or in the health sector where they do not always receive appropriate medical care and services.”

13. The European Committee of Social Rights has stated that Article 23 of the revised Charter requires States Parties to combat age discrimination in a range of areas, namely in access to goods, facilities and services. The Committee has pointed out the existence of pervasive age discrimination in many areas of society throughout Europe (healthcare, education, insurance and banking services, participation in policy making and in civil dialogue, allocation of resources and facilities) and considered that an adequate legal framework would be a fundamental measure to combat age discrimination in these areas.<sup>6</sup> Article 23 therefore requires states to enact anti-discrimination legislation to protect older persons.

14. However not all difference in treatment automatically leads to discrimination. National authorities enjoy a margin of appreciation in assessing whether and to what extent differences in similar situations justify a different treatment. The European Court of Human Rights and the European Committee of Social Rights both have held that any difference in treatment is justified if the treatment furthers a legitimate aim and is proportionate to achieve that aim.<sup>7</sup>

15. The Recommendation also addresses the issue of possible multiple discrimination of older persons and taking effective measures to avoid it. The term “multiple discrimination” refers to a situation in which a person is being discriminated against for several reasons. Member states should be particularly sensitive to the situation and specific problems of older women and older migrants, as well as conscious that multiple discrimination may also arise where an older person has, for instance, a disability or a different sexual orientation. In its Resolution 1793 (2011) on promoting active ageing: capitalising on older people’s working potential, the Parliamentary Assembly recommended the establishment of special support programmes for ageing migrants, women and people with disabilities.

16. In its Recommendation 1796 (2007) on the situation of elderly persons in Europe, the Assembly also pointed out that older women form a particularly vulnerable group which is discriminated against in many ways and whose financial insecurity is exacerbated by inadequate social support and their low income. Moreover, the Council of Europe Commissioner for Human Rights pointed out the problem that older women often receive a

<sup>5</sup> As far as member states of the European Union are concerned, Article 21 of the European Charter of Fundamental Rights and the Employment Equality Directive 2007/78/EC, prohibit age discrimination explicitly.

<sup>6</sup> European Committee of Social Rights, Conclusions 2009, Vol. 1, page 272 (concerning Finland). ([http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/2009Vol1\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/2009Vol1_en.pdf)).

<sup>7</sup> The case-law of the European Court of Human Rights under Article 14 combined with other Articles of the Convention is well established in this sense. The European Committee of Social Rights dealt with this issue in the case of *Genop-Dei and Adedy v. Greece*, collective complaint No. 66/2011, decision of 23 May 2012, para. 68.

reduced pension allowance because they have had to care for family members rather than being professionally active.<sup>8</sup>

17. The Council of Europe has recognised in several instruments that older migrants and their families should be informed and supported in benefiting from residence, social welfare, health care, adapted language courses, pension rights and incentives to participate in society. Article 19 of the revised Charter gives migrant workers and their families the right to protection and assistance. Parliamentary Assembly Recommendation 1619 (2003) on the rights of elderly migrants and Committee of Ministers Recommendation CM/Rec(2011)5 on reducing the risk of vulnerability of elderly migrants and improving their welfare, focus also on the sensitive situation of older migrants.

18. Persons with disabilities face also particular difficulties which increase during the ageing process, such as reduced vision, reduced hearing or reduced mobility. In this respect, the Council of Europe Commissioner for Human Rights suggested to member states to take this problem into account when designing policies and programmes and to consider ratifying the United Nations Convention on the Rights of Persons with Disabilities, as well as to give high priority to the implementation of the Council of Europe Disability Action Plan 2006-2015.<sup>9</sup>

### III. Autonomy and decision-making

9. Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitations should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination.

19. Any person has the right to be recognised everywhere as a person before the law, as laid down in Article 6 of the Universal Declaration on Human Rights and Article 16 of the United Nations International Covenant on Civil and Political Rights. Inspired by Article 3 of the United Nations Convention on the Rights of Persons with Disabilities and the Committee of Ministers Recommendation No. R(94)9 concerning elderly people, the Recommendation recalls that the general principles of respect for human dignity, individual autonomy and self-determination apply to older persons. Therefore older persons are presumed being capable of self-reliance (capacity to provide for one's own needs), personal preference (capacity to express wishes and make own decisions and choices) and self-assertion (pursuit of the fulfilment of one's desires and goals).<sup>10</sup>

20. The direct consequences to be drawn from these principles are the following. Older persons should be enabled to lead independent lives in their familiar surroundings for as long as they wish and are able. Older persons should be able to take and communicate decisions with regard to personal and legal matters, including decisions about living conditions, and express wishes for a funeral in accordance with their beliefs.

10. Older persons should have the possibility to interact with others and to fully participate in social, cultural and education and training activities, as well as in public life.

11. Older persons have the right to dignity and respect for their private and family life, including respect for their sexual intimacy, to the fullest extent.

21. Social cohesion and active citizenship in Europe may be achieved through the integration in society of all generations. Policies oriented towards facilitating and supporting the participation of old persons in social, cultural and economic life, even in volunteering opportunities, contribute significantly to the goals of economic growth, prosperity and social cohesion in all countries,<sup>11</sup> as well as to the intellectual, social and physical state of the elderly.

22. Information technology literacy can foster the social inclusion of older persons and their ability to experience active ageing. The Parliamentary Assembly suggested to states, in its Recommendation 1428 (1999) on the future of senior citizens, to provide for initiatives to bring retired and older persons into closer contact with

<sup>8</sup> *Aged people are too often ignored and denied their full human rights*, Viewpoint of the Council of Europe Commissioner for Human Rights, 28 April 2008 ([http://www.coe.int/t/commissioner/viewpoints/080428\\_en.asp](http://www.coe.int/t/commissioner/viewpoints/080428_en.asp))

<sup>9</sup> *Aged people are too often ignored and denied their full human rights*, Viewpoint of the Council of Europe Commissioner for Human Rights, 28 April 2008.

<sup>10</sup> *Dependence and Autonomy in Old Age*, George J Agich, (2003), Cambridge University Press, Cambridge.

<sup>11</sup> *G8 Turin Charter "Towards Active Ageing"*, Labor Ministers Conference, November 2000, Italy.

new communication technologies. In its Recommendation CM/Rec(2009)6 concerning ageing and disability in the 21st century, the Committee of Ministers recommended also that free and accessible modern information systems and counselling – including via Internet – should be available to help individuals make their own decisions and organise their lives independently.

23. Some derived rights from the absolute prohibition of maltreatments under Article 3 of the Convention and from the right to a private and family life under Article 8 of the Convention are enshrined in the Recommendation. The respect of human dignity is at the core of the prohibition under Article 3 and the respect of privacy, including intimacy is at the core of Article 8. The protection of sexual intimacy is relevant mostly in the context of residential care (and in case of detention) where the maintaining of sexual relationships may be restricted or the providing of (body) cares may impact on the dignity of the person. Another aspect of this issue is that older persons should decide autonomously on their personal relations, including choices of friends and partners, and to be in contact with people they wish.

12. Older persons enjoy legal capacity on an equal basis with others.

13. Older persons have the right to receive appropriate support in taking their decisions and exercising their legal capacity when they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions. Such appointed party should support the older person on his or her request and in conformity with his or her will and preferences.

14. Member States should provide for legislation which allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage.

15. Member States should ensure that all measures that relate to decision making and the exercise of legal capacity of older persons, including possible restrictions which may be required for protection purposes, provide for appropriate and effective safeguards to prevent abuse. The safeguards should be proportionate to the degree to which such measures affect the older person's rights and interests.

24. Emphasising the autonomy of older persons, the Recommendation considers older persons as having the ability to decide in their own best interests about their person and affairs, and therefore recognizes their legal capacity on an equal basis with others. However, when an older person suffers from a mental disorder, disability or a disease, he or she may need different degrees of support to facilitate decision-making in accordance with the principle of supported decision-making including, in exceptional cases, the designation of another person to take decisions on his or her behalf.

25. The Committee of Ministers Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity is particularly relevant and guiding text for assisted decision making. The term "advance directives" understands instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity. The European Committee of Social Rights asked states, under Article 23 of the revised Charter, for information on the legal framework related to assisted decision making for older persons and, in particular, whether there are safeguards to prevent the arbitrary deprivation of autonomous decision making by older persons.<sup>12</sup>

26. The Recommendation admits the possibility of limiting the older persons' decision making and legal capacity for protection purposes without, by this, meaning to encourage the widespread application of such limitations. While recognising that such limitations should be exceptional, based on a case-by-case assessment of the circumstances and needs, and be accompanied with appropriate safeguards, such limitations may still be possible in accordance with national law. They require therefore an explicit mention in the Recommendation to underline the need for specific safeguards in order to prevent abuse, which is particularly relevant in this context. The principles enshrined in Article 12.4 of the United Nations Convention on the Rights of Persons with Disabilities may likewise be adapted to the present context. Member states should ensure that restriction measures respect the rights, will and preferences of the older person concerned, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.

<sup>12</sup> European Committee of Social Rights, Conclusions 2009, Vol. 1, p. 70 (concerning Andorra).

#### IV. Protection from violence and abuse

16. Member States should protect older persons from violence, abuse and intentional or unintentional neglect. Such protection should be granted irrespective of whether this occurs at home, within an institution or elsewhere.

17. Member States should provide for appropriate awareness-raising and other measures to protect older persons from financial abuse, including deception or fraud.

27. The Recommendation deals with the serious problem of violence, abuse and neglect of older persons and calls upon member states to ensure them special protection from such acts, irrespective of whether this occurs at home or within an institution. In most cases maltreatment is a hidden phenomenon: the perpetrator may be a relative whom the older person is reluctant or unable to denounce and/or the older person may be unable to defend her/himself against. The European Court of Human Rights has considered that older persons often are not in a position to draw attention to shortcomings concerning the provision of care on their own initiative.<sup>13</sup>

28. The European Committee of Social Rights<sup>14</sup> and the World Health Organisation<sup>15</sup> have recognised that the abuse of older people is a significant global problem leading to poorer quality of life and reduced survival. The World Health Organisation has defined “elder abuse” as “a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person. It can take various forms: physical, psychological or emotional, sexual, financial or simply reflect intentional or unintentional neglect”.<sup>16</sup> The neglect may be seen as the failure of the caregiver(s) to meet the needs of a dependant older person, and is generally considered as a form of maltreatment.

29. The protection from abuse in the first place derives from Article 3 of the Convention which prohibits in absolute terms torture or inhuman or degrading treatment or punishment.<sup>17</sup> The prohibition of such treatment directly applies to carers providing services to older persons at home or in institutions. The protection of older persons goes even beyond this obligation, as the Convention also imposes a positive obligation on states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.<sup>18</sup>

18. Member States should implement sufficient measures aimed at raising awareness among medical staff, care workers, informal carers or other persons who provide services to older persons to detect violence or abuse in all settings, to advise them on which measures to take if they suspect that abuse has taken place and in particular to encourage them to report abuses to competent authorities. Member States should take measures to protect persons reporting abuses from any form of retaliation.

30. The Recommendation suggests to member states to take appropriate awareness-raising and other measures so that the detection of violence and abuse becomes easier. Measures may include for instance information and advice to the medical staff, care givers and persons providing services to older persons on how to detect maltreatment and how to react if it is suspected to have occurred. In addition, member states may consider providing guidance to medical and forensic staff on how to better detect violence against older persons and death from an unnatural cause.

31. Further proposals for measures to prevent maltreatment were made by the Council of Europe Commissioner for Human Rights who suggested the setting up of independent complaints and inspection systems.<sup>19</sup> In Recommendation CM/Rec(2009)6 on ageing and disability in the 21st century, the Committee of Ministers suggested the establishment of easy access to telephone hotlines to protect older persons and people with disabilities from abuse. Moreover, in Recommendation 1428 (1999) on the future of citizens: protection, participation and promotion, the Parliamentary Assembly suggested to member states to consider establishing

<sup>13</sup> *Heinisch v. Germany* (no. 28274/08), judgment of 21 October 2011, para. 71.

<sup>14</sup> European Committee of Social Rights, Conclusions 2009, Vol. 1, pp. 274-5.

<sup>15</sup> *European report on preventing older maltreatment*, Regional Office for Europe of the World Health Organisation, 2011.

<sup>16</sup> *World Report on Violence and Health*, World Health Organisation, Geneva, 2002, p.126-143.

<sup>17</sup> *Gäfen v. Germany* (no. 22978/05), judgment of 1 June 2010 [Grand Chamber], para. 87.

<sup>18</sup> *Z and others v. the United Kingdom* (no. 29392/95), judgment of 10 May 2001 [Grand Chamber], para. 73.

<sup>19</sup> *Aged people are too often ignored and denied their full human rights*, Viewpoint of the Council of Europe Commissioner for Human Rights, 28 April 2008.

information services for older persons to assist in preventing and punishing maltreatment (with particular attention to drug misuse in institutions).

32. The issue of abuse might be further complicated should the professionals responsible for treating the older persons refuse to acknowledge that abuse has occurred. The Recommendation invites member states to encourage caregivers to report to competent authorities if they have knowledge of possible act(s) of abuse.

33. To this effect and in the light of the case-law of the European Court of Human Rights, the Recommendation encourages member states to take legislative or other measures to protect persons having reported maltreatment (“whistle-blower”) from dismissal or other reprisals. The European Court of Human Rights has decided that the national courts’ upholding of a dismissal of a carer for having reported in the public domain, deficiencies in an institution concerning the quality of care (“whistle-blowing”), may under certain circumstances be in violation of Article 10 of the Convention (freedom of expression).<sup>20</sup> Thus, a certain level of protection of “whistle-blowers” is required from states, in particular where the employee/civil servant concerned is the only person, or part of a small category of persons, aware of what is happening and is better placed to act in the public interest by alerting the employer or the public at large. The European Court of Human Rights has held in *Heinisch v. Germany* that the reporting of flaws in the care of older persons is in the public interest and, taking into account the particular vulnerability of the patients concerned, is of vital importance with a view to preventing abuse.<sup>21</sup>

34. When assessing whether any reprisals, including the dismissal, of a “whistle-blower” disproportionately restricts and thus violates the freedom of expression, the European Court of Human Rights has regard to the following criteria: the authenticity and the accuracy of the information disclosed, the damage suffered by the employer as a result of the disclosure, the motive behind the actions of the reporting employee and the severity of the penalty imposed.<sup>22</sup>

35. However, national legislation may submit the reporting to some requirements, for instance, before reporting to competent authorities, carers should have previously informed their superior or other authority of the institution (duty of loyalty and discretion). . It is only where this is clearly impracticable or without effect that the information can, as a last resort, be disclosed to the public.<sup>23</sup> The information disclosed should be accurate, and the person reporting should have acted in good faith. The Parliamentary Assembly has established a number of principles for the protection of the “whistle-blowers” in its Resolution 1729 (2010), inviting member states to review their legislation in this area.

19. Member States shall carry out an effective investigation into credible claims that violence or abuse against an older person has occurred, or when the authorities have reasonable grounds to suspect that such ill-treatment has occurred.

20. Older persons who have suffered from abuse should receive appropriate help and support. Should member States fail to meet their positive obligation to protect them, older persons are entitled to an effective remedy before a national authority and, where appropriate, to receive adequate redress for the harm suffered in reasonable time.

36. The Recommendation invites member states to carry out an effective investigation when there are credible claims or the authorities have reasonable grounds to suspect that violence or abuse has occurred. This is a procedural obligation deriving from Article 3 of the Convention. The European Court of Human Rights has held that, in order for an investigation to be effective, it should respect the following requirements: the investigation must be capable of leading to the identification and punishment of those responsible (“adequacy”); it must be comprehensive in scope and address all of the relevant background circumstances (“thoroughness”); persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events (“impartiality”); the investigation must be commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available (“promptness”); and there should be a sufficient element of public scrutiny of the investigation to secure accountability, maintain public confidence and to prevent any appearance of collusion (“public scrutiny”).<sup>24</sup>

37. Older persons who have suffered from abuse should receive appropriate help and support. Such support may take various forms, including appropriate medical and psychological assistance, and should be

<sup>20</sup> *Heinisch v. Germany* (no. 28274/08), judgment of 21 October 2011.

<sup>21</sup> *Heinisch v. Germany* (no. 28274/08), judgment of 21 October 2011, para. 71.

<sup>22</sup> *Heinisch v. Germany* (no. 28274/08), judgment of 21 October 2011, para. 66-70.

<sup>23</sup> *Heinisch v. Germany* (no. 28274/08), judgment of 21 October 2011, para. 65.

<sup>24</sup> *Ramsahai and others v. the Netherlands* (no. 52391/99), judgment of 15 May 2007 [Grand Chamber], para. 324.

provided within reasonable time. In the light of Article 13 of the Convention, the Recommendation stipulates that older persons are entitled to an effective remedy before a national authority and should receive, where appropriate, adequate redress. Depending on the older person's age, the national authority should decide promptly and the situation should be redressed in reasonable time. The European Charter of Rights and Responsibilities of Older People in Need of Long-Term Care and Assistance (developed in 2010 by the EUSTaCEA project "A European Strategy to fight elder abuse") is an additional source on that issue. It recognises in Article 9 that older persons have the right to redress in case of mistreatment, abuse or neglect.<sup>25</sup>

## **V. Social protection and employment**

21. Older persons should receive appropriate resources enabling them to have an adequate standard of living and participate in public, economic, social and cultural life.

38. The provisions of this Chapter should be read in accordance with the national context and legislation of the Council of Europe member states. Some considerations relative to the older persons' participation in social, cultural and economic life are developed under Chapter III of the Recommendation.<sup>26</sup>

39. As regards social protection of older persons, the Recommendation is primarily based on Article 23 of the revised Charter which specifically guarantees some older persons' social rights and requires states to put in place measures designed to meet their specific needs. This article is supplemented by other provisions, namely Articles 11 (right to protection of health), 12 (right to social security), 13 (right to social and medical assistance) and Article 14 (the right to benefit from social welfare services). As Article 23 does not include the field of employment, the question of age discrimination in this field is mainly considered under Articles 1, paragraph 2 (non-discrimination in employment) and Article 24 (right to protection in cases of termination of employment).

40. The Recommendation resumes the part of Article 23 of the revised Charter stating that states shall adopt or encourage appropriate measures designed in particular "to enable elderly persons to remain full members of society for as long as possible, by means of: a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life [...]". Bearing in mind that Article 23 relates specifically to older persons who have stopped to work, the resources in question are retirement pensions and any other benefits which states may grant. The European Committee of Social Rights has specified that pensions should be indexed, linked and compared to the average wage levels and cost of living, including costs of transport and of medical care. The Committee usually assesses the resources of older persons in relation to the poverty line, which is calculated by Eurostat or by the Committee itself on the basis of the national poverty lines.<sup>27</sup>

41. Where countries have not accepted Article 23, the European Committee of Social Rights holds that states are nevertheless bound to ensure a minimum level of well-being for older persons, and justifies its assessment from the angle of other provisions of the revised Charter (e.g. Article 13, paragraph 1 - right to social and medical assistance<sup>28</sup> and Article 14). In its Recommendation 2000 (2012) on decent pensions for all, the Parliamentary Assembly expressed concerns about the need to ensure the sustainability and adequacy of pension systems, in particular in times of ageing populations and economic and financial crisis.

22. Member States should take measures to facilitate mobility of older persons and proper access to infrastructure for them.

23. Member States should provide adequate measures of support to enable older persons to have housing adapted to their current and future needs.

42. The Recommendation invites member states to facilitate home renovation and access to social housing for older persons with a view to ensuring them adequate and safe living conditions and preventing difficulties that may impact on the state of health or the well-being of older persons. In order for older persons to be able to

<sup>25</sup> [http://www.age-platform.eu/images/stories/Final\\_European\\_Charter.pdf](http://www.age-platform.eu/images/stories/Final_European_Charter.pdf).

<sup>26</sup> In Article 25 of the Charter of Fundamental Rights of the European Union, the latter "recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life" [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>27</sup> The Rights of Elderly Persons under the European Social Charter, Draft Information Document drawn up by the Secretariat of the Council of Europe, Department of the European Social Charter, March- April 2011.

<sup>28</sup> See the conclusions under Article 13, paragraph 1 on Armenia: "Given that Armenia has not accepted Article 23 of the Revised Charter (the right of elderly persons to social protection), the Committee assesses the level of non-contributory pension paid to a single elderly person without resources under this provision." European Committee of Social Rights, Conclusions 2009, Vol. 1, page 89.



adapt gradually their housing to their needs and state of health, member states should provide adequate measures of support and anticipate possible future needs of the elderly with a view to avoiding major difficulties in their lives. The European Committee of Social Rights has stressed that comfortable housing conditions are very important for older persons' well-being and the improvement of housing conditions of senior citizens requires considerable public funding under the form of grants, loans, etc. as the average older person usually cannot afford the costs of modernisation.<sup>29</sup>

43. In its Recommendation R(94)9 concerning elderly people, the Committee of Ministers recommended that adequate housing and social protection systems that take into consideration the needs of particularly vulnerable groups are an essential factor in preventing social exclusion. Moreover, the Council of Europe Commissioner for Human Rights recommended in this respect that states should ensure that their social protection systems, health care and housing policies are suited for older people.<sup>30</sup>

24. Member States should promote, either by public institutions or in co-operation with non-governmental organisations or with the private sector, sufficient supplementary services such as adult day care, nursing care or preparation of meals.

44. In order to continue to live at home and maintain an adequate standard of living, older persons may need some additional arrangements such as the preparation of meals, day care, nursing, and any other supplementary service, at a relatively low cost to allow the broadest possible access.<sup>31</sup> In its Resolution 1502 (2006) on demographic challenges for social cohesion, the Parliamentary Assembly recommended member states to adapt long-term care for the increasing number of older people and ensure that those who live alone have access to formal support (nurses, doctors, hospitals) and informal networks (friends, neighbours).

25. Member States which have not yet ratified the European Social Charter (revised) and the Additional Protocol to the European Social Charter providing for a system of collective complaints (ETS No. 158) are invited to consider doing so. Those which have already ratified the revised Charter, but are not yet bound by Article 23 (The right to social protection of older persons), are invited to consider declaring that they consider themselves to be bound by that provision.

45. The Recommendation encourages member states, if they have not yet done so, to consider the ratification of the European Social Charter (revised) (CETS No. 163) and of the Additional Protocol to the European Social Charter providing for a system of collective complaints (CETS No. 158). The Recommendation also contributes to reinforce the protection of older persons by inviting member states which have already ratified the revised Charter, but are not yet bound by Article 23, to consider declaring that they are bound by that provision. Article 23 provides a fundamental basis offering older persons specific protection suited to their needs and combating age discrimination in various areas.

26. Member States should ensure that older persons do not face discrimination in employment, including on grounds of age, in both the public and private sectors. This should include aspects such as conditions for access to employment (including recruitment conditions), initial and continuous vocational training, working conditions (including dismissal and remuneration), membership of trade unions or retirement. Member States should ensure that any difference in treatment is justified by furthering a legitimate aim of employment policy and by being proportionate to achieve that aim.

27. Member States should include the promotion of participation of older persons in the labour market in their employment policies.

28. Member States should pay specific attention to the safety and health problems of older workers in their respective programmes, action plans and other relevant policy action.

<sup>29</sup> European Committee of Social Rights, Conclusions 2009, Vol. 1, page 72 (concerning Andorra).

<sup>30</sup> *Aged people are too often ignored and denied their full human rights*, Viewpoint of the Council of Europe Commissioner for Human Rights, 28 April 2008.

<sup>31</sup> *Normative standards in international human rights law to older persons*, Analytical Outcome Paper, United Nations Office of the High Commissioner for Human Rights (August 2012), p. 28. (<http://social.un.org/ageing-working-group/documents/ohchr-outcome-paper-olderpersons12.pdf>).

46. Access to employment for older workers may often be particularly difficult, the Recommendation strongly encourages member states to apply to older persons the principle of equal treatment, based on Article 14 of the Convention.<sup>32</sup> Exceptions to this principle may be admissible and the Recommendation foresees a grid of analysis for such exceptions: any difference in treatment should be justified by furthering a legitimate aim of employment policy and proportionate to achieve that aim. These conditions should be assessed taking into consideration the national social and economic context in the field of employment.

47. The Recommendation also highlights the importance of the promotion of the participation of older persons in the labour market<sup>33</sup> and of the prevention and protection from recurrent schemes of negative action against older persons in the workplace.<sup>34</sup> The Parliamentary Assembly recommended member states in its Resolution 1793 (2011) on promoting active ageing: capitalising on older people's working potential "to adopt legislation to prohibit age discrimination and removing labour market barriers, and empowering older persons to enter, remain in or return to the labour market in accordance with their capabilities and willingness to work". Moreover, it recommended the implementation of programmes that "redirect both employees' and employers' attitudes towards a more positive assessment of active ageing and facilitating an efficient information and co-ordination process among employer organisations and trade unions, with regard to employment initiatives for an ageing workforce".

48. Notwithstanding the instruments affirming the principle of equal treatment, the adoption of a national scheme requiring compulsory retirement should not be considered as a discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.<sup>35</sup>

49. Paying specific attention to safety and health problems of older workers in Member States respective programmes, action plans and other relevant policy action is a way to give effect to the right to safety and health at the workplace (Article 3 of the revised European Social Charter).

## **VI. Care**

### **A. General Principles**

29. Member States should take appropriate measures, including preventive measures, to promote, maintain and improve the health and well-being of older persons. They should also ensure that appropriate health care and long-term quality care is available and accessible.

30. Services should be available within the community to enable older persons to stay as long as possible in their own homes.

31. In order to better assess and fulfil the needs of older persons, member States should promote a multi-dimensional approach to health and social care for them and encourage co-operation among the competent services.

32. Care providers should treat any sensitive personal data of older persons confidentially and carefully in accordance with their right to privacy.

33. Care should be affordable for older persons and programmes should be in place to assist older persons, if necessary, with covering the costs.

34. Care givers should receive sufficient training and support to adequately ensure the quality of the services provided. Where older persons are being cared for at home by informal carers, the latter should likewise receive sufficient training and support to ensure that they are able to deliver the care needed.

35. Member States should operate a system through which care delivery is regulated and assessed.

50. Sub-Chapter A refers mainly to the provision of long-term care for older persons in both home-based and institutional care. The term "long-term care" has been defined by the Organisation for Economic Cooperation and Development as "a range of services for people who depend on ongoing help with activities of

<sup>32</sup> See also the EU Directive 2000/78/EC "Establishing a general framework for equal treatment in employment and occupation.

<sup>33</sup> See European Parliament Resolution on the European Semester for Economic Policy Coordination (1 December 2011, §78).

<sup>34</sup> See Article 26 of the revised Charter and *Live longer, work longer: A synthesis report*, Organisation for Economic Cooperation and Development Report, 2006.

<sup>35</sup> Directive 2000/78/EC, EU Court of Justice C-286/12 *Commission v. Hungary*, judgment of 6 November 2012.

daily living caused by chronic conditions of physical or mental disability”.<sup>36</sup> Older persons need specific geriatric care to meet their long term care needs, taking into due account the specific needs of persons with dementia. Geriatric care generally aims at maintaining and improving their physical and mental health. Mental health is an equally important part of overall health and well-being of a person as physical health.

51. The European Committee of Social Rights has concluded that primary healthcare programmes and services specifically aimed at older persons must exist, together with guidelines on healthcare for older persons. In particular, there should be mental health programmes for any psychological problems in respect of the elderly, adequate palliative care services and special training for individuals caring for elderly persons.<sup>37</sup>

52. A variety of affordable community and home care services for older persons should be promoted. The Parliamentary Assembly deplored the fact that in some countries older persons may be denied treatment because of its high cost, and underlined the need for appropriate legislation or collective agreements, not least in respect of dependent older persons living in institutions or retirement homes.<sup>38</sup> The Council of Europe Commissioner for Human Rights suggested in this respect that health care systems should implement age-friendly policies and practices and consider healthy ageing.<sup>39</sup> In its General Comment No. 6, the United Nations Committee on Economic, Social and Cultural Rights specified that “governments and non-governmental organisations must establish social services to support the family when there are older people in the home, and must also implement special measures for low-income families who wish to keep older persons relatives at home”.<sup>40</sup>

53. In this respect, important suggestions may also be drawn from the 2010 European Charter of rights and responsibilities of older people in need of long-term care and assistance, which is accompanied by a guide addressed specifically to long-term care providers, social services and policy makers.<sup>41</sup> Building on this Charter, the “WeDO project” (a steering group composed of 18 partners from 12 EU member states) established in December 2012, the European quality framework for long-term care services which sets up principles and guidelines for the well-being and dignity of older people in need of care and assistance.<sup>42</sup>

54. One of the most significant barriers to a quality and appropriate health care is the lack of competent care providers, in diagnosis and treatment, to deal with older persons. The Recommendation suggests to member states to support the training of both informal and professional caregivers and promote the cooperation of competent services through a multidimensional approach. In its Resolution 1793 (2011) on promoting active ageing: capitalising on older people’s working potential, the Parliamentary Assembly advised member states to develop new approaches to care of the elderly and support informal carers through extending parental leave provisions to enable all unpaid carers responsible for dependent relatives to enjoy an adequate protection of their social rights, including pension rights. The Confederation of Family Organisations in the European Union (COFACE) has developed a “Charter for family carers” which aims at recognising the rights of family carers and highlights their role and the challenges they face.<sup>43</sup> The Parliamentary Assembly also recommended to provide special training for medical practitioners and individuals caring for older persons at home in its Recommendation 1796 (2007) on the situation of elderly persons in Europe.

### **B. Consent to medical care**

36. Older persons should receive medical care only upon their free and informed consent, and may freely withdraw consent at any time.

37. In case an older person is unable, in the particular circumstances to give consent, the wishes expressed by that person relating to a medical intervention, including life-prolonging measures, should, in accordance with national law, be taken into account.

38. When an older person does not have, according to law, the capacity to consent to an intervention, in particular because of a mental disability or a disease, the intervention may only be carried out with the authorisation of his or her representative, an authority or a person or body provided for by law. The older person

<sup>36</sup> *Long-term care for Older People*, Organisation for Economic Cooperation and Development 2005, p. 3 (<http://www.oecd.org/els/health-systems/long-term-care-for-older-people.htm>).

<sup>37</sup> European Committee of Social Rights, Conclusions 2009, Vol. 1, page 73 (concerning Andorra); page 326 (concerning France) and p. 388 (concerning Ireland).

<sup>38</sup> Parliamentary Assembly Recommendation 1796 (2007) on the situation of elderly persons in Europe, paras. 6-7

<sup>39</sup> *Aged people are too often ignored and denied their full human rights*, Viewpoint of the Council of Europe Commissioner for Human Rights, 28 April 2008.

<sup>40</sup> [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/482a0aced8049067c12563ed005acf9e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/482a0aced8049067c12563ed005acf9e?Opendocument).

<sup>41</sup> <http://www.age-platform.eu/en/age-policy-work/quality-care-standards-and-elder-abuse/1018-a-european-strategy-for-older-people-in-need-of-long-term-care-and-assistance>.

<sup>42</sup> <http://www.wedo-partnership.eu/european-quality-framework-long-term-care-services>.

<sup>43</sup> <http://www.coface-eu.org/en/Publications/Charter-for-Family-Carers/>

concerned should as far as possible take part in the authorisation procedure. Appropriate and effective safeguards should be provided to prevent abuse.

39. When, because of an emergency situation, the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the older person concerned. Appropriate and effective safeguards should be provided to prevent abuse.

55. Sub-Chapter B deals with consent to medical care of older persons. In this part, the Recommendation is based on Articles 5 to 9 of the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (ETS No. 164).<sup>44</sup>

56. In the context of the Recommendation and in the light of the Convention on Human Rights and Biomedicine, the term “medical care” covers all medical acts, in particular interventions performed for the purpose of preventive care, diagnosis, treatment of a disease or rehabilitation.

57. The free and informed consent given by a legally capable person is an important principle of medical ethics and international human rights standards. An older person must be able to freely give or refuse consent to any intervention considered involving him or her, and no intervention should, in principle, be carried out without his or her free and informed consent. This rule makes clear patients’ autonomy in their relationship with health care professionals.

58. The patient’s consent is considered to be free and informed if it is given on the basis of objective information from the responsible health care professional as to the nature and the potential consequences of the planned intervention or of its alternatives, in the absence of pressure from another source. Thus the person concerned should have received appropriate (sufficient and clear) information in particular about the purpose, nature, risks and consequences of the intervention being contemplated.

59. Freedom of consent implies that consent may be withdrawn at any time and that the decision of the person concerned shall be respected once he or she has been fully informed of the consequences. In particular circumstances, professional standards and obligations, as well as rules of conduct may oblige doctors to continue providing care to avoid seriously endangering the health of the patient.

60. Some individuals may not be able to give full and valid consent to an intervention due to their mental disability or a disease. The incapacity to consent must be understood in the context of a given intervention. Considering the diversity of the legal systems in Europe - in some countries the patient's capacity to consent must be verified for each intervention taken individually, while in others the system is based on the institution of legal incapacitation, whereby a person may be declared incapable of consenting to one or several types of act - it is for the domestic law of each country to determine whether or not persons are capable of consenting to an intervention and taking account of the need to deprive persons of their capacity for autonomy only where it is necessary and in their best interests. The Recommendation does not intend to harmonise relevant national legal systems, or to regulate possible conflicts of competences between states<sup>45</sup> as far as these complex issues are concerned.

61. In such cases where persons are not able to consent, an intervention may be carried out only if the prior authorisation of a legal representative or an authority or a person or body provided for by law has been given. The patient should be involved in the authorisation procedure whenever possible. Moreover, any previously expressed wishes by the patient should be taken into account, notably where they apply to the situation encountered and are still valid, in particular taking into account the technical progress in medicine. Whenever a person is acknowledged to be incapable of giving consent, he or she must be protected by appropriate and effective safeguards to prevent abuse, as set out in relevant national and international law. The intervention must be carried out for the direct benefit of the person.

62. Only in cases of emergency which prevent practitioners from obtaining the appropriate consent, the latter may act immediately without waiting until the consent of the patient or the authorisation of the legal representative where appropriate can be given. However practitioners should make every reasonable effort to determine what the patient would want. This possibility is limited solely to medically necessary interventions which cannot be delayed and must be carried out for the immediate benefit of the individual concerned.

<sup>44</sup> <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>

<sup>45</sup> See in this respect, for instance, the relevant provisions of the Convention of 13 January 2000 on the International Protection of Adults.

### **C. Residential and institutional care**

40. Member States should provide for sufficient and adequate residential services for those older persons who are no longer able or do not wish to reside in their own homes.
41. Older persons who are placed in institutional care have the right to freedom of movement. Any restrictions must be lawful, necessary and proportionate and in accordance with international law. There should be adequate safeguards for review of such decisions. Member States should ensure that any individual constraints for an older person should be implemented with the free and informed consent of that person, or as a proportionate response to a risk of harm.
42. Member States should ensure that there is a competent and independent authority or body responsible for the inspection of both public and private residential institutions. Member States should provide for easily accessible and effective complaint mechanisms and redress for any deficiencies in the quality of care.
43. Older persons in principle should only be placed in residential, institutional or psychiatric care with their free and informed consent. Any exception to this principle must fulfil the requirements of the European Convention on Human Rights, in particular the right to liberty and security (Article 5).

63. Sub-chapter C deals explicitly with the situation of older persons in residential and institutional care.<sup>46</sup> The Recommendation suggests the provision of sufficient and adequate institutional care for those older persons who are no longer able or do not wish to reside in their own homes. Both Article 23 of the revised Charter and the Committee of Ministers Recommendation R(94)9 concerning elderly people, grant to older persons the right to participate in decisions concerning their treatment, as well as the living conditions of the institution. The latter Recommendation states also that older persons should be able to participate in the establishment and the provision of services for themselves, including in their setting up, management and evaluation.

64. The vulnerability of older persons or, in some cases, their limited capacity to look after themselves are risk factors for violence, abuse or neglect against them, sometimes endangering their lives. This is why the European Court of Human Rights has held that under Article 2 of the Convention, States have positive obligations to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives and to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession can be determined and those responsible made accountable.<sup>47</sup> The Recommendation suggests the inspection of the residential institutions and the setting up of accessible and effective complaint mechanisms allowing to redress any deficiencies in the quality of care.

65. The European Committee of Social Rights has dealt with the issue of the inspection systems regarding the standards of care and services provided in institutions and residential facilities, and recalled the importance of ensuring that any inspection system should be entirely independent of the body managing the facility.<sup>48</sup>

66. The institutionalisation may deprive older persons of their independence and autonomy. The placement of older people in institution may often happen without their consent or appropriate safeguards,<sup>49</sup> and may have particular impact on their freedom of movement. While noting a constant trend towards de-institutionalisation, and having underlined that older persons should be able to stay as long as possible in their homes, the Recommendation dedicates some specific provisions to residential and institutional care, in the light of specific risks of abuse related to this situation. The Recommendation reiterates the general principles that older persons have the right to freedom of movement and should only be placed in residential, institutional or psychiatric care if they have consented. Without by this encouraging the practice of placement in institution without consent, the Recommendation recognises, however, that there might be cases in which the consent may not be obtained because the older person is not able to give such consent, or the authorities consider that the placement in an institution is for that person's own benefit. Possible reasons could be that the person is becoming a danger to him/herself or third persons, is incapable of seeing to his or her basic personal needs, or is becoming a threat to law and order.<sup>50</sup> On this basis, it is recommended that any restrictions on the right to freedom of movement must

<sup>46</sup> For the purpose of the Recommendation the terms "residential care" and "institutional care" are deemed to be equivalent and referring to formal care provision outside home.

<sup>47</sup> *Calvelli and Ciglio v. Italy* (n° 32967/96), judgment of 17 January 2002, [Grand Chamber] para. 49.

<sup>48</sup> European Committee of Social Rights, Conclusions 2009, Vol. 1, page 73 (concerning Andorra).

<sup>49</sup> *Normative standards in international human rights law to older persons, Analytical Outcome Paper*, United Nations Office of the High Commissioner for Human Rights ( August 2012), p. 28.

<sup>50</sup> Council of Europe Commissioner for Human Rights, Background paper for the seminar on protection of human rights and the special situation of elderly people in retirement homes or institutions CDDH-AGE(2012)02, p. 56.

be lawful, necessary and proportionate, in accordance with international human rights law. In addition, any individual constraints for an older person should be implemented with the free and informed consent of that person, or, if imposed without the person's consent, as a proportionate response to a risk of potential harm. It should be possible to challenge these decisions, which should also be subject to regular monitoring and review.

67. The European Court of Human Rights case-law has demonstrated that placement in an institution poses particular problems with regard to the right to liberty and security (Article 5, paragraph 1 of the Convention). In *H.M. v. Switzerland* case, the applicant complained that she had been placed in a nursery home against her will. The European Court of Human Rights has considered that there had not been a deprivation of liberty within the meaning of Article 5, paragraph 1 of the Convention; consequently the provision did not apply. While the European Court of Human Rights took into consideration that the domestic authorities had ordered the applicant's placement in the nursing home in her own interests in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene, the decisive factor appears to have been that the applicant, after having moved to the nursery home, had agreed to stay there.<sup>51</sup>

68. In contrast to the above case, the European Court of Human Rights found in *Stanev v. Bulgaria*,<sup>52</sup> a violation of Article 5, paragraph 1 of the Convention with respect to the applicant's placement in a psychiatric institution. In that case, in order to determine whether the applicant had been deprived of his liberty, the Grand Chamber found that the starting point must be the applicant's concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.<sup>53</sup>

69. According to the European Court of Human Rights, the notion of deprivation of liberty does comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time as well as the subjective element of a lack of consent to the confinement.<sup>54</sup> In the context of deprivation of liberty on mental-health grounds the European Court of Human Rights has found that there was a deprivation of liberty in circumstances such as the following: where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital,<sup>55</sup> where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape,<sup>56</sup> or where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave.<sup>57</sup> The European Court of Human Rights has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention,<sup>58</sup> especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.<sup>59</sup>

70. In cases in which Article 5, paragraph 1 of the Convention is applicable, any interference must be in conformity with national law, and it must also be necessary in the circumstances of the case.<sup>60</sup> Once Article 5, paragraph 1 of the Convention applies to a case, sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds of deprivation of liberty. Measures which interfere with Article 5, paragraph 1 of the Convention are not lawful unless they fall within one of those grounds.<sup>61</sup> In the context of the placement of older persons in nursery homes or psychiatric institutions, authorities have to demonstrate that the person was of "unsound mind" and the three following conditions must be satisfied: he or she must reliably be shown to be of unsound mind, the mental disorder must be of a kind or degree warranting compulsory confinement, the validity of continued confinement depends upon the persistence of such a disorder.<sup>62</sup>

71. The first sentence of Article 5, paragraph 1 of the Convention entails a positive obligation on the State to take measures providing effective protection of vulnerable persons (such as older persons), including reasonable steps to prevent arbitrary deprivation of liberty of which the authorities have or ought to have knowledge.<sup>63</sup> Moreover, Article 5, paragraph 4 requires that any decision to put an older person into compulsory

<sup>51</sup> *H.M. v. Switzerland* (no. 39187/98), judgment of 26 February 2002, paras. 44-48.

<sup>52</sup> *Stanev v. Bulgaria* (no. 36760/06), judgment of 17 January 2012 [Grand Chamber].

<sup>53</sup> *Stanev v. Bulgaria* (no. 36760/06), judgment of 17 January 2012 [Grand Chamber], para. 115; *Storck v. Germany* (no. 61603/00), judgment of 16 June 2005, para. 71; *Guzzardi v. Italy* (no. 7367/76), judgment of 6 November 1980, para. 92.

<sup>54</sup> *Storck v. Germany* (no. 61603/00), judgment of 16 June 2005, para. 74.

<sup>55</sup> *Shtukaturov v. Russia* (no. 44009/05), judgment of 27 March 2008, para. 108.

<sup>56</sup> *Storck v. Germany* (no. 61603/00), judgment of 16 June 2005, para. 76.

<sup>57</sup> *H.L. v. the United Kingdom* (no. 45508/99), ECHR 2004-IX, paras. 89-94.

<sup>58</sup> *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, paras 64-65.

<sup>59</sup> *H.L. v. the United Kingdom* (no. 45508/99), ECHR 2004-IX, para. 90.

<sup>60</sup> *Witold Litwa v. Poland* (no. 26629/95), ECHR 2000-III, para. 78.

<sup>61</sup> *Saadi v. the United Kingdom* (no. 13229/03), judgment of 29 January 2008 [Grand Chamber], para. 43; *Jendrowiak v. Germany* (no. 30060/04), judgment of 14 April 2011, para. 31.

<sup>62</sup> *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, para. 39; *Shtukaturov v. Russia* (no. 44009/05), judgment of 27 March 2008, para. 108; *Varbanov v. Bulgaria* (no. 31365/96), ECHR 2000-X, para. 45.

<sup>63</sup> *Storck v. Germany* (no. 61603/00), judgment of 16 June 2005, para. 102.

placement must be open to appeal before a court which must give a prompt ruling on the lawfulness of the placement order.

#### ***D. Palliative care***

44. Member States should offer palliative care to older persons who suffer from a life-threatening illness or an illness limiting their life expectancy, to ensure their well-being and allow them to live and die with dignity.

45. Any older person who is in need of palliative care should be entitled to access it without undue delay, in a setting which is consistent with his or her needs and preferences, including at home and in long-term care settings.

46. Family members and friends should be encouraged to accompany older persons who are terminally ill or dying. They should receive professional support, for example by ambulatory palliative-care services.

47. Health care providers involved in palliative care should fully respect patients' rights, and comply with professional obligations and standards.

48. Trained specialists in the field of palliative care should be available to lead education and research in the field. Programmes of palliative care education should be incorporated into the training of all health and social care workers concerned, and co-operation between professionals in palliative care should be encouraged.

49. Member States should ensure the adequate availability and accessibility of palliative care medicines.

50. In the organisation of their national palliative care systems, member States should take into account Committee of Ministers Recommendation Rec(2003)24 to member States on the organisation of palliative care.

72. The rationale behind Sub-Chapter D is that human dignity should be respected throughout all stages in every individual's life, including the terminally-ill and dying, and that palliative care helps to preserve this dignity by providing an appropriate environment for such patients and helping them to cope with the pain and other distressing symptoms. Therefore palliative care should be proposed in all settings in response to the progressive needs of older persons. To this end, member states should ensure that trained specialists in the field are available and encourage cooperation among them. When providing palliative care, consideration should be given to the needs and preferences of older persons, including his or her beliefs, and to the use of a language that the person is able to understand.

73. Palliative care is defined by the World Health Organisation as "an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual".<sup>64</sup>

74. The Council of Europe has laid down detailed guidelines on the implementation of palliative care in Europe in the Committee of Ministers Recommendation Rec(2003)24 on the organisation of palliative care.<sup>65</sup> In the Preamble, the Committee of Ministers considered "that palliative care is an integral part of the health care system and an inalienable element of a citizen's right to health care, and that therefore it is a responsibility of the government to guarantee that palliative care is available to all who need it".

75. Some other Council of Europe's standards are also relevant in this field, such as Parliamentary Assembly Recommendation 1418 (1999) on protection of the human rights and dignity of the terminally ill and the dying and Committee of Ministers Recommendation No. R(89)13 on the organisation of multidisciplinary care for cancer patients. The need to establish decent palliative and end-of-life care services for older persons was underlined by the Parliamentary Assembly in its Recommendation 1796 (2007) on the situation of elderly persons in Europe.<sup>66</sup> The World Health Organisation published in 2011 the guide "Palliative care for older people: better practices"<sup>67</sup> which sets out the growing needs of older persons and gathers best practices in palliative care in the European region.

<sup>64</sup> <http://www.who.int/cancer/palliative/definition/en/>.

<sup>65</sup> [http://www.coe.int/t/dg3/health/Source/Rec\(2003\)24\\_en.pdf](http://www.coe.int/t/dg3/health/Source/Rec(2003)24_en.pdf)

<sup>66</sup> Para. 11.4.2 (<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1796.htm>).

<sup>67</sup> <http://www.csi.kcl.ac.uk/files/Palliative%20care%20for%20older%20people%20-%20better%20practices.pdf>

## VII. Administration of justice

51. In the determination of their civil rights and obligations or of any criminal charge against them, older persons are entitled to a fair trial within a reasonable time within the meaning of Article 6 of the European Convention on Human Rights. Member States should take appropriate measures to accommodate the course of the judicial proceedings to the needs of older persons, for example by providing, where appropriate, free legal assistance and legal aid.

52. The competent judicial authorities should display particular diligence in handling cases involving older persons. In particular, they should duly take into account their age and health.

76. Protection of human rights requires the effective functioning of the justice system, timely remedies for violations and specific guarantees that all persons are equal before the law and before courts.<sup>68</sup> The Recommendation resumes Article 6 of the Convention and refers to older persons' access to justice and right to a fair trial. In *Süssmann v. Germany*<sup>69</sup> and *Jablonská v. Poland*,<sup>70</sup> the European Court of Human Rights has held that the advanced age of a person may be a relevant factor in considering whether a case was dealt with "within a reasonable time" and thus may tighten the requirement for prompt trial under Article 6, paragraph 1 of the Convention.

77. Examples of specific measures to ensure access to justice for older persons may be found in the UN Secretary General's Report on the follow-up to the Second World Assembly on Ageing of July 2011. Such measures include for instance the provision of legal aid or the existence of dedicated bodies to provide assistance, including technical assistance, to older persons; the deferral, reduction or exemption of litigation fees, the creation of special courts and jury systems to handle disputes involving older persons, the provision of human rights counselling services for older persons in welfare facilities, and the granting of loans to cover the expenses of trials.

78. The European Court of Human Rights takes the applicant's age and situation into account when awarding pecuniary damages. In *Georgel and Georgeta Stoicescu v. Romania*, the Court found that the state had violated its positive obligation under Article 8 to protect the 72 year-old applicant from an attack by stray dogs and stated that regard must also be had to the applicant's dire financial situation, her advanced age and deteriorating state of health, as well as to the fact that she has not benefited from free medical assistance until two and half years after the incident.<sup>71</sup>

53. Member States shall ensure that the detention of older persons does not amount to inhuman or degrading treatment. The assessment of the minimum level of severity for a treatment to be considered inhuman or degrading depends on several factors, including the age and health of the person. Consideration should be given to alternatives to the detention of older persons.

54. Member States shall safeguard the well-being and dignity of older persons in detention. In particular, they should ensure that the health of older persons is monitored at regular intervals and that they receive appropriate medical and mental health care. Moreover, member States should provide older persons in detention with conditions appropriate to their age, including appropriate access to sanitary, sports, education, training and leisure facilities. Member States should ensure the social reintegration of older persons after release.

79. As societies get older, so does their prison population. It can be assumed that older persons are currently the fastest growing category of prisoners and are more likely to suffer from chronic diseases or disabilities than other prisoners.<sup>72</sup> The European Court of Human Rights takes age into account in its case-law when considering prison conditions. In general terms, the minimum level of severity to meet the threshold of

<sup>68</sup> *Follow-up to the Second World Assembly on Ageing*, UN Secretary-General Report, 22 July 2011, Doc. A/66/173.

(<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/428/83/PDF/N1142883.pdf?OpenElement> or <http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/173>)

<sup>69</sup> *Süssmann v. Germany* (no. 20024/92), judgment of 16 September 1998 [Grand Chamber], para.61.

<sup>70</sup> *Jablonská v. Poland* (no. 60225/00), judgment of 9 March 2001 [Grand Chamber].

<sup>71</sup> *Georgel and Georgeta Stoicescu v. Romania* (no. 9718/03), judgment of 26 July 2011.

<sup>72</sup> "Geriatric prisoners – in it for life", *The Economist* (2 March 2013), referring *inter alia* to a 128% rise in over 60-year-old prisoners in England and Wales since 2000 and to the fact that 80% of them suffer from a chronic disease or disability.



Article 3 of the Convention is a relative one, and the age of the applicant may be considered a factor for establishing that level.<sup>73</sup>

80. Cases involving older persons frequently concerned the conditions of their detention. In *Sawoniuk v. the United Kingdom*, the European Court of Human Rights has held that “a failure to provide the necessary medical care to prisoners may constitute inhuman treatment and there is an obligation on States to adopt measures to safeguard the well-being of persons deprived of their liberty”.<sup>74</sup> The Court stressed in *Enea v. Italy* that “the detention of an elderly sick person over a lengthy period may fall within the scope of Article 3”.<sup>75</sup> It did not find a violation of Article 3 of the Convention even though the health of the applicant had deteriorated because the authorities had protected the applicant’s well-being by monitoring his state of health carefully, assigning the seriousness of his health problems and providing him with appropriate medical care, including two major operations in a civil hospital.

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<sup>73</sup> *Selmouni v. France* (no. 25803/94), judgment of 10 July 2001 [Grand Chamber], para. 100.

<sup>74</sup> *Sawoniuk v. the United Kingdom* (no. 63716/00), admissibility decision of 29 May 2001.

<sup>75</sup> *Enea v. Italy* (no. 74912/01), judgment of 17 September 2009 [Grand Chamber], para. 59.