

**Written Submission of the Centre for Disability Law and Policy,
NUI Galway
Červenka v The Czech Republic (App no 62507/12), submitted in April 2013**

1. These written comments are submitted by the Centre for Disability Law and Policy (CDLP) at the National University of Ireland Galway, pursuant to leave granted by the President of the Court in accordance with Rule 44§2 of the Rules of the Court. The CDLP is dedicated to producing research that informs policy makers and domestic and international courts with the very best jurisprudential analysis in order that they apply law to people with disabilities. This submission focuses on the relationship between, on the one hand, deprivation of legal capacity and, on the other, institutionalisation, access to justice, and the failure to make reasonable accommodations to support the exercise of legal capacity and independent living as a form of discrimination against persons with disabilities.
2. Since the UN Convention on the Rights of Persons with Disabilities (CRPD) does not create new rights but clarifies the content and application of general human rights it provides a useful animating guide to the norms of the European Convention on Human Rights (ECHR). This brief addresses some of the core normative bridges between the UN CRPD and the ECHR.
3. The UN CRPD is directed towards ensuring the ‘full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’, and ‘full and effective participation in society on an equal basis with others’¹—goals that cannot be achieved by institutional segregation and confinement of such persons. More fundamentally, it pivots on notions of personhood and human flourishing – attributes it shares particularly with Article 8 of the ECHR.

VOICE, CHOICE AND THE ECHR: RELEVANCE OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) – (ARTICLES 12 AND 19)

4. The normative synergies between the UN CRPD and the ECHR have already been generously noted by the Court. In its recent case law on the rights of persons with disabilities under the ECHR, the Court has increasingly referred to the CRPD as an international standard, which supports ‘a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.’² Cases such as *Shtukaturov v. Russia*³, *Stanev v. Bulgaria*⁴, *DD v. Lithuania*⁵, *X and Y v. Croatia*⁶, *Sykora v. Czech Republic*⁷, *Mihailovs v. Latvia*⁸ and *Lashin v. Russia*⁹ have used articles of the CRPD, in particular those related to legal capacity and independent living, as aids to interpretation of the ECHR in view of its status as a living instrument which ‘must be interpreted in the light of present-day conditions.’¹⁰ Given these developments, the present intervention will set out the key components of Articles 12 and 19 CRPD, on recognition of legal capacity and the right to live independently and be included in the community, to support the Court in its assessment of how these might be harmoniously interpreted with the provisions of the European Convention.

ARTICLE 12 CRPD – RESTORING ‘VOICE’ - EQUAL RECOGNITION BEFORE THE LAW.

5. The core obligations contained within Article 12 CRPD are:

¹Article 1 CRPD.

²*Glor v. Switzerland* (App. No.13444/04), judgment 30 April 2009, paragraph 53.

³(App no 44009/05) [2008] ECHR 223.

⁴(App no 36760/06) [2012] ECHR 46.

⁵(App no 13469/06) [2012] ECHR 254.

⁶(App no 5193/09) [2011] ECHR 1835.

⁷(App no 23419/07) [2012] ECHR 1960.

⁸(App no 35939/10) [2013] ECHR 65.

⁹(Application no. 33117/02) [2012] ECHR 63.

¹⁰*Glor v. Switzerland*, paragraph 53.

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, 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. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 12 CRPD lies at the 'core' of the CRPD, and is 'key to the enjoyment of all other rights'.¹¹ Compliance with Article 12 has been identified as a common challenge for European countries, many of which still operate practices that deprive a person of their legal capacity on disability related grounds.¹² Deprivation of legal capacity impacts upon the entire spectrum of rights protected by the ECHR.

6. Legal capacity is the law's recognition of the personhood of persons with disabilities – and the equal validity of an individual's choices. Persons possessing legal capacity are recognized as holders of rights (they have legal standing) and as actors under the law (they exercise legal agency). Article 12 CRPD, in providing for the recognition of the legal capacity of all people with disabilities, on an equal basis with others, is said to have restored legal personhood to people with disabilities at the level of international human rights law.
7. Deprivation of legal capacity has been described by the Council of Europe's Commissioner for Human Rights as 'civil death', where decision-making powers are removed and vested in a substitute decision-maker.¹³ Article 12 makes explicit that all persons with disabilities possess legal capacity, and should be supported to exercise their legal capacity, rather than having their legal capacity removed by the appointment of a substitute decision-maker or guardian.
8. The UN Committee on the Rights of Persons with Disabilities, the CRPD monitoring body, has repeatedly called for States to 'review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences.'¹⁴ Guardianship is therefore considered by the

¹¹Centre for Disability Law and Policy, *Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality*, (NUI Galway, 2011), p. 5.

¹² Disability High Level Group, *First Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities* (European Commission, Brussels, 2008); Disability High Level Group, *Second Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities* (European Commission, Brussels, 2009). See also the forthcoming report on Article 12 CRPD and country thematic reports by the European Union Agency for Fundamental Rights (2009): <http://fra.europa.eu/en/country-report/2012/country-thematic-reports-fundamental-rights-persons-intellectual-disabilities>

¹³ Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*, (Council of Europe, Strasbourg, 2012), p. 6.

¹⁴Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with*

Committee to be a form of substitute decision-making, which should be replaced by supported decision-making.

ARTICLE 19 CRPD – RESTORING CHOICE - THE RIGHT TO LIVE INDEPENDENTLY AND BE INCLUDED IN THE COMMUNITY

9. Article 12 seeks to restore ‘voice.’ It does so by building on naturally occurring supports in the community. Article 19 focuses on ‘choice’ on the right to live in the community on an equal basis with others. This social connectedness – which underpins both Articles 12 and 19 – is an integral part of personhood and flourishing. It was precisely this that was traditionally foreclosed to many persons with disabilities in the past. The right to live independently should not be seen as dependent on the right to exercise legal capacity. Rather, embeddedness in the community should be seen as a vitally necessary ingredient in supporting people exercise their legal capacity.
10. The core obligations in Article 19 require States Parties to recognise the equal right of all persons with disabilities to live in the community, with choices equal to others. States Parties are required to take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community. They must ensure that the three core requirements of Article 19 are fulfilled: choice of where and with whom to live, individualised support to facilitate community living and making services for the general public accessible to people with disabilities. Of particular relevance to the present case is the requirement in Article 19(a) that ‘persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.’ This connects with two core rights in the ECHR – the right to respect for a person’s home and especially the evolution of their personality in Article 8, and the right to liberty under Article 5.
11. The UN Committee on the Rights of Persons with Disabilities has provided a number of Concluding Observations on Article 19. With respect to Spain, the Committee has expressed its concern ‘that the choice of residence of persons with disabilities is limited by the availability of the necessary services, and that those living in residential institutions are reported to have no alternative to institutionalization.’¹⁵ The Committee therefore requested the State to ensure that people with disabilities ‘enjoy the freedom to choose their residence on an equal basis with others’ and ‘enjoy reasonable accommodation so as to better integrate into their communities.’
12. With regard to the institutionalization of people with disabilities, the Committee has recommended States take ‘immediate steps to phase out and eliminate institutional-based care for people with disabilities’ and develop ‘support services for persons with disabilities to live independently in accordance with their own choice.’¹⁶
13. A number of relationships can be delineated between Articles 12 and 19 CRPD and ECHR rights. In this brief we will discuss the relationship of these CRPD articles to Articles 5, 6, 8, 13 and 14 ECHR.
14. The common thread running through Articles 12 and 19CRPD is the right to forge one’s own life-plans, to have one’s choices respected and to enjoy the social support all persons take for granted in augmenting their capacity. This maps over to the rights to autonomy and privacy and human personality theory implicit in Article 8ECHR, in particular the importance of a space where ‘in which the individual may live his own personal life as he chooses’ and ‘establish and develop relationships with other human beings’.¹⁷ The interference of the right to legal capacity on the basis of disability amounts to discrimination, engaging Article 14 ECHR. Therefore, it is not permissible to use a person’s disability or decision-making ability as justification for removal or restriction of legal capacity.

Disabilities: Spain, (6th session, 19-23 September 2011) Geneva, Switzerland. See also the Committee’s reports on China, Argentina, Peru, Tunisia and Hungary:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx>

¹⁵ UN Committee on the Rights of Persons with Disabilities, *Concluding observations: Spain*, (September 19-23, 2011).

¹⁶ UN Committee on the Rights of persons with Disabilities, *Concluding Observations: China*, (September 17-28, 2012), p5. See also the Committee’s concluding observations for Hungary.

¹⁷ *Niemietz v Germany* (App no 13710/88) [1992] ECHR 80; 16 EHRR 97, paragraph 29

15. Article 19 further reinforces this right to self-determination by recognising that people with disabilities have a right to choose where and with whom they live on an equal basis with others, and should not be obliged to live in a particular living arrangement, such as an institution. Recognition of legal capacity and the right to live independently are inextricably linked together, as the person's choice of where and with whom to live cannot be fully respected unless the individual is recognised as possessing legal capacity. Deprivation of legal capacity is closely linked to the institutionalisation of persons with disabilities,¹⁸ as is evident from ECHR case law – whereby the removal of legal capacity from an individual facilitates a subsequent deprivation of liberty by placement in a hospital or social care home, with the consent of a guardian.
16. Recognition of individual self-determination (Articles 12 and 19) and the guarantee of non-discrimination (Article 5) which lie at the core of the CRPD are also central to the fundamental principles on which the ECHR is based. These include the foundation of justice and peace in the world, the observance of human rights, freedom, and the rule of law. In the next section, our submission will outline how these rights could be harmoniously interpreted in the present case, with reference to existing case law on Articles 5, 6, 8 and 13.

THE RELATIONSHIP BETWEEN DEPRIVATION OF LEGAL CAPACITY AND DETENTION IN INSTITUTIONS

17. The Court has found on a number of occasions that a person's placement in a social care institution by their guardian can amount to a deprivation of liberty, and moreover such detentions had insufficient safeguards against arbitrariness to comply with Article 5 ECHR¹⁹. In these cases, the Court has emphasized the closed nature of such institutions, where a person's egress from a facility, and their treatment, care, residence and movement, is subject to the complete and effective control of the institutional and/or guardianship authorities.²⁰
18. Deprivation of liberty in institutions is the inverse of the right to independent living under Article 19 CRPD. As the UN Committee has noted,²¹ institutionalisation of persons with disabilities is closely linked to a lack of alternatives, such as community based services. The Court also recognized this in its ruling in *Stanev v. Bulgaria* when it held that 'the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty.'²² The need for states to take steps to develop alternatives to institutionalisation is discussed below.

INSTITUTIONALISATION AND ARTICLE 8 ECHR

19. The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, has described the right to live in the community as 'a foundational platform for all other rights: a precondition for anyone to enjoy all their human rights is that they are within and among the community.'²³
20. As the Court's recent case law indicates, there is intimate relationship between deprivation of legal capacity and institutionalisation. In the first place, institutional placement is often undertaken on the basis of the decision of a guardian. In the second place, persons placed in institutions are disconnected

¹⁸ O. Lewis, 'Advancing legal capacity jurisprudence', *European Human Rights Law Review* (2011), 700-714; European Union Agency for Fundamental Rights (FRA), *Involuntary placement and involuntary treatment of persons with mental health problems*, (Vienna, 2012); C. Parker, *Forgotten Europeans, Forgotten Rights: The Human Rights of Persons Placed in Institutions*, (United Nations Office of the High Commissioner for Human Rights, Brussels, 2011); E. Steinerte, R. Murray & J. Laing, 'Monitoring those deprived of their liberty in psychiatric and social care institutions and national practice in the UK' (2012), *The International Journal of Human Rights* 16, 865-882. See also *Stanev v. Bulgaria*, paragraph 154.

¹⁹ *Stanev v. Bulgaria*; *D.D. v Lithuania*; *Kędzior v. Poland*; *Mihailovs v. Latvia*.

²⁰ *Stanev v. Bulgaria*, paragraphs 125-128; *D.D. v Lithuania*, paragraph 146; *Kędzior v. Poland*, paragraph 57; *Mihailovs v. Latvia*, paragraph 132.

²¹ See the Committee's *Concluding Observations* for China and Hungary.

²² *Stanev v. Bulgaria*, Paragraph 153.

²³ Hammarberg, T. *The right of people with disabilities to live independently and be included in the community*, CommDH/IssuePaper (2012) 3, (Strasbourg: Council of Europe, Commissioner for Human Rights, 2012), p4

from their communities and deprived of the relationships and opportunities they need to support the exercise of their legal capacity. Thomas Hammarberg has called upon states to ‘ensure that all people with disabilities have the legal capacity to make decisions, including those affecting their right to live independently and to be included in the community, through appropriate supported decision-making if needed.’²⁴

21. Placement in an institution exposes a person to a wide range of interferences in their human rights, not least their rights under Article 8 ECHR – to respect for private and family life, home and correspondence and development of their personality.
22. Persons who are admitted to institutions, even social care institutions, are at much greater risk than persons living in the community of being prescribed medications which have been found to benefit very few individuals and carry a significant risk of death through cerebrovascular adverse events.²⁵ Such medications are often used in lieu of adequate staffing and staff training in supporting people with challenging behaviours.²⁶ The Court has previously found that the administration of such medication can constitute a violation of privacy rights in Article 8.²⁷
23. Stultifying institutional environments provide few opportunities for educational or personal development.²⁸ The loss of autonomy typically associated with institutional placement – far from contributing towards a person’s health and wellbeing – makes measurable contributions to depression²⁹ and a decline in alertness, participation and wellbeing.³⁰
24. The Court has previously found in *Shtukaturov v Russia* that deprivation of legal capacity was a disproportionate interference with a person’s Article 8 rights, and so violated his Article 8 rights. However, the Court has not considered deprivation of legal capacity and guardianship under Article 8 in subsequent cases which followed *Shtukaturov* such as *Stanev v Bulgaria*, *Kędzior v Poland* and *Lashin v Russia*. It would be useful to take this opportunity to offer greater clarity on when deprivation of legal capacity may constitute a disproportionate interference with Article 8.
25. In its ruling in *Stanev v. Bulgaria*, the Court found that Mr Stanev’s treatment in the Pastra Care Home amounted to inhuman and degrading treatment in violation of Article 3 ECHR. Having so found the conditions in the facility, it declined to consider Mr Stanev’s complaint under Article 8 ECHR that the living conditions there amounted to unjustified interference with his right to respect for his private life and home.³¹ The partly dissenting judgments of judges Tulkens, Spielmann, Laffranque and Kalaydjieva expressed regret that the Court had not taken the opportunity to consider the state’s failure ‘to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed “institutionalisation syndrome”, that is, the loss of social skills and individual personality traits’ and ‘the requisite protection of vulnerable individuals against possible abuse’ under Article 8. We submit that, in this case, the opportunities for personal development for Mr Červenka in the institution were similarly extremely limited, the alternatives to institutionalisation inadequately explored and his rights to home and private life and privacy of correspondence were subject

²⁴ Hammarberg, T., *The right of people with disabilities to live independently and be included in the community*, p5.

²⁵ S. Banerjee, *The use of antipsychotic medication for people with dementia: Time for action*, (A report for the Minister of State for Care Services, London, 2009); A. Maguire, C. Hughes, C. Cardwell & D. O’Reilly, ‘Psychotropic Medications and the Transition Into Care: A National Data Linkage Study’ (2013), *Journal of the American Geriatrics Society*, 61, 215-221.

²⁶ Ibid.

²⁷ *X v Finland* (App no 34806/04) [2012] ECHR 1371, paragraphs 212-223.

²⁸ P. Bartlett, ‘A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention’ (2012), *The International Journal of Human Rights*, 16, 831-844.

²⁹ G. Boyle ‘The role of autonomy in explaining mental ill-health and depression among older people in long-term care settings’ (2005), *Ageing and Society*, 25, 731-748.

³⁰ E. J. Langer & J. Rodin, ‘The effects of choice and enhanced personal responsibility for the aged: A field experiment in an institutional setting’ (1976), *Journal of Personality and Social Psychology*, 34, 191.

³¹ The Court also declined to consider involuntary institutional placement under Article 8 in *Kędzior v Poland*, having already found a violation under Article 5 ECHR.

to significant interferences. This offers an opportunity for the Court to revisit this issue, which it would be important to do to clarify the European jurisprudence in this area.

26. It is submitted that involuntary placement will itself constitute an interference with a person's Article 8(1) rights. We suggest that when determining whether or not such an interference was in accordance with the law and necessary in a democratic society, and as such permissible under Article 8(2), the Court reflect upon the following considerations. There is evidence, described above, that far from contributing to the health and morals of the persons, institutional placements are often damaging to a person's mental and physical health as a result of the administration of harmful medications and stultifying routines.³² Secondly, interferences with Article 8 must be *necessary* in a democratic society. The general trend away from institutional placement as states actively pursue community based alternatives and recommendations from such authorities as the Council of Europe's Commissioner for Human Rights, suggests that institutionalization is not *necessary* in democratic societies.³³ Thirdly, institutional placement must be *proportionate* to the aim being served.³⁴ It is difficult to imagine many interferences with ECHR rights more monumental than confinement to an institution, where all of a person's actions, every contact with persons outside of the institution and the administration of psycho-active medications are under the control of institutional authorities. We submit that whilst such interferences with Convention rights may *also* constitute an unlawful deprivation of liberty or inhuman and degrading treatment, it is essential that Article 8 can be used to interrogate the legitimacy, necessity and proportionality of imposing upon people such institutional regimes.

DEPRIVATION OF LEGAL CAPACITY AND ACCESS TO JUSTICE – A FORM OF 'CIVIL DEATH.'

27. Typically, once a person has been deprived of their legal capacity, they experience considerable difficulties accessing justice in order to restore their legal capacity, or to challenge particular decisions made by their guardians that engage their Convention rights. This is because many regimes for the deprivation of legal capacity only permit a person to make an application to a court with the consent of their guardian, or to apply through their guardian.³⁵ It is difficult to see what safeguards such persons have against arbitrary interferences with their Convention rights by guardians, if they require the consent of guardians to take steps to challenge their own decisions. This is antithetical to the rule of law, and in violation of the right to an effective remedy under Article 13 ECHR for a wide range of Convention rights.
28. The ECHR is founded upon a common heritage of the rule of law, and this principle animates its case law. The Court has held that where states bestow discretion capable of interfering with a person's ECHR rights, as guardians enjoy, the procedural safeguards available to that person must be 'fair and such as to afford due respect to the interests safeguarded to the individual'.³⁶ The Court has recently elaborated at least four circumstances where persons deprived of their legal capacity *must* enjoy direct access to a court under Article 6 ECHR, without limitation: to ask a court to review the lawfulness of their detention under Article 5(4)³⁷; to seek the restoration of their legal capacity³⁸; where they are in dispute with their guardians³⁹; and in order to review – *directly* – the lawfulness of their placement.⁴⁰

³² S. Bannerjee, *The use of antipsychotic medication for people with dementia: Time for action*; G. Boyle, 'The role of autonomy in explaining mental ill-health and depression among older people in long-term care settings'. YEAR???

³³ European Union Agency for Fundamental Rights (FRA), *Choice and control: the right to independent living. Experiences of persons with intellectual disabilities and persons with mental health problems in nine EU Member States*, (Vienna, 2012).

³⁴ *The Sunday Times v United Kingdom* (App No 6538/74) [1979] ECHR 1, paragraph 62.

³⁵ This was the case, for example, in *Shtukaturov v. Russia*, *Stanev v. Bulgaria*, *D.D. v. Lithuania*, *Kędzior v. Poland*, *Lashin v. Russia* and *Mihailovs v. Latvia*.

³⁶ *Buckley v. The United Kingdom* (App no 20348/92) [1996] ECHR 39, paragraph 76.

³⁷ *Winterwerp v. the Netherlands* (App no 6301/73) [1979] 2 EHRR 387, paragraph 79; *Shtukaturov v. Russia*, paragraph 71; *Sýkora v. The Czech Republic* and *Mihailovs v. Latvia*.

³⁸ *Stanev v. Bulgaria*, paragraph 241 and 245; *Kędzior v. Poland*.

³⁹ *D.D. v. Lithuania*, paragraph 118.

⁴⁰ *Kędzior v. Poland*, paragraphs 117 and 173.

29. The Court may further develop its jurisprudence to elaborate essential rights of access to a court for persons deprived of their legal capacity for other fundamental rights. In particular, in light of the Court's ruling in *X v Finland*⁴¹, it is submitted that it would be a natural extension of the Court's jurisprudence to hold that a person who is deprived of their legal capacity should enjoy direct access to a court to rule on the lawfulness of any medical treatment which he may be required to submit to against his will. We suggest that in order to provide an effective deterrent against unlawful deprivation of liberty of persons deprived of their legal capacity, such persons should also enjoy a right of direct access to a court to seek compensation for unlawful detention under Article 5(5). Neither guardians, nor guardians *ad litem*, should be able to dispose of these rights to access justice for persons who have been deprived of their legal capacity.

NON-DISCRIMINATION – NOT SPECIAL RIGHTS – JUST EQUAL RIGHTS.

30. The right to non-discrimination guaranteed by Article 14 ECHR can only be argued where a breach of another Convention right is being claimed. Although disability is not specifically mentioned in the Article 14 grounds under which discrimination is prohibited, the Court has held that since the list of prohibited grounds in Article 14 is not exhaustive⁴², and 'there is no doubt that the scope of this provision includes discrimination based on disability.'⁴³

31. The CRPD can be used as an aid to interpret disability-based discrimination prohibited under Article 14 ECHR. Article 2 CRPD defines disability-based discrimination as follows:

...any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

32. Article 2 CRPD defines 'reasonable accommodation' as:

....necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

33. The rights to equality and non-discrimination, which Waddington describes as running 'through the Convention like a red thread'⁴⁴ apply equally to Articles 12 and 19 CRPD. Deprivation of legal capacity and denial of liberty can therefore constitute forms of disability-based discrimination.

34. In its case law on the rights to freedom of religion and conscience under Articles 9 and 10 ECHR, the Court has established the notion of 'reasonable accommodation'.⁴⁵ This concept of reasonable accommodation was extended to cover disability-based discrimination in *ZH v Hungary*⁴⁶, where the Court held that 'the authorities did not make any truly "reasonable steps"... a notion quite akin to that of "reasonable accommodation" in Articles 2, 13 and 14 of the UN Convention on the Rights of Persons with Disabilities'.⁴⁷ The Court has also criticised the failure to make 'sufficient efforts to reasonably accommodate' a person's special needs as raising 'a serious issue under the Convention' in *D.G. v*

⁴¹Paragraph 220.

⁴²*Stec and Others v. the United Kingdom* (App no. 65731/01) 65731/01 [2006] ECHR 1162

⁴³*Glor v. Switzerland*, paragraph 80.

⁴⁴ Lisa Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A story of exclusive and shared competences' (2011), *Maastricht Journal*, 18, 431.

⁴⁵*Thlimmenos v. Greece* (Application no. 34369/97) [2000] ECHR 162; *Jakóbski v. Poland* (App no 18429/06) [2010] ECHR 1974 ; 55 EHRR 8; *Eweida and Others v. United Kingdom* (Application nos. 48420/10, 36516/10, 51671/10 and 59842/10) HEJUD [2013] ECHR 37.

⁴⁶(App no 28973/11) - Hejud [2012] ECHR 1891.

⁴⁷ Paragraph 43.

Poland.⁴⁸

35. For the applicant in this case, the provision of supports for making decisions (including, for example, access to an independent advocate, or personal ombudsman) could have greatly enhanced the exercise of his legal capacity, and preventing appointment of a guardian. However, from the statement of facts presented it would appear that no such supports were offered to Mr Červenka. As the Court acknowledged in *Airey v. Ireland*⁴⁹, the provision of practical support can be essential to the practical and effective protection of civil and political rights, such as the right to exercise legal capacity, in the present case.⁵⁰ The practical supports necessary for the exercise of legal capacity will often simply require that people are connected back with the social capital and relationships found in their home communities.
36. This body of case law demonstrates the Court's willingness to interpret the ECHR as encompassing 'reasonable accommodation' as set out in the UN CRPD. Failure to provide 'reasonable accommodation' to persons with disabilities is viewed as constituting discrimination on the basis of disability under the CRPD, and the Court has already in *ZH v. Hungary* made an analogy between 'reasonable steps' to protect ECHR rights and 'reasonable accommodation' as defined in the CRPD. Therefore, we urge the court to find that a failure to provide people with disabilities supports to exercise legal capacity, and alternatives to institutionalization for people with disabilities, can constitute a breach of substantive ECHR rights (Articles 5, 6 and 8) when read in conjunction with the prohibition on discrimination in Article 14.
37. In determining whether a difference in treatment constitutes discrimination under Article 14 ECHR, the Court has consistently had regard to the presence or absence of any 'objective and reasonable' justification for such differential treatment. The Court stated in *Glor v. Switzerland* that 'a difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 will also be violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.'⁵¹ We submit that the measures taken in the present case do not constitute objective or reasonable justifications for differential treatment, and further, are not proportionately tailored in pursuit of a legitimate aim. This is especially so in light of the emerging consensus on standards of human rights to be achieved for persons with disabilities in Europe, which is trending away from substitute decision-making and denial of legal capacity towards support to exercise legal capacity, and away from institutionalisation and segregation towards supports to live independently and be included in the community.

SUPPORT TO ENABLE PEOPLE TO ENJOY THEIR LEGAL CAPACITY AND RETAIN INDEPENDENCE: AN INTERNATIONAL TREND

38. In the forgoing discussion we have shown that people who are deprived of their legal capacity are at heightened risk of violations of their Article 5, 6, 8 and 13 ECHR rights. In *Glor v. Switzerland* the Court also stated that it would 'have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved.'⁵² We submit that the CRPD is shaping the emerging consensus on the steps states should take to protect and promote the rights of persons with disabilities. This section discusses some emerging trends in the accommodations and supports that may be necessary to enable persons with disabilities to enjoy the rights to legal capacity and independent living.
39. Persons with intellectual, psychosocial and cognitive disabilities often need support to assist with everyday decision making, which can serve the dual purpose of helping such persons retain their legal capacity and remain living independently in the community. Research by the European Union Agency for Fundamental Rights found that 'personal assistants, freely chosen by the person with intellectual disabilities themselves, can promote autonomy and inclusion by helping to develop daily living skills,

⁴⁸ (App no 45705/07) HEJUD [2013] ECHR 143 paragraph 176. See also *Price v. United Kingdom* (App no 33394/96) [2001] ECHR 458.

⁴⁹ (App no 6289/73) [1979] ECHR 3; (1980) 2 EHRR 305.

⁵⁰ See also: *Botta v. Italy* (App No 21439/93) [1998] ECHR 12, paragraph 27

⁵¹ Paragraph 72.

⁵² Paragraph 75.

facilitating participation in community and cultural life, dealing with financial matters and opening up access to goods and service'.⁵³A comprehensive literature review of supports for decision making found that a large number of countries – including Austria, Australia, several Canadian states (Alberta, British Columbia, Manitoba, Quebec, Saskatchewan, the Yukon Territories), Colombia, Denmark, England and Wales, Germany, Hungary, India, Ireland, the Netherlands, Norway, New Zealand, Scotland, Sweden, Switzerland and the United States – have all introduced, or are introducing, measures which make provisions towards supports for decision making as an alternative to deprivation of legal capacity.⁵⁴ Indeed, the Czech Republic introduced a new Civil Code in 2012, which introduces some measure of supported decision making and requires that restrictions on legal capacity are used as a last resort.

40. Two systems of supported decision making have been especially well documented. Sweden has pioneered a system of 'personal ombudsmen' who provide support to people in a range of matters – from housing and finance to personal matters such as their relationships with others.⁵⁵ Support from a personal ombudsman is provided on the basis of a person's will and preference, and relationships of trust between the personal ombudsmen and the person whom he supports are essential. The scheme has been very successful both in terms of client satisfaction and reducing in-patient hospitalisations, resulting in savings in expenditure.⁵⁶
41. The Office of the Public Advocate in South Australia has recently completed an evaluation of a supported decision making project where people with cognitive disabilities were supported to make decisions for themselves about matters such as accommodation, lifestyle and health decisions, as an alternative to guardianship. Supporters were drawn from people's trusted family and friends and support was based upon the person's will and preferences. The project found that people using supported decision making can demonstrate that they no longer require guardianship.⁵⁷
42. These studies show that not only is it desirable that states provide alternatives to deprivation of legal capacity and institutionalisation, but that states across the globe are actively engaging in finding new ways to support people which maximize the preservation of their autonomy and independence. This enables people with disabilities to enjoy their rights to legal capacity and independent living, which contain their rights to enjoyment of home and private life and the right to liberty, on a more equal basis with others. The general trend towards support for decision making, and supports which can enable people to remain living in their communities, mean that states are increasingly recognizing their obligations to provide alternatives to guardianship and institutionalisation.

RECOMMENDATIONS

43. We submit that it would be fully in keeping with the case law of the Court and in conformity with the UN CRPD in this case to clarify the Court's jurisprudence by finding that:
 - A. Deprivation of legal capacity and institutionalisation constitute violations of Article 8 ECHR particularly because of the unnecessary and arbitrary blockages to the development of human personality. The Court has an opportunity to further explore the human personality theory underpinning the ECHR and so play its part in re-framing the question of disability into ability. Many States have been pursuing alternatives to institutionalisation and deprivation of legal

⁵³ European Union Agency for Fundamental Rights (FRA), *Choice and control: the right to independent living*, p. 8.

⁵⁴ S. Pathare & L. S. Shields, 'Supported Decision-Making for Persons with Mental Illness: A Review' (2012), *Public Health Reviews*, 34, 1-40.

⁵⁵ P. Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2012), *Psychiatry, Psychology and Law*, DOI:10.1080/13218719.2012.711683; see also PO-Skåne website (English): <http://www.po-skane.org/ombudsman-for-psychiatric-patients-30.php>; L. Salzman, 'Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?' (2011), 4 *St. Louis University Journal of Health Law & Policy* 279, 312.

⁵⁶ Centre for Disability Law and Policy, *Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality*, p. 38.

⁵⁷ M. Wallace, *Evaluation of the Supported Decision Making Project*. (Office of the Public Advocate, South Australia, 2012).

capacity, in line with the UN CRPD, demonstrating that such measures are not necessary in democratic societies. Given the harm to personhood and flourishing, and the enjoyment of other Convention rights that these measures pose, it is submitted that they are a disproportionate interference with the right to respect for home and private life. Consequently, such measures cannot be justified under Article 8(2).

- B. All persons, including persons deprived of their legal capacity, should enjoy direct rights of access to courts to challenge involuntary medical treatments under Article 8 and to seek compensation for unlawful deprivations of liberty under Article 5(5). Failure to do so means that effective remedies required by Article 13 ECHR are placed out of reach of such persons.
- C. Where deprivation of legal capacity and involuntary institutionalisation arise because States have failed to make reasonable accommodations for persons with disabilities, this constitutes a discriminatory interference with ECHR rights under Articles 5 and 8. As such, this also violates Article 14 ECHR.

In light of the emerging consensus the CRPD provides on measures to respect, protect and fulfill the rights of persons with disabilities, we are heartened to see that the Court is increasingly using the CRPD as an aid to interpretation of the ECHR, and we believe that these interpretations are fully in keeping with the trajectory of ECHR case law. Should the Court require any further clarification of the points made here or any further information relating to legal capacity and institutionalization we would be pleased to file a supplemental brief.