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Speakers' presentations

EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 7-9 June 2017



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What is disability?

Module 1



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Objective

- Introduce participants to the current human rights approach to disability and explain the evolution of other approaches

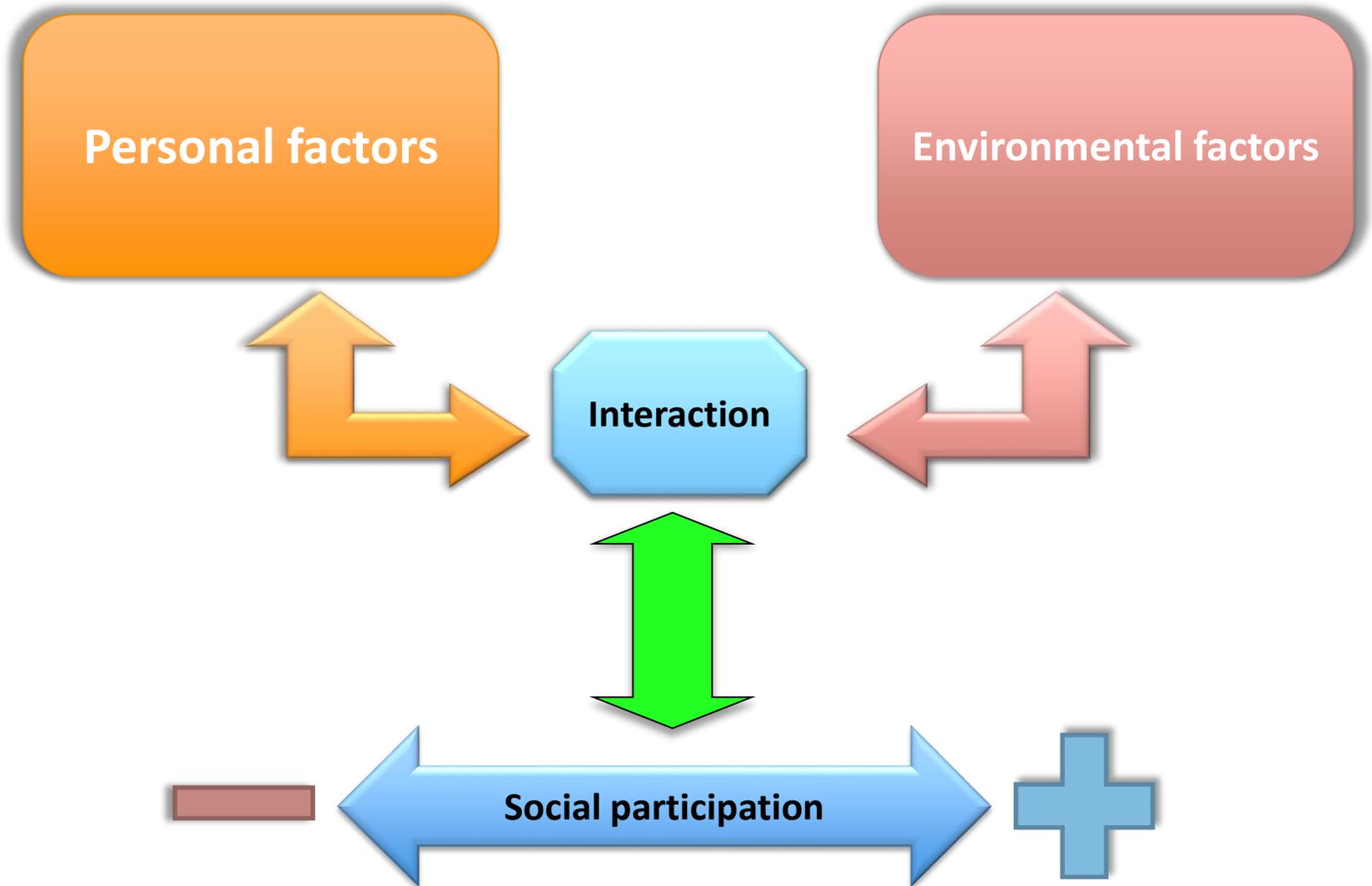
Module flow

- How disability works
- Approaches to disability
- Charity approach
- Medical approach
- Consequences of charity and medical approaches
- Social approach
- Human rights approach
- Key principles of a rights-based approach
- Convention's concept of disability
- Language and terminology



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How disability works



Some personal factors

Physical (inherent)

male/female

skin colour

visual impairment

hearing impairment

physical impairment

intellectual impairment

psychosocial impairment

fit / not fit

Socioeconomic (individual impact)

rich

middle class

poor

connected

isolated

educated

illiterate

Environmental factors

Accessibility of environment (physical and informational)

- Hilly / flat
- Lack of accessibility
- Partial accessibility
- High levels of accessibility

Legal/policy

- Charity approach
- Anti discrimination
- Supportive
- Measures (quotas...)
- Good enforcement
- Poor enforcement

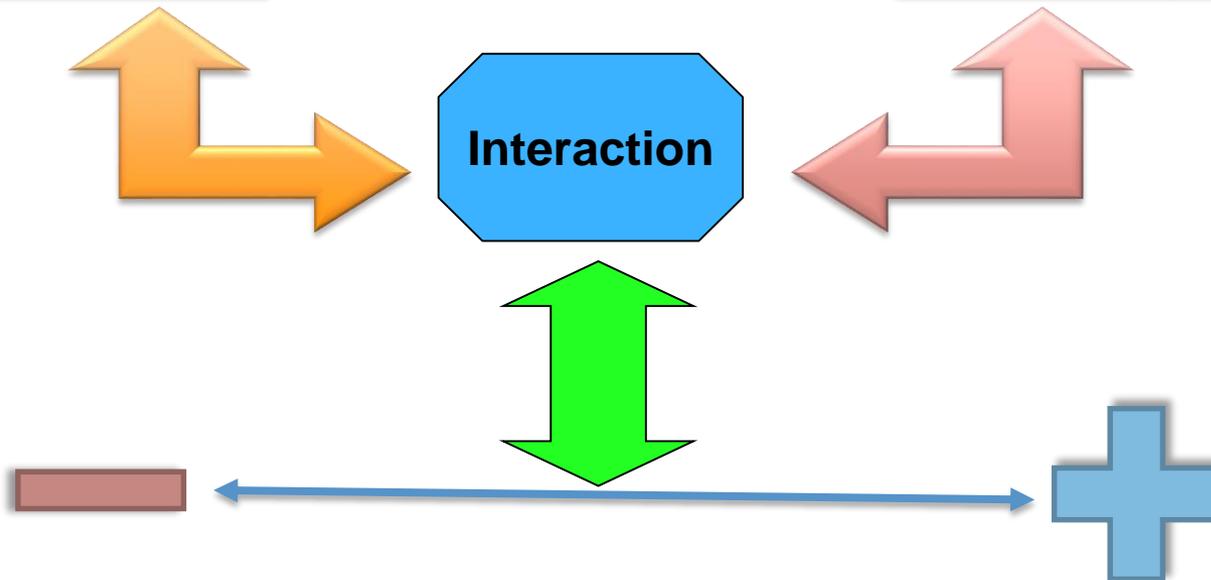
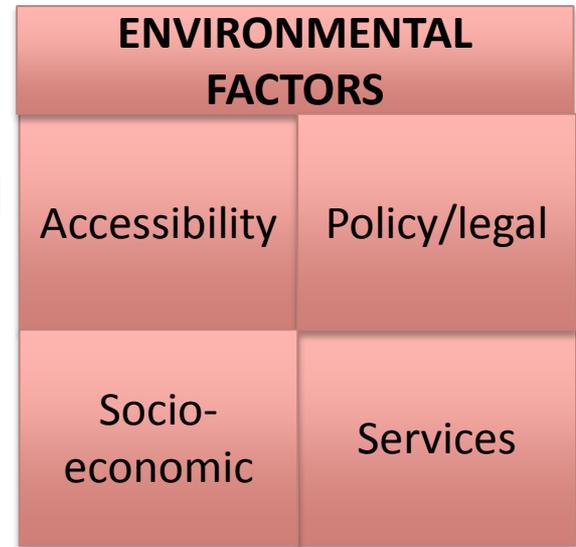
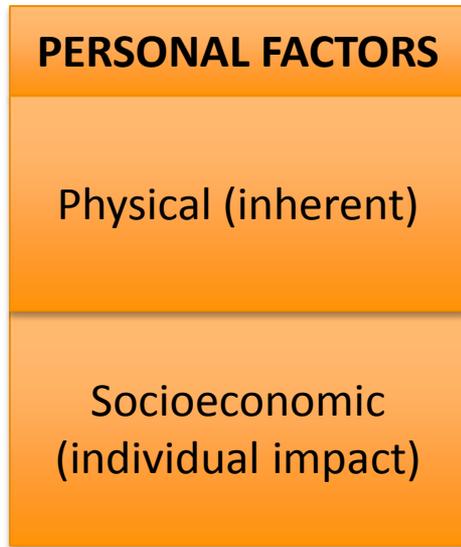
Socioeconomic

- Rural / city / big city
- Rich / poor
- Strong negative attitudes and prejudice
- Positive awareness
- Open to change / closed
- Pro poor

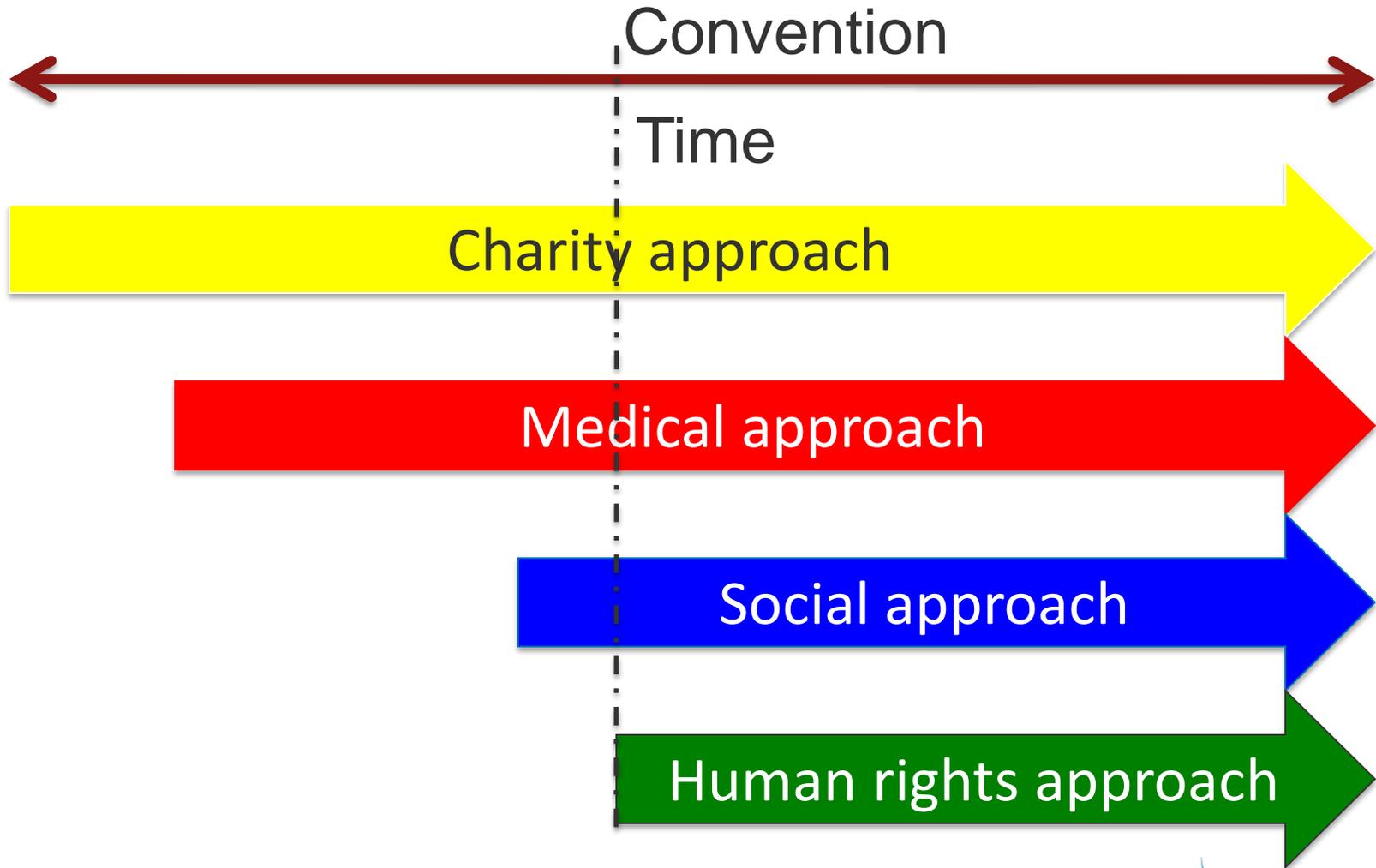
Services

- Inclusive school/not inclusive
- Inclusive health care/not inclusive
- Inclusive youth centres/not inclusive
- Inclusive livelihood support/not inclusive
- Technical aids
- Community based services
- Social support services
- Public / private
- Affordable

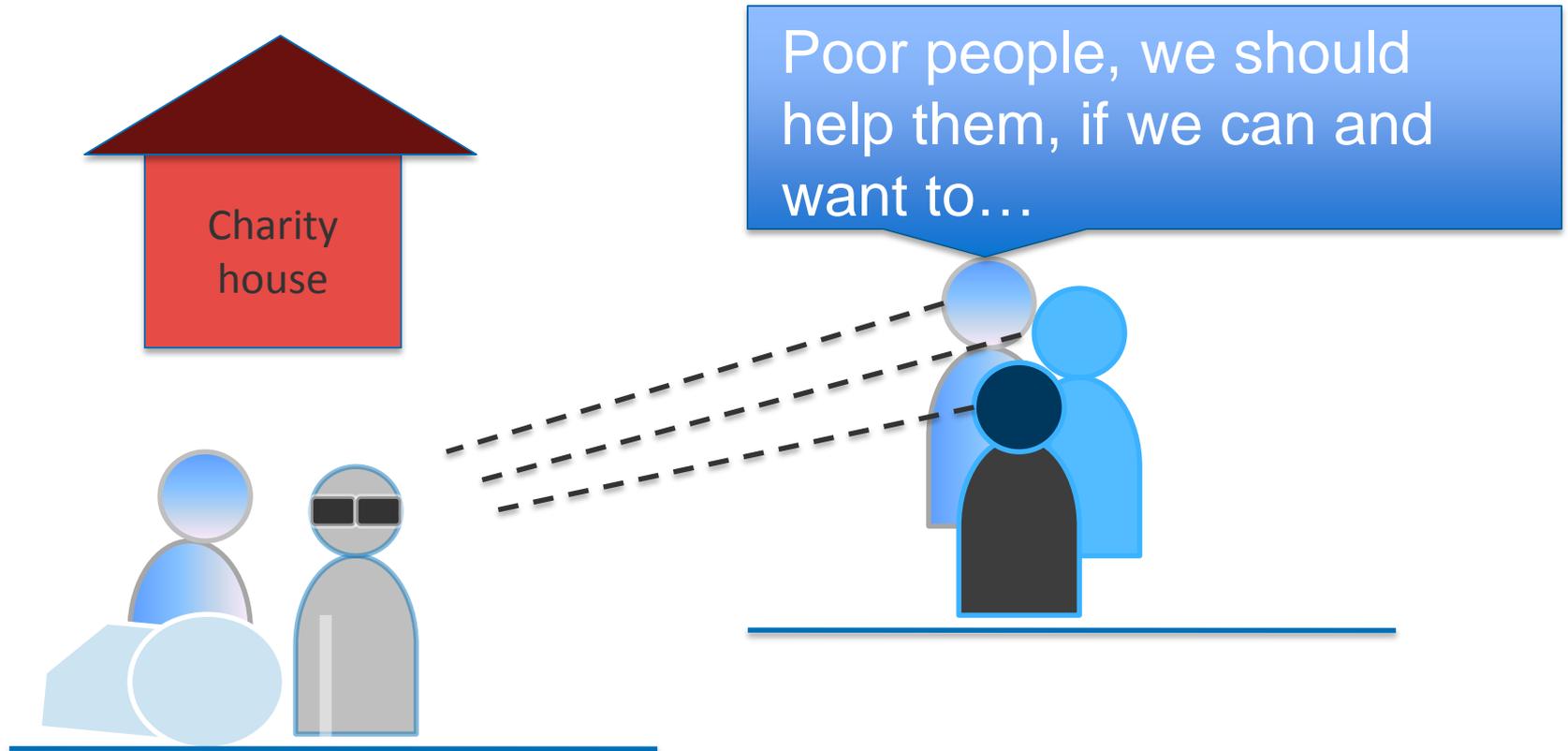
The interaction



Four approaches to disability



Charity approach



Charity approach

How this approach sees disability:

Persons with disabilities are in a tragic situation

Persons with disabilities cannot take care of themselves

Persons with disabilities inspire compassion

Persons with disabilities are objects of benevolence

How this approach proposes to treat disability:

They need our help, sympathy, charity...

Collect and give money to provide for persons with disabilities.

The quality of the “care” is less important

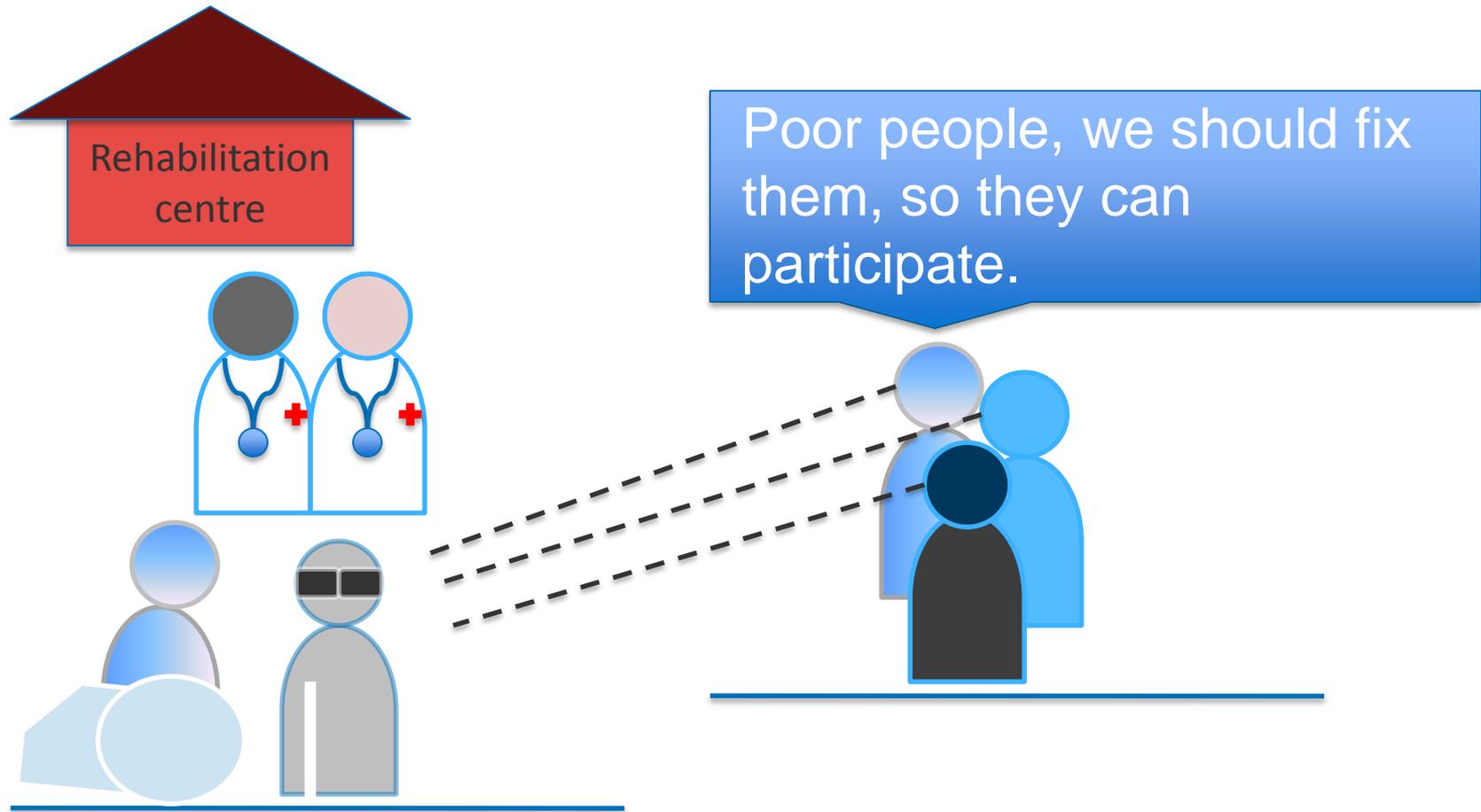
Who is the duty bearer on disability issues:

Benevolent persons, charity houses, homes, foundations, religious institutions ...



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Medical approach



Medical approach

How this approach sees disability:

Persons with disabilities need to be cured

Persons with disabilities play the passive role of patients

Persons with disabilities are considered abnormal

Persons with disabilities are unable to live independently

How this approach proposes to treat disability:

Persons with disabilities need as much rehabilitation as possible to reach the best extent of normality, in order to access rights and participate in society

Who is the duty bearer on disability issues:

Doctors and health authorities

Often health ministry



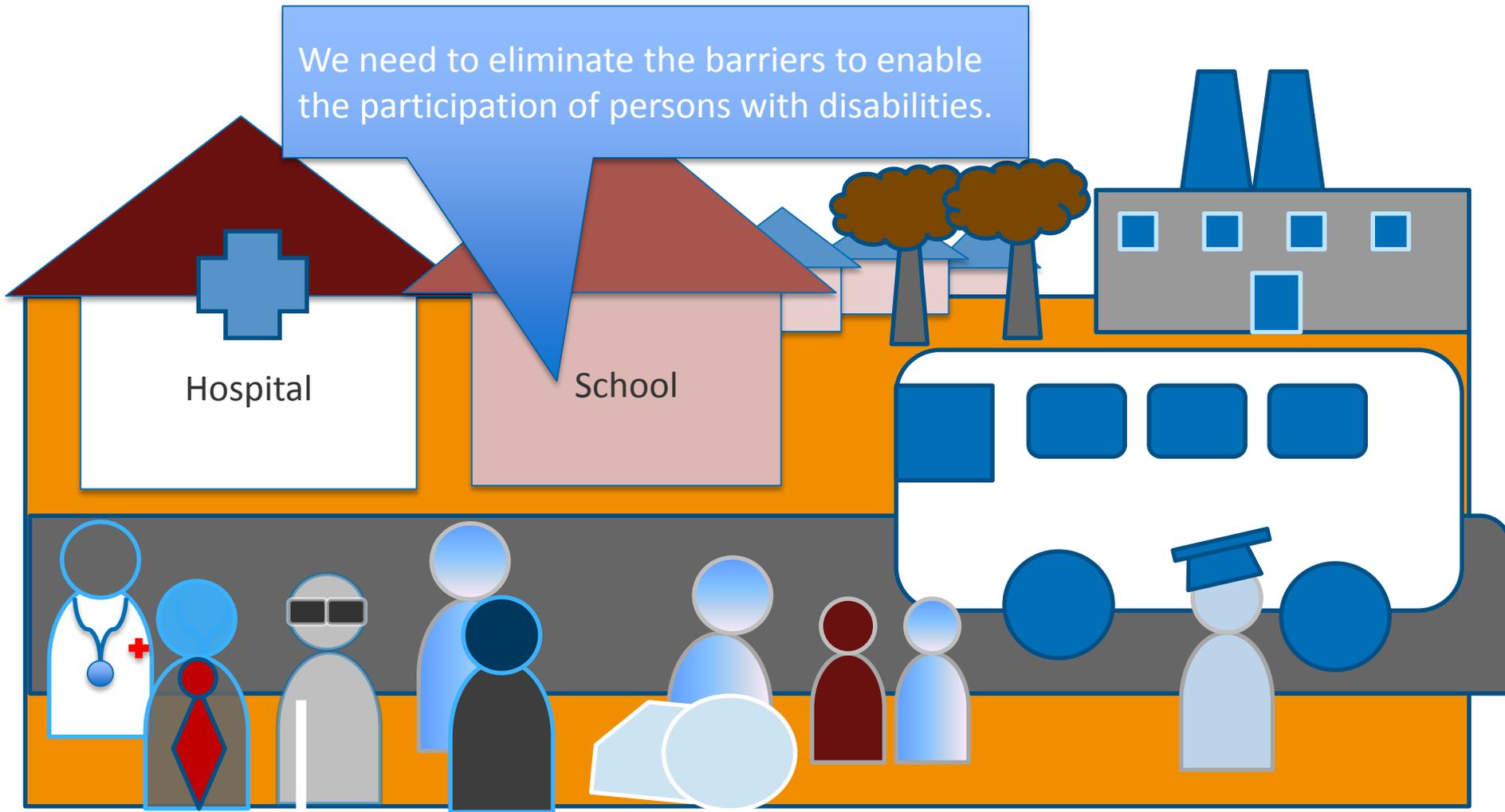
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Consequences of charity/medical approaches



Social approach

We need to eliminate the barriers to enable the participation of persons with disabilities.



Social approach

How this approach sees disability:

Disability is the result of a wrong way of organizing society: thus, persons with disabilities face bias and barriers that prevent their equal participation

Disability is not an individual problem and mainly lies in the social environment that can be limiting or empowering depending on many factors

Persons with disabilities can and should participate in society

How this approach proposes to treat disability:

Eliminate environmental barriers that constrain the participation of persons with disabilities, including attitudinal barriers

Enable the participation of persons with disabilities in public policymaking

Make all public services and policies accessible and inclusive

Ensure accessibility

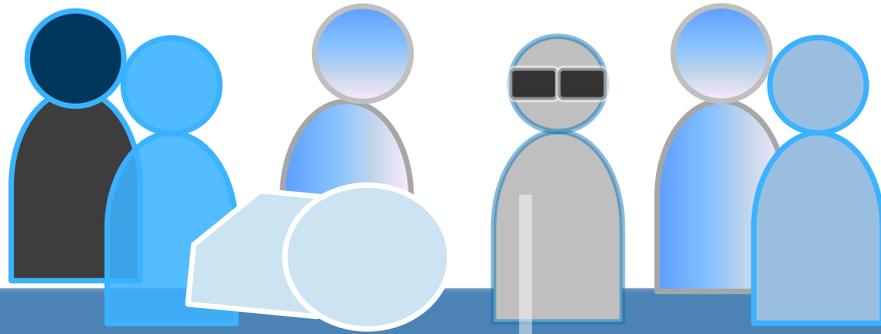
Who is the duty bearer on disability issues:

State, all ministries, society



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Persons with disabilities are part of human diversity



Being human has a broad spectrum of possibilities

MANY WAYS OF
WALKING

MANY WAYS OF
SEEING

MANY WAYS OF
THINKING

MANY WAYS OF
COMMUNICATING

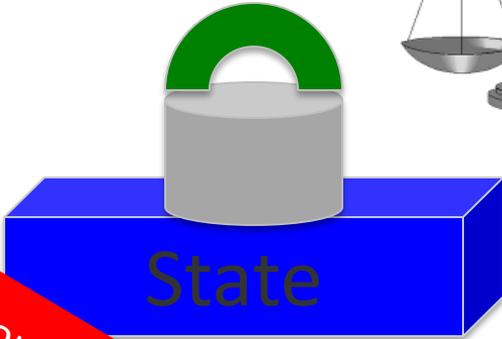
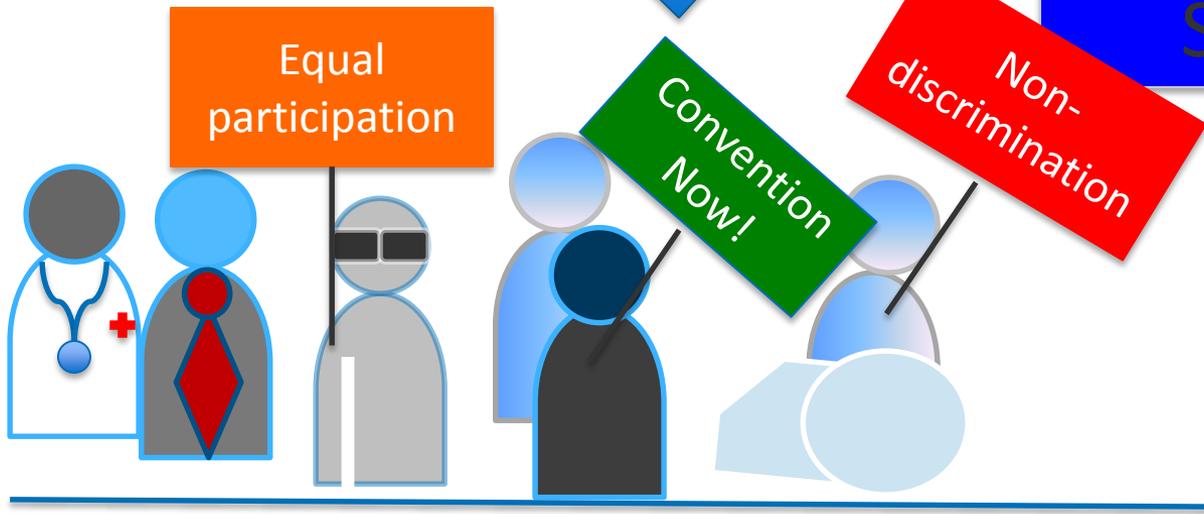
MANY WAYS OF
INTERACTING

Etc.

Human rights approach



We, persons with and without disabilities, are part of the same society and we have the same rights and obligations



Human rights approach

How this approach sees disability:

Ensures full and equal enjoyment of all human rights to persons with disabilities, and promotes respect for their inherent dignity

Focuses on equal opportunities, non-discrimination on the basis of disability and participation in society

Requires authorities to ensure rights and not restrict them

Views persons with disabilities as rights-holders

How this approach proposes to treat disability:

Enforce laws to ensure full inclusion in all social aspects (school, family, community, work, ...)

Apply policies to raise awareness

Respect equal recognition before the law

Regulate the private sector

Who is the duty bearer on disability issues:

State, all ministries and society



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Key principles of a human rights approach

Inclusion

Participation

Accessibility

Non-
discrimination

Respect for
difference and
diversity

Equality of
opportunities

Respect for
inherent
dignity



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The Convention's concept of disability

Disability is an evolving concept and results from the **interaction** between **persons with impairments** and **attitudinal and environmental barriers** that hinders their full and effective **participation in society on a equal basis with others**



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Language and terminology

Outdated	Suggested
Victim of...	Person with...
Suffering from... Afflicted by...	Person with...
Invalid	Person with disability
Mentally handicapped	Person with an intellectual impairment
Mentally ill	Person with a mental or psychosocial impairment
Manic depressive	Person with bipolarity
Epileptic	Person with epilepsy
Spastic	Person with cerebral palsy
The blind	Person who is blind, blind person, person with visual impairment
The deaf	Deaf person
Disabled parking/disabled toilet	Accessible parking/accessible toilet

Sources

- Convention on the Rights of Persons with Disabilities
- OHCHR, United Nations Department of Economic and Social Affairs and Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities— Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (HR/PUB/07/6)
- OHCHR, FAQ on the Convention on the Rights of Persons with Disabilities
www.ohchr.org/EN/Issues/Disability/Pages/FAQ.aspx
(accessed 2 August 2012)

Discrimination on the basis of disability

Module 5



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Objective

- Understand how discrimination on the basis of disability manifests itself
- Recognize different forms of discrimination against persons with disabilities
- Understand the link between non-discrimination and equality
- Understand who is responsible for combating discrimination and what measures they should take

Module flow

- Group activity – the power walk
- Forms of discrimination
- Non-discrimination in the Convention
- Reasonable accommodation
- Examples of discrimination on the basis of disability
- Specific measures to promote equality
- Who's responsible?

Discrimination on the basis of disability

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 encompasses **all forms of discrimination**, including denial of reasonable accommodation



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Forms of discrimination

What is new under the CRPD?

No condition
apply

New scope to
“specific
measures”

Multiple and
intersecting
discrimination

Discrimination
by association

Reasonable
accommodation in
all areas of law

Reasonable accommodation

*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*



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Reasonable accommodation

Elements

- Applies to all rights
- Is of immediate realization
- Applies in individual cases
- Applies upon request of a person with disability
- Implies an objective reasonableness test



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Reasonable accommodation

Objective reasonableness test

Elements

- Request
- Dialogue
- Objective justification
 - Relevant
 - Proportional
 - Possible
 - Financially feasible
 - Economically feasible



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Reasonable accommodation

Objective justification

- The responsible party for providing the accommodation has to prove that at least one of the objective criteria were not met to avoid responsibility for discrimination on the basis of disability
 - Relevance
 - Proportional
 - Possible
 - Financially feasible
 - Economically feasible

Discrimination on the basis of disability

Civil life

Denial of legal capacity
Forced institutionalization
Forced sterilization

Social and cultural life

Segregated education
Forced medical treatment
Exclusion from the community
Inaccessible environments
Negative attitudes

Political life

Denial of the right to vote

Economic life

Denial of reasonable
accommodation
Denial of property rights



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Equal recognition before the law under the CRPD

ERA seminar, Trier

Presentation of Facundo Chavez Penillas, Human Rights and Disability Advisor
Office of the High Commissioner for Human Rights

Dear colleagues,

In this opportunity I was requested to present on the standards developed so far on the right to equal recognition before the law, particularly regarding the exercise of legal capacity. I will divide this presentation in three parts: (i) the non-discriminatory approach to persons with disabilities; (ii) the standards; (iii) some practical examples.

Before presenting the standards, I would like to briefly focus on a critical aspect of this right and its consideration under the Convention on the Rights of Persons with Disabilities: the non-discriminatory approach to persons with disabilities.

The Convention, as presented yesterday, defines the group of persons with disabilities as that which is restricted on its participation in society as consequence of the social barriers that affect persons with impairments. Consequently, a first distinction to be made is in the terminology of "impairment", on the one hand, and "disability", on the other hand. "Impairment" is an individual characteristic and "disability" is the social effect that results from the barriers that affect them.

I will ask you to keep this differentiation in mind along our conversations today in order to better address the non-discriminatory approach to persons with disabilities.

The Convention defines discrimination on the basis of disability from the starting point of considering persons with disabilities as part of human diversity, as other human rights treaties focus on children, women, ethnic origin, race, among others.

Historically, persons with disabilities have not been equally considered part of human diversity and the non-discrimination approach to them was subject to conditions. That is, while persons with disabilities have been recognized in law as having the unconditional right not to be discriminated against, this non-discrimination perspective was not fully reflected in law and, if in conflict with paternalistic perspectives on them, the ground for discrimination has been diluted in practice. This is particularly

true when it comes to the exercise of their legal capacity and to make decisions on their own.

Nowadays, most legal systems in the world do not apply conditions to exercise legal capacity. Under Human Rights Law, women are not conditioned to make decisions on their assets or their medical treatment on the basis of their sex. People of African-descent are not restricted on their right to get married or to enter into contracts on the basis of their race. Even children had been recognized the right to make decisions concerning their lives according to their evolving capacities.

While the Convention and other international human rights law recognizes equal status to persons with disabilities to other populations, this has not been reflected on an equal basis with others to persons with disabilities in national law. The Convention comes to break this disparity and eliminates conditions to upholding the non-discriminatory approach to persons with disabilities, including those that historically had been considered to lack the capacity to make decisions like persons with intellectual and psychosocial disabilities. The Convention approaches the right to equal recognition before as an enabling right to exercise other rights as, without it, personhood is abolished and equal exercise of rights is a legal fiction.

Many legal systems had advanced in this sense. Absolute deprivation of legal capacity is being challenged all over the world. Many countries left behind this approach to move into partial deprivation of legal capacity and this has to be acknowledged as an advance. Nevertheless, this is not yet up to the standards in the Convention.

But, what does the standard say?

I would like to start first saying why is it important to revert practices on the exercise of legal capacity. During the negotiations of the Convention it was made evident that depriving the exercise of legal capacity had a number of negative effects that lead to human rights violations, some of the extremely harmful and irreversible. For example, without legal capacity persons with disabilities, mainly women and girls, are subject to forced sterilization and abortion; people are deprived of their liberty because of forced institutionalization; people could not enter into employment contracts or exercise their right to vote; among others.

These practices are widespread among persons with disabilities and go to the core of human dignity, and affect those who face them in irreversible manners, undermining their self-confidence and their personal integrity in ways similar to torture and degrading treatment, as it was recognized by different human rights bodies.

It was also identified that most of the people under guardianship or similar measures were deprived of their legal capacity on grounds that were disproportional to the measure, like as a mean to access to social protection schemes, health insurance, support in school, among others. After the diagnosis of an impairment – usually by a forensic team -, particularly an intellectual or psychosocial impairment, the person and their context disappear and the diagnosis takes over telling the full story of the person to the legal system.

After identifying this widespread malpractice, the obvious response was to eliminate substituted decision-making and reframe the approach to a person-centered approach where the person concerned regains control over their decision. This, of course, raises the question of what should be done in hard cases when the person cannot express their will and preference.

The Committee on the Rights of Persons with Disabilities developed in its General Comment No. 1 an approach that is in line with the non-discriminatory approach to disability.

The Committee says in that document that “mental capacity”, that is, “the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors;” should not be an obstacle to exercise legal capacity both in the dimensions of legal standing and legal agency.

This approach is the corner stone of the non-discrimination approach to persons with disabilities and should not be conditioned. This moves away the focus from the impairment to the environment and implies the recognition of persons with disabilities as subjects of rights.

The Committee in its country reviews called on States to do mainly three things: (i) eliminate substituted decision-making systems and replace them by supported decision-making systems; and (ii) provide the necessary support to make decisions when requested by the person; and (iii) provide safeguards to avoid abuse from the people providing support.

A number of countries started to move forward on this path. For example Peru was one of the first countries to adopt legislation on this sense and a bill eliminating deprivation of legal capacity, regulating support and establishing safeguards is expected to pass this year.

Costa Rica recently adopted legislation that eliminates guardianship and provides for supported-decision making. The language in this legislation is vague and further jurisprudence should be examined to see if support will be transformed into guardianship in practice.

Argentina did not eliminate guardianship altogether but included support for decision making in its legislation and the Supreme Court, deciding on the right to vote, is evaluating a case where the general prosecutor requests to the court that in order to deprive legal capacity the judges must provide arguments on why it was not possible to provide support.

I will further explore on these practices later.

Support is openly defined by the Committee as any form of human or technical support that enables the person concerned to determine and/or communicate their will and preference. Most of us rely on our networks to make decisions that we may feel go beyond our understanding, most commonly we rely on conversations with friends and family before making important financial decisions, or getting married, or choosing what to study. The idea of support does not fall far from these common practices and imply recognizing these networks as a valid way of ensuring that the person with disability concerned is making a decision that is informed and that has a substantive process

behind it. The support does not substitute the will and preference of the person concerned, and the decision ultimately lies on the person.

The Convention, recognizing that certain persons with disabilities are at higher risk of abuse from the support person, also includes the need for safeguards. These safeguards could be administrative or judicial mechanisms monitoring the role of the support person, e.g. request them to report periodically, keep record of activities, monitor assets of the support person, among others.

Maybe the most important challenge that the Convention's approach brings to the table, is that related to persons with disabilities who cannot express themselves either momentarily or permanently.

Before entering in the standards developed by the Committee, I would like to highlight that statistics show that such cases do not represent the bulk of cases among persons with disabilities and that from a public policy perspective is reasonable to allocate the necessary resources to those cases that may need a higher scrutiny of the situation. I will exemplify with practices on this later.

Advanced decisions or power-of-attorney indicating what would be the preference of the person in a given situation are a good solution to avoid substituted decision making. These practices could be encouraged by public policy or courts when a case is brought to them. Unfortunately, this is not a widespread practice.

The Committee included in its general comment the standard of the best interpretation of the will and preference of the person concerned for such cases. While it has not yet delivered detailed guidance on it, the discussions around this legal provision aimed at creating an informed assumption on the will and preference of the person that can be analysed through objective interpretations. For example, a judge could infer from letters, witnesses close to the person like friends and family, colleagues, behaviour or other sources, what would the person want in a given case to be done.

If these standards were applied in all cases, the number of deprivations of legal capacity would be reduced to a minimum that, from a public policy perspective, would be irrelevant to keep guardianship in law. Most of this change depends of developing jurisprudence and practices that make the case evident as it was in the Latin American countries I mentioned before.

But, what is it that these countries did?

Judges had the most important role on this process together with public prosecutors. A few judges and public prosecutors understood the importance of ending substituted decision-making in the face of the human rights violations at stake and the abuse that persons with disabilities were (and continue to) face in those countries. In addition, jurists found the issue interesting both from an academic and political perspective and the mental health and disability movements worked together to advocate for change. Among them not only persons with disabilities, but psychiatrists, psychologists, health service providers, social-care service providers, among others.

In Argentina, far before any legal reform, two judges one in the most populated jurisdiction and another in a medium-size city started to apply in their decisions the standards of the Convention.

The first criterion applied by these judges was to avoid looking at the person through the diagnosis lens, and started to ask questions:

Why is this person deprived of legal capacity? If the answer was connected to, for example, sign a paper to access a benefit or health insurance, they conducted a contextual evaluation of the person. Does they have assets? Who manages them and for what purpose? Does the person have social networks? Is the person making decisions in other issues? Is the measure proportional to the person's social context? An in dialogue with the person, the judges started to find solutions to all of the interests at stake.

By being consistent with the goal of not depriving legal capacity, judges and the people involved in the cases started to find support networks that could guide the persons with disabilities on managing their own lives. After that, judges started to rule against existing civil and procedural legislation finding them inapplicable in the particular case as there was the Convention and a solution that fits the Convention's standards.

These practices, motivated public prosecutors who usually are guardians of persons who lack social networks to support them to operate in the same line and started to challenge decisions that deprived their clients of legal capacity, and laws and procedures that required guardianship to access to benefits and services. These initiatives were accepted by the general prosecutor's office which created a pilot project to eliminate unnecessary guardianships. Over 4000 guardianships were considered unnecessary and ended in two years, which proved that the existing legislation was not providing for the protection it allegedly pursued. The civil code was being discussed at that moment and this approach was brought to the working group discussing capacity in the new civil code. The working group considered that a first step was to implement support and safeguards, and that judges with their practices were going to build the case by themselves against guardianship in most cases. Difficult cases were to be considered in a second stage. The new civil code entered into force in Argentina last year with this approach and practice continues to evolve.

In conjunction with this, the new mental health law included in 2010 a provision indicating that decisions depriving legal capacity should be revised every three years. This put the issue on the agenda of judges and public prosecutors that actively engaged on reverting decisions. The Ministry of Health created an interdisciplinary unit to support this process. This unit constituted by social workers, psychologists and psychiatrists and lawyers, all trained on the Convention, had two tasks: (i) monitor conditions, time and reasons of forced institutionalization in psychiatric institutions; and (ii) support courts in evaluation of deprivation of legal capacity.

In order to perform this second task, the unit developed a protocol to evaluating context based on the experiences developed by judges and prosecutors. Data collected includes: (i) basic information (address, family, etc.); (ii) how does the person concerned sees the legal process of deprivation of legal capacity (is they aware of the consequences, does it improve or restrict access to services, etc.); (iii) does the person have legal representation (if yes, was it appointed by themselves or by the State); (iv) is the person offering a support person for decision-making (friends, family, organizations, public prosecutor, etc.); (v) social resources, both personal and in the community; among others.

All of this information is made available to the judge and the public prosecutor involved in the process for them to make an informed assessment of the situation and to break the traditional approach of basing their decisions in purely medical assessments made by the forensic team. Judges realized that a diagnosis fails to describe the reality of the person and this kind of assessment should not be the basis for depriving legal capacity.

This should be considered a good practice as it is moving in the right direction and is building capacity along the way. The Committee has recognized this effort although it needs to achieve the goal of ending guardianship.

In Peru the process was motorized by two pillars. In that country guardianship is not a widespread practice as in Argentina, consequently in practice it was already a residual measure. The second pillar was that it was legally and morally unnecessary, as in most cases was doing more harm than good. Here the most important role was on politicians, civil society and renowned jurists.

I left some of the decisions related to legal capacity that support these practices with the organizers. I apologize as we do not have them in other language but in Spanish.

To open our conversation, I would like to put forward the following questions:

1. Do you already undertake contextual analysis in your countries to challenge or decide on cases requesting deprivation of legal capacity?
2. Does your legal framework allow you to challenge national laws on legal capacity using the Convention? If so, have you already decided on such cases?
3. What are the challenges that you face to enforce the Convention?

Gracias.



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Disability in EU Law

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NUI Galway
OÉ Gaillimh

Structure of the paper

- Official texts on disability in EU law
 - Treaties
 - International agreements
 - Legislation
- Case law of the EU Court of Justice
 - Focus on definition of disability
 - Impact of UN CRPD



Treaties

- Article 19 of the TFEU give the EU the power to address discrimination:
 - “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”



TFEU Continued

- Article 10 TFEU:
 - In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on ... disability.



The Charter of Fundamental Rights

- Art. 21 of the Charter lists disability as one of the grounds on which discrimination must be prohibited.
- Art. 26 addresses the “Integration of persons with disabilities” and provides: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”



International agreements:

- United Nations Convention on the Rights of Persons with Disabilities
 - Council Decision 2010/48/EC 2009 concerning the conclusion by the European Community, of the UN CRPD.
 - Annex II of this decision lists the EU acts on matters governed by the UN CRPD
 - Mixed agreement
 - Code of conduct – (OJ 2010 C340/08)

Legal effects of UNCRPD in EU Law



- International agreements concluded by EU are superior to secondary EU law
- Some obligations in international agreements may be invoked directly.
 - However see (Case C-363/12, *Z*)
 - See also (Case C-395/15, *Daouidi*)



Impact of the UNCRPD on EU Law

- Directive 2000/78/EC
Framework Employment
Directive
- Legal Definition of
Disability



Impact of the UN CRPD

- Medical Model of disability
 - Focus on what is “wrong” with the individual
 - Focus on medical solutions and how to “fix” the person
- Social Model of disability
 - Focus on barriers to participation
 - Physical, attitudinal, societal
 - Focus on a rights based approach to inclusion.



Directive 2000/78/EC

Framework Employment Directive

- Directive does not define disability
- Article 1: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of ... disability ...employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.



CJEU – Grand Chamber Decision

- *Chácon Navas v. Eurest Colectividades SA* (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706.
 - persons “with serious functional limitations (disabilities) due to physical, psychological or mental afflictions.” (paragraph 76).
 - In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time. (paragraph 45).
 - Does not cover sickness (paragraph 47)



UN CRPD and the concept of “disability”

- No fixed definition of disability
 - “a soft threshold definition in the form of guidance which is open-ended and inclusive” de Búrca
- Preamble:
 - Disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

Article 1 UNCRPD



- Persons with disabilities include those who have long-term physical, mental intellectual or sensory **impairments** which in **interaction** with various **barriers** may hinder their full and effective participation in society on an equal basis with others
- Clear endorsement of the social model.
- One limitation – must be long-term.



Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge* (1)

- FED interpreted in light of CRPD
- International agreements have **primacy over instruments of secondary law**. **Those instruments must be interpreted in a manner consistent with those agreements.**
- CRPD “an integral part of the EU legal order”



Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge* (2)

- Concept of “disability” includes an illness if:
 - That illness entails a limitation which results in particular from physical, mental or psychological **impairments** which in **interaction with various barriers may hinder the full and effective participation** of the person concerned in professional life on an equal basis



Case C-354/13 *Karsten Kaltoft v Municipality of Billund*

- **Para 53:** Following the ratification by the European Union of the United Nations Convention on the Rights of Persons with Disabilities, ... the Court held that the concept of ‘disability’ must be understood as referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers
- Obesity may be a disability if it meets this test



Case C-363/12 Z (2014)

Ques: Is the [UN Convention] capable of being relied on for the purposes of interpreting, and/or of challenging the validity, of Directive 2000/78 ...?

Ans: (71) “international agreements are concluded by the European Union they are binding on its institutions and, consequently, they prevail over acts of the European Union.

(72) “The primacy of international agreements ... over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements.”

(73) “The provisions of that Convention are thus, from the time of its entry into force, an integral part of the European Union legal order ... “

Case C-363/12 Z (2014) (Cont'd)

(75) “...the UN Convention is capable of being relied on for the purposes of interpreting Directive 2000/78, which must, as far as possible, be interpreted in a manner that is consistent with that Convention”

(76) “following the ratification by the European Union of the UN Convention, the Court held that the concept of ‘disability’ within the meaning of Directive 2000/78 had to be understood as referring to a limitation which results in particular from longterm physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers ...”



Case C-363/12 Z (2014)

- CJEU held that the concept of disability:
 - presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.
- Therefore Z did not have a disability.



Case C-395/15 Daouidi (2016)

- (49) “The UN Convention does not define ‘long-term’ as regards a physical, mental, intellectual or sensory impairment. Directive 2000/78 does not define ‘disability’, nor does it clarify the concept of a ‘long-term’ limitation of a person’s capacity for the purposes of that concept.”
- Evidence of ‘long-term’ includes lack of clearly defined prognosis as regards short-term progress, fact it is likely to be a prolonged period of time before recovery
- National Court must in determining ‘long-term’ base its decision on all of the objective evidence, such as, documents and certificates relating to that person’s condition (based on current medical and scientific knowledge) Case by case analysis.



Case C-406/15, *Milkova* (2017)

- Mental Illness does constitute a disability ...
- (48) That interpretation is supported by the UN Convention which, in accordance with settled case-law, may be relied on for the purposes of interpreting Directive 2000/78
- CJEU then referred to UNCRPD Article 27(1) on the right to work and Article 5(1) on equality and went on to state:
- (50) ”It follows from the foregoing that the legislation at issue in the main proceedings comes within the scope of Article 7(2) of Directive 2000/78 and, as such, pursues an objective covered by EU law ...”



Questions?



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Le handicap dans le droit de l'Union européenne

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Structure de la présentation

- Textes officiels sur le handicap dans le droit de l'UE
 - Traités
 - Accords internationaux
 - Législation
- Jurisprudence de la Cour de justice de l'UE
 - Accent mis sur la définition du handicap
 - Influence de la CDPH des Nations unies



Traités

- L'article 19 du TFUE attribue à l'UE le pouvoir de lutter contre la discrimination :
 - « Sans préjudice des autres dispositions des traités et dans les limites des compétences que ceux-ci confèrent à l'Union, le Conseil, statuant à l'unanimité conformément à une procédure législative spéciale, et après approbation du Parlement européen, peut prendre les mesures nécessaires en vue de combattre toute discrimination fondée sur le sexe, la race ou l'origine ethnique, la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle. »



TFUE (suite)

- Article 10 du TFUE :
 - « Dans la définition et la mise en œuvre de ses politiques et actions, l'Union cherche à combattre toute discrimination fondée sur (...) un handicap »



La Charte des droits fondamentaux

- L'article 21 cite le handicap parmi les motifs pour lesquels toute discrimination doit être interdite.
- L'article 26 aborde l'« intégration des personnes handicapées » et affirme : « L'Union reconnaît et respecte le droit des personnes handicapées à bénéficier de mesures visant à assurer leur autonomie, leur intégration sociale et professionnelle et leur participation à la vie de la communauté. »



Accords internationaux

- Convention des Nations unies relative aux droits des personnes handicapées
 - Décision du Conseil 2010/48/CE de 2009 concernant la conclusion, par la Communauté européenne, de la CDPH des Nations unies
 - L'annexe II à cette décision énumère les actes de l'Union sur les questions régies par la CDPH des Nations unies
 - Accord mixte
 - Code de conduite (JO 2010 C 340/08)



Effets juridiques de la CDPH des Nations unies dans le droit de l'UE



- Les accords internationaux conclus par l'UE priment le droit dérivé de l'UE
- Certaines obligations résultant d'accords internationaux peuvent être invoquées directement
 - Mais : voir l'affaire C-363/12, *Z*
 - Voir également l'affaire C-395/15, *Daouidi*



Influence de la CDPH des Nations unies sur le droit de l'UE

- Directive 2000/78/CE :
directive-cadre sur
l'égalité en matière
d'emploi
- Définition juridique du
handicap



Influence de la CDPH des Nations unies

- **Modèle médical du handicap**
 - L'accent est mis sur ce qui « ne fonctionne pas » chez une personne
 - L'accent est mis sur les solutions médicales et le moyen de « réparer » la personne
- **Modèle social du handicap**
 - L'accent est mis sur les obstacles à la participation
 - Sur le plan physique, dans les attitudes et dans la société
 - L'accent est mis sur une approche de l'inclusion fondée sur les droits



Directive 2000/78/CE

Directive-cadre sur l'égalité en matière d'emploi

- Cette directive ne définit pas le handicap
- Article 1 : « La présente directive a pour objet d'établir un cadre général pour lutter contre la discrimination fondée sur (...) l'handicap (...) en ce qui concerne l'emploi et le travail, en vue de mettre en œuvre, dans les États membres, le principe de l'égalité de traitement. »



CJUE – Arrêt de la grande chambre

- *Chacón Navas c. Eurest Colectividades SA* (C-13/05), Rec. 2006, p. I-06467, dans [2006] IRLR 706
 - personnes « qui ont de sérieuses limitations fonctionnelles (handicaps) découlant de troubles corporels, mentaux ou psychiques » (point 76 des conclusions de l’avocat général)
 - Pour que la limitation relève de la notion de «handicap», il doit donc être probable qu’elle soit de longue durée (point 45 de l’arrêt)
 - La maladie n’est pas couverte (point 47 de l’arrêt)



La CDPH des Nations unies et le concept de « handicap »

- Pas de définition fixe du handicap
 - « une définition utilisant un seuil souple, sous la forme d'orientations non exhaustives axées sur l'inclusion » (de Búrca)
- Préambule :
 - La notion de handicap évolue et le handicap résulte de l'interaction entre des personnes présentant des incapacités et les barrières comportementales et environnementales qui font obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres.



Article 1 de la CDPH des Nations unies



- Par personnes handicapées on entend des personnes qui présentent des **incapacités** physiques, mentales, intellectuelles ou sensorielles durables dont l'**interaction** avec diverses **barrières** peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres.
- Approbation claire du modèle social
- Une seule limitation : l'incapacité doit être durable



Affaires jointes C-335/11 et C-337/11, *Ring et Skouboe Werge* (1)

- Directive-cadre interprétée à la lumière de la CDPH
- Les accords internationaux **priment les instruments du droit dérivé. Ces instruments doivent être interprétés conformément à ces accords.**
- La CDPH « fait partie intégrante de l'ordre juridique de l'UE »



Affaires jointes C-335/11 et C-337/11, *Ring et Skouboe Werge* (2)

- La notion de « handicap » inclut la maladie si :
 - Cette maladie entraîne une limitation, résultant notamment d'**atteintes** physiques, mentales ou psychiques durables, dont **l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation** de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.



Affaire C-354/13, *Karsten Kaltoft c. Billund Kommune*

- **Point 53** : À la suite de la ratification par l'Union de la convention des Nations unies relative aux droits des personnes handicapées, (...) la Cour a considéré que la notion de «handicap», au sens de la directive 2000/78, doit être entendue comme visant une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques durables, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.
- L'obésité peut constituer un handicap s'il remplit ce critère.

Affaire C-363/12, Z (2014)

Question : La convention [de l'ONU] peut-elle être invoquée aux fins d'interpréter et/ou de contester la validité de la directive 2000/78[...] ?

Réponse : 71. « lorsque des accords internationaux sont conclus par l'Union, les institutions de l'Union sont liées par de tels accords et, par conséquent, ceux-ci priment les actes de l'Union »

72. « La primauté des accords internationaux (...) sur les textes de droit dérivé commande d'interpréter ces derniers, dans la mesure du possible, en conformité avec ces accords »

73. « Par conséquent, les dispositions de cette convention font partie intégrante, à partir de l'entrée en vigueur de celle-ci, de l'ordre juridique de l'Union »



Affaire C-363/12, Z (2014) (suite)

75. « la convention de l'ONU peut être invoquée aux fins d'interpréter la directive 2000/78, laquelle doit faire l'objet, dans la mesure du possible, d'une interprétation conforme à cette convention »

76. « à la suite de la ratification par l'Union de la convention de l'ONU, la Cour a considéré que la notion de «handicap», au sens de la directive 2000/78, devait être entendue comme visant une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques durables, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs »



Affaire C-363/12, Z (2014)

- La CJUE a statué que le concept de handicap :
 - suppose que la limitation dont souffre la personne, en interaction avec diverses barrières, puisse faire obstacle à sa pleine et effective participation à la vie professionnelle sur la base de l'égalité avec les autres travailleurs
- En conséquence, Z n'était pas une personne handicapée



Affaire C-395/15, Daouidi (2016)

- 49. « La convention de l'ONU ne définit pas la notion du caractère « durable » d'une incapacité physique, mentale, intellectuelle ou sensorielle. La directive 2000/78 ne définit pas la notion de « handicap » ni n'énonce celle de limitation « durable » de la capacité de la personne, au sens de ladite notion. »
- Les indices d'un caractère « durable » incluent le fait que l'incapacité ne présente pas une perspective bien délimitée quant à son achèvement à court terme ou que cette incapacité est susceptible de se prolonger significativement avant le rétablissement.
- Pour vérifier le caractère « durable », la juridiction nationale doit se fonder sur l'ensemble des éléments objectifs, en particulier sur des documents et des certificats relatifs à l'état de la personne concernée (établis sur la base des connaissances médicales et scientifiques actuelles). Analyse au cas par cas .



Affaire C-406/15, *Milkova* (2017)

- Le trouble mental constitue bien un handicap...
- 48. Cette interprétation est corroborée par la convention de l'ONU, qui, selon une jurisprudence constante, peut être invoquée aux fins d'interpréter la directive 2000/78
- La CJUE a ensuite fait référence à l'article 27, paragraphe 1, de la CDPH sur le droit au travail et à l'article 5, paragraphe 1, de la CDPH sur l'égalité et déclaré :
- 50. « Il découle de ce qui précède que la réglementation en cause au principal entre dans le champ d'application de l'article 7, paragraphe 2, de la directive 2000/78 et, en tant que telle, poursuit un objectif couvert par le droit de l'Union »



Questions ?



NUI Galway
OÉ Gaillimh

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handicap

Case Study

ERA Academy of European Law, June 2017.

Dr. Shivaun Quinlivan

The legal status of the UNCRPD and its role as interpretative tool

- CJEU and ECtHR interpretation of the UNCRPD
- A. Patricia works as a clothes designer in a small but exclusive clothes company. The company hires around twenty employees. Patricia has both dyslexia and is hearing impaired, she is however an incredible designer and her impairment has not prevented her from successfully advancing in her job. Over the past 5 months or so Patricia has been experiencing lower back pain – this pain has become progressively more debilitating. She has attended several medical practitioners and there is no clear medical consensus on her potential to recover. In effect is not clear from the various medical reports whether Patricia’s back will heal.

Patricia’s back problem is particularly bad when she works sitting down, or stooped over a sewing machine. Patricia’s doctor suggests the use of a height adjustable desk be installed in her office. Her employer refuses for a number of reasons, he states that “if I get you a fancy desk I will have to get everyone a fancy desk.” He also states that “people will think you are my favourite.” Finally he raises some concerns about the cost of the desk – the cheaper models start at around 300 euro. Finally her employer notes that her back problem is not in fact a disability, he acknowledges that she is disabled but because of her dyslexia and her hearing impairment and neither of those impairments require an adjustable desk.

Patricia challenges her employer’s decision and claims disability discrimination as prohibited by Directive 2000/78 and articles 2, 5 and 27 of the UNCRPD.

Is Patricia likely to be considered disabled?

If not why not?

If so why?

Are the Court likely to determine that Patricia is entitled to the desk or not?

If so why?

If not why?

Étude de cas

Académie de droit européen ERA, juin 2017

D^r Shivaun Quinlivan

Le statut juridique de la CDPH des Nations unies et son rôle d'aide à l'interprétation

- Interprétation de la CDPH par la CJUE et la Cour EDH

A. Patricia est styliste dans une entreprise d'habillement de taille modeste, mais de haute qualité, qui compte environ 20 travailleurs. Patricia est atteinte à la fois de dyslexie et d'une déficience auditive, mais elle accomplit un travail exceptionnel et son handicap ne l'a pas empêchée de gravier les échelons professionnels. Depuis cinq mois, Patricia souffre de douleurs lombaires, qui deviennent de plus en plus invalidantes. Elle a consulté plusieurs médecins et ils ne parviennent pas à s'accorder quant à son potentiel de rétablissement. En effet, les différents bilans médicaux ne permettent pas de déterminer avec certitude si le dos de Patricia peut guérir.

Les problèmes de dos de Patricia sont particulièrement intenses quand elle travaille en position assise ou penchée sur une machine à coudre. Son médecin propose qu'un bureau à hauteur réglable soit installé sur son lieu de travail, mais son employeur refuse pour toute une série de raisons. Il lui dit : « Si je vous achète un bureau de luxe, je devrai en acheter un à tout le monde » ou encore : « Les autres vont penser que vous êtes mon chouchou ». Il émet également certaines réserves au sujet du prix d'un tel bureau, les modèles les moins chers coûtant quelque 300 euros. Enfin, il estime que les problèmes de dos de Patricia ne constituent pas un handicap. Il reconnaît qu'elle a un handicap, mais à cause de sa dyslexie et de sa déficience auditive, et aucun de ces troubles ne nécessite un bureau réglable.

Patricia conteste la décision de son employeur et allègue une discrimination fondée sur le handicap, qui est interdite par la directive 2000/78 et les articles 2, 5 et 27 de la CDPH des Nations unies.

Patricia est-elle susceptible d'être considérée comme une personne handicapée ?

Si non, pourquoi ?

Si oui, pourquoi ?

Les Cours sont-elles susceptibles de statuer que Patricia a droit au bureau réglable ?

Si oui, pourquoi ?
Si non, pourquoi ?



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Accessibility and Reasonable Accommodation

Dr Shivaun Quinlivan

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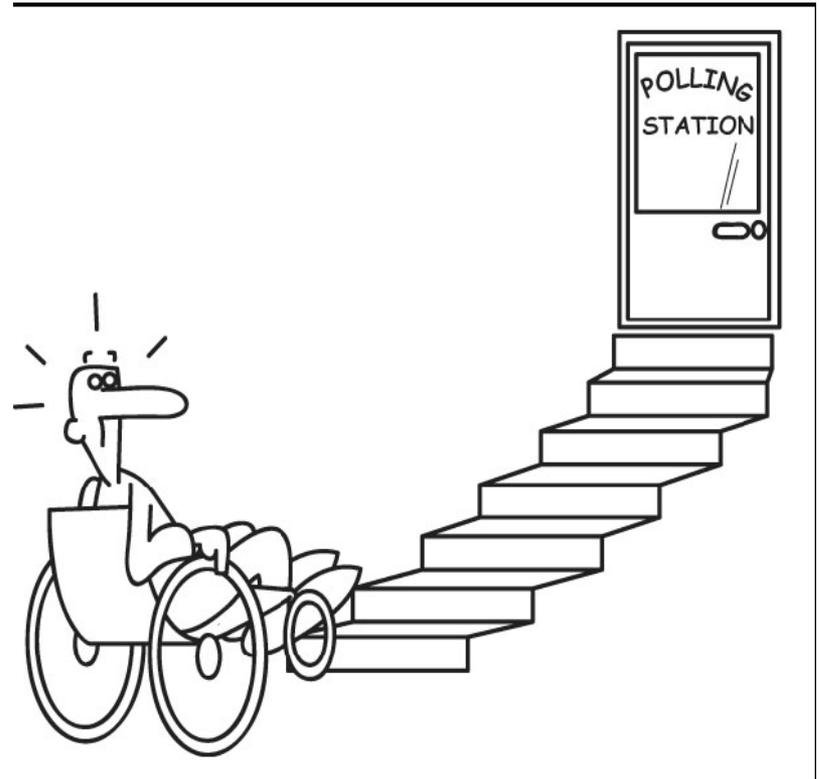
NUI, Galway



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Paper Structure

1. Brief introduction to structure of the UN CRPD
2. Reasonable Accommodation
3. Accessibility
4. Is there a relationship between these two concepts?



Structural Importance

- Articles 3-9 are cross-cutting principles or articles of general application and are to be applied in all aspects and rights contained in the convention
- Article 5 “Equality and Non-Discrimination”
 - Article 2 defines Reasonable Accommodation
- Article 9 “Accessibility”



Reasonable Accommodation - CRPD

- Failure to provide reasonable accommodation is deemed to be an act of discrimination
- Individualised duty
- Process of dialogue
- Limits to the duty
 - Disproportionate or undue burden
 - “Reasonable” – an independent modifier of the duty?



UN CRPD and Reasonable Accommodation

- CRPD prohibits ‘all forms of discrimination including denial of reasonable accommodation.’
 - Duty to legislate
 - RA must be recognised as a punishable form of discrimination
 - (Concluding Observations – Germany May 2015)
 - Justiciable and immediately enforceable.



Not to be confused with positive or affirmative action.

- Article 5(3) provides for reasonable accommodation
- Article 5(4) provides for positive or affirmative action
- Two separate and distinct concepts

- Fredman:
- “Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.”



Article 2 CRPD

- “Reasonable accommodation” means **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;
- Two constituent parts to the duty.



Individualised

- Individualised duty
- No ‘one size fits all’
- Accommodation must address a barrier to participation of an individual and the impact on duty bearer
- Requires a case by case assessment



Dialogue

- Duty ‘triggered’ when an individual needs an impairment
- Suggestive that dialogue between PWD and Duty-bearer is crucial
- Nature of dialogue dependent on nature of relationship



Limits

- Disproportionate and undue burden – one term, not two separate restrictions.
- May look to: Cost, Duration, Frequency, Benefit and Disruptions
- Not valid – attitude or others.



‘Reasonable’ Accommodation

- CRPD Cttee General Comment no. 4:
- ‘Reasonableness’ is understood as the result of a contextual test that involves an analysis of the relevance of the effectiveness of the accommodation, and the expected goal of countering discrimination. The availability of resources and the financial implications is recognised in assessing disproportionate burden.



Questions for the CJEU and National Courts

- FED does not define reasonable accommodation as a form of discrimination
- CRPD applies the principle of reasonable accommodation to ALL rights in the Convention. EU only applies it to employment via FED – impact most keenly felt in *Z case*.
- The issue of whether the term ‘reasonable’ is an independent modifier of the duty to accommodate must be reassessed throughout EU
- 27 countries in Europe have ratified – therefore it should form part of national legal interpretations.



Accessibility in the UNCRPD

- “to enable persons with disabilities **to live independently** and **participate fully** in all aspects of life, States parties shall take **appropriate measures** to ensure to persons with disabilities access, on an equal basis with others ...
- It applies to the physical environment, transportation, information and communication, and services ...
- Accessibility should be considered in the context of the general right to access from the specific perspective of disability.



Public versus Private

- As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise – GC No. 2.



Universal Design

- Universal Design applied to all goods and services
 - Broad benefits
 - Easier at the outset
 - More difficult to retro-fit
 - Not a reason not to.



Article 9 State obligations – GC No. 2

- Identify and eliminate obstacles
- State party must:
 - develop, promulgate and monitor the implementation of minimum national standards (interoperable).
- Awareness raising
- Accessible signage
- Information and communication (including technology)



Relationship with Article 5

- General Comment No. 2 on Accessibility provides:
 - This approach stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity.
 - Immediate duty (RA) versus more gradual obligation (Accessibility).



Important distinctions

- Duties of Accessibility and Reasonable accommodation may both address the same barriers – but:
- Accessibility is a group response: Reasonable accommodation individual response
- Accessibility is an ex ante duty; Reasonable accommodation is an ex nunc duty.
- Accessibility is subject to progressive realisation; Reasonable accommodation is immediately applicable



Questions?



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Accessibilité et aménagements raisonnables

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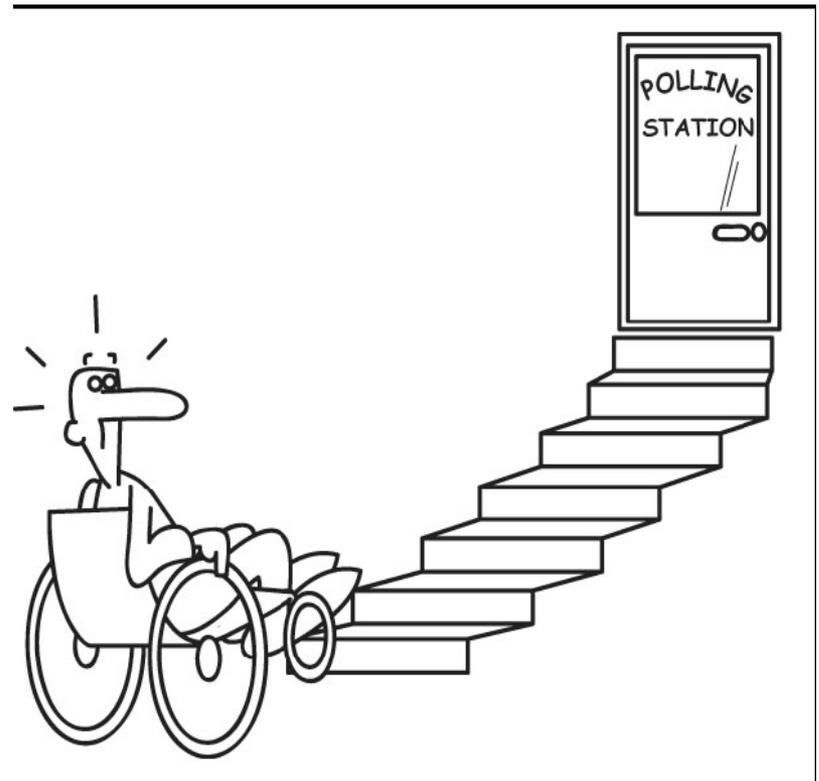
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Structure de la présentation

1. Introduction succincte à la structure de la CDPH des Nations unies
2. Aménagements raisonnables
3. Accessibilité
4. Existe-t-il un lien entre ces deux concepts ?



Importance structurelle

- Articles 3 à 9 : principes généraux ou articles d'application générale, qui doivent être respectés dans tous les domaines et pour tous les droits visés par la Convention
- Article 5 : « Égalité et non-discrimination »
 - L'article 2 définit la notion d'aménagement raisonnable
- Article 9 : « Accessibilité »



Aménagements raisonnables - CDPH

- La non-réalisation d'aménagements raisonnables est réputée constituer une discrimination
- Obligation individuelle
- Processus de dialogue
- Limites à l'obligation
 - Charge disproportionnée ou indue
 - « Raisonnable » - qualification indépendante de l'obligation ?



CDPH des Nations unies et aménagements raisonnables

- La CDPH interdit « toutes les formes de discrimination, y compris le refus d'aménagement raisonnable »
 - Obligation de légiférer
 - Le refus d'AR doit être reconnu comme une forme de discrimination punissable
 - (Observations finales, Allemagne, mai 2015)
 - Droit opposable et directement exécutoire



À ne pas confondre avec l'action positive ou affirmative

- L'article 5, paragraphe 3, prévoit les aménagements raisonnables
- L'article 5, paragraphe 4, prévoit les mesures d'action positive ou affirmative
- Deux concepts bien distincts

- Fredman :
- « Plutôt que de demander aux personnes handicapées de se conformer aux normes existantes, l'objectif consiste à développer un concept d'égalité qui induit adaptation et changement. »



Article 2 de la CDPH

- On entend par « aménagement raisonnable » les **modifications et ajustements nécessaires et appropriés** n'imposant pas de **charge disproportionnée ou indue** apportés, en fonction des besoins **dans une situation donnée**, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales.
- Deux volets constitutifs de l'obligation



Individualisation

- Obligation individuelle
- Pas de solution universelle
- L'aménagement doit éliminer un obstacle à la participation d'une personne et exercer une incidence maîtrisée sur son responsable
- Un examen au cas par cas est indispensable



Dialogue

- Obligation « déclenchée » lorsqu'une personne a besoin d'un aménagement
- Sous-entendu : le dialogue entre la personne handicapée et le responsable de l'obligation est fondamental
- La nature du dialogue dépend de la nature de la relation



Limites

- Charge disproportionnée ou indue – un seul concept et non deux limitations distinctes
- Facteurs à prendre en considération : coût, durée, fréquence, avantage et gêne
- Motifs de décision non valables : attitude ou autres personnes



Aménagements « raisonnables »

- Observation générale n° 4 du Comité des droits des personnes handicapées :
- Le « caractère raisonnable » de l'aménagement est défini après examen du milieu, c'est à dire une analyse de la pertinence et de l'efficacité de cet aménagement et de l'objectif attendu de lutte contre la discrimination. La mise à disposition de ressources et les incidences financières sont prises en compte lorsqu'il s'agit d'évaluer si cet aménagement impose une charge disproportionnée.



Questions pour la CJUE et les juridictions nationales

- La DCE ne définit pas l'absence d'aménagements raisonnables comme une forme de discrimination.
- La CDPH applique le principe des aménagements raisonnables à TOUS les droits de la Convention. L'UE l'applique seulement à l'emploi par le biais de la DCE – son effet s'est notamment fait ressentir dans l'*affaire Z*.
- La question de savoir si le terme « raisonnable » apporte une modification indépendante à l'obligation d'aménagements doit être examinée dans l'ensemble de l'UE.
- 27 États européens ont ratifié la CDPH – elle devrait donc infléchir les interprétations nationales du droit.



Accessibilité – Article 9

- Article spécifique (article 9)
- Références explicites dans d'autres articles (articles 12, 13, 19, 20 et 21)
- Références à l'accessibilité dans 2 des dispositions de « mise en œuvre » (articles 31 et 32)
- Inclusion parmi les 8 principes généraux de la Convention (article 3, point f)
- Inclusion dans le préambule (point v)



L'accessibilité dans la CDPH des Nations unies

- Afin de permettre aux personnes handicapées de **vivre de façon indépendante** et de **participer pleinement** à tous les aspects de la vie, les États Parties prennent des **mesures appropriées** pour leur assurer, sur la base de l'égalité avec les autres, l'accès (...)
- La disposition s'applique à l'environnement physique, aux transports, à l'information et à la communication, aux services (...)
- L'accessibilité doit être examinée dans le contexte du droit d'accès général sous l'angle spécifique du handicap.



Secteurs public et privé

- Du moment que des biens, produits ou services sont offerts ou fournis au public, ils doivent être accessibles à tous, qu'ils appartiennent au secteur public ou à une entreprise privée et/ou soient fournis par le secteur public ou une entreprise privée.
(Observation générale n° 2)



Conception universelle

- La conception universelle s'applique à tous les biens et services
 - Avantages substantiels
 - Action plus facile dès la conception
 - Adaptation a posteriori plus difficile
 - Pas une raison de ne pas le faire.



Article 9 : obligations pour les États – Observation générale n° 2

- Identifier et éliminer les obstacles
- Les États parties doivent :
 - élaborer et promulguer des normes nationales minimales et en contrôler l'application (interopérabilité)
- Sensibilisation
- Signalisation accessible
- Information et communication (y compris technologies)



Lien avec l'article 5

- L'Observation générale n° 2 sur l'accessibilité affirme :
 - Cette approche découle de l'interdiction de la discrimination ; le déni d'accès devrait être considéré comme un acte discriminatoire, que celui qui en est auteur soit une entité publique ou une entité privée.
 - Obligation immédiate (aménagement raisonnables) ou plus progressive (accessibilité)



Distinctions importantes

- Les obligations d'accessibilité et d'aménagements raisonnables peuvent viser les mêmes obstacles, mais :
- L'accessibilité concerne les groupes, alors que les aménagements raisonnables concernent les individus.
- L'accessibilité est une obligation ex ante, alors que l'obligation d'aménagement raisonnable est une obligation ex nunc.
- L'accessibilité se prête à une réalisation progressive, alors que les aménagements raisonnables doivent être immédiats.



Questions ?



NUI Galway
OÉ Gaillimh

Centre de droit et de politique en matière de
handicap

Case study on Guardianship v. Supported Decision Making

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Disclaimer: The opinions expressed in this presentation do not necessarily reflect the view of the European Commission.

Overview

- ▶ The VOICES Project
- ▶ Supported decision making v. Support to exercise legal capacity
- ▶ Supported Decision Making Methods
- ▶ Law reform
- ▶ Case Studies

The VOICES Project

- ▶ Funded by the European Research Council
- ▶ June 2015 – November 2018
- ▶ Meaningful involvement of people with disabilities in law reform
- ▶ 15 pairs of storytellers and respondents
- ▶ Narratives and responses in co-authored chapters in an edited collection



VOICES OF INDIVIDUALS:
Collectively Exploring
Self-determination

Stories from the Project - Claire

- ▶ Ward of Court - Lunacy Regulation (Ireland) Act 1871
- ▶ Purchase her own home
- ▶ Impact of guardianship on day to day life
- ▶ Successfully challenged her status
- ▶ Using support daily and living independently

Stories from the Project – Rusi Stanev

- ▶ *Stanev v Bulgaria* [2012] ECHR 46
- ▶ Remained within guardianship
- ▶ Little practical change for Rusi's daily life, accomodation etc.
- ▶ No litigation capacity to challenge further

Support

- ▶ Broad term encompassing formal and informal arrangements
- ▶ Vary in type and intensity based on the person and their needs
- ▶ General Comment recognises the evolving nature of the field and many and varied individual support needs
- ▶ Support to exercise legal capacity v. supported decision making

Common Misconceptions

- ▶ General Comment only places an obligation on States to provide support to exercise legal capacity
- ▶ Not everyone will wish to exercise their right to support
- ▶ Support should be open to everyone – including people with complex or high support needs or who communicate differently

Supported Decision Making



Different Forms of Supported Decision Making

- ▶ Informal Support
 - ▶ Support based on familial relationships or friendships
 - ▶ Know a person well to interpret will and preference
 - ▶ Lacks in structures or safeguards
- ▶ Formal Models
 - ▶ Based on a formal agreement or support model.
 - ▶ For Example: Representation Agreement (British Columbia), South Australia Supported Decision Making Project, Assisted Decision Making (Capacity) Act 2015 (Ireland).

Different Forms of Supported Decision Making (cont'd)

- ▶ Intentional Peer Support
 - ▶ Crisis Situations
 - ▶ USP - Kenya
- ▶ Circles of Support
 - ▶ Group of close friends or family who meet regularly to support a person to achieve certain goals and make decisions about their lives.
 - ▶ Group charged with interpreting will and preference.
 - ▶ Examples: Microboards (Canada), Circles Network (UK), BCNL Pilot Programme (Bulgaria)

Different Forms of Supported Decision Making (cont'd)

- ▶ Advance Planning
 - ▶ Advanced Healthcare Directives
 - ▶ Trusts
 - ▶ Registered Disability Savings Plan (Canada)
 - ▶ Supported Bank Account (Austria)
- ▶ Non-traditional communication
 - ▶ Communication Passports – Health Passport (UK & New Zealand)
 - ▶ Dr. Jo Watson, Deakin University – unintentional communication

Case Studies #1

- ▶ Mental Health Service: Voluntary Patient
- ▶ Melanie was born in 1981. In 2000, she was diagnosed as "suffering from depression" and received treatment. She subsequently experienced "intermittent episodes of anxiety" and had contact with mental health services. On 4 March 2005, she tried to end her life by tying a pillowcase round her neck. Her General Practitioner admitted her to hospital following an emergency referral. On 7 March 2005, she was diagnosed by a consultant psychiatrist, as suffering from a severe episode of a recurrent depressive disorder. On 18 March, she was assessed as having made a sufficient recovery to be discharged and she went on holiday for a week with her family to Egypt. On 31 March, she cut both of her wrists with broken glass and her consultant psychiatrist advised that she should be readmitted to the hospital. On 11 April, she tied lamp flex round her neck and was assessed by the doctor who considered that she was experiencing psychosis and was at a high risk of deliberate self-harm and suicide. Melanie agreed to a voluntary admission to the hospital and the doctor noted that, if she attempted or demanded to leave, she should be assessed for detention under the Mental Health Act. She was prescribed a course of drugs and kept under 15 minute observations. A ward nurse assessed that Melanie posed a moderate to high risk of ending her life. On 18 April Melanie's father expressed concern that Melanie's health was not improving and reported that she continued to have momentary suicidal thoughts since her admission and had asked her parents to "get her out" of the hospital. On 19 April Melanie met with her consultant psychiatrist and requested that she leave. Her parents expressed concern at her discharge to come home. The consultant psychiatrist agreed that Melanie could return home for two days and two nights. Melanie left the ward that day she spent most of the following day with her mother. In the late afternoon of 19 April Melanie said she was going to see a friend. Some time after 5 pm she hanged herself from a tree in a park near her home.
- ▶ Based on the UK Supreme Court Decision *Rabone* (2012). Available at: <http://www.bailii.org/uk/cases/UKSC/2012/2.html>

Case Study #2

- ▶ Residential Care: "I just want to go home"
- ▶ Mrs McMahon is 72. Her husband Michael died 10 years ago. She has two adult daughters who both live some distance away. She was diagnosed with Alzheimer's disease 5 years ago. She had been living at home and coping quite well up until the last year. She has gotten lost on her way back from the shops a few times and there are concerns that she has been leaving the door unlocked and that she may not be eating well. Six months ago she had a fall and was hospitalised. She agreed to go into the nursing home after leaving hospital "for a few weeks". She consistently tells staff "I don't want to be here. I'm better now. I want to go to my own house. Why can I not go to my own house?" Sometimes she gets very distressed. Sometimes when distressed, she asks for her husband and worries that he will not know where she is. Generally during mornings especially, she can talk very lucidly about her life, Michael's death and her fall. "It is lonely but at least it is your own place. I know I am not as young as I used to be and my memory is terrible but I can manage. I have the home help. I could get the meals on wheels if I wanted." Staff have tried to engage with her to see if they can change anything to suit her. She gets on well with the Director of Nursing and says "you are very nice dear, but I should not be here, I want to be at home." She does not want her belongings from home brought in, as she insists she will be going home soon. She has approached the visiting advocate on a number of occasions with the same complaint. After the latest incident where she became very agitated and insisted that the receptionist call a taxi for her, the visiting GP has prescribed antipsychotics.
- ▶ Case study suggested by the Alzheimer's Society of Ireland.

Questions & Further Discussion

Étude de cas sur la tutelle par rapport à la prise de décisions assistée

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Décharge : les avis exprimés dans cette présentation ne correspondent pas nécessairement à la position de la Commission européenne.

Aperçu

- ▶ Le projet VOICES
- ▶ Prise de décisions assistée ou accompagnement dans l'exercice de la capacité juridique
- ▶ Méthodes de prise de décisions assistée
- ▶ Réforme législative
- ▶ Études de cas

Le projet VOICES

- ▶ Financé par le Conseil européen de la recherche
- ▶ Juin 2015 - novembre 2018
- ▶ Implication utile des personnes handicapées dans la réforme de la législation
- ▶ 15 paires de témoins et d'interlocuteurs
- ▶ Témoignages et réactions des interlocuteurs dans des chapitres communs d'une collection publiée



VOICES OF INDIVIDUALS:
Collectively Exploring
Self-determination

Récits du projet - Claire

- ▶ Pupille du tribunal - Loi de 1871 sur la démence (Irlande)
- ▶ Achat de sa propre habitation
- ▶ Influence de la tutelle sur la vie quotidienne
- ▶ Action fructueuse de contestation de son statut
- ▶ Recours à une assistance journalière et vie autonome

Récits du projet - Rusi Stanev

- ▶ *Stanev c. Bulgarie*, Cour EDH, 2012, 46
- ▶ Maintien de la tutelle
- ▶ Peu de changements concrets dans la vie quotidienne de Rusi, son logement, etc.
- ▶ Pas de capacité judiciaire pour intenter une action de contestation à un niveau supérieur

Assistance

- ▶ Terme générique englobant des mesures formelles et informelles
- ▶ Nature et degré divers selon la personne et ses besoins
- ▶ L'Observation générale reconnaît le caractère évolutif du sujet et l'existence de besoins d'assistance multiples et variés
- ▶ Accompagnement dans l'exercice de la capacité juridique ou prise de décisions assistée

Idées fausses courantes

- ▶ L'Observation générale oblige uniquement les États à fournir un accompagnement dans l'exercice de la capacité juridique
- ▶ Tout le monde ne souhaite pas exercer son droit à une assistance
- ▶ L'assistance doit être accessible à tout le monde, y compris les personnes qui ont des besoins complexes ou importants ou qui communiquent différemment

Prise de décisions assistée



Différentes formes de prise de décisions assistée

- ▶ Soutien informel
 - ▶ Soutien basé sur les relations familiales ou amicales
 - ▶ Bonne connaissance d'une personne pour pouvoir interpréter sa volonté et ses préférences
 - ▶ Déficiences dans les structures ou les garanties
- ▶ Modèles formels
 - ▶ Sur la base d'un accord ou d'un modèle de soutien formel
 - ▶ Exemples : accord de représentation en Colombie britannique, projet de prise de décisions assistée en Australie du Sud, loi de 2015 sur la prise de décisions assistée (capacité) en Irlande

Différentes formes de prise de décisions assistée (suite)

- ▶ Soutien volontaire par les pairs
 - ▶ Situations de crise
 - ▶ USP - Kenya
- ▶ Cercles de soutien
 - ▶ Groupe d'amis proches ou de membres de la famille qui se réunissent régulièrement pour aider une personne à atteindre certains objectifs et à prendre les décisions requises sur sa vie
 - ▶ Groupe chargé d'interpréter la volonté et les préférences
 - ▶ Exemples : micro-conseils au Canada, réseau de cercles au Royaume-Uni, programme-pilote BCNL en Bulgarie

Différentes formes de prise de décisions assistée (suite)

- ▶ Planification à l'avance
 - ▶ Directives anticipées sur les soins de santé
 - ▶ Trusts
 - ▶ Plan d'épargne enregistré en cas de handicap (Canada)
 - ▶ Compte bancaire assisté (Autriche)
- ▶ Communication non traditionnelle
 - ▶ Passeports pour la communication - passeport de santé (Royaume-Uni et Nouvelle-Zélande)
 - ▶ D^r Jo Watson, Université Deakin - communication non intentionnelle

Étude de cas n° 1

- ▶ Service de santé mentale : patient volontaire
- ▶ Mélanie est née en 1981. En 2000, elle a été diagnostiquée « dépressive » et elle a reçu un traitement. Elle a ensuite souffert de « crises d'angoisse intermittentes » et elle est entrée en contact avec les services de santé mentale. Le 4 mars 2005, elle a essayé de se suicider en nouant une tige d'oreiller autour de son cou. Son médecin généraliste l'a fait hospitaliser après une admission d'urgence. Le 7 mars 2005, un psychiatre consultant a posé le diagnostic d'un épisode grave de troubles dépressifs chroniques. Le 18 mars, une évaluation a constaté que Mélanie s'était suffisamment rétablie pour quitter l'hôpital et elle est partie une semaine en vacances avec sa famille en Égypte. Le 31 mars, elle s'est tailladé les deux poignets avec un morceau de verre et son psychiatre consultant a recommandé qu'elle soit à nouveau hospitalisée. Le 11 avril, elle a noué le cordon d'une lampe autour de son cou et elle a été examinée par le médecin, qui a estimé qu'elle était atteinte d'une psychose et qu'elle présentait un risque élevé d'automutilation et de suicide. Mélanie a accepté une hospitalisation volontaire et le médecin a déclaré que si elle tentait de partir ou si elle en faisait la demande, elle devrait se soumettre à un examen en vue d'une détention au titre de la loi sur la santé mentale. Un traitement médicamenteux lui a été prescrit et une surveillance à intervalles de 15 minutes a été mise en place. Une infirmière du service a estimé que Mélanie présentait un risque moyen à élevé d'attenter à ses jours. Le 18 avril, le père de Mélanie s'est dit inquiet que la santé de Mélanie ne s'améliore pas et il a signalé qu'elle continuait d'avoir des pulsions suicidaires et qu'elle avait demandé à ses parents de la « faire sortir » de l'hôpital. Le 19 avril, Mélanie a rencontré son psychiatre consultant et lui a demandé l'autorisation de sortir. Ses parents ont exprimé leur inquiétude à l'idée qu'elle rentre à leur domicile. Le psychiatre consultant a accepté que Mélanie passe deux jours et deux nuits chez elle. Mélanie a quitté le service le jour-même et, le lendemain, elle est restée avec sa mère la majeure partie de la journée. En fin d'après-midi, elle a dit qu'elle sortait voir un ami. Un peu après 17 heures, elle s'est pendue à un arbre dans un parc proche de son domicile.
- ▶ D'après la décision de la Cour suprême britannique dans l'affaire *Rabone* (2012). Disponible sur : <http://www.bailii.org/uk/cases/UKSC/2012/2.html>

Étude de cas n° 2

- ▶ Soins résidentiels : « Je veux juste rentrer à la maison »
- ▶ Madame McMahon a 72 ans. Son mari, Michael, est décédé il y a 10 ans. Elle a deux filles adultes, qui habitent toutes les deux à une certaine distance. Elle a été diagnostiquée atteinte de la maladie d'Alzheimer il y a 5 ans, mais elle a continué de vivre dans sa maison. Elle se débrouillait bien jusqu'à l'année dernière, quand elle s'est perdue à plusieurs reprises sur le chemin de retour du magasin. On craint aussi qu'elle oublie de fermer la porte à clé et qu'elle ne s'alimente pas bien. Il y a six mois, elle a été hospitalisée à la suite d'une chute. Elle a accepté d'entrer dans une maison de soins « pour quelques semaines » après sa sortie de l'hôpital. Elle répète constamment au personnel : « Je n'ai pas envie d'être ici. Je vais mieux maintenant. Je veux rentrer chez moi. Pourquoi ne puis-je pas rentrer chez moi ? » Parfois, elle est profondément perturbée et parfois, dans cet état, elle réclame son mari et s'inquiète qu'il ne sache pas où elle est. Le matin, en général, elle peut parler avec une grande lucidité de sa vie, de la mort de Michael et de sa chute. « Je suis toute seule, mais au moins je suis dans mes propres murs. Je sais que je ne suis plus toute jeune et que ma mémoire me joue des tours, mais je peux gérer cela. J'ai une aide à domicile. Je pourrais aussi me faire livrer mes repas si je voulais. » Les membres du personnel ont essayé de lui parler pour savoir s'ils pouvaient changer quelque chose pour lui faire plaisir. Elle s'entend bien avec le directeur des soins infirmiers et lui dit : « vous m'êtes bien sympathique, mais je ne devrais pas être ici, je veux être chez moi. » Elle refuse qu'on lui apporte ses effets personnels car elle soutient qu'elle rentrera bientôt chez elle. Elle a émis la même réclamation à plusieurs reprises auprès de l'avocat de l'établissement. Après le dernier incident, où elle était très agitée et elle exigeait que le réceptionniste lui appelle un taxi, le médecin généraliste lui a prescrit un antipsychotique.
- ▶ Étude de cas suggérée par la Société Alzheimer d'Irlande.

Questions et discussion complémentaire

ACCESS TO A COURT FOR PERSONS WITH DISABILITIES

Boglárka Benkó



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Overview

- Definitions
- Origins of the right to access to justice (1. right to an effective remedy, 2. right to fair trial: substantive and procedural elements of the right to a fair trial)
- CRPD provisions on access to justice
- EU provisions on access to justice
- Disabling barriers to access to justice
- Specific elements of access to justice

Access to justice

- peoples' effective access to the systems, procedures, information, and locations used in the administration of justice (courts, tribunals, law enforcement officials, prison systems, and other bodies)
- use of the justice system for redress / have a civil claim adjudicated
- contribute to the administration of justice to society (as lawyers, jurors, judges, witnesses...)
- right to have a judicial body pronounce on the person's criminal responsibility

Origins of the right to access justice

- I. Prior to the UN CRPD
 1. Right to an effective remedy
 - Article 8 of the Universal Declaration on Human Rights
 - Article 13 of the ECHR
 - Article 47 of the EU Charter of Fundamental Rights

2. Right to a fair trial

- Article 10 of the UDHR
- Article 14 of the International Covenant on Civil and Political Rights and General comment no. 32
- Article 6 of the ECHR and *Golder v. the United Kingdom*: „the right of access to the courts is not absolute but may be subject to limitations; ...the right of access by its very nature calls for regulation by the State (also ECtHR, *Ashingdane v. the UK*)
- Article 47 of the EU Charter of Fundamental Rights

Substantive and procedural elements of the right to a fair trial

- equal access to and equality before courts
- right to legal advice and representation
- right to procedural fairness
- right to a hearing without undue delay
- right to a competent, independent and impartial tribunal established by law (public pronouncement of judgments)
- presumption of innocence
- right to a public hearing
- right to have the free assistance of an interpreter, if necessary

Access to justice in UN CRPD

- Article 13 Access to justice:
 - effective access to justice **on an equal basis with others**
 - at **all phases of the administration of justice**, including at preliminary stages, such as initial investigations by the police
 - both **direct and indirect participants**, including being witnesses
 - procedural and age-appropriate **accommodations**
 - **training** for persons working in police and justice administration
- Article 12 Equal recognition before the law
- Article 5 Equality and non-discrimination
- Articles 9 and 21 Accessibility

Access to justice in EU law

- Article 67 (4) of the Treaty on the Functioning of the European Union ‘the **Union shall facilitate access to justice**, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters’
- Article 10 (non-discrimination) of the TFEU: in defining and implementing policies and activities, the EU must aim to combat discrimination on various grounds, such as disability’
- Article 21 of the EU Charter of Fundamental Rights: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Disabling barriers to access to justice

- stereotypes and prejudices concerning ability to exercise procedural rights
- deprivation of legal capacity
- insanity defence /unfitness to stand trial
- lack of accessibility / reasonable accommodation (proceedings, buildings)
- lack of adequate representation
- lack of available remedies
- institutionalisation
- fear-based reluctance to report crimes
- financial obstacles

Specific elements of access to justice

- I. Accused
- II. Victims and witnesses
- III. Legal capacity
- IV. Deprivation of liberty
- V. Accessibility
- VI. Reasonable accommodation

I. Accused

Effective participation

- **ECtHR, *SC v. the United Kingdom***
with the assistance of interpreter, lawyer, social worker or friend
 - broad understanding of the nature of the trial process and of what is at stake for him or her
 - understanding the significance of any penalty
 - understanding the essence what is said in court
 - ability to follow what is said by the prosecution witness
 - ability to explain his version of events, the points of disagreement
 - awareness of facts which should be put forward in defence

I. Accused

Exclusion of criminal responsibility / unfitness to stand trial

- ***Marlon James Noble v. Australia* (Committee on the Rights of Persons with Disabilities)**
 - application of security measures: committal to forensic psychiatric institutions for indefinite detention based on dangerousness / public interest – violation of article 15
 - discrimination: (applies only to persons with mental impairment and does not provide reasonable accommodation) – violation of article 5 (1) and (2) of CRPD
 - lack of fair trial guarantees/ access to court to have criminal charges determined - violation of article 15
 - no adequate support to enable to stand trial – violation of article 12

I. Accused

Fair trial rights (1)

- **Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings**
 - Vulnerable persons: persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities
 - Right to information: in a format accessible to persons with disabilities
 - See also : ECtHR, *Z.H. v. Hungary*
 - Right to access to a lawyer: if a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer should not be waived
 - Right to be assisted by an *appropriate adult* (see also ECtHR, *Z.H. v. Hungary*)
 - Questioning: pre-trial investigation phase should be audio-visually recorded

I. Accused

Fair trial rights (2)

- **Right to reasonable accommodation :**
 - criminal proceedings are conducted in a manner which takes full account of the person's age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings. (ECtHR, *T and V v. the United Kingdom*)
 - Member States have to **take into account 'any potential vulnerability** that affects one's ability to follow the proceedings and to make themselves understood'
 - such measures should not affect the very essence of the other parties' right to a fair trial

III. Accused

Fair trial rights (3)

- **Right to interpretation and translation**

Directive 2010/64 on the right to interpretation and translation in criminal proceedings:

- People with disabilities are ‘in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively’
- Those who are ‘unable to speak or understand the language of the proceedings are provided with an interpreter and with translation of the essential documents’
- Appropriate assistance for ‘persons with hearing or speech impediments’

I. Accused

Fair trial rights (4)

- **Right to be present at trial** (Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings)
- **Right to obtain attendance and question witnesses** (*Blokhin v. Russia*)
- **Right to legal aid** (Commission recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings)

II. Victims and witnesses (1)

- States' obligation to make the necessary procedural arrangements to protect persons who lack litigation capacity and secure the good administration of justice and protect the health of the person concerned (ECtHR, *R.P. and others v. the UK*)
- States should adopt measures to enable effective evidence giving / participation of persons with disabilities
- Courts' role to achieve a correct balance between the accused's right to a fair trial, the prosecution's right and the right of the victims / witnesses

II. Victims and witnesses (2)

Affirmative measures

Directive 2012/29 on minimum standards on the rights, support and protection of crime victims

- Recital (9) **no discrimination** based on disability
- Recital (15) accessibility to premises and access to information
- Recital (21) provision of information and advice taking into account a person's intellectual capacity, hearing or speech impediments
- Article 3, 2 **communications in simple and accessible language**
- Article 22 **individual assessment of victims to identify specific protection needs – also victims with disabilities**

II. Victims and witnesses (3)

Statement giving

- **Right to be heard in person**
 - Establishing the competency to testify:
 - „a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient” (ECtHR, *Lashin v. Russia*)
 - Capacity to understand with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which the person’s consent or decision was likely to be necessary in the course of the proceedings

III. Victims and witnesses (4)

Accessibility

Physical accessibility

- police stations, court buildings, hearing rooms, places of taking of evidence
- Physical limitation of access to a court could not go as far as interfering with an individual's entitlement to a fair hearing
- Lack of access is a violation of the right to fair trial in the absence of alternative means (ECtHR, *Farcas v. Romania*)
- Lack of accessibility can constitute discrimination (US Supreme Court, *Tennessee v. Lane*)

III. Victims and witnesses (5)

Accessibility

Accessibility of proceedings, information and communication

- Procedural rules are not applied formalistically but take into account the vulnerability of the person
- Availability of alternative formats of information and communication
 - Employment of intermediaries / facilitators
 - Live television links / Video testimonies
 - Alternative and augmented communication
 - plain language and sign language
 - Braille

II. Victims and witnesses (6)

Right to an effective remedy

- ability to appeal unduly lenient sentences
- availability of criminal sanctions: criminalisation of hate crimes against persons with disabilities (ECtHR, *Dorđević v. Croatia*)
- legal standing to lodge criminal complaints/civil compensation procedures (ECtHR, *X. and Y. v. the Netherlands*)
- legal representation of persons in institutions (ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*)
- compensation: Council Directive 2004/80/EC relating to compensation to crime victims

III. Legal capacity (1)

Article 12 of UN CRPD

Deprivation of legal capacity

- Deprivation of legal personhood
- Substitute decision making regime / guardianship
- No right to take legal action without guardian / legal representative
- Deprivation of legal capacity prevents access to justice (ECtHR, *Kędzior v. Poland*),

Equal recognition before law

- All persons with disabilities enjoy legal capacity (right to make one's own decisions and to exercise their rights – taking legal actions) on an equal basis with others in all aspects of life
- Appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity

III. Legal capacity (2)

- a) Right to direct access to Court to restore legal capacity (ECtHR, *Kedzior v. Poland*, no. 45026/07)
- b) Right to adversarial proceedings (ECtHR, *H.F. v. Slovakia*)
- c) Right to be heard in person (*Shtukaturov v. Russia*)
- d) Right to adequate (ECtHR, *A.N. v. Lithuania*) and independent (ECtHR, *Ivinovic v. Croatia*) legal representation, availability and adequacy of legal aid schemes (ECtHR, *Plesó v. Hungary*),
- e) Right to be notified of institution of guardianship proceedings (ECtHR, *Sykora v. the Czech Republic*)
- f) Right to judicial assessment of legal capacity (*M.S. v. Croatia*)

IV. Proceedings concerning deprivation of liberty

Placement in social care homes, involuntary hospitalisation, pre-trial detention, commitment to forensic psychiatric detention

Protection against arbitrariness:

- Right to an automatic judicial periodic review of detention / right to take proceedings before a court (ECtHR, *Shtukaturov v. Russia*)
- Legal representation: right to instruct a lawyer and lawyers' obligation to follow the instruction of clients (ECtHR, *V.K. v. Russia*)
- Right to ,meaningful' information about the reasons for detention (ECtHR, *Z.H. v. Hungary*)

ACCÈS DES PERSONNES HANDICAPÉES À UN TRIBUNAL

Boglárka Benkó



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Aperçu

- Définitions
- Origines du droit à l'accès à la justice (1. droit à un recours effectif, 2. droit à un procès équitable : éléments de fond et de procédure du droit à un procès équitable)
- Dispositions de la CDPH sur l'accès à la justice
- Dispositions de l'UE sur l'accès à la justice
- Entraves à l'accès à la justice pour les personnes handicapées
- Éléments spécifiques de l'accès à la justice

Accès à la justice

- Accès effectif des citoyens aux systèmes, procédures, informations et lieux utilisés dans l'administration de la justice (cours, tribunaux, agents des services répressifs, systèmes pénitentiaires et autres instances)
- Utilisation du système judiciaire pour obtenir une réparation / juger une action de droit civil
- Contribution à l'administration de la justice (en qualité d'avocat, juré, juge, témoin...)
- Droit à ce qu'une instance judiciaire statue sur la responsabilité pénale d'une personne

Origines du droit à l'accès à la justice

- I. Avant la CDPH des Nations unies
 1. Droit à un recours effectif
 - Article 8 de la Déclaration universelle des droits de l'homme
 - Article 13 de la CEDH
 - Article 47 de la Charte des droits fondamentaux de l'UE

2. Droit à un procès équitable

- Article 10 de la DUDH
- Article 14 du Pacte international relatif aux droits civils et politiques et Observation générale n° 32
- Article 6 de la CEDH et arrêt *Golder c. Royaume-Uni* : « le droit d'accès aux tribunaux n'est pas absolu », mais peut être soumis à certaines limitations, ... le droit d'accès « appelle de par sa nature même une réglementation par l'État » (voir également l'arrêt de la Cour EDH dans l'affaire *Ashingdane c. Royaume-Uni*)
- Article 47 de la Charte des droits fondamentaux de l'UE

Éléments de fonds et de procédure du droit à un procès équitable

- Égalité d'accès à la justice et égalité devant la justice
- Droit à des conseils juridiques et à une représentation
- Droit à l'équité de la procédure
- Droit d'être entendu sans délai déraisonnable
- Droit à un tribunal compétent, indépendant et impartial établi par la loi (prononcé public des arrêts)
- Présomption d'innocence
- Droit à une audience publique
- Droit de bénéficier gratuitement de l'aide d'un interprète si nécessaire

L'accès à la justice dans la CDPH des Nations unies

- Article 13 : Accès à la justice :
 - accès effectif à la justice **sur la base de l'égalité avec les autres**
 - à **tous les stades de l'administration de la justice**, y compris les stades préliminaires comme l'enquête de police initiale
 - **participation directe et indirecte**, notamment en tant que témoins
 - **aménagements** procéduraux et aménagements en fonction de l'âge
 - **formation** pour les personnels de police et les personnels concourant à l'administration de la justice
- Article 12 : Reconnaissance de la personnalité juridique dans des conditions d'égalité
- Article 5 : Égalité et non-discrimination
- Articles 9 et 21 : Accessibilité

L'accès à la justice dans le droit de l'UE

- Article 67, paragraphe 4, du traité sur le fonctionnement de l'Union européenne : « L'Union facilite l'accès à la justice, notamment par le principe de reconnaissance mutuelle des décisions judiciaires et extrajudiciaires en matière civile. »
- Article 10 TFUE (non-discrimination) : « Dans la définition et la mise en œuvre de ses politiques et actions, l'Union cherche à combattre toute discrimination fondée sur (...) un handicap »
- Article 21 de la Charte des droits fondamentaux de l'UE : « Est interdite toute discrimination fondée notamment sur le sexe, la race, la couleur, les origines ethniques ou sociales, les caractéristiques génétiques, la langue, la religion ou les convictions, les opinions politiques ou toute autre opinion, l'appartenance à une minorité nationale, la fortune, la naissance, un handicap, l'âge ou l'orientation sexuelle. »

Entraves à l'accès à la justice pour les personnes handicapées

- Privation de la capacité juridique
- Exception d'irresponsabilité mentale / inaptitude à défendre ses droits devant un tribunal
- Défaut d'accessibilité / d'aménagements raisonnables (procédures/bâtiments)
- Stéréotypes et préjugés sur la capacité d'exercice des droits procéduraux
- Absence de représentation appropriée
- Absence de recours disponibles
- Institutionnalisation
- Réticence à signaler les crimes à cause de la peur
- Obstacles financiers

Éléments spécifiques de l'accès à la justice

- I. Personne accusée
- II. Victimes et témoins
- III. Capacité juridique
- IV. Privation de liberté
- V. Accessibilité
- VI. Aménagements raisonnables

I. Personne accusée

« Participation réelle »

- *S.C. contre Royaume Uni*
- **avec l'assistance d'un interprète, d'un avocat, d'un travailleur social ou encore d'un ami:**
 - comprendre globalement la nature et l'enjeu pour lui du procès
 - Comprendre la portée de toute peine
 - comprendre dans les grandes lignes ce qui se dit au tribunal
 - suivre les propos des témoins à charge
 - exposer à ses avocats sa version des faits
 - signaler toute déposition avec laquelle il n'est pas d'accord
 - informer de tout fait méritant d'être mis en avant pour sa défense

I. Personne accusée

Exclusion de la responsabilité pénale / inaptitude à défendre ses droits devant un tribunal

- *Marlon James Noble c. Australie* (Comité des droits des personnes handicapées)
 - Application de mesures de sécurité : renvoi à une institution psychiatrique médico-légale pour une détention d'une durée indéterminée sur la base du danger / de l'intérêt public - discrimination en violation de l'article 15 : (uniquement applicable aux personnes présentant une déficience mentale et absence d'aménagements raisonnables) - violation de l'article 5, paragraphes 1 et 2, de la CDPH
 - Absence de garantie d'un procès équitable/d'un accès à la justice pour faire déterminer les chefs d'infraction pénale - violation de l'article 15
 - Absence d'accompagnement approprié pour permettre à l'accusé de défendre ses droits devant un tribunal - violation de l'article 12

I. Personne accusée

Droit à un procès équitable (1)

- **Recommandation de la Commission du 27 novembre 2013 relative à des garanties procédurales en faveur des personnes vulnérables soupçonnées ou poursuivies dans le cadre des procédures pénales**
 - Personnes vulnérables : personnes qui ne sont pas aptes à comprendre et à participer effectivement à la procédure pénale du fait de leur âge, de leur état mental ou physique ou d'un handicap
 - Droit à l'information : dans un format accessible aux personnes handicapées
 - Voir également : Cour EDH, *Z.H. c. Hongrie*
 - Droit d'accès à un avocat : si une personne vulnérable est inapte à comprendre et à suivre la procédure, elle ne devrait pas pouvoir renoncer au droit d'accès à un avocat
 - Droit à l'aide d'un *adulte approprié* (voir également Cour EDH, *Z.H. c. Hongrie*)
 - Interrogatoire : l'enquête préliminaire devrait faire l'objet d'un enregistrement audiovisuel

III. Personne accusée

Droit à un procès équitable (2)

- Droit à des aménagements raisonnables : il est essentiel de mener les procédures pénales d'une manière qui tienne pleinement compte de l'âge de la personne accusée, de sa maturité et de ses capacités sur le plan intellectuel et émotionnel, et de prendre des mesures de nature à favoriser sa compréhension de la procédure et sa participation à celle-ci. (Cour EDH, et *T & V c. Royaume-Uni*)
- Les États membres doivent **tenir compte de « toute vulnérabilité éventuelle »** affectant la capacité des personnes handicapées à suivre la procédure et à se faire comprendre
- Ces mesures ne peuvent affecter l'essence même du droit des parties adverses à un procès équitable

I. Personne accusée

Droit à un procès équitable (3)

Directive 2010/64 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales

- Les personnes handicapées se trouvent « dans une situation de faiblesse potentielle, notamment en raison de tout trouble physique affectant leur capacité à communiquer effectivement »
- Les personnes qui « ne parlent ou ne comprennent pas la langue de la procédure pénale » se voient offrir l'assistance d'un interprète et la traduction des documents essentiels
- Assistance appropriée pour les « personnes présentant des troubles de l'audition ou de la parole »

I. Personne accusée

Droit à un procès équitable (4)

- Droit d'être entendu en personne (Directive (UE) 2016/343 portant renforcement de certains aspects de la présomption d'innocence et du droit d'assister à son procès dans le cadre des procédures pénales)
- Droit à obtenir la convocation et l'interrogation des témoins (Cour EDH, *Blokhin c. Russie*)
- Droit à l'aide juridictionnelle (Recommandation de la Commission du 27 novembre 2013 relative au droit à l'aide juridictionnelle accordé aux personnes soupçonnées ou poursuivies dans le cadre de procédures pénales)

II. Victimes et témoins (1)

- Obligation pour les États d'aménager dûment les procédures pour protéger les personnes n'ayant pas de capacités judiciaires (Cour EDH, *R.P. et autres c. Royaume-Uni*)
- Les États doivent adopter des mesures permettant la collecte de preuves/la participation effectives des personnes handicapées
- Les tribunaux doivent réaliser un juste équilibre entre le droit de la personne accusée à un procès équitable, le droit aux poursuites et le droit des victimes et témoins

II. Victimes et témoins (2)

Mesures d'action positive

Directive 2012/29 établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité

- **Considérant 9 : interdiction de la discrimination** fondée sur le handicap
- **Considérant 15 : accessibilité** aux bâtiments et accès à l'information
- **Considérant 21 : fourniture d'informations** et de conseils en tenant compte des capacités intellectuelles et des troubles de l'audition ou de la parole d'une personne
- **Article 3, paragraphe 2 : communications dans un langage simple et accessible**
- **Article 22 : évaluation personnalisée des victimes afin d'identifier les besoins spécifiques en matière de protection - y compris en cas de victimes handicapées**

II. Victimes et témoins (3)

Formulation de déclarations

- Droit d'être entendu en personne :
 - La capacité à témoigner doit être établie :
 - « la simple supposition selon laquelle une personne atteinte de schizophrénie doit être exclue de la procédure n'est pas suffisante » (Cour EDH, *Lashin c. Russie*)
 - Capacité à comprendre, à l'aide d'explications appropriées de conseillers juridiques et d'experts d'autres disciplines, selon les besoins du cas individuel, les sujets pour lesquels il est probable que la personne doive donner son consentement ou prendre une décision dans le cadre de la procédure
 - Les règles procédurales ne doivent pas être appliquées de façon formaliste, mais prendre en considération la vulnérabilité de la personne
 - Recours à des intermédiaires / facilitateurs
 - Liaisons télévisées en direct / témoignages vidéo

II. Victimes et témoins

Accessibilité

Accessibilité physique des bâtiments et espaces ouverts au public (postes de police, bâtiments des tribunaux, salles d'audience, lieux de collecte de preuves)

- Un obstacle à l'accès peut enfreindre le droit à un procès équitable au même titre qu'un obstacle juridique
- La limitation physique de l'accès à un tribunal ne peut aller jusqu'au point d'interférer avec le droit d'une personne à une audience équitable
- Un défaut d'accessibilité est une violation du droit à un procès équitable en l'absence de moyens alternatifs (Cour EDH, *Farcas c. Roumanie*)
- Un défaut d'accessibilité peut constituer une discrimination (Cour suprême des États-Unis, *Tennessee c. Lane*)

II. Victimes et témoins (5)

Accessibilité

- **Information, communications** et procédures disponibles dans des formats alternatifs (Braille, langue simplifiée et langue des signes)
- • Mise à disposition de formes d'**aide humaine ou animalière de services de médiateurs**

II. Victimes et témoins (6)

Droit à un recours effectif

- Capacité à contester les condamnations anormalement légères
- Disponibilité de sanctions pénales : pénalisation des délits motivés par la haine contre les personnes handicapées (Cour EDH, *Dorđević c. Croatie*)
- Droit légal de porter plainte au pénal/procédure d'indemnisation civile (Cour EDH, *X et Y c. Pays-Bas*)
- Représentation juridique des personnes placées dans une institution (Cour EDH, *Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie*)
- Indemnisation : directive 2004/80/CE du Conseil relative à l'indemnisation des victimes de la criminalité

III. Capacité juridique (1)

Article 12 de la CDPH des NU

Privation de la capacité juridique

- Privation de la personnalité morale
- Régime de décision par substitution / tutelle
- Impossibilité de saisir la justice sans tuteur / représentant légal
- La privation de la capacité juridique empêche l'accès à la justice (Cour EDH, *Kędzior c. Pologne*)

Reconnaissance de la personnalité juridique dans des conditions d'égalité

- Les personnes handicapées ont la capacité juridique (droit d'arrêter leurs propres décisions et d'exercer leurs droits - saisie de la justice) sur la base de l'égalité avec les autres dans tous les domaines de l'existence
- Mesures appropriées pour que les personnes handicapées puissent accéder à l'aide qui peut leur être nécessaire pour exercer leur capacité juridique

III. Capacité juridique (2)

- a) Droit d'accéder directement à la justice pour rétablir sa capacité juridique (Cour EDH, *Kędzior c. Pologne*, n° 45026/07)
- b) Droit à une procédure contradictoire (Cour EDH, *H.F. c. Slovaquie*)
- c) Droit d'être entendu en personne (*Shtukaturov c. Russie*)
- d) Droit à une représentation en justice adéquate (Cour EDH, *A.N. c. Lituanie*) et indépendante (Cour EDH, *Ivinovic c. Croatie*), disponibilité et adéquation de systèmes d'aide juridictionnelle (Cour EDH, *Plesó c. Hongrie*)
- e) Droit à la notification d'une procédure de mise sous tutelle (Cour EDH, *Sykora c. République tchèque*)
- f) Droit à l'analyse judiciaire de la capacité juridique (*M.S. c. Croatie*)

IV. Procédures relatives à la privation de liberté

Placement dans des centres d'aide sociale, hospitalisation non volontaire, détention préventive, obligation de détention psychiatrique médico-légale

- Droit à un contrôle juridictionnel périodique et automatique de la détention / droit d'introduire un recours devant un tribunal (Cour EDH, *Shtukaturov c. Russie*)
- Représentation en justice : droit de donner des instructions à un avocat et obligation pour l'avocat de suivre les instructions de son client (Cour EDH, *V.K. c. Russie*)
- Droit à une information « significative » sur les motifs de la détention (Cour EDH, *Z.H. c. Hongrie*)

ZUGANG ZUM GERICHT FÜR MENSCHEN MIT BEHINDERUNGEN

Boglárka Benkó



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Überblick

- Begriffsbestimmungen
- Ursprünge des Rechts auf Zugang zur Justiz (1. Recht auf einen wirksamen Rechtsbehelf, 2. Recht auf ein faires Verfahren: inhaltliche und verfahrenstechnische Aspekte des Rechts auf ein faires Verfahren)
- Bestimmungen der UN-BRK zum Zugang zur Justiz
- EU-Bestimmungen zum Zugang zur Justiz
- Benachteiligende Hemmnisse beim Zugang zur Justiz
- Spezifische Aspekte des Zugangs zur Justiz

Zugang zur Justiz

- wirksamer Zugang von Menschen zu den im Rahmen der Rechtspflege verwendeten Systemen, Verfahren, Informationen und Räumlichkeiten (Gerichte, Strafverfolgungsbeamte, Strafvollzugssysteme und andere Stellen)
- Nutzung des Justizsystems für Wiedergutmachung / Entscheidung über zivilrechtliche Klagen
- Beitrag zur Rechtspflege für die Gesellschaft (als Rechtsanwälte, Geschworene, Richter, Zeugen...)
- Recht auf Verkündung der Entscheidung eines Justizorgans über die strafrechtliche Verantwortung der Person

Ursprünge des Rechts auf Zugang zur Justiz

- I. Vor der UN-BRK
 1. Recht auf einen wirksamen Rechtsbehelf
 - Artikel 8 der Allgemeinen Erklärung der Menschenrechte
 - Artikel 13 der EMRK
 - Artikel 47 der EU-Charta der Grundrechte

2. Recht auf ein faires Verfahren

- Artikel 10 der Allgemeinen Erklärung der Menschenrechte
- Artikel 13 des Internationalen Paktes über bürgerliche und politische Rechte und Allgemeine Bemerkung Nr. 32
- Artikel 6 der EMRK und *Golder gegen Vereinigtes Königreich*: Das Recht auf Zugang zu Gerichten ist nicht absolut, sondern kann Beschränkungen unterliegen; ...das Recht auf Zugang verlangt schon seiner Natur nach eine Regelung durch den Staat (siehe auch EGMR, *Ashingdane gegen Vereinigtes Königreich*)
- Artikel 47 der EU-Charta der Grundrechte

Inhaltliche und verfahrenstechnische Aspekte des Rechtes auf ein faires Verfahren

- gleichberechtigter Zugang zu und Gleichheit vor Gerichten
- Recht auf rechtliche Beratung und Vertretung
- Recht auf Verfahrensgerechtigkeit
- Recht auf Gehör ohne unangemessene Verzögerungen
- Recht auf ein zuständiges, unabhängiges und unparteiisches, auf Gesetz beruhendes Gericht (öffentliche Verkündung von Urteilen)
- Unschuldsvermutung
- Recht auf eine öffentliche Anhörung
- Recht auf kostenfreie Bereitstellung eines Dolmetschers, sofern erforderlich

Zugang zur Justiz in der UN-BRK

- Artikel 13 Zugang zur Justiz
 - wirksamer Zugang zur Justiz **gleichberechtigt mit anderen**
 - in **allen Phasen der Rechtspflege**, auch in Vorverfahrensphasen, beispielsweise den anfänglichen Ermittlungen der Polizei
 - sowohl **unmittelbare als auch mittelbare Teilnahme**, einschließlich als Zeugen
 - verfahrensbezogene und altersgemäße **Vorkehrungen**
 - **Schulungen** für die im Justizwesen und bei der Polizei tätigen Personen
- Artikel 12 Gleiche Anerkennung vor dem Recht
- Artikel 5 Gleichberechtigung und Nichtdiskriminierung
- Artikel 9 und 21 Zugänglichkeit

Zugang zur Justiz im Unionsrecht

- Artikel 67 Absatz 4 des Vertrags über die Arbeitsweise der Europäischen Union: „Die Union erleichtert den Zugang zum Recht, insbesondere durch den Grundsatz der gegenseitigen Anerkennung gerichtlicher und außergerichtlicher Entscheidungen in Zivilsachen.“
- Artikel 10 (Nichtdiskriminierung) des AEUV: Bei der Festlegung und Durchführung ihrer Politik und ihrer Maßnahmen zielt die Union darauf ab, Diskriminierungen aus verschiedenen Gründen, beispielsweise einer Behinderung, zu bekämpfen
- Artikel 21 der EU-Charta der Grundrechte: Diskriminierungen, insbesondere wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der genetischen Merkmale, der Sprache, der Religion oder der Weltanschauung, der politischen oder sonstigen Anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung, des Alters oder der sexuellen Ausrichtung, sind verboten.

Benachteiligende Hemmnisse beim Zugang zur Justiz

- Entziehung der Rechts- und Handlungsfähigkeit
- Einrede der Unzurechnungsfähigkeit / Verhandlungsunfähigkeit
- fehlende Zugänglichkeit / Fehlen von angemessenen Vorkehrungen (Verfahren, Gebäude)
- Stereotype und Vorurteile in Bezug auf die Fähigkeit, Verfahrensrechte wahrzunehmen
- Fehlen einer angemessenen Vertretung
- Fehlen verfügbarer Rechtsbehelfe
- Unterbringung in einer Einrichtung
- angstbedingtes Widerstreben, Straftaten zu melden
- finanzielle Hindernisse

Spezifische Aspekte des Zugangs zur Justiz

- I. Beschuldigte
- II. Opfer und Zeugen
- III. Rechts- und Handlungsfähigkeit
- IV. Freiheitsentziehung
- V. Zugänglichkeit
- VI. Angemessene Vorkehrungen

I. Beschuldigte

effektive Wahrnehmung von Verfahrensrechte

- EGMR, *S.C. gegen das Vereinigte Königreich*
**mit Hilfe von einem Dolmetscher,
Rechtsanwalt, Sozialarbeiter oder Freund**
 - Verständnis des Prozesses (einschließlich der Bedeutung einer Strafe, die verhängt werden kann)
 - verstehen was vor Gericht gesagt wird
 - Verstehen was von der Zeugen gesagt wird
 - seine eigene Version erklären können, Widerspruch erheben können
 - verstehen welche Tatsachen für den Fall relevant sind

I. Beschuldigte

Ausschluss der strafrechtlichen Verantwortung / Verhandlungsunfähigkeit

- *Marlon James Noble gegen Australien* (Ausschuss für die Rechte von Menschen mit Behinderungen)
 - Anwendung von Sicherungsmaßnahmen: Einweisung in forensisch-psychiatrische Einrichtungen zur Sicherungsverwahrung von unbestimmter Dauer aufgrund von Gefährlichkeit / öffentlichem Interesse – Verstoß gegen Artikel 15 Diskriminierung: (gilt nur für Menschen mit geistiger Behinderung und sieht keine angemessenen Vorkehrungen vor) – Verstoß gegen Artikel 5 Absätze 1 und 2 der UN-BRK.
 - Fehlen von Garantien für ein faires Verfahren / Zugang zum Gericht, um eine Entscheidung in einem Strafverfahren zu erwirken – Verstoß gegen Artikel 15
 - keine angemessene Unterstützung, um die betreffende Person verhandlungsfähig zu machen – Verstoß gegen Artikel 12

I. Beschuldigte

Rechte auf ein faires Verfahren (1)

- **Empfehlung der Kommission vom 27. November 2013 über Verfahrensgarantien in Strafverfahren für verdächtige oder beschuldigte schutzbedürftige Personen**
 - Schutzbedürftige Personen: Personen, die aufgrund ihres Alters, ihrer geistigen oder körperlichen Verfassung oder aufgrund von Behinderungen nicht in der Lage sind, einem Strafverfahren zu folgen oder tatsächlich daran teilzunehmen
 - Recht auf Belehrung und Unterrichtung: in einem für Menschen mit Behinderungen zugänglichen Format
 - Siehe auch: EGMR, *Z.H. gegen Ungarn*
 - Recht auf Zugang zu einem Rechtsbeistand: Ist eine schutzbedürftige Person nicht in der Lage, das Verfahren zu verstehen und ihm zu folgen, sollte auf das Recht auf Zugang zu einem Rechtsbeistand nicht verzichtet werden können.
 - Recht auf Unterstützung durch einen *geeigneten Erwachsenen* (siehe auch EGMR, *Z.H. gegen Ungarn*)
 - Befragungen: Befragungen in der vorgerichtlichen Ermittlungsphase sollten audiovisuell aufgezeichnet werden

I. Beschuldigte

Rechte auf ein faires Verfahren (2)

- Recht auf angemessene Vorkehrungen: Strafverfahren werden in einer Weise geführt, die das Alter des Beschuldigten, seinen Reifegrad sowie seine intellektuellen und emotionalen Fähigkeiten in vollem Umfang berücksichtigt, und es werden Schritte unternommen, um seine Fähigkeit, das Verfahren zu verstehen und am Verfahren teilzunehmen, zu fördern. (EGMR, *T und V gegen das Vereinigte Königreich*)
- Innerstaatliche Behörden verfügen über einen gewissen Ermessensspielraum, um die relevanten verfahrenstechnischen Regelungen zu treffen und so eine geordnete Rechtspflege sicherzustellen und die Gesundheit der betreffenden Person zu schützen
- Solche Maßnahmen sollten das Recht der anderen Parteien auf ein faires Verfahren im Wesentlichen unberührt lassen

I. Beschuldigte

Rechte auf ein faires Verfahren (3)

Richtlinie 2010/64 über das Recht auf Dolmetschleistungen und Übersetzungen in Strafverfahren:

- Menschen mit Behinderungen befinden sich „in einer potenziell schwachen Position (...), insbesondere weil sie körperliche Gebrechen haben, die ihre Fähigkeit beeinträchtigen, sich effektiv zu verständigen“
- Personen, die die Verfahrenssprache nicht sprechen oder verstehen, werden ein Dolmetscher und eine Übersetzung der wesentlichen Unterlagen zur Verfügung gestellt
- Angemessene Unterstützung für „hör- und sprachgeschädigte Personen“
- Die Mitgliedstaaten haben **etwaige Benachteiligungen**, die die Fähigkeit der Personen beeinträchtigen, dem Verfahren zu folgen und sich verständlich zu machen, zu **berücksichtigen**

III. Beschuldigte

Rechte auf ein faires Verfahren (4)

- Recht auf Anwesenheit in der Verhandlung (Richtlinie 2016/343 über die Stärkung bestimmter Aspekte der Unschuldsvermutung und des Rechts auf Anwesenheit in der Verhandlung in Strafverfahren)
- Recht, Zeugen laden und befragen zu lassen (*Blokhin gegen Russland*)
- Recht auf Prozesskostenhilfe (Empfehlung der Kommission vom 27. November 2013 zum Recht auf Prozesskostenhilfe in Strafverfahren für Verdächtige oder Beschuldigte)

II. Opfer und Zeugen (1)

- Verpflichtung der Staaten, die erforderlichen verfahrenstechnischen Regelungen zu treffen, um Menschen mit fehlender Prozessfähigkeit zu schützen (EGMR, *R.P. und andere gegen das Vereinigte Königreich*)
- Staaten sollten Maßnahmen treffen, um wirksame Zeugenaussagen / die Beteiligung von Menschen mit Behinderungen zu ermöglichen
- Rolle des Gerichts bei der Erreichung eines ausgewogenen Verhältnisses zwischen den Rechten des Beschuldigten auf ein faires Verfahren, dem Recht der Staatsanwaltschaft und dem Recht der Opfer/Zeugen

IV. Opfer und Zeugen (3)

Abgabe von Erklärungen

- Recht, persönlich angehört zu werden:
 - Feststellung der Fähigkeit, als Zeuge auszusagen:
 - „eine einfache Annahme, dass eine unter Schizophrenie leidende Person vom Verfahren ausgeschlossen werden muss, reicht nicht aus“ (EGMR, *Salontajui-Drobnjak gegen Serbien*)
 - Fähigkeit, mithilfe einer sachgerechten Erläuterung durch Rechtsberater und gegebenenfalls Sachverständige anderer Disziplinen die Fragen zu verstehen, zu denen im Verlauf des Verfahrens voraussichtlich eine Zustimmung oder Entscheidung der betreffenden Person erforderlich war
 - Verfahrensvorschriften werden nicht formalistisch angewandt, sondern berücksichtigen die Schutzbedürftigkeit der Person
 - Einsatz von Mittelspersonen / Prozessbegleitern
 - Live-Fernsehübertragungen / Videoaufzeichnungen von Zeugenaussagen

II. Opfer und Zeugen (2)

Positive Maßnahmen

Richtlinie 2012/29 über Mindeststandards für die Rechte, die Unterstützung und den Schutz von Opfern von Straftaten

- Erwägungsgrund (9) **keine Diskriminierung** aus Gründen einer Behinderung
- Erwägungsgrund (15) Zugänglichkeit von Gebäuden und Zugang zu Informationen
- Erwägungsgrund (21) Erteilung von Informationen und Ratschlägen unter Berücksichtigung der geistigen Fähigkeiten sowie der Verständnis- oder Verständigungsprobleme einer Person
- Artikel 3 Absatz 2 **Kommunikation in einfacher und verständlicher Sprache**
- Artikel 22 **Individuelle Begutachtung der Opfer zur Ermittlung besonderer Schutzbedürfnisse – auch Opfer mit Behinderungen**

I. Opfer und Zeugen (4)

Zugänglichkeit

- **Zugänglichkeit der physischen Umwelt** Artikel 2 der UN-BRK: von Gebäuden und Räumen, die der Öffentlichkeit offenstehen (Polizeidienststellen, Gerichtsgebäude, Verhandlungssäle, Beweisaufnahmeorte)
- Die Behinderung des Zugangs konnte, wie ein rechtliches Hindernis, eine Verletzung des Rechtes auf ein faires Verfahren darstellen
- Die physische Beschränkung des Zugangs zu einem Gericht konnte nicht soweit gehen, dass sie eine Verletzung des Rechtes einer Person auf ein faires Verfahren darstellte
- Fehlender Zugang stellt einen Verstoß gegen das Recht auf ein faires Verfahren dar, wenn keine Alternativen verfügbar sind (EGMR, *Farcas gegen Rumänien*)
- Mangelnde Zugänglichkeit kann Diskriminierung darstellen (US Supreme Court, *Tennessee gegen Lane*)

I. Opfer und Zeugen (5)

Zugänglichkeit

Zugänglichkeit von Verfahren, Information und Kommunikation

- **Flexiblie Anwendung von Verfahrensordnung**
- Verfügbarkeit von **Information, Kommunikation** und Verfahren in alternativen Formaten
 - Brailleschrift
 - leicht verständliche Sprache
 - Zeichensprache
 - Bereitstellung von **menschlicher Assistenz und Mittelspersonen**

II. Opfer und Zeugen (6)

Recht auf einen wirksamen Rechtsbehelf

- Beschwerdemöglichkeit gegen zu milde Strafen
- Verfügbarkeit strafrechtlicher Sanktionen: strafrechtliche Verfolgung von hassmotivierten Straftaten gegen Menschen mit Behinderungen (EGMR, *Dorđević gegen Kroatien*)
- Klagebefugnis, um Strafanzeige zu erstatten/zivilrechtliche Schadensersatzklage zu erheben (EGMR, *X. und Y. gegen die Niederlande*)
- Rechtliche Vertretung von Menschen in Einrichtungen (EGMR, *Centre for Legal Resources im Namen von Valentin Câmpeanu gegen Rumänien*)
- Entschädigung: Richtlinie 2004/80/EG des Rates zur Entschädigung der Opfer von Straftaten

III. Rechts- und Handlungsfähigkeit (1)

Artikel 12 der UN-BRK

Entziehung der Rechts- und Handlungsfähigkeit

- Entziehung des Persönlichkeitsrechts
- System der ersatzweisen Entscheidungsfindung / Vormundschaft
- Kein Klagerecht ohne Vormund / gesetzlichen Vertreter
- Entziehung der Rechts- und Handlungsfähigkeit verhindert den Zugang zur Justiz (EGMR, *Kędzior gegen Polen*)

Gleiche Anerkennung vor dem Recht

- Alle Menschen mit Behinderungen genießen in allen Lebensbereichen gleichberechtigt mit anderen Rechts- und Handlungsfähigkeit (das Recht, eigene Entscheidungen zu treffen und ihre Rechte auszuüben – gerichtliche Schritte zu unternehmen)
- Geeignete Maßnahmen, um Menschen mit Behinderungen Zugang zu der Unterstützung zu verschaffen, die sie bei der Ausübung ihrer Rechts- und Handlungsfähigkeit gegebenenfalls benötigen

III. Rechts- und Handlungsfähigkeit (2)

- a) Recht auf direkten Zugang zum Gericht zur Wiederherstellung der Rechts- und Handlungsfähigkeit (EGMR, *Kedzior gegen Polen*, Nr. 45026/07)
- b) Recht auf ein kontradiktorisches Verfahren (EGMR, *H.F. gegen Slowakei*)
- c) Recht, persönlich angehört zu werden (*Shtukaturov gegen Russland*)
- d) Recht auf angemessene (EGMR, *A.N. gegen Litauen*) und unabhängige (EGMR, *Ivinovic gegen Kroatien*) rechtliche Vertretung, Verfügbarkeit und Angemessenheit von Regelungen zur Prozesskostenhilfe (EGMR, *Plesó gegen Ungarn*),
- e) Recht auf Unterrichtung über die Einleitung eines Vormundschaftsverfahrens (EGMR, *Sykora gegen Tschechische Republik*)
- f) Recht auf gerichtliche Beurteilung der Rechts- und Handlungsfähigkeit (*M.S. gegen Kroatien*)

IV. Verfahren betreffend die Entziehung der Freiheit

Unterbringung in Sozialfürsorgeeinrichtungen, Zwangseinweisung, Untersuchungshaft, Verpflichtung zu forensisch-psychiatrischem Zwangsaufenthalt

- Recht auf eine automatische, regelmäßige gerichtliche Überprüfung des Gewahrsams / Recht, bei einem Gericht Klage zu erheben (EGMR, *Shtukaturov gegen Russland*)
- Rechtliche Vertretung: Recht, einem Rechtsanwalt Anweisungen zu erteilen, und Verpflichtung von Rechtsanwälten, den Anweisungen von Mandanten Folge zu leisten (EGMR, *V.K. gegen Russland*)
- Recht auf „aussagekräftige“ Informationen über die Gründe für die Ingewahrsamnahme (EGMR, *Z.H. gegen Ungarn*)

X.Y., the applicant, is a man who is intellectually disabled. On 14 February 2001 he was taken, with his two brothers, into public care by the child welfare authorities and placed temporarily with a foster family with whom they had already been living since August 2000. The foster family lived in a village situated about 50 km from the applicant's home town, which is in the South of Finland.

In June 2006 the foster family, the applicant and one of his brothers moved to a village in the North of Finland. The removal of the children was not authorised by the competent child welfare authority. The applicant had a close relationship with his foster parents who accompanied the applicant to his school and to other activities, if needed.

On 11 July 2007 the competent child welfare authority decided to remove the applicant from the foster family and to place him in a disabled children's home in his home town in southern Finland. The authority found that the foster care had not been satisfactory in the light of the fact that the foster parents had made important decisions without consulting the child welfare authorities, such as moving north.

On 23 July 2008 the applicant turned 18. On 13 August 2008 he began studying at a local vocational school. On 4 November 2008 a mentor (guardian) was appointed for the applicant for matters other than those pertaining to his person. The applicant could thus freely make his own decisions in matters pertaining to his own person.

On 30 December 2008 the social welfare authorities requested the District Court to appoint a mentor for the applicant also for matters pertaining to his person. The request was, *inter alia*, based on the fact that a conflict had emerged between the child welfare service and the applicant's former foster parents as to where the applicant should live. The appointment of an external mentor was therefore needed in order to assess the applicant's best interests and settle the matter accordingly. The applicant as well as his biological parents were heard before the court.

On 25 January 2009 the former foster parents, who he considered to be his real family, took the applicant to their home to live with them.

On 18 June 2009 the District Court, on the basis of the Guardianship Service Act, appointed a mentor for the applicant in matters concerning his property and economy, as well as matters pertaining to his person to the extent that

the applicant was unable to understand their significance. The court found that, owing to his diminished mental faculties, the applicant was incapable of looking after his own interests and taking care of his personal affairs.

On 7 February 2011, after having received a psychologist's report dated 26 November 2010 on the applicant, the appointed mentor decided, against the applicant's will, that it was in his best interests for him to live in a social care home for disabled adults.

On 8 April 2011 the applicant asked the District Court to discharge the mentor appointed for him from her duties as far as matters pertaining to his place of residence and education were concerned. On the alternative, he requested that another person of his choosing be appointed as his mentor in those matters. The District Court heard the applicant in person, as well as witnesses including the applicant's mentor, his former foster mother, his brother and two staff members from his housing service. According to the record of the testimony of the applicant's mentor, she had discussed his placement in a social care home with him. The mentor was of the view that the applicant did not understand all the consequences of the plan, and did not realise that the good things in his present situation would not be relocated with him. In the light of all the circumstances, the mentor considered that the move would have been against the applicant's interests. Relying on the testimony of the mentor, the District Court found that the applicant lacked the necessary mental capacity to assess his situation and refused his requests.

Subsequently, the applicant lodged an action challenging his placement in the social care home and alleging the unlawful deprivation of his liberty. His action was dismissed on the grounds that his placement was arranged by his mentor who, responsible to make decisions concerning the applicant's person gave her consent to the arrangement. Thus, his placement could not be regarded as deprivation of liberty.

X.Y., le demandeur, a un handicap intellectuel. Le 14 février 2001, les autorités de protection de l'enfance l'ont mis sous assistance publique et confié temporairement, avec ses deux frères, à la garde d'une famille d'accueil où la fratrie habitait déjà depuis le mois d'août 2000. La famille d'accueil vivait dans un village situé à environ 50 km de la ville d'origine du demandeur, dans le sud de la Finlande.

En juin 2006, la famille d'accueil, le demandeur et l'un de ses frères ont déménagé dans un village du nord de la Finlande. Les services compétents pour la protection de l'enfance n'avaient pas autorisé le déplacement des enfants. Le demandeur entretenait un lien étroit avec ses parents d'accueil, qui l'accompagnaient à l'école et à d'autres activités si nécessaire.

Le 11 juillet 2007, les services compétents pour la protection de l'enfance ont décidé d'enlever le demandeur à la famille d'accueil et de le placer dans un foyer pour enfants handicapés dans sa ville d'origine, dans le sud de la Finlande. Ces services estimaient que la prise en charge n'avait pas été satisfaisante car les parents d'accueil avaient pris des décisions importantes sans consulter les autorités de protection de l'enfance, comme le déménagement dans le nord.

Le 23 juillet 2008, le demandeur a fêté ses 18 ans. Le 13 août 2008, il a commencé à étudier dans une école professionnelle locale. Le 4 novembre 2008, un tuteur a été désigné au demandeur pour les affaires autres que celles concernant sa personne. Le demandeur pouvait donc prendre librement ses propres décisions dans les domaines concernant sa personne.

Le 30 décembre 2008, les autorités de protection de l'enfance ont saisi le tribunal régional afin qu'il désigne également un tuteur au demandeur pour les sujets concernant sa personne. Cette requête était due, entre autres, à ce qu'un conflit avait éclaté entre les services de protection de l'enfance et les anciens parents d'accueil du demandeur quant à l'endroit où le demandeur devait résider. Il était donc indispensable qu'un tuteur externe soit désigné pour évaluer l'intérêt supérieur du demandeur et régler le problème en conséquence. Le tribunal a entendu à la fois le demandeur et ses parents biologiques.

Le 25 janvier 2009, les anciens parents d'accueil du demandeur, qui formaient à ses yeux sa véritable famille, ont repris le demandeur chez eux.

Le 18 juin 2009, le tribunal régional a désigné une tutrice au demandeur, sur le fondement de la loi relative aux services de tutelle, pour les affaires concernant ses biens et sa situation économique ainsi que les affaires concernant sa personne dans la mesure où le demandeur était inapte à comprendre leur

importance. Il a estimé qu'en raison de ses facultés mentales déficientes, le demandeur n'était pas capable de veiller à ses propres intérêts et de s'occuper de ses affaires personnelles.

Le 7 février 2011, la tutrice désignée a reçu le rapport d'un psychologue daté du 26 novembre 2010 sur le demandeur et décidé, contre la volonté du demandeur, qu'il était dans son intérêt supérieur de vivre dans un foyer d'aide sociale pour adultes handicapés.

Le 8 avril 2011, le demandeur a saisi le tribunal régional afin qu'il révoque la tutrice de ses fonctions relatives aux affaires concernant son lieu de résidence et son éducation. À titre subsidiaire, il a demandé à ce qu'une autre personne de son choix soit désignée pour exercer sa tutelle dans ces matières. Le tribunal régional a entendu personnellement le demandeur, ainsi que plusieurs témoins, parmi lesquels sa tutrice, son ancienne mère d'accueil, son frère et deux membres du personnel de son service de logement. D'après le compte rendu du témoignage de la tutrice, elle avait discuté avec le demandeur de son placement dans un foyer d'aide sociale. La tutrice pensait que le demandeur n'avait pas compris toutes les conséquences de ce projet et n'était pas conscient que les éléments positifs de sa situation actuelle ne l'accompagneraient pas s'il déménageait. À la lumière de toutes les circonstances du cas, la tutrice considérait que le déménagement aurait été contraire à l'intérêt du demandeur. S'appuyant sur le témoignage de la tutrice, le tribunal régional a jugé que le demandeur ne possédait pas les capacités mentales nécessaires pour apprécier sa situation et il a rejeté ses requêtes.

Plus tard, le demandeur a intenté une action dans laquelle il a contesté son placement dans le foyer d'aide sociale et allégué qu'il avait été illégalement privé de liberté. Il a été débouté au motif que son placement avait été organisé par sa tutrice, qui ayant la responsabilité de prendre les décisions relatives à la personne du demandeur, avait donné son consentement à cette disposition. Son placement ne pouvait donc être qualifié de privation de liberté.

Academy of European Law



THE EUROPEAN CONVENTION ON HUMAN RIGHTS, UNCRPD

&

THE LEGAL RIGHTS OF CITIZENS SUFFERING MENTAL ILL- HEALTH

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Trier, 9 June 2017



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Brief

In keeping with my brief, this presentation for European judges on the detention of persons with disabilities, 'with a focus, for example, on conditions for ordering the detention of persons with disabilities, the treatment in detention, relevant EU law, international and domestic case-law.' The slides and case studies are provided separately.

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A – THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND MENTAL HEALTH

INTRODUCTION

The European Convention on Human Rights is an international treaty under which the member states of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. The Convention, which was signed on 4 November 1950 in Rome, entered into force in 1953. It is the modern day Magna Carta and one of the most important documents in legal history.

The European Court of Human Rights is an international court which was set up in 1959. It rules on individual or state applications which allege violations of Convention rights. Since 1998 it has sat as a full-time court.

The court has delivered more than 10,000 judgments. These are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas. The case-law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe.

This paper summarises the ways in which the Convention applies to people who suffer mental ill-health or who are alleged to be affected by such a condition. The most important case law is summarised. The material is arranged under the following headings:

- Article 2 *Protection of right to life* *Page 5*
- Article 3 *Inhuman or degrading treatment* *Page 10*
- Article 5(1) *Detention of persons of unsound mind* *Page 31*
- Article 5(2) *Providing reasons for the detention* *Page 56*
- Article 5(4) *Reviews of the lawfulness of the detention* *Page 58*
- Article 6(1) *Determination of civil rights* *Page 66*
- Article 8 *Right to respect for private life* *Page 69*
- Article 12 *Right to Marry* *Page 78*
- Article 14 *Discrimination* *Page 79*
- Protocol 1, Art. 3 *Right to Vote* *Page 80*
- Protocol 4, Art. 2 *Freedom of Movement* *Page 81*

Sources and acknowledgments

This paper draws heavily on the work and insights of staff of the European Court of Human Rights and the Council of Europe and in particular the following publications and sources to which the reader is referred:

- The HUDOC database.¹
- *Guide on Article 5 of the Convention: Right to Liberty and Security*, Council of Europe/European Court of Human Rights, 2014.
- *Thematic Report: Health-related issues in the case-law of the European Court of Human Rights*, Council of Europe/European Court of Human Rights, June 2015.
- The following factsheets published by the European Court of Human Rights: *Detention and mental health* (September 2016), *Right to vote* (October 2016), *Elderly people and the ECHR* (October 2016), *Persons with disabilities and the European Convention on Human Rights* (March 2017).

Note on the citation of cases

The form of citation for judgments and decisions published from 1 November 1998 to the end of 2007 follows the following pattern: name of case (in italics), application number, paragraph number (for judgments), abbreviation of the European Court of Human Rights (ECHR), year and number of volume. From the beginning of 2008, there is no volume number (e.g., ECHR 2008, ECHR 2009, etc.).

Any variation from that is added in brackets after the name of the case:

- '(dec.)' for a decision on admissibility;
- '(preliminary objections)' for a judgment concerning only preliminary objections;
- '(just satisfaction)' for a judgment concerning only just satisfaction;
- (revision) for a judgment concerning revision;
- '(interpretation)' for a judgment concerning interpretation;
- '(striking out)' for a judgment striking the case out;
- '(friendly settlement)' for a judgment concerning a friendly settlement;
- '[GC]' where the judgment or decision has been given by the Grand Chamber of the court.

§2 — ARTICLE 2

1 The HUDOC database provides access to the case-law of the court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

Article 2 provides that everyone's right to life shall be protected by law.²

ARTICLE 2

Right to life

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

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

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

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

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

Under Article 2 state agents are obliged to refrain from acts or omissions of a life-threatening nature or which place the health of individuals at grave risk.³ Without Convention-compliant justification, they must not use lethal force or force which, while not resulting in death, gives rise to serious injury.

The positive obligation

States also have positive obligations under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction.⁴ An issue may arise under Article 2 where it is shown that the authorities of a contracting state have put a person's life at risk through the denial of health care which they have undertaken to make available to the population in general.⁵

Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.⁶

2 Article 10 of the UNCRPD is also concerned with the right to life: 'States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.' The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

3 *İlhan v Turkey* [GC], no. 22277/93, 27 June 2000. In the absence of any indication to the contrary the cited text is a judgment on the merits delivered by a Chamber of the court.

4 *Cyprus v Turkey* [GC], no. 25781/94, 10 May 2001, §219; *LCB v the United Kingdom*, judgment of 9 June 1998, Reports 1998-III, p140, §36.

5 *Cyprus v Turkey* [GC], supra, §219; *Nitecki v Poland* (dec), no. 65653/01, 21 March 2002; *Oyal v Turkey*, no. 4864/05, 23 March 2010.

6 *Keenan v United Kingdom*, no. 27229/95, 3 April 2001, [2001] ECHR 242, §90; *Tais v France*, no. 39922/03, 1 June 2006, §97.

Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.⁷

Hospitals and (social) care homes

Article 2 requires states ‘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, whether in the public or the private sector, can be determined and those responsible made accountable ...’⁸

Dodov v Bulgaria (2008)⁹ concerned the disappearance from a state-run nursing home for the elderly of a patient called Mrs Stoyanova who was suffering from Alzheimer’s disease. Nursing home staff had been instructed not to leave her unattended. However, a nursing orderly left her alone in the home’s courtyard and, on returning to fetch her a few minutes later, found that she was no longer there. The area of the nursing home was searched in vain and police were alerted that day. The police interviewed witnesses and seven days later issued a press release. They also subsequently checked patients admitted to psychiatric clinics and leads given by the public. Mrs Stoyanova has never been seen since. Her son, Mr Dodov, alleged a breach of Article 2.

The court held that there had been a violation of Article 2. It was reasonable to assume that Mrs Stoyanova had died. Given the instructions never to leave her unattended, there was a direct link between the failure to supervise her and her disappearance. Despite the availability in Bulgarian law of three avenues of redress – criminal, disciplinary and civil – the authorities had not, in practice, provided the applicant with the means to establish the facts surrounding his mother’s disappearance, and to bring to account those people or institutions that had breached their duties. Faced with an arguable case of negligent acts endangering human life, the legal system as a whole had thus failed to provide the adequate and timely response required by the state’s procedural obligations under Article 2.¹⁰ There had been no violation of Article 2 with regard to the police’s response. Bearing in mind the practical realities of daily police work, the court was not convinced that the police’s reaction to the disappearance had been inadequate.

The applicant in ***Watts v. the United Kingdom (2010)***¹¹ was 106 years of age. She had been living for several years in a care home owned and managed by the city council. The city council decided to close the home for budgetary reasons. The applicant complained that her involuntary transfer to a new residential care home resulted in a risk to her life and her health.

7 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242, §91; Younger v United Kingdom (dec), no. 57420/00, ECHR 2003-I; Trubnikov v Russia, no. 49790/99, 5 July 2005, §68).

8 Calvelli and Ciglio v Italy, judgment (Grand Chamber) of 17 January 2002, §49.

9 Dodov v Bulgaria, no. 59548/00, 17 January 2008.

10 The court also held that the civil proceedings which had lasted ten years had not been concluded within a reasonable time, in violation of Article 6§1.

11 Watts v the United Kingdom (dec), no. 53586/09, 4 May 2010.

The court found that the applicant's complaints were ill-founded and declared the application inadmissible. A poorly managed transfer of elderly care home residents could affect their life expectancy. However, the careful planning and steps taken to minimise any risk to the applicant's life, in the context of the difficult operational choices faced by local authorities, meant that the authorities had met their positive obligations under Article 2.

The case of ***Centre of Legal Resources on behalf of Valentin Câmpeanu v Romania (2014)***¹² concerned a young Roma man suffering from severe mental disabilities and HIV infection who had spent his entire life in state care, having been abandoned at birth and placed in an orphanage. He was then placed in a psychiatric hospital which had no facilities to treat HIV where he died at the age of 18. The conditions were known to be appalling, without adequate staff, medication, heating or food. The Grand Chamber found that there had been a violation of Article 2 in both its substantive and procedural aspects. Mr Câmpeanu had been placed in medical institutions which were not equipped to provide him with adequate care for his condition; he had been transferred from one unit to another without proper diagnosis; and the authorities had failed to ensure his appropriate treatment with anti-retroviral medication. The authorities were aware of the lack of personnel and heating and insufficient food in the psychiatric hospital and had unreasonably put his life in danger. There had been no effective investigation into the circumstances of his death.

Prisons

Prison authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.¹³ In the case of mentally ill persons, regard must be had to their particular vulnerability.¹⁴

In ***Keenan v United Kingdom (2001)***,¹⁵ the applicant's son Mark Keenan had committed suicide by hanging while serving a prison sentence at HM Prison Exeter. Mr Keenan had been receiving anti-psychotic medication intermittently from the age of 21. His medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. Mrs Keenan alleged a violation of Article 2. In deciding whether there had been a violation, the court examined whether the authorities knew or ought to have known there was a real and immediate risk of the detainee committing suicide and whether they did all that could be reasonably expected of them, having regard to the nature of the risk. The court found that Mr Keenan had not actually been diagnosed as suffering from schizophrenia. On the whole, the authorities responded reasonably to his conduct, placing him in hospital care and under watch when he showed suicidal tendencies. He was subject to daily medical supervision by the prison doctors, who on two occasions had consulted external psychiatrists with knowledge of

12 Center of Legal Resources on behalf of Valentin Câmpeanu v Romania (GC), no. 47848/08, 17 July 2014.

13 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242, §92; Trubnikov v Russia, no. 49790/99, 5 July 2005, §70. A complaint under Article 3 was upheld; see below.

14 Aerts v Belgium, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64, §66; Keenan, supra, §111; Rivière v France, no. 33834/03, 11 July 2006, §63.

15 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242.

his case. The prison doctors, who could have required his removal from segregation at any time, found him fit for segregation. On the day of his death there was no reason to alert the authorities that he was in a disturbed state of mind rendering a suicide attempt likely. It was not apparent therefore that the authorities omitted any step which should reasonably have been taken and the Article 2 complaint was not upheld.

In ***Renolde v France (2008)***,¹⁶ the applicant was the sister of Joselito Renolde, who died aged 35 after hanging himself in a cell in Bois-d'Arcy Prison where he was being held in pre-trial detention. Three days after a suicide attempt in prison, he had been given most severe disciplinary penalty possible for an assault, namely 45 days detention in a punishment cell. The court examined whether the authorities knew or ought to have known that he posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent the risk. The court found that the authorities knew that Mr Renolde was suffering from psychotic disorders capable of causing him to commit acts of self-harm. The risk was real and he required careful monitoring in case of a sudden deterioration. The case could be distinguished from that of *Keenan* because, despite Mr Renolde's suicide attempt and diagnosed mental condition, there was never any discussion of whether he should be admitted to a psychiatric institution. Having regard to the state's obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that state authorities, knowing of such a risk, would take special measures geared to his condition to ensure its compatibility with continued detention. Given that the authorities did not order his admission to a psychiatric institution, they should at the very least have provided him with medical treatment corresponding to the seriousness of his condition. In fact, the evidence indicated that his medication was handed to him twice a week without any supervision of whether he took it. Expert toxicological reports revealed that at the time of his death he had not taken his neuroleptic medication for at least two to three days. This lack of supervision of his daily medication played a part in his death. It was also the case that the imposition of 45 days detention in a punishment cell could not be supported and was likely to have aggravated any existing risk of suicide. In the light of all these considerations, the authorities had failed to comply with their positive obligation to protect Mr Renolde's right to life. There had been a violation of Article 2.

Jasinska v Poland (2010)¹⁷ concerned the suicide of the applicant's grandson while he was serving a prison sentence for theft with aggravating circumstances. The applicant alleged that her grandson was able to steal medicines and kill himself as a result of negligence on the part of the prison authorities. The court held that there had been a violation of Article 2, finding that the Polish authorities had failed to comply with their obligation to protect the prisoner's life. The prison authorities had been informed of the deterioration in his health and should have considered him as a suicide risk, rather than simply renewing his medical prescriptions. There was a clear deficiency in a system that had allowed a first-time prisoner, who was mentally fragile and whose state of health had deteriorated, to gather a lethal dose of drugs without the knowledge of the medical staff responsible for supervising his medicine, and to subsequently commit suicide. The authorities' responsibility was not confined to prescribing medicines. It extended to ensuring that they were properly taken, in particular in the case of mentally disturbed prisoners.

16 *Renolde v France*, no. 5608/05, 16 October 2008, [2008] ECHR 1085.

17 *Jasinska v Poland*, no. 28326/05, 1 June 2010.

In *De Donder and De Clippel v Belgium (2011)*,¹⁸ the applicants' son was convicted and sentenced to a special regime because he was receiving psychiatric treatment. Subsequently, he was transferred to the ordinary section of the prison and even spent several days segregated in a punishment cell. He committed suicide. The court noted that the applicants' son had been detained under the Social Protection Act. This provided that the persons to whom it was applicable were not subject to the rules on ordinary detention but to the rules on compulsory admission, so that they could be given the psychological and medical support their condition required. Furthermore, the decision by the deputy public prosecutor recalling the deceased to prison had specified that he should be admitted to the psychiatric wing. Accordingly, the applicants' son should never have been held in the ordinary section of a prison. By holding him there in breach of domestic law, the authorities had contributed to the risk of him committing suicide. On the facts there had been a violation of the substantive aspect of Article 2. The court could not find any evidence that the state's investigation had not satisfied the requirements of an effective investigation. There was no violation of Article 2 in its procedural aspect.

The case of *Ketreb v France (2012)*¹⁹ concerned the suicide in prison by hanging of a drug addict. His sisters alleged that the French authorities had failed to take proper steps to protect their brother's life when he was placed in the prison's disciplinary cell. They also complained that the disciplinary measure was unsuitable for a person in his state of mind. The court held that there had been a violation of Article 2, finding that the French authorities had failed in their positive obligation to protect Mr Ketreb's right to life. It must have been clear to both the prison authorities and medical staff that his state was critical and placing him in a disciplinary cell had only made matters worse. That should have led the authorities to anticipate a suicidal frame of mind, which had already been noted during a previous stay in the punishment block some months earlier, and should, for example, have alerted the psychiatric services. Nor had the authorities set in place any special measures, such as appropriate surveillance or regular searches, which might have found the belt he used to commit suicide. There was also a violation of Article 3 (see below).

The case of *Coselav v Turkey (2012)*²⁰ concerned a 16-year-old juvenile's suicide in an adult prison. His parents alleged that the Turkish authorities had been responsible for the suicide of their son and that the ensuing investigation into his death had been inadequate. The court held that there had been a violation of Article 2 in relation to both its substantive and procedural limbs. The Turkish authorities had been indifferent to the deceased's grave psychological problems, even threatening him with disciplinary sanctions for previous suicide attempts. They had also been responsible for a deterioration of his state of mind by detaining him in prison with adults without providing any medical or specialist care, thus leading to his suicide. Furthermore, the Turkish authorities had failed to carry out an effective investigation to establish who had been responsible for the applicants' son's death, and how.

In *Isenc v France (2016)*,²¹ the applicant's son had committed suicide 12 days after he was admitted to prison. The applicant alleged a violation of his son's right to life.

18 *De Donder and De Clippel v Belgium*, no. 8595/06, 6 December 2011.

19 *Ketreb v France*, no. 38447/09, 19 July 2012.

20 *Coselav v Turkey*, no. 1413/07, 9 October 2012.

21 *Isenc v France*, no. 58828/13, 4 February 2016.

The court held that there had been a violation of Article 2. Although provided for in the domestic law, the arrangements for collaboration between the prison and medical services in supervising inmates and preventing suicides had not worked. The court noted that a medical check-up of the deceased when he was admitted was required as a minimum precautionary measure. Although the government submitted that he had received such a medical consultation, it failed to furnish any documentary evidence corroborating this and had not proved that he had been examined by a doctor. In the absence of any proof of an appointment with the prison medical service, the court considered that the authorities had failed to comply with their positive obligation to protect the applicant's son's right to life.

§3 — ARTICLE 3

*Article 3 of the Convention provides that, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*²²

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.²³ The court has often stated that it must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe.

The positive obligation

In general terms, the Convention does not confer a right to a particular standard of medical service or access to medical treatment in any particular country.²⁴ Nor does it guarantee to any individual a right to receive medical care which if given would exceed the standard level of health care available to the population generally.²⁵

The court will, however, have regard to legal and policy materials relating to healthcare which have been adopted within the framework of the Council of Europe. The case law refers to the

22 Article 15 of the UNCRPD (Freedom from torture or cruel, inhuman or degrading treatment or punishment) is in similar terms: '1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation. 2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

23 *Chahal v United Kingdom*, no. 22414/93, 15 November 1996, Reports 1996-V, §79, [1996] ECHR 54.

24 *Wasilewski v Poland (dec)*, no. 32734/96, 20 April 1999.

25 *Nitecki v Poland (dec)*, no. 65653/01, 21 March 2002; *Kaprykowski v Poland*, no. 23052/05, 3 February 2009, [2009] ECHR 198, §75.

recommendations of the Committee of Ministers in the health sector,²⁶ as well as to conventions such as the Oviedo Convention²⁷ and the Council of Europe Convention,²⁸ and the European Social Charter on health-related issues.²⁹ Such conventions and charters enable the court to assess the margin of appreciation enjoyed by contracting states and to set baseline standards compatible with the human rights of individuals. In effect, therefore, there is no guarantee to high quality healthcare or to a particular treatment but in certain circumstances a minimum standard of healthcare is guaranteed.

Under Article 3, the state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility.

There is a particular need for states to take such measures in the context of psychiatric hospitals, where patients are typically in a position of inferiority and helplessness.³⁰

Prison detainees are also in a special situation because of their dependence on the authorities when it comes to their living conditions, including access to medical care. In addition, the fact that they are deprived of their liberty means that any acts and omissions of the authorities are likely to have a greater impact on their psychological well-being. The state must ensure that detainees are held in conditions which are compatible with respect for human dignity. It must also ensure that the manner and method of execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured through requisite medical assistance.³¹ Diagnosis and care in detention facilities, including prison and psychiatric hospitals, should be prompt and accurate. Where necessitated by the person's medical condition, supervision should be regular and involve a comprehensive therapeutic strategy aimed at ensuring the detainee's recovery or at least preventing a deterioration of their condition.³² In order to determine whether these requirements have been met, the court will thoroughly examine, in the light of the particular allegations, whether the authorities have followed the medical advice and recommendations.³³

The state's positive obligation in relation to ill-treatment inflicted by private individuals

In ***Moldovan v Romania (2005)***,³⁴ the court said that:

26 Biriuk v Lithuania, no. 23373/03, 25 November 2008, §21.

27 Glass v United Kingdom, no. 61827/00, 9 March 2004, [2004] ECHR 102, (2004) 39 EHRR 15; Vo v France [GC], no. 53924/00, 8 July 2004, §§ 35 and 84.

28 S and Marper v the United Kingdom [GC], nos. 30562/04 and 30566/04, 4 December 2008.

29 Zehnalova and Zehnal v the Czech Republic, no. 38621/97, 14 May 2002; Mółka v Poland (dec), no. 56550/00, 11 April 2006.

30 See e.g. Herczegfalvy v Austria, no. 10533/83, Series A no. 244, [1992] ECHR 58, (1992) 15 EHRR 437 (the 'Herczegfalvy case').

31 Kudła v Poland [GC], no. 30210/96, 26 October 2000, §94.

32 Pitalev v Russia, no. 34393/03, 30 July 2009, §54.

33 Vladimir Vasilyev v Russia, no. 28370/05, 10 January 2012, §59; Center of Legal Resources on behalf of Valentin Câmpeanu v Romania (GC), no. 47848/08, 17 July 2014.

34 Moldovan v Romania, nos. 41138/98 and 64320/01, 12 July 2005, §98.

'The obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, §§149-50, ECHR 2004-...; *A. v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VI, p. 2699,§22; *Z. and Others v. the United Kingdom [GC]*, no. 29392/95, §§ 73-75, ECHR 2001-V, and *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002).'

In *Dordevic v Croatia (2012)*,³⁵ the court said:

'138. The court reiterates that, as regards the question whether the State could be held responsible, under Article 3, for ill-treatment inflicted on persons by non-State entities, the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see, *mutatis mutandis*, *H.L.R. v. France*, 29 April 1997,§40, Reports 1997-III). These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see, *mutatis mutandis*, *Osman v. the United Kingdom*, 28 October 1998, §116, Reports 1998-VIII, and *E. and Others v. the United Kingdom*, no. 33218/96,§88, 26 November 2002).

139. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of this positive obligation must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk of ill-treatment, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Article 8 of the Convention (see *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, §53, ECHR 2006-XI; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01,§96, 3 May 2007; and *Milanović*, cited above,§84; see also, *mutatis mutandis*, *Osman*, cited above,§116).'

35 *Dordevic v Croatia*, no. 41526/10, 24 July 2012, [2012] ECHR 1640.

The *Dordevic case* involved disabilist hate crime perpetrated by young teenage children against disabled adults. The victims were Dalibor Dordevic and his mother Radmila Dordevic who was his carer. Dalibor was a man with both learning and physical disabilities aged in his mid-30s who suffered a sustained program of abuse and harassment at the hands of children attending a school some 70 metres from his home.

The court considered that this harassment, which on one occasion caused Dalibor physical injuries, when combined with feelings of fear and helplessness, was sufficiently serious to invoke the protection of Article 3. Radmila had not been exposed to violence. Nevertheless, the incidents caused disruption to her daily life and had an adverse effect on her private and family life, and thus Article 8 was applicable.

On the facts, competent state agencies were fully aware of the ongoing harassment of Dalibor but failed to take sufficient steps to ascertain the extent of the problem and to prevent further abuse from taking place. 'No serious attempt was made to assess the true nature of the situation complained of, and to assess the lack of a systematic approach which resulted in the absence of adequate and comprehensive measures.' The lack of any concrete action, the absence of social services involvement or of experts who could have worked with the children were noted, as was the fact that Dalibor had not been provided with counselling. 'Apart from responses to specific incidents, no relevant action of a general nature to combat the underlying problem has been taken by the competent authorities despite their knowledge that the first applicant had been systematically targeted and that future abuse was very likely to follow'. Consequently, although the continuing risk of abuse was real and foreseeable, in breach of Article 3 the state had failed to take all reasonable measures to prevent abuse against Dalibor. Similarly, Croatia had failed to take all adequate and relevant measures to protect the family and private life of Radmila, in breach of Article 8.

III-treatment

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and sometimes the victim's sex, age and state of health.³⁶

Although the purpose of such treatment is a factor, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3.³⁷

The distinction between torture and other types of ill-treatment is to be made on the basis of a difference in the intensity of the suffering inflicted. Ill-treatment that is not torture, because it does not have sufficient intensity or purpose, will be classed as 'inhuman or degrading'. As with all Article 3 assessments, the assessment of this minimum is relative.

36 *Ireland v United Kingdom*, no. 5310/71, 18 January 1978, Series A no. 25, [1978] ECHR 1, (1978), 2 EHRR 25, §162; *Kudla v Poland* [GC], no. 30210/96, 26 October 2000, §91; *Peers v Greece*, no. 28524/95, §67.

37 *Peers*, supra, §74.

‘Degrading treatment’ is that which arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. It has also been described as involving treatment such as would lead to breaking down the physical or moral resistance of the victim³⁸ or drive them to act against their will or conscience.³⁹

Use of seclusion on psychiatric wards/units

Although the segregation or seclusion of a mental health patient or prisoner does not in itself constitute inhuman or degrading treatment, the specific circumstances may mean that such a detention regime is contrary to Article 3.

A v United Kingdom (1980)⁴⁰ concerned a complaint that the conditions and circumstances of a patient's seclusion in England's [high-secure] Broadmoor Hospital in 1974 amounted to inhuman and degrading treatment, contrary to Article 3. In particular, the patient alleged that he had been deprived of adequate furnishing and clothing, that the conditions in the room had been insanitary and that it had been inadequately lit and ventilated. A's complaint was declared admissible and a friendly settlement was reached with an *ex gratia* payment to the patient of £500 being made by the Government.

In **Dhoest v Belgium (1997)**,⁴¹ the custodial mental institution at Tournai was composed of two wings, separated by an administrative unit in the centre. The west wing was designed for the treatment of psychiatric (civil) patients on a voluntary basis or compulsorily and the east wing for the treatment of ‘mentally abnormal offenders’ confined on the basis of the Act of Social Protection. The applicant complained that his treatment at the custodial mental institution violated Article 3. The Commission noted that it would not normally consider the segregation for security, disciplinary or protective reasons of persons committed to hospital in relation to criminal proceedings as constituting inhuman treatment or punishment. However, in ‘making an assessment in a given case, regard must be had to the surrounding circumstances including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.’ In Mr Dhoest's case:

‘72. The conditions of his detention were also inhuman on account of the fact that he had been segregated from other detainees almost throughout his confinement in Tournai. The cell in which he was detained contained only a bed and a flush toilet and no table or chair. It had only one small window which was situated above eye-level. He had his daily exercise in a courtyard separate from other inmates. His meals were served in his cell and work, if provided at all, had to be carried out in his cell. The only “distraction” offered was a weekly interview with the prison priest. There were no facilities in the form of a common workshop or any recreation in the form of listening to the radio or watching television.

38 Ireland v the United Kingdom, Ireland v United Kingdom, no. 5310/71, 18 January 1978, Series A no. 25, [1978] ECHR 1, (1978), 2 EHRR 25, §167.

39 The Greek Case, nos. 3321-3/67, 1969.

40 A v United Kingdom (dec) (1980) DR 10, 3 EHRR 131.

41 Dhoest v Belgium, no. 10448/83, 14 May 1997, 12 EHRR 135.

73. Whereas it is true that, as the Commission had held in the past, the segregation of a prisoner does not in itself constitute inhuman or degrading treatment, specific circumstances might render detention conditions contrary to Article 3 of the Convention. Decisive in this respect was the severity of the measure concerned, its length, its purpose and its effect on the detainee concerned and the availability of a minimum of social contacts.

74. Isolating him for such a long period of time was a disproportionate sanction to his escapes or attempts to escape. Medical expert opinion had confirmed that he did not constitute a danger to other prisoners.

75. Finally the applicant's continued detention was also inhuman because he had no prospects of being released, which was against generally recognised principles regarding treatment of long-term prisoners. He It is, however, necessary that those responsible for the patient's seclusion continuously review the arrangements.'

General conditions on psychiatric wards/units

In *Parascineti v Romania (2012)*,⁴² Mr Parascineti was admitted to an endocrinology department where he displayed signs of acute psychosis, as a result of which he was urgently admitted to the psychiatric ward of a municipal hospital. Mr Parascineti complained that conditions on the psychiatric ward during his stay there were appalling. Dozens of patients, some of whom had scabies and lice, were housed in the same room and he had even had to share his bed with one or two other patients. The smell from the toilets, which were at one end of the room, was unbearable and, like the other patients, he was not allowed out into the fresh air. Furthermore, all 70 to 100 patients in the ward were given access to the bathroom at the same time and had to share the only two showers there.

The court reiterated that the state is required to ensure that all persons deprived of their liberty are detained in conditions which are compatible with respect for their human dignity, that the manner and method of the execution of the measure does not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment or confinement, their health and well-being are adequately secured.

In cases of mental illness, increased vigilance is required in view of the detainees' vulnerability and the risk that this will heighten their sense of inferiority and powerlessness. Mr Parascineti had given a detailed and coherent description of what he had endured, and in particular the overcrowding and the very poor conditions of hygiene. The government had admitted that the conditions in the psychiatric wards the hospital had been inadequate. There were rooms with 20 to 30 beds and sometimes two patients had to share a bed. Hygiene was unsatisfactory, there were not enough specialised staff and patients were likely to catch scabies or become infested with lice. Such conditions, inadequate for any individual deprived of his liberty, were even more so for someone like the applicant who had been diagnosed with mental disorders and who consequently needed specialised treatment as well as a minimum standard of hygiene. There had been a violation of Article 3.

42 *Parascineti v Romania* [GC] no. 32060/05, 13 March 2012.

Conditions in (social) care homes

In *Stanev v Bulgaria (2012)*,⁴³ the Bulgarian courts found Mr Stanev to be partially incapacitated, on the ground that he had been suffering from schizophrenia since 1975 and was unable to manage his own affairs adequately or realise the consequences of his actions. In 2002 he was placed under the partial guardianship of a council officer. Without consulting or informing Mr Stanev, the guardian had him placed in the Pastra social care home for men with psychiatric disorders. Mr Stanev complained about the living conditions in the home.

The court observed that Article 3 prohibits the inhuman and degrading treatment of anyone in the care of the authorities. It was not disputed that the building in which Mr Stanev lived had been renovated in late 2009, resulting in an improvement in his living conditions. Therefore, the complaint would be treated as covering the period between 2002 and 2009. The court found that the food had been insufficient and of poor quality. The residents' diet contained no milk or eggs and only rarely fruit and vegetables. The building was inadequately heated and in winter Mr Stanev had to sleep in his coat. He could shower only once a week in an unhygienic and dilapidated bathroom. The toilets were in an execrable state and, according to the findings of the Council of Europe's Committee for the Prevention of Torture and Degrading Treatment or Punishment (CPT), access to them was dangerous. No therapeutic activities were provided and residents led passive, monotonous lives. The home did not return clothes to the same people after they were washed, which was likely to arouse a feeling of inferiority in the residents. Mr Stanev was exposed to all of these conditions for a considerable period, approximately seven years. Although the CPT had concluded that the living conditions at the relevant time could be said to amount to inhuman and degrading treatment, the Bulgarian government did not act on their undertaking to close down the institution.

The court considered that the lack of financial resources cited by the government was not a relevant argument which justified keeping Mr Stanev in the living conditions described. Taken as a whole, his living conditions for a period of approximately seven years amounted to degrading treatment, in violation of Article 3.

The treatment of persons suffering from mental disorder

The leading case is *Herczegfalvy v Austria (1992)*⁴⁴ which states that as a general rule a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.

In *Herczegfalvy*, the applicant complained about his medical treatment, in particular that he had been forcibly administered food and neuroleptics, isolated, and attached by handcuffs to a security bed for several weeks.

The Austrian Government argued that the measures were the consequence of the applicant's behaviour. He had refused urgent medical treatment and food which was necessary in view of the deterioration in his physical and mental health.

43 *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46.

44 *Herczegfalvy v Austria*, no. 10533/83, Series A no. 244, [1992] ECHR 58, (1992) 15 EHRR 437.

Similarly, it was his extreme aggressiveness, and his threats and acts of violence against hospital staff, which explained why the staff had used coercive measures, including the intramuscular injection of sedatives and the use of handcuffs and a security bed. These measures had been agreed by his curator, their sole aim had always been therapeutic, and they had been terminated as soon as the patient's state permitted this.

According to the court (at §§82–83):

'82. The court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of no derogation.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.

83 In this case it is above all the length of time during which the handcuffs and security bed were used which appears worrying. However, the evidence before the court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. No violation of Article 3 has thus been shown.'

'Medical necessity' in this context is not limited to life-saving treatment. It can also cover treatment, such as anti-psychotic medication, imposed as part of a therapeutic regime.⁴⁵ In addition, the decision as to what therapeutic methods are necessary is principally one for the national medical authorities: those authorities have a certain margin of appreciation in this respect since it is in the first place for them to evaluate the evidence in a particular case.

In *Buckley v United Kingdom (1997)*,⁴⁶ the applicant was the mother of Orville Blackwood, who died in England's [high-secure] Broadmoor Hospital on 28 August 1991, where he was detained under the Mental Health Act 1983. He died after being injected with Modecate 150mg intramuscularly and Sparine 150mg intramuscularly. The drugs were administered without consent. His mother complained that:

1. Her son's death constituted a violation of Article 2 and that his treatment was inhuman or degrading treatment or punishment in violation of Article 3.
2. The Mental Health Act 1983 permitted the treatment, namely the administration of the stated psychiatric drugs in the stated doses, which caused her son's death.

45 See Buckley, *infra*.

46 Buckley v United Kingdom (dec), European Commission, 26 February 1997, 1997 EHRLR 435.

3. The enforced medical treatment of her son was a violation of the right to respect for private life under Article 8 of the Convention.
4. Her son suffered discrimination contrary to Article 14, on the ground of race and his status as a patient detained in a special hospital under the Mental Health Act 1983.
5. The Mental Health Act 1983, and in particular section 139, which concerns the protection for acts done in pursuance of the said Act, in combination with the law of negligence, resulted in there being no effective remedy before a national authority in breach of Article 13.

Adopting the same numbering, the Commission held that:

1. The circumstances did not disclose any failure, substantive or procedural, to protect the applicant's right to life as required by Article 2 (manifestly ill-founded).
2. None of the circumstances disclosed that Mr Blackwood's treatment was anything other than part of a therapeutic regime. Given that the applicant's own medical expert found no grounds on which to criticise the hospital for negligent treatment, the Commission found no grounds on which to depart from the general rule set out in the *Herczegfalvy* (manifestly ill-founded).
3. The complaint concerning Article 8 was rejected for the same reasons as in (1) and (2) (manifestly ill-founded).
4. There was no evidence of discrimination in respect of Mr Blackwood's treatment, either on grounds of race, or his status as a patient detained in a special hospital under the Mental Health Act 1983 (manifestly ill-founded).
5. Article 13 did not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applied if the individual could be said to have an 'arguable claim' of a violation of the Convention. The application did not disclose any such 'arguable claim' (manifestly ill-founded).

In ***Dvoracek v the Czech Republic (2014)***,⁴⁷ Mr Dvoracek was diagnosed with Wilson's disease, a genetic disorder linked associated with neurological and psychological problems. At the time of his diagnosis, he was beginning to suffer speech and motor problems and was afflicted with hebephiliac (a form of paedophilia), as a result of which he was prosecuted on several occasions for offences against minors. On 30 August 2007 the district court ordered him to undergo protective treatment in a hospital instead of the outpatient treatment which another district court had previously ordered. He was given anti-androgen treatment using medication to lower his testosterone level.

47 *Dvořáček v the Czech Republic*, no. 12927/13, 6 November 2014.

Mr Dvoracek reported that his illness had worsened during his time in hospital, that he had suffered mental problems caused by fear of the hospital, castration, humiliation and loss of dignity, that the medicinal treatment had impeded his sex life with his girlfriend and that he wanted to undergo psychotherapy. After a number of medical examinations, the courts acceded to his request.

The court held that there had been no violation of Article 3 with regard to the applicant's detention in a psychiatric hospital and the medical treatment administered. It noted that anti-androgen treatment had been a therapeutic necessity and that it had not been established that the applicant had been pressured into undergoing it. While there was no reason to cast doubt on the hospital's statements that he had been apprised of the side-effects, a specific form setting out his consent, and informing him of the benefits and side-effects of the treatment and his right to withdraw his original consent at any stage, would have clarified the situation. However, even though such a procedure would have reinforced legal certainty, the failure to use such a form was insufficient for a breach of Article 3. The court could not establish beyond reasonable doubt that the applicant had been subjected to forcible medicinal treatment. The court also held that there had been no violation of Article 3 of the Convention concerning the investigation into the applicant's allegations of ill-treatment.

The sentencing of persons with mental ill-health

In *Drew v United Kingdom (2006)*,⁴⁸ it was held that a statutory requirement that courts pass an automatic life sentence for a second serious sexual or violent offence in the absence of exceptional circumstances, even in the case of 'a mentally-disordered offender', did not breach Article 3 or Article 5.

Prisons, prison conditions and medical treatment

Article 3 requires the state to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance.⁴⁹

However, the Convention does not impose a general obligation on state authorities to release detainees on health grounds or to place them in a civil hospital in order to provide particular treatment, even if the person is suffering from an illness that is particularly difficult to treat.⁵⁰ However, the detention of a person who is ill may raise issues under Article 3, and a lack of appropriate medical care can amount to inhuman or degrading treatment contrary to that provision:

48 *Drew v United Kingdom*, no. 35679/03, 7 March 2006, [2006] ECHR 1172.

49 See *Hurtado v Switzerland*, no. 17549/90, 28 January 1994, Series A no. 280-A, §79; *Mouisel*, *ibid*, §40.

50 *Mouisel v France*, no. 67263/01, 14 November 2002, ECHR 2002-IX, (2002) ECHR 740, §37.

'The court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 ... and that the lack of appropriate medical care may amount to treatment contrary to that provision ... In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment ...

... [T]here are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant ...'⁵¹

Detainees with physical disabilities

Where persons with disabilities are detained, the authorities must take care to provide conditions that meet any special needs resulting from the person's disability.⁵²

In ***DG v Poland (2013)***,⁵³ the court found that the conditions of detention of a paraplegic prisoner, who was confined to a wheelchair and suffered from incontinence, were inadequate: he did not have daily access to the shower rooms and could not reach the toilets without help from other inmates.

In contrast, in ***Zarzycki v Poland (2013)***,⁵⁴ the court found that the authorities had provided the applicant, a prisoner amputated at both elbows, with the regular and adequate assistance his special needs warranted. In these circumstances, even though his disability made him more vulnerable to the hardships of detention, his treatment had not reached the threshold of severity required to constitute degrading treatment within the meaning of Article 3.

Medical care in prison for persons suffering from mentally illness

Like prisoners with physical disabilities, detainees suffering from mental illness may require special medical care and treatment if their deprivation of liberty is to be compatible with Article 3.

In ***Aerts v Belgium (1998)***,⁵⁵ the applicant was arrested in November 1992 for an assault, having attacked his ex-wife with a hammer. He was placed in detention pending trial in the psychiatric wing of a prison. The applicant complained about the conditions of detention. It was accepted that the general conditions in the wing were unsatisfactory. The European Committee for the Prevention of Torture (CPT) had considered that the standard of care given to patients there fell below the minimum acceptable from an ethical and humanitarian point

51 *Sławomir Musiał v Poland*, no. 28300/06, 20 January 2009, §§87-88.

52 *Price v the United Kingdom*, no. 33394/96, 10 July 2001.

53 *DG v Poland*, no. 45705/07, 12 February 2013.

54 *Zarzycki v Poland*, no. 15351/03, 6 March 2013.

55 *Aerts v Belgium*, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.

of view. It also considered that prolonging their detention there for lengthy periods carried an undeniable risk of a deterioration of their mental health. In the present case, however, there was no proof of a deterioration in Mr Aerts's mental health, and the living conditions on the psychiatric wing did not seem to have had such serious effects on his mental health as would bring them within the scope of Article 3. It had not been conclusively established that the applicant had suffered treatment that could be classified as inhuman or degrading. There had been no violation of Article 3.

In *Romanov v Russia (2005)*,⁵⁶ the applicant, who suffered from a 'profound dissociative psychopathy', complained about the conditions and length of his detention in the psychiatric ward of a detention facility, where he had been held for over 15 months. The court held that there had been a violation of Article 3. The conditions of detention, in particular the severe overcrowding and its detrimental effect on his well-being, combined with the length of the period during which he had been detained in such conditions, amounted to degrading treatment. They must have undermined his human dignity and aroused in him feelings of humiliation and debasement.

The applicant in *Khudobin v Russia (2006)*⁵⁷ had a history of chronic illnesses which included epilepsy, pancreatitis, hepatitis and 'mental deficiencies'. Doctors had recommended outpatient psychiatric supervision. Although Russian law prohibited any form of entrapment or incitement by police officers, he was arrested for supplying heroin to an undercover police agent and held in custody until the criminal proceedings were discontinued 13 months later. During his trial he underwent three psychiatric examinations which ultimately concluded that he was legally insane at the time of the alleged crime, as a result of which he was discharged from criminal liability. Mr Khudobin complained that he did not receive adequate medical assistance at the relevant detention facility and was subjected to inhuman and degrading treatment. He said that his health sharply deteriorated in detention, where he contracted measles, bronchitis, and repetitive pneumonias and had several epileptic seizures. The court found that the Russian government had violated Article 3 by failing to providing him with adequate medical treatment and subjecting him to inhuman conditions of detention. It accepted the applicant's description of the facts because the government could not refute them, even though the events occurred presumably with the knowledge of the prison authorities. The level of anxiety caused by the lack of medical assistance, compounded by his HIV-positive status, serious mental disorders and physical sufferings, violated Article 3.

In *Novak v Croatia (2007)*,⁵⁸ the applicant complained about a lack of adequate medical treatment for his post-traumatic stress disorder. The court found that the applicant had not provided any documentation to prove that his detention conditions had led to a deterioration of his mental health and dismissed the application.

The applicant in *Kucheruk v Ukraine (2007)*⁵⁹ was suffering from chronic schizophrenia. He complained of ill-treatment while in detention, notably handcuffing in solitary confinement, and of inadequate conditions of detention and medical care. The court held that there had

56 *Romanov v Russia*, no. 63993/00, 20 October 2005.

57 *Khudobin v Russia* 59696/00, 26 October 2006, [2006] ECHR 898.

58 *Novak v Croatia*, no. 8883/04, 14 June 2007.

59 *Kucheruk v Ukraine*, no. 2570/04, 6 September 2007.

been a violation of Article 3. The handcuffing for seven days of the applicant who was mentally ill without psychiatric justification or medical treatment had to be regarded as inhuman and degrading treatment. Furthermore, his solitary confinement and handcuffing suggested that the authorities had not provided appropriate medical treatment and assistance to him.

The applicant in *Dybeku v. Albania (2007)*,⁶⁰ was suffering from chronic paranoid schizophrenia for which he had treated in psychiatric hospitals for a number of years. Having been sentenced in 2003 to life imprisonment for murder and illegal possession of explosives, he was placed in a normal prison, where he shared cells with inmates who were in good health and where he was treated as an ordinary prisoner. The court held that there had been a violation of Article 3. The fact that the Albanian Government admitted that the applicant had been treated like the other prisoners, notwithstanding his long history of paranoid schizophrenia, showed a failure to comply with the Council of Europe's recommendations on dealing with prisoners with mental illnesses. Under Article 46 (binding force and execution of judgments), the court invited Albania as a matter of urgency to take the necessary measures to secure appropriate conditions of detention, and in particular adequate medical treatment, for prisoners requiring special care on account of their state of health.

In *Sławomir Musiał v Poland (2009)*,⁶¹ the applicant, who suffered from epilepsy, schizophrenia and other mental disorders, was detained in various remand centres without psychiatric facilities. The court found that the generally poor conditions in which he was held were not appropriate for ordinary prisoners, let alone for someone with a history of mental disorder and in need of specialised treatment, who was more susceptible to a feeling of inferiority and powerlessness. The applicant had been kept in detention centres primarily for healthy people for nearly 3½ years of detention. Doctors had recommended that he receive regular psychiatric supervision but even after his attempted suicide he was not given in-patient care. The authorities' failure during most of the applicant's time in detention to hold him in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward had unnecessarily exposed him to a risk to his health which must have resulted in stress and anxiety. It also ignored the Council of Europe Committee of Ministers recommendations in respect of prisoners suffering from serious mental-health problems.⁶²

Owing to its nature, duration and severity, the treatment to which Mr Musiał was subjected qualified as inhuman and degrading, in violation of Article 3. Poland was to secure his transfer to a specialised institution at the earliest possible date which was capable of providing him with the necessary psychiatric treatment and constant medical supervision. Furthermore, in view of the seriousness and structural nature of the problem of overcrowding, and the resultant inadequate living and sanitary conditions in Polish detention facilities, Article 46 would be invoked. Necessary legislative and administrative measures were to be taken rapidly in order to secure appropriate conditions of detention, in particular for prisoners in need of special care because of their state of health.

60 *Dybeku v Albania*, no. 41153/06, 18 December 2007.

61 *Sławomir Musiał v Poland*, no. 28300/06, 20 January 2009.

62 Recommendation R (98) 7 of the Committee of Ministers of the Council of Europe to the Member States concerning the ethical and organisational aspects of health care in prison, and Recommendation Rec (2006) 2 of 11 January 2006 on the European Prison Rules.

In ***Kaprykowski v Poland (2009)***,⁶³ the applicant was suffering from epilepsy marked by frequent (daily) seizures and also from encephalopathy accompanied by dementia. He was classified by social security authorities as a person with a 'first-degree disability making him completely unfit to work'. He alleged that the medical treatment and assistance offered to him during his detention in a remand centre had been inadequate in view of his severe epilepsy and other neurological disorders. The court found that throughout his incarceration several doctors had stressed that he should receive specialised psychiatric and neurological treatment and be under constant medical supervision. Furthermore, the medical experts appointed by the district court considered that the penitentiary system could no longer offer him the treatment he required and recommended that he undergo brain surgery. Consistent with this, when he was being released from the prison hospital, the doctors clearly recommended that he be placed under 24-hour medical supervision. Given the evidence, the court was convinced that Mr Kaprykowski had been in need of constant medical supervision during his time in the remand centre, in the absence of which he faced major health risks. The lack of adequate medical treatment there, and placing him in a position of dependency and inferiority vis-à-vis his healthy cellmates, undermined his dignity and entailed particularly acute hardship. This caused him anxiety and suffering beyond that inevitably associated with any deprivation of liberty. His continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment, and violated Article 3.

In ***Raffray Taddei v France (2010)***,⁶⁴ the applicant suffered from a number of medical conditions, including anorexia and Munchausen's syndrome. She complained about her continuing detention and a failure to provide her with appropriate treatment. In April 2009 a psychiatric expert stated that she required specialised supervision for the treatment of the above conditions. The need for such treatment was confirmed by a psychiatrist assigned to her. The court found that the failure by the national authorities to sufficiently take into account Ms Taddei's need for specialised care in an adapted facility, combined with transfers to prison institutions which appeared not to have the facilities necessary for the proper treatment of her illness, had been capable of causing her a level of distress that exceeded the unavoidable level of suffering inherent in detention. There had been a violation of Article 3.

In ***Cocaign v France (2011)***,⁶⁵ the applicant was imprisoned in 2006 for attempted rape committed using a weapon. In January 2007 he killed a fellow-inmate before cutting open his chest and eating part of his lungs. On 17 January 2007, he was condemned to 45 days in a disciplinary cell for this violence' to his deceased cellmate. On 18 January 2007, the prison governor applied to the prefect of the département of Yvelines to have him compulsorily admitted to a psychiatric institution. The prefect acceded to the request, ordering his admission to the Villejuif difficult patients' unit. On 14 February 2007, a hospital doctor concluded that the applicant's condition no longer justified his involuntary placement. The prefect ordered his return to Bois d'Arcy, where he finished serving his disciplinary penalty. On 26 October 2007, a court report by two psychiatrists established that the applicant was legally insane at the time of the murder.

63 *Kaprykowski v Poland*, no. 23052/05, 3 February 2009, [2009] ECHR 198.

64 *Raffray Taddei v France*, no. 36435/07, 21 December 2010.

65 *Cocaign v France*, no. 32010/07, 3 November 2011.

The court noted that the day after the disciplinary penalty had been imposed, the prison Governor had applied for the applicant's compulsory admission to a psychiatric hospital, and an order to that effect had been made four days later. The applicant had spent three weeks in the hospital and the decision to return him to a punishment cell had been taken only after he had been given appropriate treatment. The rest of the disciplinary penalty had been served under medical supervision. It could not be inferred from the applicant's illness alone that his confinement in a punishment cell and the execution of that penalty constituted inhuman and degrading treatment and punishment in breach of Article 3.

In **G v France (2012)**,⁶⁶ the applicant was suffering from a chronic schizophrenia-type illness with evidence of psychosis, hallucinations, delusions and aggressive and addictive behaviour. He was alternately kept in prison and hospital psychiatric wards between 1996 and 2004. On 21 May 2005, he was sent to Toulon-La Farlède prison after causing damage in Chalucet psychiatric hospital, where he had asked to be admitted. As a result, on 30 June 2005 he was sentenced to 12 months imprisonment, of which ten months were suspended. On his arrival in prison he set fire to his mattress. He was placed under psychiatric observation, then made to share a cell with another detainee, who was known to have psychiatric problems. On 16 August 2005 a fire broke out in his cell. Both detainees suffered serious injuries. With burns to 65% of his body, the applicant's cell mate died from his injuries on 6 December the same year. The applicant said that he 'suffered from schizophrenia, heard voices and saw strange things' but that 'everything was better at the moment'; he added that 'I feel freer since the fire in my cell ... everything has become clearer in my head. I can say that everything is calm now'. On 13 November 2008 the Var Assize Court sentenced the applicant to 10 years imprisonment and declared him civilly liable 'for the prejudice suffered by the civil parties'.

Pursuant to Article 3, the applicant argued that his constant moves back and forth between prison and hospital amounted to inhuman and degrading treatment. He explained that when his condition deteriorated to the point where it was no longer compatible with detention he was placed in hospital, and when he recovered his 'stability' he was sent back to prison until his condition deteriorated again. He considered that his return to prison constituted a form of torture. Lastly, he argued that the decision to put him back in normal detention at Les Baumettes was absurd considering his extreme vulnerability *vis-à-vis* the other detainees and the danger to his safety.

The court held that there had been a violation of Article 3. It referred to the Council of Europe Committee of Ministers' Recommendation Rec (2006) on the European Prison Rules. The applicant's continued detention over a four-year period had made it more difficult to provide him with the medical treatment his condition required, and subjected him to hardship exceeding the unavoidable level of suffering inherent in detention. Alternately treating him in prison and a psychiatric institution, and detaining him in prison, clearly impeded the stabilisation of his condition, demonstrating thereby that he had been unfit to be detained from an Article 3 standpoint. The physical conditions of detention in the prison psychiatric unit, where the applicant had been held on several occasions, had been described by the domestic authorities themselves as demeaning and could only have exacerbated his feelings of distress, anxiety and fear.

66 G v France, no. 27244/09, 23 February 2012.

In **ZH v Hungary (2012)**,⁶⁷ ZH had a learning disability. He was also deaf and mute and unable to use sign language or to read or write. He complained that his detention in prison for almost three months constituted inhuman and degrading treatment. The court held that there had been a violation. Given the inevitable feelings of isolation and helplessness that flowed from his disabilities, and ZH's lack of comprehension of his situation and the prison order, he must have suffered anguish and a sense of inferiority, especially as a result of being cut off from the only person (his mother) with whom he could effectively communicate. Although the allegations of molestation by other inmates were not supported by evidence, a person in his position would have faced significant difficulties bringing any such incidents to the wardens' attention, which could have resulted in fear and the feeling of being exposed to abuse.

The applicant in **Claes v Belgium (2013)**⁶⁸ was a man with an intellectual disability who committed a series of sexual assaults. He was held continuously in the psychiatric wing of a prison for many years. Apart from access to the prison psychiatrist or psychologist, no specific treatment or medical supervision was prescribed for him. The court held that there had been a violation of Article 3. The national authorities had not provided him with adequate care and he had been subjected to degrading treatment as a result. His continued detention over a lengthy period in the psychiatric wing without appropriate medical care or any realistic prospect of change constituted particularly acute hardship which caused him distress that went beyond the suffering inevitably associated with detention. Whatever obstacles were created by his own behaviour, they did not release the state from its obligations, given the position of inferiority and powerlessness typical of patients confined in psychiatric hospitals and even more so of those detained in a prison setting. The applicant's situation stemmed in reality from a structural problem: on the one hand the support provided to persons in prison psychiatric wings was inadequate, on the other placing them in facilities outside prison often proved impossible, either because of a shortage of suitable psychiatric hospital beds or because the relevant legislation did not allow mental health authorities to order their placement in external facilities.

In **Țicu v Romania (2013)**,⁶⁹ the applicant was serving a 20-year sentence for participating in an armed robbery occasioning the victim's death. In childhood he had suffered from an illness which led to considerable delays in his mental and physical development. He complained about the poor conditions of detention in the prisons where he had been serving his sentence, and especially overcrowding and shortcomings in the provision of medical treatment. The court noted that the recommendations of the Committee of Ministers of the Council of Europe to member States⁷⁰ advocated that prisoners suffering from serious mental health problems should be kept and cared for in a hospital facility that was adequately equipped and possessed appropriately trained staff. The living conditions in the institutions where the applicant had been held, and continued to be held, were a particular cause for concern. Such conditions would be inadequate for any person deprived of their liberty but especially so for someone like him on account of his mental health problems and need for appropriate medical supervision. There had been a breach of Article 3.

67 ZH v Hungary, no. 28973/11, 8 November 2012.

68 Claes v Belgium, no. 43418/09, 10 January 2013, [2013] ECHR 286.

69 Țicu v Romania, no. 24575/10, 1 October 2013.

70 Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison and Recommendation Rec (2006) 2 on the European Prison Rules.

In ***Bamouhammad v Belgium (2015)***,⁷¹ the applicant was suffering from Ganser syndrome (or ‘prison psychosis’). He alleged that in prison he had been subjected to inhuman and degrading treatment which affected his mental health. He also complained of a lack of effective remedies. The court found that the level of seriousness required for treatment to be regarded as ‘degrading’ had been exceeded. The applicant’s need for psychological supervision had been emphasised in all medical reports. However, endless transfers had prevented such supervision with the result that his already fragile mental health had not ceased to worsen throughout his detention. The prison authorities had not sufficiently considered his vulnerability or viewed his situation from a humanitarian perspective. There had been a violation of Article 3 (and of Article 13 — right to an effective remedy).

The case of ***Murray v the Netherlands (2016)***⁷² concerned a man convicted of murder in 1980 who served his life sentence on the islands of Curaçao and Aruba until being granted a pardon in 2014 due to his deteriorating health. The applicant complained about the imposition of a life sentence without any realistic prospect of release and that he was not provided with a special detention regime for prisoners with psychiatric problems. The court found a violation of Article 3, reiterating that states are under an obligation to provide appropriate medical care to detainees suffering from mental health problems. Mr Murray had been assessed prior to being sentenced as requiring treatment. Subsequently, the domestic court which advised against his release found a close link between the persistence of his risk of reoffending and the lack of treatment. Notwithstanding this, he was never provided with any treatment for his mental condition during the time he was imprisoned, and consequently any request by him for a pardon was in practice incapable of leading to release.

The case of ***WD v Belgium (2016)***⁷³ concerned the confinement for over 15 years of a mentally-ill man in the psychiatric wing of an ordinary prison without appropriate medical care. Previously, WD had been found not to be criminally responsible for the sex offences with which he was charged. The applicant complained that the institution in which he was held was ill-adapted to the situation of people with mental-health problems. The court found that WD was subjected to degrading treatment by being detained in a prison environment for so long without appropriate treatment and with no prospect of reintegrating into society. This had caused him particularly acute hardship and an intensity of distress which exceeded the unavoidable level of suffering inherent in detention. The court considered that his situation originated in a structural deficiency specific to the Belgian psychiatric detention system. Pursuant to Article 46, the court required the state to reorganise its system for the psychiatric detention of offenders in such a way that the detainees’ dignity was respected. In particular, it encouraged the Belgian state to take action to reduce the number of offenders with mental disorders who were detained in prison psychiatric wings without appropriate treatment. The court applied the pilot-judgment procedure to the case, giving the government two years to remedy the general situation and adjourning proceedings in all similar cases for that period.⁷⁴

71 *Bamouhammad v Belgium*, no. 47687/13, 17 November 2015.

72 *Murray v the Netherlands* [GC], no. 10511/10, 26 April 2016.

73 *WD v Belgium*, no. 73548/13, 6 September 2016.

74 The court also found that there had been a violation of Article 5§1. The applicant’s detention since 2006 in a facility ill-suited to his condition had broken the link required by Article 5§1(e) between the purpose and the practical conditions of detention. There had also been a violation of Articles 5§4 and 13. The Belgian system in operation at the time had not provided the applicant with an effective remedy in practice in

Prisoners with suicidal tendencies

The applicant in ***Kudla v Poland (2000)***⁷⁵ suffered from chronic depression and twice tried to commit suicide. He complained that he was not given adequate psychiatric treatment in detention.

The court found no violation of Article 3. His suicide attempts could not be linked to any discernible shortcoming on the part of the authorities. Furthermore, he had been examined by specialist doctors and frequently received psychiatric assistance. It reiterated that the state must ensure that a detainee's health and well-being are adequately secured by providing them with the requisite medical assistance.

In ***Keenan v United Kingdom (2001)***,⁷⁶ Mark Keenan had been receiving intermittent anti-psychotic medication for several years and his medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. His mother alleged th

at he had suffered inhuman and degrading treatment due to the conditions of detention. The court found no violation of Article 2 (see above) but did find that there was a violation of Article 3. The lack of effective monitoring of his condition, and the lack of informed psychiatric input into his assessment and treatment, disclosed significant defects in the medical care provided to a mentally-ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment, which may well have threatened his physical and moral resistance, was incompatible with the standard of treatment required in respect of a mentally-ill person.

In ***Gennadiy Naumenko v Ukraine (2004)***,⁷⁷ the applicant had been sentenced to death but this was commuted to life imprisonment. He alleged that he was subjected to inhuman and degrading treatment during his time in prison from 1996 to 2001. In particular, he had wrongfully been forced to take medication.

The court observed that, no matter how disagreeable, therapeutic treatment could not in principle be regarded as contrary to Article 3 if it was persuasively shown to be necessary. From the evidence of the witnesses, the medical file and his own statements it was clear that the applicant was suffering from serious mental disorders and he had twice made attempts on his own life. He had been put on medication to relieve his symptoms. It was highly regrettable that his medical file contained only general statements that made it impossible to determine whether he had consented to the treatment. However, he had not produced sufficient credible evidence to demonstrate that, even without his consent, the authorities had acted wrongfully in making him take the medication. The court had insufficient evidence before it to establish beyond reasonable doubt that he had been forced to take medication in a way that contravened Article 3.

respect of his Convention complaints – in other words, a remedy capable of affording redress for the situation of which he was the victim and preventing the continuation of the alleged violations.

75 *Kudla v Poland* [GC], no. 30210/96, 26 October 2000.

76 *Keenan v United Kingdom*, no. 27229/95, 3 April 2001, [2001] ECHR 242.

77 *Gennadiy Naumenko v Ukraine*, no. 42023/98, 10 February 2004.

In ***Rivière v France (2006)***,⁷⁸ the applicant complained about his continued imprisonment in spite of his psychiatric problems. He had been diagnosed with a psychiatric disorder involving suicidal tendencies. The experts in his case had been concerned by aspects of his behaviour, in particular a compulsion towards self-strangulation, which indicated a need for treatment outside the prison. The court held that the applicant's continued detention without appropriate medical supervision amounted to inhuman and degrading treatment. It observed that prisoners with serious mental disorders and suicidal tendencies require special measures geared to their condition regardless of the seriousness of their offence.

The case of ***Renolde v France (2008)***⁷⁹ concerned the placement in a disciplinary cell for 45 days and suicide of the applicant's brother who was suffering from acute psychotic disorders capable of resulting in self-harm.

The court found that there had been a violation of Article 2 (see above). The court further held that there had been a violation of Article 3 because of the severity of the disciplinary punishment imposed on him, which was liable to break his physical and moral resistance. He had been suffering from anguish and distress at the time. Indeed, only eight days before his death his condition had so concerned his lawyer that she had immediately asked the investigating judge to order a psychiatric assessment of his fitness for detention in a punishment cell. The disciplinary penalty imposed on him was incompatible with the standard of treatment required in respect of a mentally ill person and constituted inhuman and degrading treatment and punishment.

In ***Güveç v Turkey (2009)***,⁸⁰ the applicant, aged 15 at the time, had been tried before an adult court and found guilty of membership of an illegal organisation. He was held for more than 4½ years in pre-trial detention in an adult prison, where he did not receive medical care for his psychological problems and made repeated suicide attempts.

The court held that there had been a violation of Article 3: in the light of his age, the length of his detention with adults and the authorities' failure to provide adequate medical care, or to take steps to prevent his repeated suicide attempts, he had been subjected to inhuman and degrading treatment.

The case of ***Ketreb v France (2012)***⁸¹ concerned the suicide in prison by hanging of a drug addict. His sisters alleged that the French authorities failed to take proper steps to protect their brother's life when he was placed in the prison's disciplinary cell. They also complained that the disciplinary measure applied to their brother was unsuitable for a person in his state of mind.

The court held that there was a violation of Article 2, finding that the authorities had failed in their positive obligation to protect his right to life (see above). There had also been a violation of Article 3: his placement in a disciplinary cell for two weeks was incompatible with the level of treatment required in respect of such a mentally disturbed person.

78 *Rivière v France*, no. 33834/03, 11 July 2006.

79 *Renolde v France*, no. 5608/05, 16 October 2008, [2008] ECHR 1085.

80 *Güveç v Turkey*, no. 70337/01, 20 January 2009.

81 *Ketreb v France*, no. 38447/09, 19 July 2012.

Detention in police stations

In *Rupa v Romania (2008)*,⁸² the applicant had suffered from psychological disorders since 1990 and was registered by the public authorities as having a second-degree disability. He alleged that twice he had been detained in inhuman and degrading physical conditions at police stations: firstly in January 1998 and later between March and June 1998. The court found that in January he spent the night following his arrest in the police holding room. This was furnished only with metal benches that were manifestly unsuitable for the detention of a person with the applicant's medical problems. He had also not had a medical examination on that occasion. The state of anxiety inevitably caused by such conditions had undoubtedly been exacerbated by the fact that he was guarded by the same police officers who took part in his arrest. As regards his detention from 11 March to 4 June, his behavioural disorders had manifested themselves immediately after he was remanded in custody. These disorders could have endangered his own person. Therefore, the authorities were under an obligation to have him examined by a psychiatrist as soon as possible in order to determine whether his mental condition was compatible with detention, and what therapeutic measures should be taken. Further still, the Romanian government had not shown that the measures of restraint applied during his detention at the police station had been necessary. Subsequently, he was displayed before the court in public with his feet in chains. There had been a violation of Article 3.

In *MS v the United Kingdom (2012)*,⁸³ the police were called out in the early hours because the applicant was highly agitated and sitting in a car sounding its horn continuously. He was detained by a police officer under the Mental Health Act 1983 and taken to a police station as a place of safety for a permitted period of up to 72 hours, to enable him to be assessed by a doctor and social worker. The police subsequently found his aunt at his address, seriously injured by him. Unsuccessful efforts were made on the same day to place MS in a psychiatric medium secure unit. He remained in police custody for more than 72 hours, locked up in a cell where he kept shouting, taking off all of his clothes, banging his head on the wall, drinking from the toilet and smearing himself with food and faeces.

MS complained about being kept in police custody during a period of acute mental suffering when it had been clear to all that he was severely mentally ill and required hospital treatment as a matter of urgency. The court stated that there was no doubt that MS's initial detention had been justified and also authorised under English law. The court could not accept his criticism of the clinic's medical personnel or his allegation that his intake of liquid and food had been inadequate. However, the fact remained that he had been in a state of great vulnerability throughout his detention at the police station. As indicated by all the medical professionals who examined him, he had been in dire need of appropriate psychiatric treatment. That situation, which persisted until his transfer to the clinic on the fourth day of his detention, diminished excessively his fundamental human dignity. Throughout that time, he had been entirely under the control of the state and the authorities had been responsible for the treatment he experienced. The maximum 72-hour time limit for his detention had not been respected. Even though there had been no intention to humiliate MS, the conditions he had been required to endure had reached the threshold of degrading treatment.

82 *Rupa v Romania*, no. 58478/00, 16 December 2008.

83 *MS v United Kingdom*, no. 24527/08, 3 May 2012, [2012] ECHR 804.

Immigration, deportation and extradition cases

Healthcare needs have been invoked as a shield against expulsion and the court has held that in extreme cases this may engage Article 3. Domestic courts are always under an obligation to carefully assess the alleged risk of ill-treatment in deportation cases.

The applicant in *Bensaid v United Kingdom (2001)*⁸⁴ was an Algerian national who suffered from schizophrenia, as a result of which he had been receiving medical care and support in the UK since 1994. Previously, Mr Bensaid had indefinite leave to remain in the country as the foreign spouse of a UK national but this leave lapsed after he visited Algeria in 1996. Mr Bensaid complained that his proposed expulsion to Algeria placed him at risk of inhuman and degrading treatment contrary to Article 3. He also argued, under Article 8, that his removal would have a severely damaging effect on his private life, in particular his moral and physical integrity. He obtained a psychiatric report stating that he might suffer a relapse of his psychotic illness if he was returned to Algeria and that it was very unlikely that such a relapse would be effectively treated. Although treatment was available, it would require a journey through a dangerous part of the country that the applicant might not be able to undertake. The court found that Mr Bensaid had not met the high threshold necessary to show an Article 3 violation. Although the court accepted the seriousness of his medical condition, and the possibility that his reduced access to treatment and the greater instability in Algeria could increase his risk of relapse, the risk of his condition worsening was largely speculative; he would also face a risk of relapse if he remained in the UK. It was not enough in itself that the treatment available in Algeria was of a lesser quality than that available in the UK.

In *Aswat v United Kingdom (2013)*,⁸⁵ Mr Aswat had been indicted in the United States as a co-conspirator in respect of the establishment of a jihad training camp in Oregon. He was arrested in the UK in 2005 following a request for his extradition by US authorities. Because he suffered from paranoid schizophrenia he was transferred from prison to Broadmoor (high-secure) Hospital in 2008. The last forensic psychiatrist reports in his case, in 2011 and 2012, indicated that while his condition was well-controlled on anti-psychotic medication, and his participation in occupational and vocational activities in the hospital had helped prevent a significant deterioration in his mood, his detention in hospital was required for medical treatment. Such treatment was necessary for his health and safety. Mr Aswat complained that extradition would be incompatible with Article 3. His detention in Broadmoor Hospital in the UK was essential for his personal safety and treatment. If extradited, he could remain in pre-trial detention for a number of years and there was no information as to the conditions of that detention. Furthermore, if convicted in the USA, it was likely that he would be detained in a 'supermax' prison, where he could be isolated in a cell, which was likely to exacerbate his mental illness. The court found that there was a real risk that the applicant's extradition to the USA, a country with which he had no ties, and to a different, potentially more hostile prison environment, would result in a significant deterioration in his mental and physical health. Such extradition would violate Article 3.

84 *Bensaid v the United Kingdom*, no. 44599/98, 6 February 2001.

85 *Aswat v the United Kingdom*, no. 17299/12, 16 April 2013.

ARTICLE 5(1)

Article 5§1 provides that everyone has the right to liberty and security of person. No one shall be deprived of their liberty on the ground of unsoundness of mind unless such detention is lawful and in accordance with a procedure prescribed by law.⁸⁶

ARTICLE 5

Right to liberty and security

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

...

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

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

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

Article 5§1(e) refers to several categories of individual: persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all of them in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds.⁸⁷

The reason why the Convention allows these individuals to be deprived of their liberty is not only that they may be a danger to public safety but also that their own interests may necessitate their detention.⁸⁸

The term 'a person of unsound mind' does not lend itself to precise definition because psychiatry is an evolving field, both medically and in terms of social attitudes. However, it cannot be taken to permit the detention of someone simply because their views or behaviour deviate from established norms.⁸⁹

Ten commandments

By way of introduction, the Convention and associated case law can be seen as laying down the following commandments:

86 With regard to the security of the person and associated guarantees, see also Article 14 of the UNCRPD. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

87 *Enhorn v Sweden*, no. 56529/00, 25 January 2005, ECHR 2005-I, §43.

88 *Ibid*; *Guzzardi v Italy*, no. 7367/76, 6 November 1980, Series A no. 39, [1980] ECHR 5, §98.

89 *Rakevich v Russia*, no. 58973/00, 28 October 2003, §26.

- 1) Deprivation of liberty requires that the person has been confined in a particular restricted space 'for a not negligible length of time'. This is the 'objective condition'.
- 2) In addition, a 'subjective condition' must be met. This is that the person has not validly consented to their confinement.
- 3) A person cannot consent to being confined if they lack capacity to consent to it.
- 4) The distinction between deprivation of liberty and restriction of liberty is one of degree or intensity, not one of nature or substance.
- 5) The starting-point is the specific situation of the individual concerned. Account must be taken of a whole range of factors arising in the particular case, such as the type, duration, effects and manner of implementation of the measure in question.
- 6) Of considerable importance is whether the professionals exercise 'complete and effective control' over the person's his care and movements, so that the individual is 'under continuous supervision and control and is not free to leave.'
- 7) The state's obligations are engaged if a public authority is directly involved in the detention (it is 'imputable to the state'), but also if the state has breached its positive obligation to protect the individual against interferences by private persons.
- 8) This is because Article 5(1) imposes a positive obligation on the state to protect the liberty of its citizens. The state is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.
- 9) It is also essential that the person concerned should have access to a court and the opportunity to be heard in person or, where necessary, through some form of representation. Without this s/he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty. In the case of a detention on account of mental illness, special procedural safeguards may prove to be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.
- 10) With regard to persons in need of psychiatric treatment in particular, the state is also under an obligation to secure to its citizens 'their right to physical integrity' under Article 8. Private psychiatric institutions, in particular those where persons are held without a court order, need not only a licence, but also competent state supervision on a regular basis of whether the confinement and medical treatment is justified.

The positive obligation

The right to liberty and security is of the highest importance in a 'democratic society'.⁹⁰

Article 5 is concerned with the physical liberty of the person. Its aim is to ensure that no one is deprived of that liberty in an arbitrary or unjustified manner.⁹¹

A 'deprivation of liberty' is not confined to the classic case of detention following arrest or conviction. It may take numerous other forms.⁹² The fact that a person is not handcuffed, put in a cell or otherwise physically restrained is not a decisive factor in establishing whether or not a deprivation of liberty exists.⁹³

Article 5 is applicable in a variety of circumstances, including the placement of individuals in psychiatric or social care institutions⁹⁴ and house arrest.⁹⁵ Consequently, the court has found that there was a deprivation of liberty in circumstances such as the following:

- (a) where an applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, unsuccessfully attempted to leave the hospital;⁹⁶
- (b) where an applicant who initially consented to her admission to a clinic subsequently attempted to escape;⁹⁷
- (c) where an applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave.⁹⁸

The court has said that the right to liberty is too important in a democratic society for a person to lose the benefit of Article 5 for the single reason that they may have given themselves up to be taken into detention, especially where the person is legally incapable of consenting to, or disagreeing with, the proposed action.⁹⁹

90 *Medvedyev and Others v France* [GC], no. 3394/03, 29 March 2010, ECHR 2010, §76; *Ladent v Poland*, no. 11036/03, 18 March 2008, §45.

91 *McKay v United Kingdom* [GC], no. 543/03, 3 October 2006, ECHR 2006-X, §30.

92 *Guzzardi v Italy*, *supra*, §95.

93 *MA v Cyprus*, no. 41872/10, 23 July 2013, §193.

94 See e.g. *De Wilde, Ooms and Versyp v Belgium*, nos. 2832/66; 2835/66; 2899/66, 18 June 1971, Series A no. 12; *Nielsen v Denmark*, no. 10929/84, 28 November 1988, Series A no. 144, [1988] ECHR 23, (1988) 11 EHRR 175; *HM v Switzerland*, no. 39187/98, 26 February 2002, ECHR 2002-II, [2002] ECHR 157, (2002) 38 EHRR 314; *HL v United Kingdom*, no. 45508/99, 5 October 2004, ECHR 2004-IX, (2004) 40 EHRR 761; *Storck v Germany*, no. 61603/00, 16 June 2005, ECHR 2005-V, 43 EHRR 96, [2005] ECHR 406; *A. and Others v Bulgaria*, no. 51776/08, 29 November 2011; *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46.

95 *Mancini v Italy*, no. 44955/98, 2 August 2001, ECHR 2001-IX; *Lavents v Latvia*, no. 58442/00, 28 November 2002; *Nikolova v Bulgaria* (no. 2), no. 40896/98, 30 September 2004; *Dacosta Silva v Spain*, no. 69966/01, 2 November 2006, ECHR 2006-XIII.

96 *Shtukurov v Russia*, no. 44009/05, 27 March 2008, 54 EHRR 962.

97 *Storck v Germany*, no. 61603/00, 16 June 2005, ECHR 2005-V, 43 EHRR 96, [2005] ECHR 406.

98 *HL v United Kingdom*, no. 45508/99, 5 October 2004, ECHR 2004-IX, (2004) 40 EHRR 761.

99 *HL v the United Kingdom*, *supra*, §90; *Stanev v Bulgaria* [GC], *supra*, §119; *De Wilde, Ooms and Versyp v Belgium*, nos. 2832/66; 2835/66; 2899/66, 18 June 1971, Series A no. 12.

Article 5§1 imposes a positive obligation on the state not only to refrain from actively infringing the rights in question, but also to take appropriate steps to protect everyone within its jurisdiction against unlawful interference with those rights.¹⁰⁰

This duty on the state includes implementing measures which provide for the effective protection of vulnerable persons and taking reasonable steps to prevent any deprivation of liberty of which the authorities have or ought to have knowledge.¹⁰¹

The responsibility of a state is engaged if it acquiesces in a person's loss of liberty by private individuals or fails to put an end to the situation.¹⁰²

Deprivation of liberty and restriction of liberty

The case law confirms that Article 5(1) is concerned only with deprivation of liberty and not with restrictions of liberty or movement which do not amount to a deprivation of liberty, which are governed by Article 2 of Protocol 4.¹⁰³

Nor is Article 5 concerned with the conditions of detention. Disciplinary steps imposed within a prison which have effects on conditions of detention cannot be considered as constituting a deprivation of liberty.

Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention and fall outside the scope of Article 5§1 of the Convention.¹⁰⁴

In *Ashingdane v United Kingdom (1985)*,¹⁰⁵ the applicant complained about his prolonged detention in a high secure hospital (Broadmoor Hospital) from October 1978 to October 1980, after he had been declared fit for transfer to an ordinary psychiatric hospital (Oakwood Hospital).

The court reiterated that Article 5(1) is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol 4. The distinction between a deprivation and restriction of liberty is one of degree or intensity. In order to determine if the circumstances involve a deprivation, the starting point must be the concrete situation of the individual concerned, and account must be taken of a whole range of criteria, such as the

100 *El-Masri v the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13 December 2012, ECHR 2012, §239.

101 *Storck v Germany*, supra, §102.

102 *Riera Blume and Others v Spain*, no. 37680/97, 14 October 1999, ECHR 1999-VII; *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, §§319-21; *Medova v Russia*, no. 25385/04, 15 January 2009, §§123-25.

103 *Ashingdane v United Kingdom*, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8; *Creangă v Romania* [GC], no. 29226/03, 23 February 2012, §92; *Engel and Others v Netherlands*, nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, Series A no. 22, (1976) 1 EHRR 647, §58.

104 *Bollan v the United Kingdom* (dec), no. 42117/98, 4 May 2000, ECHR 2000-V.

105 *Ashingdane v United Kingdom*, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8.

type, duration, effects and manner of implementation of the measure in question.¹⁰⁶ In Mr Ashingdane's case, there were important differences between the regimes at Broadmoor and Oakwood. His transfer to Oakwood had a proximate connection with a possible recovery of liberty because it was a staging post on the road to any eventual discharge into the community. However, since he had remained a detained patient during his subsequent stay at Oakwood,¹⁰⁷ it could not be said that, whilst being kept at Broadmoor pending transfer, he was being maintained in detention although medically and administratively judged fit for a return to liberty.

The Court accepted that there must be some relationship between the permitted ground of for the person's deprivation of liberty relied upon and the place and conditions of detention. The detention of a person as a mental health patient would only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic or other appropriate institution authorised for the purpose. However, subject to that, Article 5(1)(e) is not in principle concerned with the suitability of treatment or the location of the detention.

What is a deprivation of liberty?

Because there must be a deprivation, rather than a mere restriction, of liberty for Article 5 to apply, the first question is always, 'Is this person deprived of their liberty?'

What therefore constitutes a deprivation of liberty? According to the case law, the difference between restrictions on movement serious enough to come within the ambit of a deprivation of liberty under Article 5§1 and mere restrictions of liberty, which are subject to Article 2 of Protocol No. 4, is one of degree or intensity, and not one of nature or substance.¹⁰⁸

The starting point must be the individual'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.¹⁰⁹

Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.¹¹⁰

106 Referring to *Engel and Others v Netherlands*, nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, Series A no. 22, (1976) 1 EHRR 647, §§58-59; *Guzzardi v Italy*, no. 7367/76, 6 November 1980, Series A no. 39, [1980] ECHR 5, §92.

107 Mr Ashingdane was deprived of his liberty notwithstanding that when eventually transferred to Oakwood he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds, and the possibility of unescorted leave outside the hospital.

108 *Ashingdane v United Kingdom*, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8; *Guzzardi v Italy*, no. 7367/76, 6 November 1980, Series A no. 39, [1980] ECHR 5, §93; *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, §314; *Stanev v Bulgaria [GC]*, no. 36760/06, 17 January 2012, [2012] ECHR 46, §115.

109 *Guzzardi v Italy*, no. 7367/76, 6 November 1980, Series A no. 39, [1980] ECHR 5, §92; *Medvedyev and Others v France [GC]*, no. 3394/03, 29 March 2010, ECHR 2010, §73; *Creangă v Romania [GC]*, no. 29226/03, 23 February 2012, §91.

110 See e.g. *Guzzardi v Italy*, supra, §95; *HM v Switzerland*, no. 39187/98, 26 February 2002, ECHR 2002-II, [2002] ECHR 157, (2002) 38 EHRR 314, §45; *HL v United Kingdom*, no. 45508/99, 5 October 2004, ECHR

Where the overall circumstances indicate a deprivation of liberty within the scope of Article 5§1, the relatively short duration of the person's detention does not prevent there being a deprivation of liberty.¹¹¹ For example, an element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure.¹¹²

The court is not bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty and undertakes an autonomous assessment of the situation.¹¹³

Two conditions must both be met for a deprivation of liberty to exist: an objective condition and a subjective condition. The objective condition is that the person has been confined in a restricted space (such as a hospital or social care home) for a not negligible length of time. The subjective condition is that they have not validly consented to this confinement.¹¹⁴

In relation to the objective condition, in many cases it has been held to be decisive that the individual is under continuous supervision and control and is not free to leave.¹¹⁵

The fact that a person *de jure* lacks legal capacity to decide matters for themselves does not dispense with the second condition by rendering irrelevant the question of whether or not they object to their confinement and regime.¹¹⁶

2004-IX, (2004) 40 EHRR 761, §91; *Storck v Germany*, no. 61603/00, 16 June 2005, ECHR 2005-V, 43 EHRR 96, [2005] ECHR 406, §73.

111 *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, §317; *Iskandarov v Russia*, no. 17185/05, 23 September 2010, §140.

112 *Krupko and Others v Russia*, no. 26587/07, 26 June 2014, §36; *Foka v Turkey*, no. 28940/95, 24 June 2008, §78; *Gillan and Quinton v the United Kingdom*, no. 4158/05, ECHR 2010, §57; *Shimovolos v Russia*, no. 30194/09, 21 June 2011, §50; *Brega and Others v Moldova*, no. 61485/08, 24 January 2012, §43.

113 *HL v United Kingdom*, *supra*, §90; *HM v Switzerland*, no. 39187/98, 26 February 2002, ECHR 2002-II, [2002] ECHR 157, (2002) 38 EHRR 314, §§30 and 48; *Creangă v Romania [GC]*, *supra*, §92.

114 *Storck v Germany*, *supra*, §74; *Stanev v Bulgaria [GC]*, no. 36760/06, 17 January 2012, [2012] ECHR 46, §117; *mutatis mutandis*, *HM v Switzerland*, *supra*, §46;

115 See e.g. *HL v United Kingdom*, *supra*, §91; *Storck v Germany*, *supra*, §73; *DD v Lithuania*, no. 13469/06, 14 February 2012, [2012] ECHR 254, §156.

116 *Shtukurov v Russia*, no. 44009/05, 27 March 2008, 54 EHRR 962, §§107-09: 109: '§108. The Court notes in this respect that ... the applicant lacked *de jure* legal capacity to decide for himself. However, this does not necessarily mean that the applicant was *de facto* unable to understand his situation. §109. In sum, even though the applicant was legally incapable of expressing his opinion, the Court in the circumstances is unable to accept the Government's view that the applicant agreed to his continued stay in the hospital. The Court therefore concludes that the applicant was deprived of his liberty by the authorities within the meaning of Article 5§1 ...'; *DD v Lithuania*, *supra*, §150: '§150 Whilst accepting that in certain circumstances, due to severity of his or her incapacity, an individual may be wholly incapable of expressing consent or objection to being confined in an institution for the mentally handicapped or other secure environment, the Court finds that that was not the applicant's case. As transpires from the documents presented to the Court, the applicant subjectively perceived her compulsory admission to the Kėdainiai Home as a deprivation of liberty. Contrary to what the Government suggested, she has never regarded her admission to the facility as consensual and has unequivocally objected to it throughout the entire duration of her stay in the institution'

Case law on whether a deprivation of liberty exists

In *Nielsen v Denmark (1988)*,¹¹⁷ the mother of the applicant Jon Nielsen, who was then 12 years old, held sole parental rights. She requested his admission to the State Hospital's Child Psychiatric Ward 'since it was clear that he did not want to stay with her'. She acted on the advice of the Social Welfare Committee and Professor Tolstrup, who was responsible for his treatment at the State Hospital, and the recommendation of her family doctor. On 26 September 1983, the applicant was admitted. According to Professor Tolstrup, the procedure followed was the usual one: the holder of parental rights made the request, the family doctor recommended admission and the responsible chief physician of the ward accepted admission. The applicant alleged that his committal to the Child Psychiatric Ward constituted a deprivation of liberty which contravened Article 5. The court held as follows:

'70. There is also no reason to find that the treatment given at the Hospital and the conditions under which it was administered were inappropriate in the circumstances.

The applicant was in need of medical treatment for his nervous condition and the treatment administered to him was curative, aiming at securing his recovery from his neurosis. This treatment did not involve medication, but consisted of regular talks and environmental therapy

The restrictions on the applicant's freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital: it is true that the door of the Ward, like all children's wards in the hospital, was locked, but this was to prevent the children exposing themselves to danger or running around and disturbing other patients; the applicant was allowed to leave the Ward, with permission, to go for instance to the library and he went with other children, accompanied by a member of the staff, to visit playgrounds and museums and for other recreational and educational purposes; he was also able to visit his mother and father regularly and his old school friends and, towards the end of his stay in hospital, he started going to school again; in general, conditions in the Ward were said to be "as similar as possible to a real home"

The duration of the applicant's treatment was 5½ months. This may appear to be a rather long time for a boy of 12 years of age, but it did not exceed the average period of therapy at the Ward and, in addition, the restrictions imposed were relaxed as treatment progressed

71. The Commission, in reaching the conclusion that the present case did involve a deprivation of liberty within the meaning of Article 5 ... attached particular weight to the fact that the case concerned [the] 'detention in a psychiatric ward of a 12-year-old boy who was not mentally ill and that the applicant, when he disappeared from the hospital, was found and brought back to the hospital by the police'

117 *Nielsen v Denmark*, no. 10929/84, 28 November 1988, Series A no. 144, [1988] ECHR 23, (1988) 11 EHRR 175.

72. The Court accepts, with the Government, that the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse. However, it does not follow that the present case falls within the ambit of Article 5

The restrictions imposed on the applicant were not of a nature or degree similar to the cases of deprivation of liberty specified in paragraph 1 of Article 5 (art. 5-1). In particular, he was not detained as a person of unsound mind so as to bring the case within paragraph 1 (e) (art. 5-1-e). Not only was the child not mentally ill within the meaning of the 1938 Act, but the Psychiatric Ward at the Hospital was in fact not used for the treatment of patients under the 1938 Act or of patients otherwise suffering from mental illnesses of a psychotic nature. Indeed, the restrictions to which the applicant was subject were no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions in which the applicant stayed thus did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated.

Regarding the weight which should be given to the applicant's views as to his hospitalisation, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5 (art. 5-1).

Nor did the intervention of the police, which would have been appropriate for the return of any runaway child of that age even to parental custody, throw a different light on the situation.

73. The Court concludes that the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5 (art. 5), but was a responsible exercise by his mother of her custodial rights in the interest of the child. Accordingly, Article 5 (art. 5) is not applicable in the case.'

In *HM v Switzerland (2002)*,¹¹⁸ the applicant, who was born in 1912, complained of an unlawful deprivation of liberty following her placement in a nursing home on account of neglect. She submitted in this respect that the Convention only cited 'vagrancy', and not neglect, as a ground of detention.

The court held that there had been no violation of Article 5§1. The applicant's placement in the nursing home had not amounted to a deprivation of liberty within the meaning of Article 5§1, but had been a responsible measure taken by the competent authorities in the applicant's interests, in order to provide her with necessary medical care and satisfactory living conditions and standards of hygiene. The applicant was also able to maintain social contact with the outside world while in the home. The court further noted that, after the applicant had moved to the nursing home, she had agreed to stay there.

118 *HM v Switzerland*, no. 39187/98, 26 February 2002, ECHR 2002-II, [2002] ECHR 157, (2002) 38 EHRR 314.

‘44. Turning to the circumstances of the present case, the Court notes that the applicant had had the possibility of staying at home and being cared for by the Lyss Association for Home Visits to the Sick and Housebound, but she and her son had refused to cooperate with the association. Subsequently, the living conditions of the applicant at home deteriorated to such an extent that the competent authorities of the Canton of Berne decided to take action. On 16 December 1996 the Aarberg District Governor visited the applicant at home in order to assess the situation and, finding that she was suffering from serious neglect, decided on 17 December 1996 to place her in the S Nursing Home. On 16 January 1997, after carefully reviewing the circumstances of the case, the Cantonal Appeals Commission of the Canton of Berne concluded that the living conditions and standards of hygiene and of medical care at the applicant's home were unsatisfactory, and that the nursing home concerned, which was in an area which the applicant knew, could provide her with the necessary care.

45. Furthermore, it transpires ... that the applicant was not placed in the secure ward of the nursing home ... Rather, she had freedom of movement and was able to maintain social contact with the outside world.

46. The Court notes, in addition, the decision of the Cantonal Appeals Commission of 16 January 1997, according to which the applicant was hardly aware of the effects of her stay in the nursing home, which were mainly felt by her son who did not wish to leave his mother. Moreover, the applicant herself was undecided as to which solution she in fact preferred. For example, at the hearing before the Appeals Commission, she stated that she had no reason to be unhappy with the nursing home.

47. Finally, the Court notes that, after moving to the nursing home, the applicant agreed to stay there. As a result, the Aarberg District Government Office had lifted the order for the applicant's placement on 14 January 1998.

48. Bearing these elements in mind, in particular the fact that the Cantonal Appeals Commission 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, and also taking into consideration the comparable circumstances in *Nielsen* (cited above), the Court concludes that in the circumstances of the present case the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5§1, but was a responsible measure taken by the competent authorities in the applicant's interests. Accordingly, Article 5§1 is not applicable in the present case.’

In ***HL v the United Kingdom (2004)***,¹¹⁹ the applicant was autistic and unable to speak, and his level of understanding was limited. In July 1997, while at a day centre, he started harming himself. He was detained in a psychiatric hospital intensive behavioural unit as an ‘informal patient’, i.e. without any detention order being made under the Mental Health Act 1983. Contact between him and his long-term carers was initially prohibited while he remained in hospital, and then subsequently restricted by the hospital to one visit a week. HL was sedated while in hospital which ‘ensured that he remain tractable’ and kept under continuous

119 *HL v United Kingdom*, no. 45508/99, 5 October 2004, ECHR 2004-IX, (2004) 40 EHRR 761.

observation by nursing staff. Those responsible for his care indicated that, if he tried to leave the hospital at all, they would arrange for him to be assessed with a view to his detention under the Mental Health Act 1983.

The applicant alleged that his period of treatment as an informal patient¹²⁰ in a psychiatric institution amounted to a deprivation of liberty. Furthermore, this had been unlawful because the procedures available to him for a review of the legality of his detention did not satisfy the requirements of Article 5. The court accepted that HL was deprived of his liberty:

'91. Turning therefore to the concrete situation as required by the *Ashingdane* judgment, the Court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems on 22 July 1997 to the date he was compulsorily detained [under the Mental Health Act 1983] on 29 October 1997.

More particularly, the applicant had been resident with his carers for over three years. On 22 July 1997, following a further incident of violent behaviour and self-harm in his day care centre, the applicant was sedated before being brought to the hospital and subsequently to the IBU [intensive behavioural unit], in the latter case supported by two persons. His responsible medical officer (Dr M) was clear that, had the applicant resisted admission or tried to leave thereafter, she would have prevented him from doing so and would have considered his involuntarily committal under section 3 of the 1983 Act (paragraphs 12, 13 and 41 above): indeed, as soon as the Court of Appeal indicated that his appeal would be allowed, he was compulsorily detained under the 1983 Act. The correspondence between the applicant's carers and Dr M ... reflects both the carer's wish to have the applicant immediately released to their care and, equally, the clear intention of Dr M and the other relevant health care professionals to exercise strict control over his assessment, treatment, contacts and, notably, movement and residence: the applicant would only be released from the hospital to the care of Mr and Mrs E as and when those professionals considered it appropriate. While the Government suggested that "there was evidence" that the applicant had not been denied access to his carers, it is clear from the above-noted correspondence that the applicant's contact with his carers was directed and controlled by the hospital, his carers visiting him for the first time after his admission on 2 November 1997.

Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn [a House of Lords judge in the earlier UK proceedings] as 'stretching credulity to breaking point' and as a 'fairy tale' (paragraph 46 above)

93. Considerable reliance was placed by the Government on the ... *HM v Switzerland* judgment, in which it was held that the placing of an elderly applicant in a foster home, to ensure necessary medical care as well as satisfactory living conditions and hygiene, did not amount to a deprivation of liberty within the meaning of Article 5 of the

120 Subsequently he was detained ('sectioned') under the Mental Health Act 1983.

Convention. However, each case has to be decided on its own particular 'range of factors' and ... there are also distinguishing features. In particular, it was not established that *HM* was legally incapable of expressing a view on her position, she had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay. This combined with a regime entirely different to that applied to the present applicant (the foster home was an open institution which allowed freedom of movement and encouraged contacts with the outside world) allows a conclusion that the facts of the *HM* case were not of a 'degree' or 'intensity' sufficiently serious to justify the conclusion that she was detained (see the ... *Guzzardi* judgment, at §93).

The Court also finds a conclusion that the present applicant was detained consistent with the above-cited *Nielsen* judgment on which the Government also relied. That case turned on the specific fact that the mother had committed the applicant minor to an institution in the exercise of her parental rights (the *Nielsen* judgment, at §§ 63 and 68), pursuant to which rights she could have removed the applicant from the hospital at any time. [In *HL*'s case] ... the fact that the hospital had to rely on the doctrine of necessity and, subsequently, on the involuntary detention provisions of the 1983 Act demonstrates that the hospital did not have legal authority to act on the applicant's behalf in the same way as Mr Nielsen's mother.

94. The Court therefore concludes that the applicant was 'deprived of his liberty' within the meaning of Article 5§1 of the Convention from 22 July 1997 to 29 October 1997.'

The court also accepted *HL*'s complaint that there had been a violation of Article 5§4 because there were no proper procedural safeguards in place to protect him against an arbitrary deprivation of liberty on general (common law) grounds of necessity.

In ***Storck v Germany (2005)***,¹²¹ the applicant, Waltraud Storck, was a German national who had spent almost 20 years of her life in psychiatric institutions and hospitals. At her father's request, she was placed in a locked ward of a private psychiatric clinic from 29 July 1977 to 5 April 1979 following various family conflicts. Ms Storck was an adult who had not been placed under guardianship and she had never signed a declaration consenting to her placement in the institution. Nor had there had been a judicial decision authorising her detention there.

The applicant repeatedly tried to flee from the clinic and was brought back by force by the police on 4 March 1979. After receiving medical treatment for schizophrenia at the clinic, she developed a post-poliomyelitis syndrome with the result that 'she is now 100% disabled'. From 1980 to 1991/1992 she lost the ability to speak. In 1994, an expert report found that she had never suffered from schizophrenia and also that her behaviour had been caused by conflicts with her family. The applicant brought complaints under Article 5, Article 6§1 and Article 8 of the Convention concerning her placement and medical treatment in the private clinic, her treatment in the university clinic and the fairness of the ensuing proceedings.

121 *Storck v Germany*, no. 61603/00, 16 June 2005, ECHR 2005-V, 43 EHRR 96, [2005] ECHR 406.

The Court found that the applicant, who had notably tried to flee from the clinic on several occasions, had not agreed to her continued stay there and had therefore been deprived of her liberty within the meaning of Article 5§1.

As there was no court order in place authorising Ms Storck's confinement in the private clinic, her detention had been unlawful and her confinement there breached the right to liberty guaranteed by Article 5§1. No separate issues arose under Article 5§§4 and 5.

The state was responsible for the deprivation of liberty in three respects. Firstly, the authorities became actively involved in her placement in the clinic when the police, by use of force, brought her back to the clinic from which she had fled. Secondly, the national courts, in compensation proceedings brought by the applicant, failed to interpret the civil law provisions relating to her claim in the spirit of Article 5. Thirdly, the state had violated its existing positive obligation to protect Ms Storck against interferences with her liberty carried out by private individuals.

'73 ... it is undisputed that the applicant had been placed in a locked ward of that clinic. She had been under continuous supervision and control of the clinic personnel and had not been free to leave the clinic during her entire stay there of some 20 months. When the applicant had attempted to flee it had been necessary to fetter her in order to secure her stay in the clinic. When she had once succeeded in escaping from there she had to be brought back by the police. She had also not been able to maintain regular social contacts with the outside world. Objectively, she must therefore be considered as having been deprived of her liberty.

74. However, the notion of deprivation of liberty within the meaning of Article 5§1 does not only comprise the objective element of a person's confinement to a certain limited place for a not negligible length of time. A person can only be considered as being deprived of his or her liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see, *mutatis mutandis*, *H.M. v Switzerland*, cited above, §46). The Court notes that in the present case, it is disputed between the parties whether the applicant had consented to her stay in the clinic.

75 ... the Court observes that the applicant had attained majority at the time of her admission to the clinic and had not been placed under guardianship. Therefore, she had been considered to have the capacity to consent or object to her admission and treatment in hospital. It is undisputed that she had not signed the clinic's admission form prepared on the day of her arrival. It is true that she had presented herself to the clinic, accompanied by her father. However, 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 (see *De Wilde, Ooms and Versyp v Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, §65; *H.L. v the United Kingdom*, cited above, §90).

76. Having regard to the continuation of the applicant's stay in the clinic, the Court considers the key factor in the present case to be that ... the applicant, on several occasions, had tried to flee from the clinic. She had to be fettered in order to prevent her from absconding and had to be brought back to the clinic by the police when she

had managed to escape on one occasion. Under these circumstances, the Court is unable to discern any factual basis for the assumption that the applicant — presuming her capacity to consent — had agreed to her continued stay in the clinic. In the alternative, assuming that the applicant had no longer been capable of consenting following her treatment with strong medicaments, she could, in any event, not be considered as having validly agreed to her stay in the clinic.

77. Indeed, a comparison of the facts of this case with those in *HL v the United Kingdom* ... cannot but confirm this finding. That case concerned the confinement of an individual who was of age but lacked the capacity to consent in a psychiatric institution which he had never attempted to leave, and in which the Court had found that there had been a deprivation of liberty. In the present case, *a fortiori*, a deprivation of liberty must be found. The applicant's lack of consent must also be regarded as the decisive feature distinguishing the present case from the case of *HM v Switzerland* ... In that case, it was held that the placing of an elderly person in a foster home, to ensure necessary medical care, had not amounted to a deprivation of liberty. However, that applicant, who had been legally capable of expressing a view, had been undecided as to whether or not she wanted to stay in the nursing home. The clinic could then draw the conclusion that she did not object.

78. The Court therefore concludes that the applicant had been deprived of her liberty within the meaning of Article 5§1 of the Convention.'

The court reiterated the positive obligation on the state to protect the liberty of its citizens. It also emphasised that *ex post facto* sanctions, in the shape of criminal and civil liability for wrongful detention, do not provide effective protection for people in such a vulnerable position.

In *Shtukaturov v Russia (2008)*,¹²² the applicant was admitted to hospital on 4 November 2005. His admission was requested by his mother as the guardian of a legally incapable person. In terms of domestic law it was therefore a voluntary admission and did not require approval by a court. The applicant claimed that he had been confined in hospital against his will and that his placement in hospital amounted to a deprivation of his liberty. He observed that he was placed in a locked facility. After he attempted to flee the hospital in January 2006, he was tied to his bed and given an increased dose of sedative medication. He was not allowed to communicate with the outside world until he was discharged. Subjectively, he perceived his confinement as a deprivation of liberty, had never regarded his detention as consensual, and unequivocally objected to it throughout his stay. Because the authorities had relied on his status as a legally incapable person, and treated his hospitalization as a voluntary confinement, in contravention of Article 5§4 none of the procedural safeguards usually required in cases of involuntary hospitalisation had applied to him. The court found that the applicant was deprived of his liberty:

'107 ... The applicant was confined in the hospital for several months, he was not free to leave and his contacts with the outside world were seriously restricted

122 *Shtukaturov v Russia*, no. 44009/05, 27 March 2008, 54 EHRR 962.

108. The Court notes ... that ... the applicant lacked *de jure* legal capacity to decide for himself. However, this does not necessarily mean that the applicant was *de facto* unable to understand his situation. First, the applicant's own behaviour at the moment of his confinement proves the contrary. Thus, on several occasions the applicant requested his discharge from hospital, he contacted the hospital administration and a lawyer with a view to obtaining his release, and once he attempted to escape from the hospital (see, *a fortiori*, *Storck v Germany* ... where the applicant consented to her stay in the clinic but then attempted to escape). Second ... the findings of the domestic courts on the applicant's mental condition were questionable and quite remote in time

109. In sum, even though the applicant was legally incapable of expressing his opinion, the Court in the circumstances is unable to accept the Government's view that the applicant agreed to his continued stay in the hospital. The Court therefore concludes that the applicant was deprived of his liberty by the authorities within the meaning of Article 5§1 of the Convention.

110. The Court further notes that although the applicant's detention was requested by the applicant's guardian, a private person, it was implemented by a State-run institution — a psychiatric hospital. Therefore, the responsibility of the authorities for the situation complained of was engaged.'

In *Stanev v Bulgaria (2012)*,¹²³ the Bulgarian courts found that Mr Stanev was partially incapacitated, on the ground that he had suffered from schizophrenia since 1975 and was unable to manage his own affairs adequately or to realise the consequences of his actions. In 2002 he was placed under the partial guardianship of a council officer. Without consulting or informing him, his guardian had Mr Stanev placed in the Pastra social care home for men with psychiatric disorders, in a remote mountain location. He had lived there ever since and the director of the home subsequently became his guardian.

Mr Stanev was only allowed to leave the institution with the director's permission. On one occasion, when he did not return from a period of organised leave, the director contacted the police who located him. Mr Stanev tried to have his legal capacity restored in November 2004. In 2005 prosecutors refused to bring a case, finding that he could not cope alone and that the institution was the most suitable place for him. This decision relied on a medical report dated 15 June 2005 which stated that there were signs of schizophrenia. An application for judicial review was rejected on the ground that an application could be made by his guardian. Several oral requests to his guardian to apply for his release were refused. Mr Stanev complained that he was deprived of his liberty and therefore was entitled to the protections afforded by Article 5.

The court found that Mr Stanev's placement in the social care home was the result of various steps taken by public authorities and institutions through their officials, from the initial request for his placement there through to its implementation. It was therefore attributable to the Bulgarian authorities.

123 *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46.

Mr Stanev was housed in a block which he was able to leave but the time he spent away from the institution and the places he could go were always subject to controls and restrictions. The system of leave of absence and the fact that managers kept his identity papers placed significant restrictions on his personal liberty. Although he was able to undertake certain journeys, he was under constant supervision and was not free to leave the home without permission whenever he wished. In addition, the government had not shown that his state of health put him at immediate risk or required the imposition of any special restrictions to protect him. The duration of the applicant's placement in the home was not specified and so was indefinite; he was listed in the municipal registers as being permanently resident there and indeed was still living there. As he had lived in the home for more than eight years, he must have felt the full adverse effects of the restrictions imposed on him. The court was not convinced that he ever consented to the placement, even tacitly. Although domestic law attached a certain weight to his wishes, and it appeared that he was well aware of his situation, Mr Stanev was not asked for his opinion on his placement in the institution and never explicitly consented to it. At least from 2004 onwards, he explicitly expressed his desire to leave the institution, both to psychiatrists and through applications to the authorities to have his legal capacity restored. Taking into consideration the authorities involvement in the decision to place him in the institution, the rules on leave of absence, the duration of the placement and his lack of consent, this was a deprivation of liberty and Article 5§1 was applicable.

Furthermore, this deprivation of liberty was unlawful and there had therefore been a violation of Article 5§1. There were deficiencies in the assessment of whether he still suffered from a disorder warranting his confinement, and indeed no provision was made for such an assessment under the relevant legislation. The lack of a recent medical assessment alone would have been sufficient to conclude that his placement in the home was unlawful. In addition, it had not been established that he posed a danger to himself or to others. Further still, the decision by his guardian to place him in an institution for people with psychiatric disorders without obtaining his prior consent was invalid under Bulgarian law and therefore his deprivation of liberty was unlawful for the purposes of Article 5.

'115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement ... is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Guzzardi v Italy*, 6 November 1980, §§ 92-93, Series A no. 39)

120 ... The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see *Storck*, cited above, §102). Thus, having regard to the particular circumstances of the cases before it, the Court has held that the national authorities' responsibility was engaged as a result of detention in a psychiatric hospital at the request of the applicant's guardian (see *Shtukaturov*, cited above) and detention in a private clinic (see *Storck*, cited above)

121. The Court observes at the outset that it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a “deprivation of liberty” within the meaning of Article 5§1.¹²⁴ In some cases, the placement is initiated by families who are also involved in the guardianship arrangements and is based on civil-law agreements signed with an appropriate social care institution. Accordingly, any restrictions on liberty in such cases are the result of actions by private individuals and the authorities’ role is limited to supervision. The Court is not called upon in the present case to rule on the obligations that may arise under the Convention for the authorities in such situations.¹²⁵

122. It observes that there are special circumstances in the present case. No members of the applicant’s family were involved in his guardianship arrangements, and the duties of guardian were assigned to a State official (Ms RP), who negotiated and signed the placement agreement ... without any contact with the applicant, whom she had in fact never met. The placement agreement was implemented in a State-run institution by social services, which likewise did not interview the applicant ... The applicant was never consulted about his guardian’s choices, even though he could have expressed a valid opinion and his consent was necessary in accordance with the Persons and Family Act 1949 ... That being so, he was not transferred to the Pastra social care home at his request or on the basis of a voluntary private-law agreement on admission to an institution to receive social assistance and protection. The Court considers that the restrictions complained of by the applicant are the result of various steps taken by public authorities and institutions through their officials ... and not of acts or initiatives by private individuals. [That] ... set[s] the present case apart from *Nielsen* ... in which the applicant’s mother committed her son, a minor, to a psychiatric institution in good faith ... [in] the exercise of exclusive custodial rights over a child who was not capable of expressing a valid opinion.

123. The applicant’s placement in the social care home can therefore be said to have been attributable to the national authorities. It remains to be determined whether the restrictions resulting from that measure amounted to a “deprivation of liberty” within the meaning of Article 5.

124. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive (see *Ashingdane*, cited above, §42). While it is true that the applicant was able to go to the nearest village, he needed express permission to do so ... Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

125 ... such leave of absence was entirely at the discretion of the home’s management, who kept the applicant’s identity papers and administered his finances, including transport costs

124 A critical observation because it can be seen that this vital question remains open.

125 Likewise, a critical observation because it can be seen that this vital question also remains open.

126. The Court considers that this system of leave of absence and the fact that the management kept the applicant's identity papers placed significant restrictions on his personal liberty.

127. Moreover, it is not disputed that when the applicant did not return from leave of absence in 2006, the home's management asked the Ruse police to search for and return him ... since his authorised period of leave had expired, the staff returned him to the home without regard for his wishes.

128 the factors outlined above lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home without permission whenever he wished. With reference to the *Dodov* case ... the applicant's mother [in that case] suffered from Alzheimer's disease and ... as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb

130. As to the subjective aspect of the measure ... the applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it ... The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation (see *Shtukurov* ... §108). In the present case ... it appears that he was well aware of his situation ... the applicant explicitly expressed his desire to leave the Pastra social care home

131. These factors set the present case apart from *HM v Switzerland* ... in which the Court found that there had been no deprivation of liberty as the applicant had been placed in a nursing home purely in her own interests and, after her arrival there, had agreed to stay. In that connection the Government have not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there. That being so, the Court is not convinced that the applicant consented to the placement or accepted it tacitly at a later stage and throughout his stay.

132. Having regard to the particular circumstances of the present case, especially the involvement of the authorities in the decision to place the applicant in the home and its implementation, the rules on leave of absence, the duration of the placement and the applicant's lack of consent, the Court concludes that the situation under examination amounts to a deprivation of liberty within the meaning of Article 5§1 ...'

In *DD v Lithuania (2012)*,¹²⁶ the applicant had suffered from mental disorder since the age of 16 when she discovered she was adopted. More than 20 hospital admissions had resulted in various diagnoses, the most recent being episodic paranoid schizophrenia. Her adoptive father was granted a declaration that DD was legally incapacitated and a legal guardian was appointed. Her first guardian was her psychotherapist and friend, who later resigned and was replaced with DD's adoptive father.

In 2004, on the initiative of her adoptive father and without her consent, DD was placed in a social care home where she remained at the time of the hearing. In 2007, the director of the home became her guardian. As an incapacitated person, DD was not given the opportunity to participate in this or any other guardianship proceedings.

DD contended that her involuntary admission to the home amounted to a 'deprivation of liberty'. The government argued that the care home was providing social services, not compulsory psychiatric treatment, and that the restrictions on DD were necessary because of the severity of her mental illness, were in her interests and were no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering mental health problems.

Finding that there was a deprivation of liberty, the court distinguished the *Nielsen* and *HM* cases:

'146... the key factor in determining whether Article 5§1 applies to the applicant's situation is that the Kedainiai Home's management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to that institution, to this day (ibid., §91). As transpires from the rules of the Kedainiai Home, a patient therein is not free to leave the institution without the management's permission. In particular, ... on at least one occasion the applicant left the institution without informing its management, only to be brought back by the police ... Moreover, the director of the Kedainiai Home has full control over whom the applicant may see and from whom she may receive telephone calls ... Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see *Storck v Germany*, no. 61603/00, §73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point.

147. Considerable reliance was placed by the Government on the court's judgment in [*HM v Switzerland*] ... in which it was held that the placing of an elderly applicant in a foster home in order to ensure necessary medical care as well as satisfactory living conditions and hygiene did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention. However, each case has to be decided on its own particular "range of factors" and, while there may be similarities between the present case and *HM*, there are also distinguishing features. In particular, it was not established that *HM* was legally incapable of expressing a view on her position. She had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay, in plain contrast to the applicant in the instant case. Further, a

126 *DD v Lithuania*, no. 13469/06, 14 February 2012, [2012] ECHR 254.

number of safeguards — including judicial scrutiny — were in place in order to ensure that the placement in the nursing home was justified under domestic and international law. This led to the conclusion that the facts in HM were not of a “degree” or “intensity” sufficiently serious to justify a finding that H.M. was detained (see *Guzzardi*, cited above, §93). By contrast, in the present case the applicant was admitted to the institution upon the request of her guardian without any involvement of the courts.

148. As to the facts in *Nielsen*, the other case relied on by the Government, the applicant in that case was a child, hospitalised for a strictly limited period of time of only five and a half months, on his mother’s request and for therapeutic purposes. The applicant in the present case is a functional adult who has already spent more than seven years in the Kėdainiai Home, with negligible prospects of leaving it. Furthermore, in contrast to this case, the therapy in *Nielsen* consisted of regular talks and environmental therapy and did not involve medication. Lastly, as the court found in *Nielsen*, the assistance rendered by the authorities when deciding to hospitalise the applicant was “of a limited and subsidiary nature” (§63), whereas in the instant case the authorities contributed substantially to the applicant’s admission to and continued residence in the... Home.

149. Assessing further, the court draws attention to the incident of 25 January 2005, when the applicant was restrained by the Kedainiai Home staff. Although the applicant was placed in a secure ward, given drugs and tied down for a period of only fifteen to thirty minutes, the court notes the particularly serious nature of the measure of restraint and observes that where the facts indicate a deprivation of liberty within the meaning of Article 5§1, the relatively short duration of the detention does not affect this conclusion ...

150. The court next turns to the “subjective” element ... the applicant subjectively perceived her compulsory admission to the Kedainiai Home as a deprivation of liberty. Contrary to what the Government suggested, she has never regarded her admission to the facility as consensual and has unequivocally objected to it throughout the entire duration of her stay in the institution. On a number of occasions the applicant requested her discharge ... She even twice attempted to escape ... In sum, even though the applicant had been deprived of her legal capacity, she was still able to express an opinion on her situation, and in the present circumstances the court finds that the applicant had never agreed to her continued residence at the Kedainiai Home.

151. Lastly, the court notes that although the applicant’s admission was requested by the applicant’s guardian, a private individual, it was implemented by a State-run institution – the Kedainiai Home. Therefore, the responsibility of the authorities for the situation complained of was engaged ...’

Having found that there was a deprivation of liberty, the court decided that it was lawful to confine DD to the care home because she satisfied the *Winterwerp* criteria (see below) and no alternative measures were appropriate.¹²⁷

127 Whether a person of unsound mind is detained in a psychiatric hospital or a community facility, *Stanev and DD* confirm that *Winterwerp* should be applied.

When is a deprivation of liberty on the ground of unsoundness of mind ‘lawful’

If an individual is deprived of his liberty on the ground of unsoundness of mind, the next question is whether their deprivation of liberty is lawful? Does it comply with or contravene the Article 5 requirements? The leading case is *Winterwerp v The Netherlands*.¹²⁸ In that case, the court set down four conditions that must be satisfied for a person’s detention on the basis of unsoundness of mind to be lawful under Article 5§1(e).¹²⁹

1. The deprivation of liberty must be lawful.

Lawfulness presupposes conformity with domestic law and the Convention.

As regards the conformity with the domestic law, the term ‘lawful’ covers procedural as well as substantive rules.

Domestic law must be in conformity with the Convention, including the general principles expressed or implied by it.¹³⁰ The general implied principles to which the Article 5§1 case law refers are the principle of the rule of law and, connected to this, the principles of legal certainty, proportionality and protection from arbitrariness, which is the very aim of Article 5.¹³¹ A deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention.¹³²

As concerns the principle of legal certainty, the Convention requires that the law is sufficiently clear and precise. It is essential that the conditions for a deprivation of liberty under domestic law are clearly defined and that the law foreseeable in its application, so that so that a person may know to a degree that is reasonable in the circumstances the consequences which a given action may entail, if need be by taking appropriate advice.¹³³

The essential objective of Article 5 is to prevent citizens from being deprived of their liberty in an arbitrary fashion.¹³⁴ No detention that is arbitrary can ever be regarded as ‘lawful’. If there are no procedural rules, no criteria, no statement of purpose, no time limits or treatment, and no requirement for continuing clinical assessment, then there is nothing in the law to protect the individual against the arbitrary deprivation of liberty.

128 *Winterwerp v Netherlands*, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR 387.

129 See *Winterwerp v Netherlands*, supra, §39. The four conditions were confirmed in *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46, §145; *DD v Lithuania*, no. 13469/06, 14 February 2012, [2012] ECHR 254, §156; *Kallweit v Germany*, no. 17792/07, 13 January 2011, §45; *Shtukaturov v Russia*, no. 44009/05, 27 March 2008, 54 EHRR 962, §114; *Varbanov v Bulgaria*, no. 31365/96, ECHR 2000-X, §45.

130 *Plesó v Hungary*, no. 41242/08, 2 October 2012, §59.

131 *Simons v Belgium* (dec), no. 71407/10, 28 August 2012, §32.

132 *Creangă v Romania*, supra, §84; *A and Others v the United Kingdom* [GC], no. 3455/05, 19 February 2009, §164.

133 See e.g. *Del Río Prada v Spain* [GC], no. 42750/09, 21 October 2013, ECHR 2013, §125; *Creangă v Romania* [GC], no. 29226/03, 23 February 2012, §120; *Medvedyev and Others v France* [GC], no. 3394/03, 29 March 2010, ECHR 2010, §80.

134 See e.g. *Witold Litwa v Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, §78.

Arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the detention do not genuinely conform to the purpose of the restrictions permitted by the relevant subparagraph of Article 5§1; where there is no connection between the ground relied on and the place and conditions of detention; and where there is no proportionality between the ground of detention relied on and the detention in question.¹³⁵ The speed with which the domestic courts replace a detention order which has expired or has been found to be defective is a further relevant element in assessing whether a person's detention must be considered arbitrary.¹³⁶ The absence or lack of reasoning in detention orders is another element taken into account by the court when assessing lawfulness under Article 5§1.¹³⁷

In terms of the principle of proportionality, the authorities should consider less intrusive measures than detention.¹³⁸

As regards the relationship between the ground relied upon and the place and conditions of detention, in principle the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.¹³⁹ However, where the circumstances justify it, a person may be placed temporarily in an establishment not specifically designed for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.¹⁴⁰

135 See *James, Wells and Lee v the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012, §§191-95; *Saadi v the United Kingdom* [GC], no. 13229/03, 29 January 2008, §§68-74.

136 *Mooren v Germany* [GC], no. 11364/03, 9 July 2009, §80. Thus, in the context of sub-paragraph (c), the court considered that a period of less than one month between the expiry of the initial detention order and the issue of a fresh, reasoned detention order following a remittal of the case from the appeal court to a lower court did not render the applicant's detention arbitrary: *Minjat v Switzerland*, no. 38223/97, 28 October 2003, §§46 and 48. In contrast, a period of more than a year following a remittal from a court of appeal to a court of lower instance, in which the applicant remained in a state of uncertainty as to the grounds for his detention on remand, combined with the lack of a time-limit for the lower court to re-examine his detention, was found to render the applicant's detention arbitrary: *Khudoyorov v Russia*, no. 6847/02, 8 November 2005, ECHR 2005-X (extracts), §§ 136-37.

137 The absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5§1: *Stasaitis v Lithuania*, no. 47679/99, 21 March 2002, §§66-67. Likewise, a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness: *Khudoyorov v Russia*, *supra*, §157. What is required is a detention order based on concrete grounds and setting a specific time-limit: *Meloni v Switzerland*, no. 61697/00, 10 April 2008, §53.

138 *Ambruszkiewicz v Poland*, no. 38797/03, 4 May 2006, §32.

139 *LB v Belgium*, no. 22831/08, 2 October 2012, §93; *Ashingdane v United Kingdom*, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8, §44; *OH v Germany*, no. 4646/08, 24 November 2011, §79.

140 *Pankiewicz v Poland*, no. 34151/04, 12 February 2008, §§44-45; *Morsink v Netherlands*, no. 48865/99, 11 May 2004, §§67-69; *Brand v Netherlands*, no. 49902/99, 11 May 2004, §§64-66. With regard to Article 5§1(e), the case law provides that it should not be interpreted as only allowing the detention of 'alcoholics' in the limited sense of persons in a clinical state of 'alcoholism', because nothing in the text of this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit

2. Except in emergency cases, the individual concerned must be reliably shown to be of ‘unsound mind’, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.

The very nature of what has to be established before the competent national authority — a true mental disorder — calls for objective medical expertise. Except in an emergency, no deprivation of liberty of a citizen considered to be of unsound mind is in conformity with Article 5§1 (e) if it has been ordered without seeking the opinion of a medical expert.¹⁴¹ A mental condition must be of a certain gravity in order to be considered as a ‘true’ mental disorder.¹⁴² The relevant time at which a person must be reliably established to be of unsound mind is the date of adoption of the measure depriving that person of their liberty as a result of that condition.¹⁴³

3. The mental disorder must be of a kind or degree warranting compulsory confinement.

In deciding whether an individual should be detained as a person ‘of unsound mind’, the national authorities have a certain discretion because it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case.¹⁴⁴ The detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate their condition, but also where the person needs control and supervision to prevent them from, for example, causing harm to themselves or others.¹⁴⁵

4. The validity of continued confinement depends upon the persistence of such a disorder.

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant’s confinement.¹⁴⁶ However, the continuation of a deprivation of liberty for purely administrative reasons is not justified.¹⁴⁷

the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking: *Kharin v Russia*, no. 37345/03, 3 February 2011, §34. Therefore, persons whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves can be taken into custody for the protection of the public or their own interests, such as their health or personal safety: *Hilda Hafsteinsdóttir v Iceland*, no. 40905/98, 8 June 2004, *Witold Litwa v Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, §42. However, this does not mean however that Article 5§1(e) permits the detention of an individual merely because of his alcohol intake: *Witold Litwa v Poland*, supra, §§ 61-62.

141 *Ruiz Rivera v Switzerland*, no. 8300/06, 18 February 2014, §59; *SR v Netherlands (dec)*, no. 13837/07, 18 September 2012, §31.

142 *Glien v Germany*, no. 7345/12, 28 November 2013, §85.

143 *OH v Germany*, no. 4646/08, 24 November 2011, §78.

144 *Plesó v Hungary*, no. 41242/08, 2 October 2012, §61; *HL v United Kingdom*, no. 45508/99, 5 October 2004, ECHR 2004-IX, (2004) 40 EHRR 761, §98.

145 *Hutchison Reid v United Kingdom*, no. 50272/99, 20 February 2003, ECHR 2003-IV, [2003] ECHR 94, (2003) 37 EHRR 211, §52.

146 *Luberti v Italy*, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

147 *RL and M-JD v France*, no. 44568/98, 19 May 2004, §129.

In *X v United Kingdom (1981)*,¹⁴⁸ a patient who was subject to special restrictions because of a risk of serious harm to others complained that it had been unlawful for the Home Secretary to recall him to Broadmoor (high-secure) Hospital without any doctor having certified first that he was of unsound mind. This argument was rejected by the court. The court noted that the Home Secretary's power of recall was concerned,

'with the recall, perhaps in circumstances when some danger is apprehended, of patients whose discharge from hospital has been restricted for the protection of the public ... The *Winterwerp judgment* expressly identified "emergency cases" as constituting an exception to the principle that the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind"; nor could it be inferred from the *Winterwerp judgment* that the "objective medical expertise" must in all conceivable cases be obtained before rather than after confinement of a person on the ground of unsoundness of mind. Clearly, where a provision of domestic law was designed ... to authorise the emergency confinement of persons capable of presenting a danger to others, it would be impracticable to require thorough medical examination prior to any arrest or detention. A wide discretion must in the nature of things be enjoyed by the national authority empowered to order such emergency confinements.'

The court found that the statutory conditions governing a recall to hospital were not incompatible with the meaning under the Convention of the expression 'the lawful detention of persons of unsound mind'. In circumstances such as X's, the interests of the protection of the public prevailed over the individual's right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees. However, following the use for a short period of such an emergency measure, the patient's further detention in hospital had to satisfy the minimum conditions described in *Winterwerp*.

In the *Luberti Case (1984)*,¹⁴⁹ the court accepted that terminating the confinement of an individual whom a court has previously found to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to that fact, and the very serious nature of the offence committed by the applicant when mentally ill, the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.

As with *X v United Kingdom (1981)*, the applicant in *Kay v United Kingdom (1994)*¹⁵⁰ complained about his recall to Broadmoor Hospital without a prior medical assessment, in his case on the expiration of a lengthy prison sentence. The Commission noted that his recall was in accordance with the procedures prescribed by domestic law. Furthermore, the Home Secretary was entitled to be concerned about the protection of the public in the light of the applicant's history of psychopathy, and his serious criminal record involving extreme violence towards girls and women. However, this historical background did not mean that one could dispense with the need to obtain up-to-date medical evidence about the applicant's mental

148 *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

149 *Luberti v Italy*, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

150 *Kay v United Kingdom*, no. 17821/91, 1 March 1994, [1994] ECHR 51.

health before ordering his recall. The most recent tribunal decision in 1986 had found that there was no evidence the applicant was then suffering from a psychopathic disorder and the weight of medical evidence at the time of recall was in his favour. It had not been impossible to have him assessed in prison, and the existence of a dissenting report from a Broadmoor doctor who had not interviewed him could not outweigh the tribunal's finding, nor provide a sufficient scientific basis for his continued compulsory confinement in hospital nearly three years later. Consequently, when the Home Secretary decided to recall the applicant to Broadmoor certain minimum conditions of lawfulness were not respected. In particular, there was no up-to-date objective medical expertise showing that the applicant suffered from a true mental disorder, or that his previous psychopathic disorder persisted. In the absence of any emergency, there were no particular circumstances to justify the omission. Accordingly, the applicant's recall and return to Broadmoor could not be qualified as the lawful detention of a person of unsound mind for the purposes of Article 5(1)(e).

In *Johnson v United Kingdom (1997)*,¹⁵¹ the applicant's detention in Rampton [high secure] Hospital was reviewed by a tribunal on 15 June 1989. The tribunal accepted the medical evidence that he was not then suffering from mental illness, stating that the episode of mental illness from which he formerly suffered has come to an end. It ordered his conditional rather than absolute discharge, because he required rehabilitation under medical supervision in a hostel environment, and a recurrence of his mental illness requiring recall to hospital could not be excluded. This discharge was deferred until arrangements could be made for his suitable accommodation. Considerable efforts to secure a hostel were unsuccessful. Eventually, on 12 January 1993, a tribunal ordered his absolute discharge. The applicant complained that his detention between 15 June 1989 and 12 January 1993 violated Article 5(1). More particularly, the tribunal in 1989 should have ordered his immediate and unconditional discharge, since he had made a full recovery from the episode of mental illness specified in the hospital order imposed by the court.

The court observed that it does not automatically follow from a finding by an expert authority that the mental disorder which justified confinement no longer persists that therefore the patient must be immediately and unconditionally released into the community. Such a rigid approach would place an unacceptable degree of constraint on the responsible authority's exercise of judgment when determining whether the interests of the patient and the community will be best served by such a course of action. In the field of mental illness, the assessment as to whether the disappearance of symptoms is confirmation of complete recovery is not an exact science. Whether or not recovery from the episode of illness which justified the confinement is complete and definitive, or merely apparent, cannot always be measured with absolute certainty. It is the patient's behaviour outside the confines of the psychiatric institution which will be conclusive of this. Therefore, a responsible authority is entitled to exercise a measure of discretion in deciding whether it is appropriate to order immediate and absolute discharge in a case as this. It is, however, of paramount importance that appropriate safeguards are in place which ensure that any deferral of discharge is consonant with the purpose of Article 5(1)(e) and, in particular, that discharge is not unreasonably delayed.

151 *Johnson v United Kingdom*, no. 22520/93, 24 October 1997, (1997) 27 EHRR 296, [1997] ECHR 88.

Although the tribunal was entitled to conclude that it was premature to order Mr Johnson's absolute and immediate discharge from hospital, it lacked the power to guarantee that he would be relocated to a suitable hostel within a reasonable time. The onus was on the authorities to secure a hostel willing to admit him. In between reviews, Mr Johnson could not petition the tribunal to have the terms of the residence condition reconsidered; nor was the tribunal empowered to monitor the progress made in the search for a hostel outside the annual reviews, and to amend the deferred conditional discharge order in the light of the difficulties encountered by the authorities. The imposition of the hostel residence condition in 1989 by the tribunal therefore led to the indefinite deferral of the applicant's release from hospital. Having regard to this situation, and the lack of adequate safeguards, including provision for judicial review to ensure that his release would not be unreasonably delayed, his continued confinement after 15 June 1989 could not be justified under Article 5(1)(e).

In *Roux v United Kingdom (1996)*,¹⁵² the applicant was subject to special restrictions because of a risk of serious harm to others. He complained that it had been unlawful for the Home Secretary to recall him to Broadmoor [high-secure] Hospital because of a concern that he was beginning to repeat the pattern of behaviour evident before the commission of his two offences against prostitutes. Mr Roux complained that his recall contravened Article 5 because he had not failed to comply with or breached any condition of the tribunal order discharging him and no breach of an obligation prescribed by law. Furthermore, no court had determined the state of his mental health at the time of his recall. The Government submitted that the Home Secretary's power of recall was not limited by the conditions attached to release and there could be occasions where recall was appropriate even though no conditions had been breached. Conversely, some breaches of the conditions of discharge from hospital would not warrant recall to hospital. In the event, a friendly settlement was reached, whereby the Government agreed to pay £2,000 to the applicant together with the agreed costs.

In *Aerts v Belgium (1998)*,¹⁵³ national legislation provided only for the detention of a mentally ill person in a prison as a provisional measure, pending a designation by the relevant mental health board as to the institution where the person was to be detained. The applicant maintained that his detention for seven months in the psychiatric wing of Lantin Prison, pending transfer to the Paifve Social Protection Centre (his designated place of detention), breached Article 5. The prison psychiatric wing was not an appropriate institution for the treatment of the mentally ill and the treatment he received there had done him harm. The court reiterated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic or other appropriate institution. Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind. Indeed, on 2 August 1993, the Mental Health Board had expressed the view that the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. The proper relationship between the aim of the detention and the location and conditions in which it took place was therefore deficient, and there had been a breach of Article 5.

152 *Roux v United Kingdom*, no. 25601/94, 4 September 1996.

153 *Aerts v Belgium*, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.

In *Halilovic v Bosnia and Herzegovina (2009)*,¹⁵⁴ the appellant's detention for four years and five months was pursuant to an administrative decision, as opposed to a decision of the competent civil court, as required by the amended domestic legislation and so breached Article 5(1). Compensation of €22,500 was awarded.

In *X v Finland (2012)*,¹⁵⁵ the court found that while there had been no problem with the applicant's initial involuntary confinement in a mental institution, the safeguards against arbitrariness as regards the need for her continued confinement had been inadequate. In particular, there had been no independent psychiatric opinion, as the two doctors who had decided to prolong her stay were from the hospital where she was confined. In addition, the applicant had no standing under domestic law to seek a review of the need for her continued confinement, as a review could only take place at the initiative of the domestic authorities. In addition to the breach of Article 5, the court also found a violation of the applicant's right to respect for her private life under Article 8 because of the forced administration of medication during her confinement.

Deprivation of liberty in 'supported living' and in one's own home

The issue of deprivations of liberty in supported living placements and the individual's own home was considered by the UK Supreme Court in what is known as the *Cheshire West Case (2014)*.¹⁵⁶ The court reiterated the standard test as to what constitutes a deprivation of liberty (as set out in cases such as *HL, Storck* and *Stanev*) and also made the self-evident point that a deprivation of liberty which is imputable to the state may occur in a setting such as one's own home or a supported living environment.¹⁵⁷

ARTICLE 5(2)

Article 5(2) provides that everyone who is arrested must be informed promptly of the reasons for their arrest and of any charge against them.

ARTICLE 5

Right to liberty and security

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

The remaining paragraphs of Article 5 set out the Convention rights of persons who are 'deprived of their liberty' within the meaning of Article 5(1).

154 *Halilovic v Bosnia and Herzegovina*, no. 23968/05, 24 November 2009, [2009] ECHR 1933.

155 *X v Finland*, no. 34806/04, 3 July 2012.

156 *P v Cheshire West and Chester Council and P and Q v Surrey County Council* [2014] UKSC 19.

157 Ultimately, however, the judgment lacked intellectual rigour and did little to clarify the grey areas. Consequently, the implementation of the decision nationally has been fairly subjective.

The underlying purpose of Article 5§2 is that a person who is arrested must be told why they are being deprived of their liberty. This is an integral part of the scheme of protection afforded by Article 5. It enables the person, if they wish, to apply to a court to challenge the grounds and reasons given and the lawfulness of their detention. This is the right conferred by Article 5§4,¹⁵⁸ and a person in such a situation cannot make effective use of it unless they are promptly and adequately informed of the reasons for the deprivation of liberty.¹⁵⁹

The words in Article 5§2 must be interpreted ‘autonomously’, that is in accordance with the aim and purpose of Article 5 which is to protect everyone from arbitrary deprivations of liberty. The term ‘arrest’ extends beyond the realm of the criminal law to persons deprived of their liberty in other situations, for example on the ground of unsoundness of mind, and the words ‘any charge’ must be interpreted accordingly.¹⁶⁰

The wording clearly indicates that the duty on states is to furnish specific information to the individual or their representative.¹⁶¹ The detained person must be told the essential legal and factual grounds for their detention in simple non-technical language that they can understand.¹⁶²

The reasons do not have to be set out in the text of the decision which authorises the person’s detention; nor do they have to be in writing or in any special form.¹⁶³ Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features.¹⁶⁴ However, a bare indication of the legal basis for the arrest or detention, taken on its own, is insufficient for the purposes of Article 5§2.¹⁶⁵

If the relevant person is incapable of receiving the information, the relevant details must be given to the individuals who represent their interests, such as their lawyer or guardian.¹⁶⁶ More particularly, if the mental condition of a person with an intellectual disability is not given due consideration in the process, it cannot be said that they were provided with the requisite information enabling them to make effective and intelligent use of the right ensured by Article 5§4, unless a lawyer or another authorised person was informed in their stead.¹⁶⁷

158 Fox, Campbell and Hartley v the United Kingdom, no. 12244/86, 30 August 1990, Series A no. 182, 13 EHRR 157, [1990] ECHR 18, §40; Čonka v Belgium, no. 51564/99, 5 February 2002, ECHR 2002-I, [2002] ECHR 14, §50.

159 Van der Leer v the Netherlands, no. 11509/85, 21 February 1990, Series A no. 170-A, [1990] ECHR 3, 12 EHRR 567, §28; Shamayev and Others v Georgia and Russia, no. 36378/02, 12 April 2005, ECHR 2005-III, §413.

160 Van der Leer v the Netherlands, *supra*, §§ 27-28; X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §66.

161 Saadi v the United Kingdom [GC], no. 13229/03, 29 January 2008, §53.

162 See e.g. Bordovskiy v Russia, no. 49491/99, 8 February 2005, §56; Nowak v Ukraine, no. 60846/10, 31 March 2011, §63; Gasiņš v Latvia, no. 69458/01, 19 April 2011, §53.

163 X v Germany, Commission decision of 13 December 1978, DR 16; Kane v Cyprus (dec), no. 33655/06, 13 September 2011.

164 Fox, Campbell and Hartley v the United Kingdom, *supra*, §40.

165 *Ibid*, §41; Murray v the Netherlands [GC], no. 10511/10, 26 April 2016, §76; Kortesis v Greece, no. 60593/10, 12 June 2012, §§61-62.

166 ZH v Hungary, no. 28973/11, 8 November 2012, §§42-43.

167 ZH v Hungary, *supra*, §41.

In *X v the United Kingdom (1981)*,¹⁶⁸ the court emphasised that the need for the applicant to be apprised of the reasons for his recall followed from Article 5§4; a person entitled to take proceedings to have the lawfulness of their detention speedily decided cannot make effective use of that right unless they are promptly and adequately informed of the facts, and the legal authority relied on, to deprive them of their liberty.’

In *Van der Leer v The Netherlands (1990)*,¹⁶⁹ the court held that the word ‘arrest’ in Article 5(2) embraces deprivation of liberty on the ground of unsoundness of mind:

‘28. ... Paragraph 4 (art. 5-4) does not make any distinction as between persons deprived of their liberty on the basis of whether they have been arrested or detained. There are therefore no grounds for excluding the latter from the scope of paragraph 2 (art. 5-2).

29. Having found that Article 5§2 (art. 5-2) is applicable, the Court must determine whether it has been complied with in this case.

30. The applicant was in hospital to receive treatment as a “voluntary” patient. It was not until 28 November 1983 that she learned, when she was placed in isolation, that she was no longer free to leave when she wished because of an order made ten days previously ... The Government did not contest this.

31. It therefore appears that neither the manner in which she was informed of the measures depriving her of her liberty, nor the time it took to communicate this information to her, corresponded to the requirements of Article 5§2 (art. 5-2). In fact it was all the more important to bring the measures in question to her attention since she was already in a psychiatric hospital prior to the Cantonal Court judge’s decision, which did not change her situation in factual terms.’

ARTICLE 5(4)

*Article 5§4 provides that everyone who is deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful.*¹⁷⁰

ARTICLE 5

Right to liberty and security

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

168 *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

169 *Van der Leer v the Netherlands*, no. 11509/85, 21 February 1990, Series A no. 170-A, [1990] ECHR 3, 12 EHRR 567.

170 As concerns access to justice, see also Article 13 of the UNCRPD. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

Article 5§4 is the *habeas corpus* provision of the Convention. It provides detained persons with the right to seek a judicial review of their detention¹⁷¹ and this extends to both the procedural and substantive justifications of the deprivation of liberty.¹⁷²

Furthermore, the notion of ‘lawfulness’ in Article 5§4 has the same meaning as in Article 5§1. Consequently, the detained person is entitled to a review of the ‘lawfulness’ of their detention not just in terms of the requirements of domestic law but also the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1.¹⁷³

The remedy of habeas corpus does not enable a judicial determination as wide as this because where the terms of a statute afford the executive a discretion, whether wide or narrow, the review exercisable by the courts in habeas corpus proceedings bears solely on the conformity of the exercise of that discretion with the empowering statute.¹⁷⁴

The Article 5§1(e) criteria for ‘lawful detention’ necessitates that the review guaranteed by Article 5§4 in relation to the continuing detention of a mental health patient should be made by reference to their contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the time of the initial decision to detain.¹⁷⁵

A person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings ‘at reasonable intervals’ to put in issue the lawfulness of their detention.¹⁷⁶ A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own.¹⁷⁷

The forms of judicial review which satisfy the requirements of Article 5§4 may vary from one domain to another and will depend on the type of deprivation of liberty in issue.¹⁷⁸

Where the European Court of Human Rights court has found no breach of the requirements of Article 5§1, this does not release the court from carrying out a review of compliance with Article 5§4. The two paragraphs are separate provisions. Observance of the former does not necessarily entail observance of the latter.¹⁷⁹

171 *Mooren v Germany* [GC], no. 11364/03, 9 July 2009, §106; *Rakevich v Russia*, no. 58973/00, 28 October 2003, §43.

172 *Idalov v Russia* [GC], no. 5826/03, 22 May 2012, §161; *Reinprecht v Austria*, no. 67175/01, 12 April 2006, ECHR 2005-XII, (2007) 44 EHRR 39, IHRL 3254, §31.

173 *Suso Musa v Malta*, no. 42337/12, 23 July 2013, §50.

174 See *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

175 See *X v United Kingdom*, supra.

175 *Juncal v United Kingdom* (dec), no. 32357/09, 17 September 2013, §30; *Ruiz Rivera v Switzerland*, no. 8300/06, 18 February 2014, §60.

176 *Ibid*, §77.

177 *X v Finland*, no. 34806/04, 3 July 2012, §170; no. 24086/03, 17 December 2013, §82.

178 *MH v United Kingdom*, no. 11577/06, 22 October 2013, §75.

179 *Douiyeb v Netherlands* [GC], no. 31464/96, 4 August 1999, §57; *Kolompar v Belgium*, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §45.

It is not always necessary that an Article 5§4 procedure is attended by the same guarantees as are required under Article 6 for criminal or civil litigation but it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty.¹⁸⁰

The ‘court’ to which the detained person has access does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country.¹⁸¹ However, it must be a body of ‘judicial character’ offering certain procedural guarantees appropriate to the kind of deprivation of liberty in question.¹⁸² To satisfy the requirements of the Convention the review must comply with both the substantial and procedural rules of national legislation and be conducted in conformity with the aim of Article 5, which is to protect the individual against arbitrariness.¹⁸³ The ‘court’ must be independent both of the executive and of the parties to the case,¹⁸⁴ and have the power to order release if it finds that the detention is unlawful. A mere power of recommendation is insufficient.¹⁸⁵

A ‘speedy’ decision

Article 5§4 also proclaims the right to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it is unlawful.¹⁸⁶

The term ‘speedily’ cannot be defined in the abstract. As with the ‘reasonable time’ requirements of Article 5§3 and Article 6§1, whether the decision has been made ‘speedily’ must be determined in the light of the circumstances of the particular case.¹⁸⁷

The notion of ‘speedily’ (*à bref délai*) indicates a lesser urgency than that of ‘promptly’ (*aussitôt*) in Article 5§3.¹⁸⁸ However, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of ‘speediness’ of judicial review under Article 5§4 comes closer to the standard of ‘promptness’ under Article 5§3.¹⁸⁹ The relevant starting point is the date when the application for release was made/the proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant’s detention, including any appeal.¹⁹⁰

180 *A and Others v United Kingdom* [GC], no. 3455/05, 19 February 2009, §203; *Idalov v Russia* [GC], no. 5826/03, 22 May 2012, §161.

181 *Weeks v United Kingdom*, no. 9787/82, 2 March 1987, Series A no. 114, (1988) 10 EHRR 293, §61.

182 See e.g. *De Wilde, Ooms and Versyp v Belgium*, nos. 2832/66; 2835/66; 2899/66, 18 June 1971, Series A no. 12, §§76 and 78.

183 *Koendjibiarie v Netherlands*, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §27.

184 *Stephens v Malta* (no. 1), no. 11956/07, 21 April 2009, §95.

185 *Benjamin and Wilson v United Kingdom*, no. 28212/95, 26 September 2002, §§33-34.

186 *Ibid*, §154; *Baranowski v Poland*, no. 28358/95, 28 March 2000 ECHR 2000-III, §68.

187 *RMD v Switzerland*, no. 19800/92, 26 September 1997, §42; *Rehbock v Slovenia*, no. 29462/95, 28 November 2000, ECHR 2000-XII, §84.

188 *E v Norway*, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; *Brogan and Others v United Kingdom*, nos. 11234/84 and 11209/84, 29 November 1988, Series A no. 145-B, (1988) 11 EHRR 117, §59.

189 *Shcherbina v Russia*, no. 41970/11, 26 June 2014, §§65-70, where a delay of sixteen days in the judicial review of the applicant’s detention order issued by the prosecutor was found to be excessive.

190 *Sanchez-Reisse v Switzerland*, no. 9862/82, 21 October 1986, Series A no. 107, [1986] ECHR 12, (1986) 9 EHRR 71, §54; *E. v Norway*, §64.

Where the judicial determination involves complicated issues — such as the detained person’s medical condition — this may be taken into account when considering how long is ‘reasonable’ under Article 5§4. However, even in complicated cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention.¹⁹¹

If the length of time before a decision is taken is *prima facie* incompatible with the notion of speediness, the court will look to the state to explain the reason for the delay.¹⁹²

In assessing the speedy character required by Article 5§4, factors such as the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state’s responsibility may be taken into consideration.¹⁹³

Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.¹⁹⁴

In the case of *Barclay-Maguire v United Kingdom (1983)*,¹⁹⁵ the Commission declared admissible an application which alleged that a delay of 18 weeks between the making of a tribunal application and its determination contravened Article 5(4). The government, seeking a settlement from the Commission, suggested 13 weeks as a reasonable target time. It subsequently failed to meet this target. A number of patients subsequently sought judicial review in relation to delayed hearings but judgment was avoided by offering them an earlier date, necessarily at the expense of other patients.¹⁹⁶

In *Koendjibiharie v Netherlands (1990)*,¹⁹⁷ the relevant period was held to have begun on 17 May 1984 when the application to extend the patient’s confinement was filed with the Court of Appeal. The decision was received more than four months later. Such a lapse of time was not compatible with the notion of speediness. The court, accordingly, found a failure to comply with the requirement of ‘speediness’ laid down in Article 5(4).

In *Kay v United Kingdom (1994)*,¹⁹⁸ the Commission referred to the court’s case law that periods of eight weeks to five months in mental health determinations were difficult to reconcile with the notion of ‘speedily’ in Article 5(4) of the Convention.¹⁹⁹

191 *Frasik v Poland*, no. 22933/02, 5 January 2010, §63; *Jablonski v Poland*, no. 33492/96, 21 December 2000, §§91-93.

192 *Koendjibiharie v Netherlands*, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §29.

193 *Mooren v Germany [GC]*, no. 11364/03, 9 July 2009, §106; *Kolompar v Belgium*, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §42.

194 *E v Norway*, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §66; *Bezicheri v Italy*, no. 11400/85, 25 October 1989, Series A no. 164, (1990) 12 EHRR 210, [1989] ECHR 19, §25.

195 *Barclay-Maguire v United Kingdom (dec)*, no. 9117/80, 9 December 1983.

196 See e.g. the judicial review applications in *R. v Mental Health Review Tribunal, ex p. Hudson* (unreported, 1986) and *R. v Mental Health Review Tribunal, ex p. Mitchell* (unreported, 1985).

197 *Koendjibiharie v Netherlands*, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820.

198 *Kay v United Kingdom*, no. 17821/91, 1 March 1994, [1994] ECHR 51.

199 *E v Norway*, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; *Van der Leer v the Netherlands*, supra, §§ 27-28; *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §§32-36.

It was not contested by the government that mental health review tribunals frequently took up to six months to determine cases like the applicant's. In Kay's case, the determination took just over two years and the first hearing date proposed by the tribunal was nearly five months after referral. In the Commission's view, the system itself was inherently too slow. The tribunal proceedings were not conducted 'speedily' within the meaning of Article 5(4).

In *Pauline Lines v United Kingdom (1997)*,²⁰⁰ the applicant was subject to special restrictions because of a risk of serious harm to others. She was readmitted to hospital on 27 July 1993. On 7 December 1993, the Home Secretary referred her case to a tribunal which then heard the matter on 23 February 1994. The patient complained about the length of time it took for her to have a review following admission, contrary to Article 5(4). The Commission unanimously declared her complaint to be admissible. In the event, a friendly settlement was reached, whereby the government paid the applicant's representatives £3591.75, of which £2000 represented compensation and the remainder costs.

In *RSC v United Kingdom (1997)*,²⁰¹ the applicant was subject to special restrictions because of a risk of serious harm to others. He was recalled to Broadmoor [high-secure] Hospital on 16 November 1994. On 22 November 1994, the Home Secretary referred his case to a tribunal, which adjourned the initial hearing on 20 September 1995 and did not determine his detention until 25 March 1996. The applicant alleged a violation of Article 5(4), *inter alia* on the ground that the tribunal did not decide the matter 'speedily'. A friendly settlement was reached. The government agreed to pay the applicant £2,000 compensation, together with £2,800 costs. It also undertook to amend the tribunal rules, so that when a conditionally discharged patient was recalled there must be a tribunal hearing within two months from the date on which the case was referred to the tribunal (which must be within a month of recall).

Periodic reviews

The detention of persons on the ground of unsoundness of mind constitutes a special category with its own specific problems. In particular, the reasons initially warranting confinement may cease to exist. The very nature of the deprivation of liberty 'would appear to require a review of lawfulness to be available at reasonable intervals. By virtue of Article 5(4), a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is thus in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the lawfulness ... of his detention, whether that detention was ordered by a civil or criminal court or by some other authority.'²⁰²

Whereas one year per instance may be a rough rule of thumb in Article 6§1 cases, Article 5§4 concerns issues of liberty which require particular expedition.²⁰³ Where an individual's personal liberty is at stake, the court has very strict standards concerning the state's compliance with the requirement of speedy review of the lawfulness of detention.

200 *Pauline Lines v United Kingdom*, European Commission, no. 2451/94, 17 January 1997.

201 *RSC v United Kingdom*, European Commission, no. 27560/95, 28 May 1997.

202 *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52, referring to *Winterwerp v Netherlands*, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR, §§ 57 and 60.

203 *Panchenko v Russia*, §117.

The applicant in *Turnbridge v United Kingdom (1990)*²⁰⁴ was detained in Broadmoor [high-secure] Hospital. He complained that an annual review of the lawfulness of his detention by a tribunal was insufficient. The Commission found nothing to suggest that the period of a year which the applicant must respect before reapplying to a tribunal for his discharge was an unreasonable interval in the circumstances. Inadmissible.

Legal assistance

In the *Megyeri Case (1992)*,²⁰⁵ the applicant's confinement was grounded on a finding in criminal proceedings that he was not responsible for his acts because he was suffering from a schizophrenic psychosis with signs of paranoia. Sometime later, in July 1986, the Aachen Regional Court had before it expert evidence stating that his condition had deteriorated, he was unwilling to undergo treatment and he had shown a distinct propensity towards aggressive behaviour and violence. Before the Commission, Mr Megyeri submitted that the failure to appoint a lawyer to assist him in the 1986 regional court proceedings concerning his possible release violated Article 5(4). The court found it was doubtful 'to say the least' whether, acting on his own, he was able to marshal and present adequately points in his favour on the relevant issues, involving as they did matters of medical knowledge and expertise. It was even more doubtful whether, on his own, he was in a position to address adequately the legal issue arising: would his continued confinement be proportionate to the aim pursued (the protection of the public). There had been a breach of Article 5(4).

The court stated that the principles enshrined within Article 5(4) included the following:

1. A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings 'at reasonable intervals' before a court to put in issue the 'lawfulness' of their detention (see, *inter alia*, *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52).
2. Article 5(4) requires that the procedure followed must have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place (see *Wassink v Netherlands*, no. 12535/86, 27 September 1990, Series A no. 185-A, [1990] ECHR 22, [1990] ECHR 22, §30).
3. The judicial proceedings referred to in Article 5(4) need not always be attended by the same guarantees as those required by Article 6(1) for civil or criminal litigation. None the less, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards

204 *Turnbridge v United Kingdom (dec)*, European Commission, no. 16397/90, 17 May 1990.

205 *Megyeri v Germany*, no. 13770/88, 12 May 1992, (1993) 15 EHRR 584, [1992] ECHR 49.

may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v Netherlands*, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR 387, §60).

4. Article 5(4) does not require that persons committed to care under the head of 'unsound mind' should themselves take the initiative in obtaining legal representation before having recourse to a court (see *Winterwerp v Netherlands*, supra, §66).
5. It follows from the foregoing that where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences, but in respect of which he could not be held responsible on account of mental illness, he should (unless there were special circumstances) receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what was at stake for him (personal liberty) taken together with the very nature of his affliction (diminished mental capacity) compelled this conclusion.

Case law

The applicant in *R v United Kingdom (1986)*²⁰⁶ was detained in Broadmoor [high-secure] Hospital, subject to special restrictions because of a risk of serious harm to others. On 23 March 1984, he appeared before a mental health review tribunal. The tribunal found that it could not evaluate the degree to which he presented a risk to the public without evidence of unescorted leave and accordingly he was not discharged. The applicant complained of a violation of Article 5(4), in that the Mental Health Act 1983 failed to give the tribunal sufficient power to meet the reasonable needs of a 'court' within the meaning of Article 5(4). It was not sufficient that the tribunal be able to discharge, conditionally or unconditionally; it must also have ancillary powers, such as the ability to grant brief trial leave of absence. Furthermore, it was difficult to reconcile the exclusive power of the Home Secretary to authorise even one day's escorted leave with the tribunal's power to give an absolute discharge, because the power to grant brief trial leave was clearly less drastic than a power to order an absolute discharge.

According to the Commission, 'In the present case the Mental Health Review Tribunal had jurisdiction to decide on the substantive lawfulness of the applicant's detention and it had the power (indeed the duty) to release the applicant if the conditions for continued detention were not satisfied. In this respect the present Mental Health Review Tribunal is different from that considered by the Court in the case of *X v United Kingdom*' (§1). Article 5(4) 'does not require any control of detention beyond that of "the lawfulness of his detention" and in the present case the Mental Health Review Tribunal was able to make such a review. It follows that this part of the application is manifestly ill-founded' (§1).

206 *R v United Kingdom* (dec), European Commission, no. 12039/86, 18 July 1986.

In *Stanev v Bulgaria (2012)*,²⁰⁷ the court found that Mr Stanev was deprived of his liberty (see above). The court then considered his complaint under Article 5§4. The court observed that the Bulgarian Government had not provided any domestic remedy capable of giving him a direct opportunity to challenge the lawfulness of his placement in the institution and the continued implementation of that measure. The validity of the placement agreement could only have been challenged on the ground of lack of consent on his guardian's initiative. The Bulgarian courts were not involved at any time or in any way in the placement and the domestic legislation did not provide for automatic periodic judicial review of placements in homes for people with mental disorders. Because his placement in the institution was not recognised as a deprivation of liberty in Bulgarian law, there were no national legal remedies available to challenge its lawfulness. Therefore, there had been a violation of Article 5§4.

In *DD v Lithuania (2012)*,²⁰⁸ the court found that DD was deprived of her liberty in the social care home where she was confined (see above). The court then considered her right to a review of her deprivation of liberty. The court noted that Article 5§4 requires that the procedure followed has a judicial character and gives to the individual guarantees appropriate to the kind of deprivation of liberty in question. It is essential that the person has access to a court and the opportunity to be heard in person or, where necessary, through some form of representation. Special procedural safeguards may be called for to protect the interests of those who, because of their mental disabilities, are not fully capable of acting for themselves. That last principle was all the truer when, as here, the placement was carried out without any involvement on the part of the courts. The form of judicial review may vary from one domain to another and depend on the type of the deprivation liberty at issue. However:

'165... It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kedainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.

166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kedainiai Home in the first place. The court also observes that the applicant's current legal guardian is the Kedainiai Home – the same social care institution which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the court considers that where a person capable of expressing a view, despite having been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation...

207 *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46.

208 *DD v Lithuania*, no. 13469/06, 14 February 2012, [2012] ECHR 254.

167. In the light of the above, the court ... holds that there has also been a violation of Article 5§4 of the Convention.'

ARTICLE 6

Article 6(1) provides that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁰⁹

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Proceedings to divest individuals of their legal capacity

In **Shtukaturov v Russia (2008)**,²¹⁰ the applicant had a history of mental illness and was officially declared disabled in 2003. Following a request filed by his mother, the Russian courts declared him legally incapable in December 2004. His mother was subsequently appointed as his guardian and, in November 2005, she admitted him to a psychiatric hospital. The applicant alleged that he had been deprived of his legal capacity without his knowledge.

The court held that there had been a violation of Article 6 in relation to the proceedings depriving the applicant of his legal capacity. The applicant, who appeared to have been a relatively autonomous person despite his illness, had not been given any opportunity to participate in the proceedings concerning his legal capacity. Given the consequences of those proceedings for his personal autonomy and indeed liberty, his attendance had been indispensable not only to give him the opportunity to present his case, but also to allow the judge to form an opinion on his mental capacity. Therefore, the decision in December 2004, based as it was purely on documentary evidence, had been unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6§1.

209 As concerns access to justice, see also Article 13 of the UNCRPD. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

210 Shtukaturov v Russia, no. 44009/05, 27 March 2008, 54 EHRR 962.

The case of ***X and Y v Croatia (2011)***²¹¹ concerned proceedings brought by social services to divest a mother and daughter of their legal capacity. The first applicant, who was born in 1923, was bedridden and suspected to be suffering from dementia. She was divested of her legal capacity in August 2008. She alleged that the proceedings had been unfair because she had not been notified of them and thus had not been heard by a judge or been able to give evidence. The court held that there had been a violation of Article 6§1, finding that the first applicant had been deprived of adequate procedural safeguards in proceedings which resulted in a decision adversely affecting her private life. As regards the reasons adduced by the domestic court for its decision, the court observed that in order to ensure proper care for the ill and elderly the state authorities had at their disposal much less intrusive measures than divesting them of legal capacity.

In ***Stanev v Bulgaria (2012)***,²¹² the court found that Mr Stanev was deprived of his liberty and that there had been a violation of his rights under Article 5§4 (see above). The court then proceeded to consider whether Article 6 had also been breached. The court noted that, under Bulgarian law, no legal distinction was made between those partially and fully deprived of legal capacity. The measure in question was indefinite and Mr Stanev was unable to apply for the restoration of his legal capacity other than through his guardian or one of the people listed in legislation. Nor was there any automatic periodic review of whether the grounds for placing a person under guardianship remained valid. Although the right of access to the courts was not absolute and restrictions on a person's procedural rights might be justified, even in cases where the person had been only partially deprived of legal capacity, the right to ask a court to review a declaration of incapacity was a fundamental procedural right for the protection of those who had been partially deprived of legal capacity. It followed that in principle such people should have direct access to the courts.

The court observed that, according to a recent study, 18 out of 20 national European legal systems allowed direct access to the courts for any partially incapacitated person who wished to have their status reviewed. In 17 countries such access was even open to those declared fully incapable. There was therefore a European trend towards granting legally incapacitated people direct access to the courts to seek a restoration of their legal capacity. The court stressed the growing importance which international instruments for the protection of people with mental disorders attached to granting them as much legal autonomy as possible. Article 6§1 should be interpreted therefore as guaranteeing in principle that anyone in Mr Stanev's position must have direct access to a court to seek restoration of their legal capacity. As direct access of this kind was not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation, there had been a violation of Article 6§1.

The case of ***Nataliya Mikhaylenko v Ukraine (2013)***²¹³ concerned the applicant's lack of access to court for the purpose of seeking a restoration of her legal capacity. In 2007, the applicant was deprived of her legal capacity on the ground that she was suffering from a serious mental illness. Gradually, her mental health improved. In 2009, her guardian applied for her legal capacity to be restored but the application was dismissed without being considered on its merits owing to the guardian's repeated failure to appear in court. In 2010

211 *X and Y v Croatia*, no. 5193/09, 3 November 2011.

212 *Stanev v Bulgaria* [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46.

213 *Nataliya Mikhaylenko v Ukraine*, no. 49069/11, 30 May 2013, [2013] ECHR 484.

the applicant herself lodged an application for her legal capacity to be restored. However, both it and her subsequent appeals were dismissed on the ground that the Code of Civil Procedure did not provide her with a right to lodge such an application. Under domestic legislation it was for the applicant's guardian or the guardianship authority to raise the issue of the restoration of her legal capacity before a court.

The court observed that the applicant had had no procedural status in capacity proceedings and could not influence them. By virtue of clear and foreseeable rules of domestic law, she could not personally apply to a court for restoration of her legal capacity. Furthermore, the Code did not provide that a declaration of legal incapacity was subject to automatic judicial review even though the duration of the measure in her case was not limited in time. Lastly, it had not been shown that the domestic authorities had effectively supervised the applicant's situation, including the performance of the guardian's duties, or taken the requisite steps to protect her interests. Restrictions on the procedural rights of persons deprived of their legal capacity could be justified to protect their own or others' interests or for the proper administration of justice. However, the approach pursued by the domestic law in this case was not in line with the general trend at European level. The absence of any judicial review, which had seriously affected many aspects of the applicant's life, could not be justified by the legitimate aims underpinning the limitations on access to a court by incapacitated persons. The situation in which she had been placed amounted to a denial of justice as regards the possibility of securing a review of her legal capacity. Article 6(1) had been violated.

Other case law

In *Mocie v France (2003)*,²¹⁴ the applicant had applied to the competent national courts, seeking mainly an increase in his military invalidity pension. The first set of proceedings, which commenced in 1988, was still pending when the European Court of Human Rights delivered its judgment almost 15 years later; a second set of proceedings had lasted for almost eight years.

The court held that there had been a violation of Article 6§1 on account of the length of the proceedings in question. It noted that the invalidity pension had made up the bulk of the applicant's income. The proceedings had in substance been aimed at boosting the applicant's pension in the light of his deteriorating health. They were therefore of particular importance to him and called for particular diligence on the part of the authorities.

The case of *Farcaş v Romania (2010)*²¹⁵ involved applicant who had suffered from progressive muscular dystrophy since the age of 10. He complained that one effect of his physical disability was that it was impossible for him to access certain buildings, in particular those of the courts that had jurisdiction over disputes concerning his civil rights. Because the entrance to the local court building was not specially adapted, he could not enter the court or seek assistance from the bar association, and had been unable to challenge the termination of his contract.

214 *Mocie v France*, no. 46096/99, 8 April 2003.

215 *Farcaş v Romania* (dec), no. 32596/04, 14 September 2010.

The court declared the application to be manifestly ill-founded and inadmissible, even when viewed in conjunction with Article 14 (prohibition of discrimination). On the facts, it found that neither Mr Farcas's right of access to a court nor his right of individual petition had been hindered by insurmountable obstacles which prevented him from bringing proceedings, lodging an application or communicating with the court. He could have brought proceedings before the courts or administrative authorities by post, if necessary through an intermediary. The local post-office was accessible and, in any event, access to it was not indispensable for posting letters. The assistance of a lawyer was not necessary to bring the proceedings in question, and the applicant could always have contacted the bar association by letter or fax, or made a request to the court for free legal assistance. No appearance of discriminatory treatment against the applicant had been noted.

The case of *Blokhin v Russia (2016)* concerned the detention for 30 days in a temporary detention centre for juvenile offenders of a 12-year old boy suffering from a mental and neuro-behavioural disorder. The applicant maintained that the proceedings against him had been unfair for two reasons. He had been questioned by the police in the absence of his guardian, a legal counsel or a teacher and he had not been given the opportunity to cross-examine the two witnesses against him. The Grand Chamber held that there had been a violation of Article 6§§1 and 3. The applicant's defence rights had been violated because he had been questioned by the police without legal assistance. Furthermore, the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention. When their liberty was at stake, it was essential that adequate procedural safeguards were in place to protect the best interests and well-being of a child. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected. There had also been violations of Article 3 (inhuman or degrading treatment) and Article 5§1 (right to liberty and security).

ARTICLE 8

*Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence. There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article 8.*²¹⁶

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

²¹⁶ See also Article 22 (Respect for privacy) of the UNCRPD: '1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court has on a number of occasions ruled that ‘private life’ is a broad term not susceptible to exhaustive definition.²¹⁷ However, Article 8 ‘secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality’.²¹⁸ It protects the moral and physical integrity of the individual, including the right to live privately away from unwanted attention.²¹⁹

The right to respect for one’s private life guaranteed by Article 8 has been prominent in relation to issues of health, treatment and care. The court has interpreted the right to such respect as including the right to protection of one’s physical, moral and psychological integrity, as well as the right to choose and exercise one’s personal autonomy; for example, to refuse medical treatment or to request a particular form of medical treatment.²²⁰ The imposition of treatment against a person’s will gives rise to an interference with their right to respect for their private life and their right to physical integrity.

While Article 8 contains no explicit procedural requirements, ‘the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8’.²²¹ The extent of the state’s margin of appreciation turns partly on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism.²²²

The issue of proportionality (the interference must be ‘necessary in a democratic society’) is a consistent theme the case law. When considering whether an interference is proportionate, the burden lies on the state to justify its action. The ‘proportionality’ test entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of the individual with those of the whole community.

More particularly, under Article 8 the authorities must strike a fair balance between the interests of a person of unsound mind and the other legitimate interests concerned. As a rule, in complicated matters such as issues concerning mental capacity the authorities enjoy a wide margin of appreciation. National authorities have the benefit of direct contact with the persons concerned and therefore are particularly well placed to determine such issues. The court’s task is rather to review under the Convention the decisions taken by the national authorities in the exercise of their powers.²²³

217 Peck v United Kingdom, no. 44647/98, 28 January 2003, (2003) 36 EHRR 41, [2003] ECHR 44, §57.

218 Sidabras v Lithuania, nos. 55480/00 and 59330/00, 27 July 2004, (2006) 42 EHRR 6, §43; Brüggeman v Germany, no. 6959/75, 12 July 1977, (1981) 3 EHRR 244, §55.

219 X and Y v Netherlands, no. 8978/80, 26 March 1985, (1985) 8 EHRR 235, [1985] ECHR 4, §§22–27.

220 Glass v United Kingdom, no. 61827/00, 9 March 2004, [2004] ECHR 102, (2004) 39 EHRR 15, §§74–83; Tysiąc v Poland, no. 5410/03, 20 March 2007, [2007] ECHR 219, (2007) 45 EHRR 42.

221 Shtukaturov v Russia, supra, §89; Görgülü v Germany, no. 74969/01, 26 February 2004, §52.

222 Shtukaturov v Russia, supra, §89; Sahin v Germany, no. 30943/96, 11 October 2001, §§46 et seq.

223 Shtukaturov v Russia, supra, §87; *mutatis mutandis*, Bronda v Italy, no. 22430/93, 9 June 1998, Reports 1998-IV, §59.

Notwithstanding this observation, the margin of appreciation varies in accordance with the nature of the issues and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life.²²⁴

The positive obligation

Article 8 gives rise to both negative and positive obligations. States are under a positive obligation to secure the right to effective respect for physical and psychological integrity.²²⁵ This obligation may require the state to take measures to provide effective and accessible protection of the right to respect for private life,²²⁶ through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures.²²⁷

Medical treatment

The issue of free and informed consent to medical treatment has been a feature of the case law under Article 8.

In *Grare v France (1983)*,²²⁸ a voluntary in-patient complained his treatment with antipsychotic drugs resulted in unpleasant side-effects that violated Article 8. It was held that, even if the treatment regime constituted an invasion of his private life, it justified in the interests of his health and public order.

In *Acmanne v Belgium (1983)*,²²⁹ compulsory tuberculosis screening was held not to breach Article 8 although it interfered with the individual's private life.

In *TV v Finland (1994)*,²³⁰ the court ruled inadmissible a claim by an HIV-positive prisoner that his Article 8 rights were breached because guards were present during his medical review at an outside clinic and because staff involved in his treatment had allegedly disclosed his HIV status to others.

It was held that although access by prison and medical staff to information regarding the applicant's HIV status constituted an interference with his Article 8(1) rights, this could be justified under Article 8(2). His medical notes were marked to alert staff to his blood-borne disease and the access to this information was lawful, necessary to protect the rights and freedoms of others and proportionate.

224 Shtukaturvov v Russia, supra, §88; Elsholz v Germany [GC], no. 25735/94, ECHR 2000-VIII, §49.

225 Sentges v Netherlands (dec), no. 27677/02, 8 July 2003; Pentiacova and Others v Moldova (dec) no. 14462/03, 4 January 2005; Nitecki v Poland (dec), no. 65653/01, 21 March 2002.

226 Airey v Ireland, no. 6289/73, 11 September 1979, (1979) 2 EHRR 305, [1979] ECHR 3, §33; McGinley and Egan v United Kingdom, nos. 10/1997/794/995-996, 9 June 1998, [1998] ECHR 51, §101; Roche v United Kingdom, no. 32555/96, 19 October 2005, [2008] ECHR 926, (2006) 42 EHRR 30, §162.

227 Tysic v Poland, supra, §110.

228 Grare v France, no. 18835/91, 2 December 1992, 15 EHRR CD 100.

229 Acmanne v Belgium, no. 10435/83, 40 DR 251.

230 TV v Finland (dec), no. 21780/93, 2 March 1994.

The case of *Passannante v Italy (1998)*²³¹ concerned a five-month delay for a neurological appointment in the state system, whereas a private appointment was available in four days. Pursuant to the positive obligation, it was held that excessive delay on the part of a public health service to provide a medical service to which a patient was entitled can raise an issue under article 8, if the delay has or is likely to have a serious impact on the patient's health. However, on the facts this duty did not arise because no damage to health was evidenced.

The case of *Glass v United Kingdom (2004)*²³² concerned the administration of drugs to a severely disabled child (the second applicant) despite the opposition of his mother (the first applicant). Believing that the child had entered a terminal phase and, with a view to relieving his pain, the doctors administered diamorphine against the mother's wishes. Furthermore, a 'do not resuscitate' notice was added to the child's file without consulting the mother. During this time disputes broke out in the hospital involving family members and the doctors. The child survived the crisis and was able to be discharged home. The applicants argued that UK law and practice had failed to guarantee respect for the child's physical and moral integrity.

The court held that the decision of the authorities to override the mother's objections to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8. The decision to impose treatment in defiance of her objections interfered with the child's right to respect for his private life, and in particular his right to physical integrity. This interference was in accordance with the law and the action taken by the hospital staff had pursued a legitimate aim. However, as to the necessity of the interference, it had not been explained to the court's satisfaction why the hospital had not sought the intervention of the courts in the initial stages to overcome the deadlock. The onus to take such an initiative and defuse the situation in anticipation of a further emergency was on the hospital. Instead, the doctors used the limited time available to try to impose their views on the mother.

Correspondence of patients

In *Herczegfalvy v Austria (1992)*,²³³ the applicant complained that the hospital authorities had violated Article 8 by administering food by force, imposing treatment he complained of and refusing to send on his correspondence. The complaint was directed in particular at the psychiatric hospital's practice of sending all of his letters to the curator for him to select which ones to pass on. The court noted that this interference constituted a breach of Article 8 unless it was 'in accordance with the law', pursued a legitimate aim or aims under paragraph 2, and was 'necessary in a democratic society' for achieving such aims. The expression 'in accordance with the law' required that the impugned measure had a basis in national law; but it also referred to the quality of the law in question, requiring that it was accessible to the person, who must be able to foresee its consequences for him, and compatible with the rule of law. Compatibility with the rule of law implied that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by Article 8(1). If a law conferred a discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required would depend on the particular subject matter.

231 *Passannante v Italy* (dec), no. 32647/96, 1 July 1998, 26 EHRR CD153.

232 *Glass v United Kingdom*, no. 61827/00, 9 March 2004, [2004] ECHR 102, (2004) 39 EHRR 15.

233 *Herczegfalvy v Austria*, no. 10533/83, Series A no. 244, [1992] ECHR 58, (1992) 15 EHRR 437 (the 'Herczegfalvy case').

Although the Austrian government had argued that the impugned decisions were based directly on section 51 of the Hospitals Law, and articles in the Civil Code, these very vaguely worded provisions did not specify the scope or conditions of exercise of the discretionary power. Such specifications appeared all the more necessary in the field of detention in psychiatric institutions because the persons concerned were frequently at the mercy of the medical authorities. Their correspondence might be their only contact with the outside world. In the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or the arrangements for their review, the provisions did not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society, and there had been a violation of Article 8.

Information and Confidentiality

In *Panteleyenko v Ukraine (2006)*,²³⁴ the applicant complained about the disclosure at a court hearing of confidential information about his mental state and psychiatric treatment. The court found that obtaining from a psychiatric hospital confidential information concerning the applicant's mental state and treatment, and disclosing it at a public hearing, amounted to an interference with his right to respect for his private life. The court noted that the information was incapable of affecting the outcome of the litigation; the first-instance court's request for information was 'redundant' because the information was not 'important for an inquiry, pre-trial investigation or trial'.

In *Szuluk v United Kingdom (2009)*,²³⁵ the court dealt for the first time with the issue of medical confidentiality in prison. A prisoner who had undergone brain surgery discovered that his correspondence with the specialist supervising his hospital treatment had been monitored by a prison medical officer. The court found a violation of his right to respect for his correspondence under Article 8.

Changes of mentor, guardian or similar person in authority

In *JT v United Kingdom (2000)*,²³⁶ the applicant was detained in hospital for treatment under the Mental Health Act 1983. Her statutory 'nearest relative', who exercised important powers under the Act, was her mother. There was no mechanism in the Act which enabled JT to apply for the 'nearest relative' to be replaced. Her mother had persistently taken her stepfather's side and he had (allegedly) sexually abused her, which she said was responsible to a significant extent for her psychiatric difficulties. She complained that because her mother was her nearest relative in law, she was entitled to receive, and then discuss with him, information for tribunal reviews, which violated her right to respect for her private life. The Commission held that the absence of any possibility to apply to a court to change her nearest relative interfered with JT's rights under Article 8(1) and was disproportionate to the aims pursued. There had been a violation. Following that finding, the applicant's case was struck out after a friendly settlement under which the government undertook to seek to amend the legislation.

234 *Panteleyenko v Ukraine*, no. 11901/02, 29 June 2006.

235 *Szuluk v United Kingdom*, no. 36936/05, 2 June 2009, [2009] ECHR 845.

236 *JT v United Kingdom*, no. 26494/95, 30 March 2000, [2000] ECHR 132; [2000] ECHR 133.

The case of ***A-MV v Finland (2017)***²³⁷ concerned an intellectually disabled man's complaint about the Finnish courts' refusal to replace his court-appointed mentor, which had the effect that he had been prevented from deciding where, and with whom, he would like to live. His court-appointed mentor had decided that it was not in his best interests to move from his home town in the south to live in a remote village in the far north with his former foster parents. His request to replace the mentor was refused in the domestic proceedings.

The court held that there had been no violation of Article 8. The Finnish courts' decision to refuse to replace the mentor was justified. It was reached following a concrete and careful consideration of the applicant's situation. It had taken into account his inability to understand what was at stake if he moved, namely that it would involve a radical change in his living conditions. Such a decision, taken in the context of protecting his health and well-being, had therefore not been disproportionate. Moreover, the applicant had been involved at all stages of the proceedings and his rights, will and preferences had been taken into account by competent, independent and impartial domestic courts. Nor had there been any violation of Article 2 (freedom of movement) of Protocol No. 4 to the Convention.

Disproportionate deprivation of decision-making legal capacity

In ***Shtukurov v Russia***,²³⁸ the applicant had a history of mental illness and was officially declared disabled in 2003. Following a request filed by his mother, the Russian courts declared him legally incapable on 28 December 2004. This decision deprived him of his capacity to act independently in almost all areas of life: he was no longer able to buy or sell any property on his own, to work, to travel, to choose his place of residence, to join associations or to marry. Even his liberty could henceforth be limited without his consent and without any judicial supervision. His mother was appointed as his guardian and, in November 2005, she admitted him to a psychiatric hospital. The applicant alleged, *inter alia*, that the interference with his private life was disproportionate and so contravened Article 8.

The court held that there had been a violation of Article 8 as a result of the applicant being fully deprived of his legal capacity. The principles for the legal protection of incapable adults set down by the Council of Europe's Committee of Ministers²³⁹ recommended that legislation should provide a 'tailor-made' response to each individual case. However, Russian legislation distinguished only between full capacity and full incapacity and made no allowances for borderline situations.

The interference with the applicant's private life had resulted in him becoming fully dependent on his official guardian in almost all areas of his life for an indefinite period when this was disproportionate to the government's legitimate aim of protecting his interests and health of others.

237 *A-MV v Finland*, no. 53251/13, 23 March 2017.

238 *Shtukurov v Russia*, no. 44009/05, 27 March 2008, 54 EHRR 962.

239 Recommendation no. R (99) 4 of 23 February 1999. 'Although these principles have no force of law for this Court, they may define a common European standard in this area', at §95.

Furthermore, his participation in the decision-making process had been ‘reduced to zero’. The court was particularly struck by the fact that the only hearing on the merits in his case lasted ten minutes. In such circumstances it could not be said that the judge had ‘had the benefit of direct contact with the persons concerned’, which normally would call for judicial restraint on the part of the European Court of Human Rights. Given the seriousness of the interference complained of, the court proceedings were perfunctory at best and the reasoning inadequate:

‘94 ... the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure — see, mutatis mutandis, *Winterwerp*, cited above, §40.’

In the applicant’s case, the questions to the doctors formulated by the judge did not concern ‘the kind and degree’ of his mental illness, and the medical report did not analyse the degree of his incapacity in sufficient detail, nor explain what kind of actions he was unable to understand and control.

Having examined the decision-making process and the reasoning behind the domestic decisions, the court concluded that the interference with the applicant’s private life was disproportionate to the legitimate aim pursued. There had therefore been a breach of Article 8 ‘on account of the applicant’s full incapacitation (§96).’

In *Ivinović v Croatia (2014)*,²⁴⁰ the applicant, who was born in 1946, had suffered from cerebral palsy and used a wheelchair since early childhood. The case concerned proceedings, brought by a social welfare centre, in which she had been partly divested of her legal capacity. The court held that there had been a violation of Article 8, finding that the Croatian courts, in depriving partially the applicant of her legal capacity, did not follow a procedure which could be said to be in conformity with the guarantees under Article 8.

In *AN v Lithuania (2016)*,²⁴¹ the applicant had a history of mental illness. He complained that he had been deprived of his legal capacity without his participation or knowledge and that, as an incapacitated person, he had then been unable to request the restoration of his legal capacity. The court held that there had been a violation of Article 8, finding that the interference with the applicant’s right to respect for his private life had been disproportionate to the legitimate aim pursued. The district court had had no opportunity to examine the applicant in person and essentially had relied in its decision on the testimony of his mother and the psychiatric report. While the court did not doubt the competence of the medical expert or the seriousness of the applicant’s illness, it stressed that the existence of a mental disorder, even a serious one, could not be the sole reason to justify full incapacitation. The court also held that there had been a violation of Article 6§1 (right to a fair trial), finding that the regulatory framework for depriving people of their legal capacity had not provided the necessary safeguards. The applicant had been deprived of a clear, practical and effective opportunity to have access to court in connection with the incapacitation proceedings.

240 *Ivinović v Croatia*, no. 13006/13, 18 September 2014.

241 *AN v Lithuania*, no. 17280/08, 31 May 2016.

Lack of legal representation of a disabled child

The case of **AMM v Romania (2012)**²⁴² concerned proceedings to establish the paternity of a 10-year old minor AMM who was born outside marriage and had a number of disabilities. He had been registered on his birth certificate as having a father of unknown identity. His putative father Z did not attend the domestic court hearing or co-operate with forensic tests. Before the domestic court, the applicant was first represented by his mother and subsequently, since his mother suffered from a serious disability which resulted in her being placed under the care of the social welfare authorities, by his maternal grandmother. The court held that there had been a violation of Article 8. The domestic courts did not strike a fair balance between the child's right to have his interests safeguarded in the proceedings and the right of his putative father not to undergo a paternity test or take part in the proceedings. As concerned the issue of whether the Romanian State had acted in breach of its positive obligation under Article 8, the guardianship office had not taken part in the proceedings as it was required to do. Nor had the applicant or his mother had been represented by a lawyer at any point in the proceedings. The Court pointed out that it had previously held that consideration must be given to the vulnerability of certain individuals and their inability in some cases to plead their case coherently or, indeed, at all. Having regard to the child's best interests, it had been up to the authorities to act on his behalf in order to compensate for the difficulties facing his mother, so as to avoid him being without protection.

Strip-searches

In **Wainwright v United Kingdom (2006)**,²⁴³ Mr Patrick O'Neill (the first applicant's son and the second applicant's half-brother) was arrested on suspicion of murder and detained on remand at HM Prison Armley. Following a report by a senior prison officer raising suspicions that he was involved in the supply and use of drugs within prison, the prison governor ordered that all of his visitors be strip-searched before visits. A complaint was made that this contravened Article 8. The court held that due to their manner the strip searches of the applicants did breach Article 8 but did not reach the minimum level of severity prohibited by Article 3.

Other case law

In **X and Y v the Netherlands (1985)**,²⁴⁴ a girl with an intellectual disability (the second applicant) lived in a home for children with mental disabilities. On the day after her sixteenth birthday (which was the age of consent for sexual intercourse in the Netherlands) she was raped in the home by a relative of the person in charge. She was traumatised by the experience but deemed unfit to sign an official complaint given her low mental age. Her father (the first applicant) signed in her place but proceedings were not brought against the perpetrator because the girl had to make the complaint herself. The domestic courts recognised that there was a gap in the law.

242 AMM v Romania, no. 2151/10, 14 February 2012.

243 Wainwright v United Kingdom, no. 12350/04, 26 September 2006, [2006] ECHR 807.

244 X and Y v Netherlands, no. 8978/80, 26 March 1985, (1985) 8 EHRR 235, [1985] ECHR 4.

The court recalled that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities. However, it does not merely compel the state to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. In the present case, the protection afforded by the civil law in a case of wrongdoing of the kind inflicted on the second applicant was insufficient. This was a case where fundamental values and essential aspects of private life were at stake. Effective deterrence was indispensable in this area and could be achieved only by criminal-law provisions. Observing that the Dutch Criminal Code had not provided her with practical and effective protection, the court concluded that the second applicant had been the victim of a violation of Article 8.

In *Kutzner v Germany (2002)*,²⁴⁵ the applicants, husband and wife, and their two daughters had lived since the children's birth with the first applicant's parents and an unmarried brother in an old farmhouse. The applicants had attended a special school for people with learning difficulties. Owing to their late physical and, more particularly, mental development, the girls were examined on a number of occasions by doctors. On the advice of one of the doctors and their own application, the girls had received educational assistance and support from a very early age. The applicants complained that the subsequent withdrawal of their parental authority and the placing of their daughters with foster families, mainly on the ground that they lacked the intellectual capacity to bring up their children, breached their right to respect for their family life. The court held that there had been a violation of Article 8. The authorities may have had legitimate concerns about the late development of the children, as noted by the social services departments concerned and psychologists. However, the placement order and its implementation had been unsatisfactory. Although the reasons relied on by the administrative and judicial authorities had been relevant, they had been insufficient to justify such a serious interference in the applicants' family life. Notwithstanding a margin of appreciation, the interference had not been proportionate to the legitimate aims pursued.

In *AK and L v Croatia (2013)*,²⁴⁶ the first applicant was the mother of the second applicant, who was born in 2008. Soon after his birth, the second applicant was placed with a foster family in another town on the grounds that his mother had no income and lived in a dilapidated property without heating. The first applicant had consented to this. Her complaint was that she had not been represented in the subsequent court proceedings which resulted in a decision divesting her of her parental rights, on the ground that she had a mild mental disability, and that her son had been put up for adoption without her knowledge, consent or participation in the adoption proceedings. The court held that there had been a violation of Article 8. Despite it being a requirement of domestic law, and the authorities' findings that the first applicant suffered from a mild mental disability, she had not been represented by a lawyer in the proceedings divesting her of parental rights. In addition, by not informing her of the adoption proceedings, the national authorities had deprived her of the opportunity to seek a restoration of her parental rights before the ties between her and her son had been finally severed by his adoption. The first applicant had thus been prevented from enjoying her right guaranteed by domestic law and had not been sufficiently involved in the decision-making process.

245 *Kutzner v Germany*, no. 46544/99, 26 February 2002, (2002) 35 EHRR 653; [2002] ECHR 160.

246 *AK and L v Croatia*, no. 37956/11, 8 January 2013, [2013] ECHR 290.

In *Kocherov and Sergeyeva v Russia (2016)*,²⁴⁷ the first applicant, who had a mild intellectual disability, lived in a care home between 1983 and 2012. In 2007, he and another resident of the care home had a daughter, the second applicant. A week after her birth the child was placed in public care where, with the first applicant's consent, she remained for several years. In 2012, the first applicant was discharged from the care home and expressed an intention to take the second applicant into his care. However, the domestic courts restricted his parental authority over the child. The second applicant remained in public care although the first applicant was allowed to maintain regular contact with her. In 2013, he managed to have the restriction of his parental authority lifted and the second applicant went to live with him. The applicants complained that, as a result of the restriction of the first applicant's parental authority, their reunification had been postponed for a year.

The court held that there had been a violation of Article 8. The reasons relied on by the Russian courts to restrict the first applicant's parental authority had been insufficient to justify the interference with the applicants' family life, and therefore been disproportionate to the legitimate aim pursued. As to the first applicant's mental disability, it appeared from a report submitted to the domestic authorities that his state of health allowed him fully to exercise his parental authority. However, the domestic court had disregarded this evidence. The question whether the mother posed a danger to the child was directly relevant when it came to striking a balance between the child's interests and those of her father. However, the domestic courts had based their fears for the second applicant's safety on a mere reference to the fact that she lacked legal capacity, without demonstrating that her behaviour had or might put the second applicant at risk. Their reference to the mother's legal status was thus not a sufficient ground for restricting the first applicant's parental authority.

In *Dmitriy Ryabov v Russia (2013)*,²⁴⁸ the applicant complained about having only restricted access to his son following his son's placement in the care of maternal grandparents soon after being born. The applicant and his wife both suffered from schizophrenia and he alleged that court decisions to restrict his parental rights on the ground he was a danger to his son had not been convincing. Any contact that had been granted to him had been illusory because it had to take place with the consent of his son's guardian, the maternal grandmother, who was hostile to him having any contact. The court held that there had not been a violation of Article 8. The interference with the applicant's parental rights constituted an interference with his right to respect for his family life. However, it had been in accordance with the law, pursued the legitimate aim of protecting the health and morals and rights and freedoms of the child, and had been necessary in a democratic society, within the meaning of Article 8.

ARTICLE 12

*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*²⁴⁹

247 *Kocherov and Sergeyeva v Russia*, no. 16899/13, 29 March 2016, [2016] ECHR 312.

248 *Dmitriy Ryabov v Russia*, no. 33774/08, 1 August 2013, [2013] ECHR 771.

249 Article 23 (Respect for home and the family) of the UNCRPD requires State parties to ensure that the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The right contained in Article 12 is closely related to Article 8 which secures a right to respect for one's private and family life, home and correspondence.

In *Lashin v Russia (2013)*,²⁵⁰ the applicant suffered from schizophrenia and had been legally incapacitated since 2000. In 2002 he and his fiancée applied to the competent authority in order to register their marriage. However, they were unable to do so because the Russian Family Code prohibited persons who were legally incapacitated due to mental disorder from getting married. Having already found a violation of Article 8 on account of the maintenance of the applicant's status as an incapacitated person and his inability to have it reviewed, the court considered that there was no need for a separate examination under Article 12. The applicant's inability to marry was one of many legal consequences of his incapacity status.

Pending application

*Delecolle v France*²⁵¹ is a pending application which was communicated to the French Government on 18 September 2015. The applicant, who was born in 1937, complains that he is unable to marry, and criticises the fact he must obtain authorisation from a supervisor or the guardianship judge in order to marry. The court gave notice of the application to the French Government and put questions to the parties under Article 12 of the Convention.

ARTICLE 14

Article 14 prohibits discrimination based on 'any status', such as mental ill-health.

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

free and full consent of the intending spouses is recognized. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

250 *Lashin v Russia*, no. 33117/02, 22 January 2013, [2013] ECHR 282.

251 *Delecolle v France*, no. 37646/13.

The right under Article 14 not to be discriminated against on account of one's physical or mental condition has also been examined by the court, which has expressly acknowledged health as being one of the protected grounds which can be relied on in non-discrimination cases.²⁵² Relevant case law has been referred to above in the course of summarising the case law concerning persons suffering from mental ill-health.

RIGHT TO VOTE (ARTICLE 3 OF PROTOCOL NO. 1)

States undertake to hold elections which ensure the free expression of the opinion of 'the people'.

ARTICLE 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Having been diagnosed with a psychiatric condition in 1991, the applicant in ***Alajos Kiss v Hungary (2010)***²⁵³ was placed under partial guardianship in May 2005 on the basis of the civil code. In February 2006, he realised that he had been omitted from the electoral register drawn up for upcoming legislative elections. His complaint to the electoral office was to no avail. He further complained to the district court which in March 2006 dismissed his case, observing that under the Hungarian Constitution persons placed under guardianship did not have the right to vote. When legislative elections took place in April 2006, the applicant could not participate. He submitted that his disenfranchisement, imposed on him because he was under partial guardianship for a psychiatric condition, constituted an unjustified deprivation of his right to vote that was not susceptible to any remedy.

The court held that there had been a violation of Article 3 of Protocol No. 1. The indiscriminate removal of voting rights without an individualised judicial evaluation, solely on the grounds of mental disability necessitating partial guardianship, could not be considered compatible with the legitimate grounds for restricting the right to vote. Mentally disabled people were at risk of legislative stereotyping and the state had to have very weighty reasons when restricting fundamental rights to such particularly vulnerable groups in society without an individualised evaluation of their capacities and needs. The applicant had lost his right to vote as a result of the imposition of an automatic, blanket restriction.

252 Kiyutin v Russia, no. 2700/10, 10 March 2011; IB v Greece, no. 552/10, 3 October 2013.

253 Alajos Kiss v Hungary, no. 38832/06, 20 May 2010, [2010] ECHR 692.

The case of **Gajcsi v Hungary (2014)**²⁵⁴ concerned an applicant who suffered from a psychosocial disability. In 2000 a district court placed the applicant under partial guardianship and as an automatic consequence his name was deleted from the electoral register. In 2008 his legal capacity was restored in all areas in health care matters but his electoral rights were not restored. This meant that he was unable to vote in the general elections in Hungary in 2010.

Referring to its decision in *Alajos Kiss v Hungary*, the court held that there had been a violation of Article 3 of Protocol No. 1.

ARTICLE 2 OF PROTOCOL No 4 (FREEDOM OF MOVEMENT)

Everyone has the right to liberty of movement and freedom to choose his residence. There shall be no restrictions on the exercise of these rights other than such as are in accordance with law, necessary in a democratic society and for one of the expressly permitted purposes.

ARTICLE 2

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Somewhat surprisingly, Article 2 of Protocol No. 4 seems only rarely to have been invoked in respect of restrictions on liberty which fall short of being a deprivation of liberty for the purposes of Article 5. The answer may be that such restrictions, interfering as they do with a person's private life, are dealt with under Article 8.

Article 2 of Protocol No. 4 was relied on by the applicant in the case of **MV v Finland (2017)**,²⁵⁵ where it was dealt with fairly summarily. His application was effectively disposed of under Article 8:

254 Gajcsi v Hungary, no. 62924/10, 23 September 2014.

255 A-MV v Finland, no. 53251/13, 23 March 2017.

'94. In support of his complaint, the applicant also invoked the provisions of Article 2 of Protocol No. 4 to the Convention. In view of the content of that Article as cited above, in particular the fact that paragraph 3 of the Article is closely aligned with paragraph 2 of Article 8, and taking into account the conclusions reached under Article 8 of the Convention above, the Court does not consider that an examination of the applicant's complaint can lead to different findings when reviewed under Article 2 of Protocol No. 4. There has therefore been no violation of that Article, either.'

B – UNCRPD

The text of the Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006. It opened for signature on 30 March 2007. Following ratification by the twentieth party, it came into force on 3 May 2008. As of April 2017, the Convention has 160 signatories and 173 parties. The European Union ratified it on 23 December 2010 to the extent that responsibilities of the member states were transferred to it.

By Article 1, the purpose of the Convention ‘is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’²⁵⁶

DEFINITIONS

“Discrimination on the basis of disability” means ‘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.’²⁵⁷

ARTICLE 12

Article 12

Equal recognition before the law

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.

256 The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006), Article 1. Referred to in the footnotes which follow as ‘The UNCRPD’. This ‘definition’ is to be found in Article 1 rather than as a definition in ‘Article 2: Definitions’.

257 The UNCRPD, Article 2.

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.

There is arguably some ambiguity as to the precise meaning of Article 12 and presumably that is because it embodies a compromise of different opinions expressed during the drafting and adoption process.

On the one hand, the article requires states to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life' and 'to 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 ...'

On the other hand, the article provides that all measures that relate to the exercise of legal capacity must provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law; and that such safeguards shall ensure that legal capacity measures 'respect' the rights, will and preferences of the person, 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'. Such safeguards must be proportional to the degree to which such measures affect the person's rights and interests' and states 'ensure that persons with disabilities are not arbitrarily deprived of their property'.

The inclusion of the requirements, conditions and caveats stipulated in the preceding paragraph make no sense whatsoever unless the interventions referred to are permitted by the Convention subject to the appropriate safeguards. Necessarily once such an intervention takes place, the person affected at that point no longer 'enjoys legal capacity on an equal basis with others in all aspects of life'.

The intention may be that Article 12 is to be understood in the same way as Article 8 of the European Convention on Human Rights, in that there is a general statement of rights followed by a statement of the circumstances in which those rights may be qualified and the safeguards and limits attaching to any interference. If so, Article 12 can be understood in the following way:

1. Persons with disabilities shall not by virtue of the fact that they have a disability (whether physical, mental, intellectual or sensory) be denied 'the right to recognition everywhere as persons before the law' or prevented from enjoying 'legal capacity on an equal basis with others in all aspects of life'. States shall 'take appropriate measures to provide access by such persons to the support they may require in exercising their legal capacity' and shall ensure that persons with disabilities may own or inherit property, control their own financial affairs and have equal access to bank loans, mortgages and other forms of financial credit.
2. States shall also ensure that all measures that concern the exercise of legal capacity by a person with a mental or other disability:
 - incorporate appropriate and effective safeguards which are consistent with international human rights and proportional to the degree to which such measures affect the person's rights and interests;
 - protect them from abuse;
 - respect their rights, will and preferences;
 - 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; and
 - do not arbitrarily deprive the person of their property.

Such a formulation incorporates the fundamental principles set down in Article 12 without ignoring the clearly enumerated conditions and reservations which can only be there for a purpose.

It also acknowledges the reality that some people are so disabled that they cannot exercise certain legal rights even with support. Take for example the person in the final sad stages of dementia, confined to bed and so cognitively impaired as to be unable to form the idea of swallowing let alone mobilising, or the person in a persistent vegetative state following a road traffic accident.

It seems unlikely that more than this is intended given that the UNCRPD recognises the need for some interference with liberty in this and other articles.²⁵⁸ The counterpart of autonomy is accountability for acts autonomously done. The reality is that not all adults are able to assume this burden of legal responsibility. If, in a desire to maximise the autonomy and dignity of a person with a significant learning disability we hold that they are able to enter into a binding contract which they are unable to understand even with full support, with that goes all the potentially disastrous consequences of then being liable for breaches of an understood contract.

258 See e.g. Article 14 below (Liberty and Security of the Person).

Likewise, if we hold that a person who cannot understand the litigation is able to litigate they will be personally liable to pay the often substantial costs of misconceived litigation. In other situations the fact that the individual is held in all cases to have legal capacity may render them liable to pay damages and/or to imprisonment for injuring someone when mentally unwell, bound by gifts made in a manic phase or as a result of delusional beliefs, and so on. We cannot do without capacity laws which define a person's ability to make legally-binding decisions and either to be held legally accountable to others for their acts and omissions or to be released from such liability.

In **A-MV v Finland (2017)**,²⁵⁹ the court rejected a central tenet of the interpretation of Article 12 of the UNCRPR, namely that the will and preferences of an individual should always be determinative of any decision taken in their name. The case concerned an intellectually disabled man's complaint about the Finnish courts' refusal to replace his court-appointed mentor, meaning that he had been prevented from deciding where and with whom he would like to live (see above).

A-MV's application was supported by the Mental Disability Advocacy Centre which argued that 'states were required to ensure that the will and preferences of persons with disabilities were respected at all times and could not be overridden or ignored by paternalistic "best interests" decision-making ... The starting point, based on the current international standards, was that the will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person ... There was a clear move from a "best-interests" model to a "supported decision-making" approach.'

The court accepted that AM-V's right to private life under Article 8 was interfered with by the fact that the domestic courts had refused to change his mentor. The question was whether the interference was justified. The court identified the critical legal contention advanced by the applicant as being that 'there was a measure in place under which the mentor was required not to abide by the applicant's wishes and instead to give precedence to his best interests, if and where the applicant was deemed unable to understand the significance of a specific matter'. The court reminded itself that, in order to determine the proportionality of a general measure, it had primarily to assess the legislative choices underlying it, and further reminded itself of the margin of appreciation left to national authorities. The court noted that under Finnish law the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated:

'The powers of the mentor to represent the ward cover the latter's property and financial affairs to the extent set out in the appointing court's order, but these powers do not exclude the ward's capacity to act for him- or herself. If, like in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance [...]. In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended

259 A-MV v Finland, no. 53251/13, 23 March 2017

on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue. The Court also notes that Finland, having recently ratified the UNCRPD, has done so while expressly considering that there was no need or cause to amend the current legislation in these respects.'

Reminding itself of the review nature of its jurisdiction, the court saw no reason to call into question the factual findings of the domestic courts:

'In the light of the above mentioned findings, the Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.'

The Court was mindful of the need for domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect them and safeguard their interests, especially under circumstances where their individual qualities or situation placed them in a particularly vulnerable position. The Court considered that a proper balance was struck in the AM-V's case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law which ensured that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to his circumstances and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting his health, in a broader sense of his well-being.

For these reasons, the court considered that, in the light of the findings of the domestic courts, the impugned decision was based on relevant and sufficient reasons and the refusal to make changes in the mentor arrangements concerning the applicant was not disproportionate to the legitimate aim pursued. There had been no violation of Article 8.²⁶⁰

Best interests approaches

Properly interpreted, a 'best interests' approach is not dismissive of the significance of the individual's autonomy, wishes, feelings, beliefs and values.

²⁶⁰ This summary of the facts is taken from one prepared by Alex Ruck-Keene, an English barrister at 39 Essex Street Chambers who is an authority on the UNCRPD.

There is much less difference than has commonly been supposed between a properly applied person-centred ‘best interests’ approach and a supported decision model. For example, one of the principles of the English and Welsh Mental Capacity Act 2005 is that ‘a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success’.²⁶¹ That therefore requires providing the person with the support they require to make their own decision before reaching any decision on evidence that they lack the capacity to decide the matter in issue.²⁶² If the person cannot make their own decision, the fact that any decision made on their behalf must be made in their ‘best interests’ simply imposes a person-centred requirement that it is their best interests, not anyone else’s, which is determinative. Furthermore, the fact that the individual’s past and present wishes, feelings, beliefs and values must be considered²⁶³ and given due weight tells us that this is not a sterile objective test of best interests. It is not a case of trying to determine what some hypothetical objective or rational person would decide in this situation when presented with these choices. Nor are we seeking to do nothing more sophisticated than impose on the individual an objective and rational analysis based on professional expertise of what they ought sensibly to do in that situation. The person’s wishes and feelings are always the starting point and very often the end point. The decision or outcome will often be that which accords with their wishes because any risks must be significant to outweigh the benefit for them of autonomy and self-determination. After all, why would any person wish another person to receive care or treatment otherwise than in accordance with their wishes if they can be cared for adequately in accordance with their wishes? The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is their welfare in the context of their wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further *their* important and legitimate interests, not one’s own.

It is also the case that, properly interpreted, the objective and subjective importance of individual liberty is a crucial factor in all ‘best-interests’ decision-making. The enduring impression left after spending many years visiting psychiatric wards is not one of fear or dangerousness, but of suffering and an often disarming kindness on the part of those who have lost their liberty. Although compelled to submit to the will of others, and forced to accept medication which, if mentally beneficial, often produces severe physical discomfort, most patients remain dignified and courteous, and retain the compassion to respond to the plight of others in a similarly unfortunate situation.

Equally remarkable is their striving to be free members of society after many years outside society, even when many other higher faculties are profoundly impaired. A hospital is not a prison but for the individual concerned both involve detention and a complete loss of that right most important to them, so that Byron’s words — ‘Eternal spirit of the chainless Mind ! / Brightest in dungeons, Liberty ! thou art’ — are often an apt description of the individual’s predicament.

261 Mental Capacity Act 2005, s.1.

262 This requirement is equivalent to what other jurisdictions may refer to as ‘co-decision-making’ (‘You wouldn’t have capacity on your own to make the decision’) or a decision-making representative scheme (‘You don’t have capacity on your own to make that decision and don’t have a co decision-maker’).

263 Ibid, s4.

Shared and co-decision making

There has been considerable support in recent years for shared decision-making and co-decision making schemes. The difficulty intellectually is that a person is either able with support to make their own decision or is not able. If the person is able to do so then they should be entitled in law to make their own decision, rather than having to share this right with another person. If they wish to relieve themselves of some of the burden of decision-making they can appoint an attorney to act on their behalf and in accordance with such conditions and restrictions as they wish to insert in the power of attorney document. It is not a matter for the state. If the person is not able with support to make their own decision then masking this with a co-decision-making agreement is dubious. Having just found that they are unable to make their own decision even if properly and fully supported, the corollary can only be that it is the co-decision maker or shared decision-maker who is making the decisions for them on a best interests basis.

The Victorian Law Reform Commission's *Guardianship: Final Report*²⁶⁴ sets out some of the relevant considerations. The Commission itself supported the introduction of co-decision-making. In its view, co-decision making is qualitatively different to substitute decision-making because the person with impaired decision-making ability continues to have legal responsibility for decisions about their own affairs, even though those decisions require the agreement of another person. However, there were a number of 'challenges'. In particular, the co-decision maker might be in a position to exert significant influence over a person with impaired decision-making ability. That created the potential for abuse. In circumstances where a person's decision-making ability fluctuated considerably, it might also be difficult for co-decision makers to determine whether a decision had been jointly made or was really a substitute decision. The Mental Health Legal Centre indicated that while they initially supported the proposal for co-decision makers, negative consumer feedback and concerns about the potential for abuse had changed their view. Victoria Legal Aid expressed concern that a co-decision-making arrangement had the potential to be an 'uneven partnership', where the co-decision maker may heavily influence the person with a disability to agree with a decision that the co-decision maker thinks is appropriate. The Federation of Community Legal Centres shared Victoria Legal Aid's concerns, arguing that 'the co-decision making model ... seems likely to increase complexity without much associated benefit'.

ARTICLE 13

Article 13

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

264 *Guardianship: Final Report*, Victorian Law Reform Commission, 2012.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

This is an important statement of principle and one which, if properly implemented by states, would have enormous benefits both in terms of the rights of people suffering from significant mental ill-health and the fair administration of justice.

Of critical significance is the availability of state-funded legal aid for persons in court proceedings which involve a deprivation or restriction of their liberty or which impact on the exercise by them of a citizen's usual legal rights. The European Court of Human Rights has bit-by-bit extended the requirement for legal representation in Article 5 and Article 8 proceedings without yet laying down the unequivocal principle that representation is required by the Convention.

The relevant factors which affect access to justice in this field of law include:

- The simplicity of the legislative scheme. Laws should be a last resort; impose minimum powers, duties and rights; be unambiguous, just, as short as possible, in plain language, provide a mechanism for enforcing duties and a remedy when powers are exceeded.
- The professional and judicial culture.
- The appointment of specialist mental health judges with experience in the field rather than generic judges.
- The existence of a specialist panel of lawyers to assist applicants.
- The formality of proceedings and the volume and complexity of rules, procedures and forms.
- The availability of publicly-funded legal aid and representation.
- The level of resources (judicial, court space, local authority and health services support in relation to providing court reports and less restrictive alternatives).
- The existence of a system of periodic automatic referral of cases which does not rely on the individual making an application.
- The forensic model (one, two or three person courts or tribunals; the use of assessors; inquisitorial or adversarial).
- The location of hearings (conventional court, tribunal sitting locally, the person's own home).
- Court fee levels.
- Public and press access, publicity, reporting.
- Training.

— The delegation of powers to civil servants.

ARTICLE 14 (LIBERTY AND SECURITY OF PERSON)

Article 14

Liberty and security of person

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

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

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

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

The CRPD states that a deprivation of liberty based on the existence of a disability would be contrary to the CRPD and in itself discriminatory. This was also the conclusion of the Chair of the Ad Hoc Committee drafting the CRPD. The chair closed the discussions on Article 14 saying: ‘This is essentially a non-discrimination provision. The debate has focused on the treatment of PWD (persons with disabilities) on the same basis as others. PWD who represent a legitimate threat to someone else should be treated as any other person would be.’²⁶⁵

According to the Office of High Commissioner of Human Rights (OHCHR), ‘unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person’s disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by Article 14 of the CRPD.’ The OHCHR suggests the following interpretation:

‘[Article 14] [...] should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.’²⁶⁶

²⁶⁵ *Involuntary placement and involuntary treatment of persons with mental health problems*, FRA – European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union, 2012, p.15.

²⁶⁶ *Involuntary placement and involuntary treatment of persons with mental health problems*, FRA – European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union, 2012, p.16.

OTHER ARTICLES

The remaining articles contain a number of significant rights, some of which overlap with Article 8 of the European Convention but many of which go further and impact on the considerable economic and social disadvantage experienced by people with disabilities:

Article 17 (Protecting the integrity of the person) provides that, ‘Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’ This is relevant to interventions such as community treatment orders, medication and other treatment without consent, access to one’s home and searches.

Article 19 (Living independently and being included in the community) requires states to ‘recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and [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’. States must ensure 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.’ They must ‘have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community’. This will be relevant to people with a disability who are subject to a guardian or mentor with power to determine their place of residence. It will also be relevant to individuals who are required to live in a particular community setting because of their disability, e.g. supported living for a person with Alzheimer’s disease or an intellectual disability.

Article 22 (Respect for privacy) provides that, ‘1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others. This Article has a considerable overlap with Article 8 of the ECHR.

Article 23 (Respect for home and the family) states that, ‘1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others. Inter alia, State parties must ensure that the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized. This article overlaps with Articles 8 and 12.

Article 24 (Education) recognizes the right of persons with disabilities to education and the necessity for persons with disabilities to develop their personality, talents and creativity to their fullest potential. States must enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.

Article 25 (Health) provides that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties must provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, and also such health services as are needed specifically because of their disabilities.

Article 26 (Habilitation and rehabilitation) requires States Parties to take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties must organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services.

Article 27 (Work and employment) provides that States Parties must protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.

Article 28 (Adequate standard of living and social protection) recognizes the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions. State Parties must take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

Article 29 (Participation in political and public life) requires that States Parties guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.

Article 30 (Participation in cultural life, recreation leisure and sport) recognises the right of persons with disabilities to take part on an equal basis with others in cultural life. State Parties must take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats.

OTHER CONVENTIONS, DECLARATIONS AND RECOMMENDATIONS

Over the years a number of other conventions and international documents have been published, including the following:²⁶⁷

European Recommendations

- Recommendation No R (99) 4 of 23 February 1999 of the Committee of Ministers of the Member States of the Council of Europe On Principles Concerning the Legal Protection of Incapable Adults
- Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison;
- Recommendation Rec (2006) 2 on the European Prison Rules.

Recommendation No R (99) 4 on Principles re the Legal Protection of Incapable Adults

The recommendation was adopted by the Committee of Ministers on 23 February 1999. The Committee recommended that the governments of member states take or reinforce, in their legislation and practice, all measures considered necessary with a view to the implementation of the principles set out in the Recommendation. The recommendation is set out in full here because it is surprisingly difficult to download a copy:

PRINCIPLES

Part I – Scope of application

1. The following principles apply to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests.
2. The incapacity may be due to a mental disability, a disease or a similar reason.
3. The principles apply to measures of protection or other legal arrangements enabling such adults to benefit from representation or assistance in relation to those affairs.
4. In these principles "adult" means a person who is treated as being of full age under the applicable law on capacity in civil matters.

²⁶⁷ Some of the language and terms used would today be considered inappropriate but the relevant provisions are summarised as published.

5. In these principles "intervention in the health field" means any act performed professionally on a person for reasons of health. It includes, in particular, interventions for the purposes of preventive care, diagnosis, treatment, rehabilitation or research.

Part II — Governing principles

Principle 1 — Respect for human rights

In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications on those rights contained in the relevant international legal instruments.

Principle 2 — Flexibility in legal response

1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations.
2. Appropriate measures of protection or other legal arrangements should be available.
3. The law should provide for simple and inexpensive measures of protection or other legal arrangements.
4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned.
5. The range of measures of protection should include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers.
6. Consideration should be given to the inclusion of measures under which the appointed person acts jointly with the adult concerned, and of measures involving the appointment of more than one representative.
7. Consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity.
8. Consideration should be given to the need to provide expressly that certain decisions, particularly those of a minor or routine nature relating to health or personal welfare, may be taken for an incapable adult by those deriving their powers from the law rather than from a judicial or administrative measure.

Principle 3 — Maximum preservation of capacity

1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.
3. Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative's consent, to undertake specific acts or acts in a specific area.
4. Whenever possible the adult should be enabled to enter into legally effective transactions of an everyday nature.

Principle 4 — Publicity

The disadvantage of automatically giving publicity to measures of protection or similar legal arrangements should be weighed in the balance against any protection which might be afforded to the adult concerned or to third parties.

Principle 5 — Necessity and subsidiarity

1. No measure of protection should be established for an incapable adult unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned. A measure of protection may be established, however, with the full and free consent of the person concerned.
2. In deciding whether a measure of protection is necessary, account should be taken of any less formal arrangements which might be made, and of any assistance which might be provided by family members or by others.

Principle 6 — Proportionality

1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.
2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention.

Principle 7 — Procedural fairness and efficiency

1. There should be fair and efficient procedures for the taking of measures for the protection of incapable adults.
2. There should be adequate procedural safeguards to protect the human rights of the persons concerned and to prevent possible abuses.

Principle 8 — Paramountcy of interests and welfare of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration.

2. This principle implies, in particular, that the choice of any person to represent or assist an incapable adult should be governed primarily by the suitability of that person to safeguard and promote the adult's interests and welfare.
3. This principle also implies that the property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare.

Principle 9 — Respect for wishes and feelings of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect.
2. This principle implies, in particular, that the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect.
3. It also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view.

Principle 10 — Consultation

In the establishment and implementation of a measure of protection there should be consultation, so far as reasonable and practicable, with those having a close interest in the welfare of the adult concerned, whether as representative, close family member or otherwise. It is for national law to determine which persons should be consulted and the effects of consultation or its absence.

Part III — Procedural principles

Principle 11— Institution of proceedings

1. The list of those entitled to institute proceedings for the taking of measures for the protection of incapable adults should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for proceedings to be initiated by a public official or body, or by the court or other competent authority on its own motion.
2. The person concerned should be informed promptly in a language, or by other means, which he or she understands of the institution of proceedings which could affect his or her legal capacity, the exercise of his or her rights or his or her interests unless such information would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.

Principle 12 — Investigation and assessment

1. There should be adequate procedures for the investigation and assessment of the adult's personal faculties.

2. No measure of protection which restricts the legal capacity of an incapable adult should be taken unless the person taking the measure has seen the adult or is personally satisfied as to the adult's condition and an up-to-date report from at least one suitably qualified expert has been submitted. The report should be in writing or recorded in writing.

Principle 13 — Right to be heard in person

The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.

Principle 14 — Duration, review and appeal

1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.
2. Measures of protection should be reviewed on a change of circumstances and, in particular, on a change in the adult's condition. They should be terminated if the conditions for them are no longer fulfilled.
3. There should be adequate rights of appeal.

Principle 15 Provisional measures in case of emergency

If a provisional measure is needed in a case of emergency, principles 11 to 14 should be applicable as far as possible according to the circumstances.

Principle 16 — Adequate control

There should be adequate control of the operation of measures of protection and of the acts and decisions of representatives.

Principle 17 — Qualified persons

1. Steps should be taken with a view to providing an adequate number of suitably qualified persons for the representation and assistance of incapable adults.
2. Consideration should be given, in particular, to the establishment or support of associations or other bodies with the function of providing and training such people.

Part IV — The role of representatives

Principle 18 — Control of powers arising by operation of law

1. Consideration should be given to the need to ensure that any powers conferred on any person by operation of law, without the intervention of a judicial or administrative authority, to act or take decisions on behalf of an incapable adult are limited and their exercise controlled.
2. The conferment of any such powers should not deprive the adult of legal capacity.
3. Any such powers should be capable of being modified or terminated at any time by a measure of protection taken by a judicial or administrative authority.

4. Principles 8 to 10 apply to the exercise of such powers as they apply to the implementation of measures of protection.

Principle 19 — Limitation of powers of representatives

1. It is for national law to determine which juridical acts are of such a highly personal nature that they cannot be done by a representative.
2. It is also for national law to determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body.

Principle 20 — Liability

1. Representatives should be liable, in accordance with national law, for any loss or damage caused by them to incapable adults while exercising their functions.
2. In particular, the laws on liability for wrongful acts, negligence or maltreatment should apply to representatives and others involved in the affairs of incapable adults.

Principle 21 — Remuneration and expenses

1. National law should address the questions of the remuneration and the reimbursement
2. Distinctions may be made between those acting in a professional capacity and those acting in other capacities, and between the management of personal matters of the incapable adult and the management of his or her economic matters.

Part V — Interventions in the health field

Principle 22 — Consent

1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.
2. Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that:
 - a. it is for his or her direct benefit, and
 - b. authorisation has been given by his or her representative or by an authority or a person or body provided for by law.
3. Consideration should be given to the designation by the law of appropriate authorities, persons or bodies for the purpose of authorising interventions of different types, when adults who are incapable of giving free and informed consent do not have a representative with appropriate powers. Consideration should also be given to the need to provide for the authorisation of a court or other competent body in the case of certain serious types of intervention.

4. Consideration should be given to the establishment of mechanisms for the resolution of any conflicts between persons or bodies authorised to consent or refuse consent to interventions in the health field in relation to adults who are incapable of giving consent.

Principle 23 — Consent (alternative rules)

If the government of a member state does not apply the rules contained in paragraphs 1 and 2 of Principle 22, the following rules should be applicable:

1. Where an adult is subject to a measure of protection under which a given intervention in the health field can be carried out only with the authorisation of a body or a person provided for by law, the consent of the adult should nonetheless be sought if he or she has the capacity to give it.
2. Where, according to the law, an adult is not in a position to give free and informed consent to an intervention in the health field, the intervention may nonetheless be carried out if:
 - a. it is for his or her direct benefit, and
 - b. authorisation has been given by his or her representative or by an authority or a person or body provided for by law.
3. The law should provide for remedies allowing the person concerned to be heard by an independent official body before any important medical intervention is carried out.

Principle 24 — Exceptional cases

1. Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which, because of their special nature, require the provision of additional protection for the person concerned.
2. Such rules may involve a limited derogation from the criterion of direct benefit provided that the additional protection is such as to minimise the possibility of any abuse or irregularity.

Principle 25 — Protection of adults with a mental disorder

Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, an adult who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.

Principle 26 — Permissibility of intervention in emergency situation

When, because of an emergency situation, the appropriate consent or authorisation cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the person concerned.

Principle 27 — Applicability of certain principles applying to measures of protection

1. Principles 8 to 10 apply to any intervention in the health field concerning an incapable adult as they apply to measures of protection.

2. In particular, and in accordance with principle 9, the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes should be taken into account.

Principle 28 — Permissibility of special rules on certain matters

Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedom of others.

United Nations and WHO Declarations and Guidelines

- ‘The protection of persons with mental illness and the improvement of mental health care’ (Universal Declaration of Human Rights, UN Resolution of 1991, No. A/RES/46/119, 75th Plenary Meeting);
- The United Nations Declaration on the Rights of Mentally Retarded Persons, proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.
- The United Nations Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975;
- The Guidelines for the Promotion of Human Rights of Persons with Mental Health Disorders (WHO/MNH/MND/95.4).

INTERNATIONAL CONVENTIONS & PRINCIPLES

A. UNITED NATIONS

Principles for the protection of persons with mental illness and the improvement of mental health care.

Adopted by General Assembly resolution 46/119 of 17 December 1991

The exercise of the rights set forth in these Principles may be subject only to such limitations as are prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and freedoms of others

Determination of mental illness	Principle 4	<ol style="list-style-type: none"> 1. A determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards. 2. A determination of mental illness shall never be made on the basis of political, economic or social status, or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental health status. 3. Family or professional conflict, or non-conformity with moral, social, cultural or political values or religious beliefs prevailing in a person's community, shall never be a determining factor in diagnosing mental illness.
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		4. A background of past treatment or hospitalization as a patient shall not of itself justify any present or future determination of mental illness.
		5. No person or authority shall classify a person as having, or otherwise indicate that a person has, a mental illness except for purposes directly relating to mental illness or the consequences of mental illness.
Standards of care	Principle 8	2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort.
Treatment	Principle 9	<p>1. Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.</p> <p>4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.</p>
Medication	Principle 10	<p>1. Medication shall meet the best health needs of the patient, shall be given to a patient only for therapeutic or diagnostic purposes and shall never be administered as a punishment or for the convenience of others. Subject to the provisions of paragraph 15 of Principle 11, mental health practitioners shall only administer medication of known or demonstrated efficacy.</p> <p>2. All medication shall be prescribed by a mental health practitioner authorized by law and shall be recorded in the patient's records.</p>
Consent to treatment	Principle 11	<p>6. Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 below, a proposed plan of treatment may be given to a patient without a patient's informed consent if the following conditions are satisfied:</p> <p>(a) The patient is, at the relevant time, held as an involuntary patient;</p> <p>(b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2 above, is satisfied that, at the relevant time, the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, if domestic legislation so provides, that, having regard to the patient's own safety or the safety of others, the patient unreasonably withholds such consent; and</p> <p>(c) The independent authority is satisfied that the proposed plan of treatment is in the best interest of the patient's health needs.</p> <p>11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.</p> <p>15. Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment, but only with the approval of a competent, independent review body specifically constituted for this purpose.</p>
Resources for mental health facilities	Principle 14	2. Every mental health facility shall be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with these Principles.

Monitoring and remedies	Principle 22	States shall ensure that appropriate mechanisms are in force to promote compliance with these Principles, for the inspection of mental health facilities, for the submission, investigation and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.
Implementation	Principle 23	<p>1. States should implement these Principles through appropriate legislative, judicial, administrative, educational and other measures, which they shall review periodically.</p> <p>2. States shall make these Principles widely known by appropriate and active means.</p>
Scope of principles	Principle 24	These Principles apply to all persons who are admitted to a mental health facility.
Saving of existing rights	Principle 25	There shall be no restriction upon or derogation from any existing rights of patients, including rights recognized in applicable international or domestic law, on the pretext that these Principles do not recognize such rights or that they recognize them to a lesser extent.

Declaration on the Rights of Mentally Retarded Persons

Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971

Right to a guardian	Para. 5	5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
Protection from abuse	Para. 6	6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
Legal safeguards	Para. 7	7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

Declaration on the Rights of Disabled Persons

Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975

Right to protection	Para. 10	10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.
Right to legal aid	Para. 11	11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

B. WORLD HEALTH ORGANISATION

The Guidelines for the Promotion of Human Rights of Persons with Mental Health Disorders (WHO/MNH/MND/95.4)

The instrument aims to depict basic legal principles for the field of mental health with as little influence as possible from given cultures or legal traditions. Embodiment of these principles into the legal body of a jurisdiction in a format, structure and language that suit local requirements is best handled on an ad hoc basis by state authorities.

Promotion of Mental Health and Prevention of Mental Disorders	Principle 1	Everyone should benefit from the best possible measures to promote their mental well-being and to prevent mental disorders.
Access to Basic Mental Health Care	Principle 2	Everyone in need should have access to basic mental health care.
Mental Health Assessments in Accordance with Internationally Accepted Principles	Principle 3	Mental health assessments should be made in accordance with internationally accepted medical principles and instruments (e.g: WHO's ICD-10 Classification of Mental and Behavioural Disorders - Clinical Descriptions and Diagnostic Guidelines, Tenth Revision, 1992).
Provision of the Least Restrictive Type of Mental Health Care	Principle 4	Persons with mental health disorders should be provided with health care which is the least restrictive.
Self-Determination	Principle 5	Consent is required before any type of interference with a person can occur.
Right to be Assisted in the Exercise of Self-Determination	Principle 6	In case a patient merely experiences difficulties in appreciating the implications of a decision, although not unable to decide, he/she shall benefit from the assistance of a knowledgeable third party of his or her choice.
Availability of Review Procedure	Principle 7	There should be a review procedure available for any decision made by official (judge) or surrogate (representative, e.g. guardian) decision-makers and by health care providers.
Automatic Periodical Review Mechanism	Principle 8	In the case of a decision affecting integrity (treatment) and/or liberty (hospitalization) with a long-lasting impact, there should be an automatic periodical review mechanism.
Qualified Decision-Maker	Principle 9	Decision-makers acting in official capacity (e.g. judge) or surrogate (consent-giving) capacity (e.g. relative, friend, guardian) shall be qualified to do so.
Respect of the Rule of Law	Principle 10	Decisions should be made in keeping with the body of law in force in the jurisdiction involved and not on another basis nor on an arbitrary basis.

C – JUDICIAL DECISION-MAKING²⁶⁸

Mental health law comprises two main areas: the circumstances in which detention and other forms of compulsion are justified and decision-making on behalf of people who in law lack the capacity to make their own decision(s).

The statutory criteria to be applied in both areas almost always confer considerable discretion on the judge or tribunal. This recognises the reality that personal welfare cases are personal (person-based) and fact sensitive. Consequently, the law variously requires the court or tribunal in very general terms to consider whether detention or compulsion is ‘necessary’ or ‘appropriate’ or ‘justified’ or what decision is in the relevant person’s ‘best interests’.

The qualities required of the judge

At its most prosaic, the judge needs to know the relevant law and procedure and to be a competent evaluator of evidence. This ensures that the decisions of the court are lawful and if that is the sole concern of the judiciary it suffices.

For anyone concerned with the quality of the decision-making — whether a citizen continues to be detained who could have been released, whether a citizen has been released without an adequate understanding of the dangers they pose to themselves or others, whether a decision made as being in a person’s best interests adds to their woe rather than their happiness — a great deal more is required. Sympathy, empathy and compassion are important but other judicial qualities are also necessary and perhaps equally important. In particular, experience in the field, understanding and courage are key attributes.

Experience

It is unsatisfactory to seek to determine principles by reason only, without regard for human experience of the world within which principles are formulated and applied. Our value judgements are judgements about experienced objects.²⁶⁹

Unless it consists only of making the same mistakes over many years, experience of front-line practice is advantageous in any field but especially so in mental health law.

The purpose served by compassion is to alleviate suffering. Achieving this requires that a judge’s interventions are efficient and effective.

We do not need to think about what we know. Relevant experience cuts down on thinking time and increases a judge’s efficiency and effectiveness.

268 This part of the paper is taken from A Eldergill, *Compassion and the Law: A Judicial Perspective*, *Elder Law Journal* Vol. 5, No. 4, 11.2015.

269 J Dewey, *The Quest for Certainty* (Milton, Balch & Co, 1929), at p 265.

If the judge's knowledge and experience of the lives of people experiencing mental ill-health is based on reading, literally paper-thin, their decisions are less likely to be effective.

A judge who has experience of working *in situ* with people who are experiencing acute or chronic mental health problems will have dealt many times before with the vast majority of legal situations which they face. This enables them to calibrate the likely effect of their decisions on the lives of those affected by them. Unlike the judge whose experience of the experiences of others is limited to the bench, who usually never knows or sees first-hand the consequences of their final orders, the former will know from their experience of outcomes what is likely to be an effective response and what not, and which strategies tend to maximise or minimise the happiness of the person concerned.

Understanding

There are limits to our imaginative understanding. Therefore, personal interaction, listening and observation are important as catalysts to understanding and empathy. Provided that the person is not hard-hearted, spending time with people who are experiencing mental ill-health triggers a desire to understand their feelings, experiences, hopes and fears. From this a range of insights emerge in relation to life in psychiatric units, run-down housing, police stations and prisons, and the daily struggles of service users, their families and professionals. Containment on an acute psychiatric ward is a frightening, and in itself largely untherapeutic, experience at the best of times, the more so if the person is unfamiliar with the environment.

Part of this understanding is a practical awareness of the limits of legislation and judicial orders. The law provides a useful framework for managing conflict, conferring authority, enforcing legal duties and restraining the unlawful exercise of power. It cannot solve family conflict and resentment, that feeling of not being a loved or favoured child, a scarcity of resources, the disease process itself or the fact that the person concerned must soon die. It is a relatively ineffective means of modifying personal behaviour and attitudes — 'he that complies against his will, is of his own opinion still' — so that one can legislate for marriage but not for a happy marriage. Although it can provide a framework for managing violence associated with mental disorder, it cannot significantly reduce these risks. That this is so is clear following most psychiatric homicides and suicides. Had the professional carers foreseen what was about to happen, they had power under the law to intervene. That they did not intervene was due, not to any lack of legal powers, but to the fact that they did not foresee what was about to occur. Yet no amount of laws and orders can improve foresight.

What one can always do is no harm: there are many we cannot help but none we cannot avoid harming. This principle is as important to the practice of law as it is to the practice of medicine: The 'wicked are wicked, no doubt, and they go astray and they fall, and they come by their deserts; but who can tell the mischief which the very virtuous do?'²⁷⁰

Practical experience in the field also provides some understanding of the problems and natural limits of science, medicine and in particular psychiatry.

270 WM Thackeray, *The Newcomes* (Bradbury & Evans, 1855).

Many lawyers new to the area think of medicine as a science and tend to believe that words like disease and schizophrenia have established meanings which are universally accepted by medical practitioners. This is an idealized view and the tendency to regard both legal and medical terms as having value-free fixed meanings rather than as expressing concepts is misplaced. For example, ideas about what causes mental disorder depend on how normal mental health and, by elimination, mental disorder are defined. Classifications of mental disorders are unstable and the nosology of mental disorders (the study of their classification and relationship to one another) is split into rival schools. Although a single patient may acquire many different diagnoses over time, these are rarely explicable in terms of corresponding objective changes in their condition.

Underlying the question of nosology is that of ontology: the study of whether things actually exist in the real world or are merely products of our own ways of studying and classifying the world. The following passage is a good example of the essence of the problem:²⁷¹

'Your pier-glass or extensive surface of polished steel made to be rubbed by a housemaid, will be minutely and multitudinously scratched in all directions; but place now against it a lighted candle as a centre of illumination, and lo ! the scratches will seem to arrange themselves in a fine series of concentric circles round that little sun. It is demonstrable that the scratches are going everywhere impartially, and it is only your candle which provides the flattering illusion of a concentric arrangement, its light falling with an exclusive optical selection. These things are a parable. The scratches are events, and the candle is the egoism of any person now absent ...'

Classifying certain paintings as abstract may, as with mental disorder, be based on a conception that their essential distinguishing feature is a lack of any order. If so, the objects may be placed in the class 'disordered' but attempting to minutely sub-divide these disordered objects in Linnean fashion may be contradictory and offend reality. Consequently, Allport's view of psychiatric classifications was that 'all typologies place boundaries where boundaries do not belong ... each theorist slices nature in any way he chooses and finds only his own cuttings worthy of admiration'.²⁷²

These practical problems arise from the fact that it is not illnesses per se which are being classified but people — litigants or parties in a judicial context — suffering from illness. Each patient has some attributes which they share with all patients, certain attributes which they share with some but not all patients, and yet other attributes unique to that individual. Because this is so, the same disorder or disease is likely to affect all people identically in certain respects, different classes of people distinguished by certain key attributes in ways common only to members of the class, and each person within a class in yet other ways peculiar to them. Variability 'is the law of life. As no faces are the same, so no two bodies are alike, and no two individuals react alike and behave alike under the abnormal conditions which we know as disease'.²⁷³ The clinical picture is 'most often profoundly coloured and

271 G Eliot, *Middlemarch* (Penguin English Library, 1965) at p 297.

272 G Allport, *Personality: A Psychological Interpretation* (Henry Holt & Co, 1937), at pp 295-296.

273 Sir W Osler, *Medical Education in Counsels and Ideals* (Houghton Mifflin, 2nd ed., 1921).

sometimes decisively shaped by factors specific to the individual and his environment. Hence the notorious difficulty in identifying separate disease processes in psychiatry'.²⁷⁴

The lessons for the judge are to concentrate on this individual's circumstances and unhappiness, to listen to them in the hope of understanding what it is they need from us and before interfering to be mindful that we are all profoundly ignorant and will be revealed as such by future generations. Seek the truth but beware those who have found it.

Courage

It is the courage to acknowledge and then accept risks inherent to mental health practice which is the most important quality of all for judges, social workers and psychiatrists.

The weak practitioner or judge will choose the least 'risky' option, which they take to be the one least likely to result in harm to the person's physical safety. It makes *them* less anxious and is the least 'risky' if appealed. The judge will set a high bar on the level of understanding necessary for autonomous decision-making and fall back on false ideas such as that best interests is an objective test based on professional opinion.

Such an approach leaves little room for compassionately promoting the happiness of people who value their freedom because freedom comes at a price in terms of safety and safety bears a price in terms of freedom. It is not possible to have it both ways. If the individual has clear feelings and beliefs about the life they wish to lead, the compassionate option may be the one which allows them to lead that life, even for a short period, rather than the one free of risks. A ship is safest in harbour but that is not what ships are for.

The purpose of compulsory powers, including 'best interests' interventions, is not to eliminate that element of risk in human life which is a consequence of being free to act and to make choices and decisions.

Nor, strange though it may sound, is their purpose to protect an individual from risks which arise when their understanding of substantial risks, or their capacity to control behaviour associated with such risks, is significantly impaired by mental disorder.

Compulsory powers are means not ends. The purpose of compulsory powers is to increase human happiness or to reduce human suffering.

Consequently, when decision-making for incapacitated people we are seeking the outcome which maximises the individual's happiness not, if different, the one which is safest.

All personal welfare decisions involve balancing competing risks of unhappiness of which the risk of physical harm is but one. Deprivation of liberty and compulsory treatment risk the loss of employment, family contact, self-esteem and dignity; unnecessary loss of liberty; institutionalisation; social isolation; and disabling adverse effects.

274 WA Lishman, *Organic Psychiatry, The Psychological Consequences of Cerebral Disorder* (Blackwell Scientific Publications, 2nd ed., 1987), at p 3.

While we must do our best to assess the risks to a person's physical safety in any decisions we make for them in truth it is difficult to impossible to predict outcomes:²⁷⁵

- a. A risk can in theory be measured and is the basis of actuarial prediction — in theory because in practice all of the critical variables never are known. The risk depends on the situation but the situations in which the person may find themselves in the future can only be speculated upon.
- b. Because future events can never be predicted, it is important to put in place an adequate system for supervising an incapacitated person whose own safety may potentially be at risk or who may pose a threat to the safety of others. However, this approach is not fail-safe: it is based on the assumption that most episodes of harm do not erupt like thunderstorms from clear skies. In reality, as with weather systems, only the pattern of events for the next 24 hours can usually be forecast with some accuracy; and contact with supervisors is less regular.
- c. Even a very low risk from time to time becomes an actuality. However careful the assessment, it is inevitable that some individuals will later take their own lives, come to harm or commit a serious offence.
- d. An outcome is often the result of a complex series of events and the choice of one particular causal factor may be arbitrary.
- e. Small differences in one key variable can result in vastly different behaviours and outcomes: just as a sudden change in the physical state of water into steam or ice occurs with the rise or fall of temperature beyond a critical level so the addition of a small additional stress on an individual may have a profound effect on their mental state or behaviour.
- f. All harm and violence takes place in the present and the past is a past, and so unreliable, guide to present and future events.
- g. Understanding the situations in which a person has previously been harmed or been dangerous, and avoiding their repetition, can give a false sense of security about the future. Although life is understood backwards, it must be lived forwards, and the difference between explanation and prediction is significant: explanation relies on hindsight, prediction on foresight, and the prediction of future risk involves more than an explanation of the past.
- h. Predictions are most often founded not on fact but on 'retrospective predictions' of what occurred in the past ('retrodiction').

275 A Eldergill, 'Is Anyone Safe? Civil Compulsion under the Draft Mental Health Bill', *Journal of Mental Health Law*, Dec 2002; A Eldergill, *Mental Health Review Tribunals: Law and Procedure* (Sweet and Maxwell, London, 1997).

A judge must have sufficient courage to accept that all decisions in mental health are risk-laden and not be paralysed by this or practise too defensively. The primary purpose of the personal welfare provisions of the Mental Capacity Bill was a desire to protect and increase the autonomy, happiness, dignity and independence of vulnerable people, not that the legislation should be used as a risk management tool.

Empathy, sympathy and compassion

Translating a compassionate desire to alleviate a person's suffering into effective compassion in the form of a remedy is difficult without some understanding of what is causing their suffering and what it is that makes them happy or fulfilled.

If the person understands the causes of their unhappiness and can communicate this it may simply be a case of listening to them so that little empathy is required.

If, however, they are confused, embarrassed, depressed, anxious, experiencing hallucinations, affected by delusional beliefs or have a severe learning disability then empathy is important.

While medicine benefits from a traditional scientific approach and the objective recording of a patient's symptoms and signs, these symptoms and signs are the external public manifestation of inner mental processes. Seeking out the underlying causes and associations, the private unobservable conflicts, requires empathy and without it there can be no understanding of the individual or the causes of their symptoms.

Because this is so the development and application of sympathy and intuitive understanding becomes a prerequisite for the *objective* observation of mental phenomena in others. Consequently, Jaspers wrote that 'natural science is indeed the groundwork of psychopathology and an essential element in it but the humanities are equally so and, with this, psychopathology does not become any less scientific but scientific in another way'.²⁷⁶

The same can be said of the law. The notion that judicial objectivity requires being dispassionate and that objective decision-making is contaminated by empathy, sympathy and compassion is impossible to support. A person's behaviour is determined by the way in which they perceive reality at any moment and not by reality as it can be described in physical objective terms. It is not in accordance with reason or logic for a judge not to value, or to dismiss or disregard, beliefs expressed by the relevant person which the judge believes are irrational or illogical.

In the first place, because mental illness is often the response of an individual to their life situation one must always ask the threefold question: 'Why did this person break down, in this way, at this time?' The person's beliefs and feelings offer the judge an insight into the underlying causes or triggers of their illness and distress, and an opportunity to ensure that the judge's order adequately responds to their situation and needs.

276 K Jaspers, *General psychopathology* (Manchester University Press, 1962).

Secondly, if their beliefs are unlikely to change one must seek to develop and hopefully agree a plan which can accommodate them. The case of *Re P (capacity to tithe inheritance) (2014)*²⁷⁷ involved a gentleman with a history of schizophrenia who wished to tithe 10% of his inheritance to the Church of the Latter Day Saints. The case is a typical example of this principle:

123. The law has always sought to show due respect for liberty of conscience and religious belief and the European Convention on Human Rights reinforces this. Even if a person lacks capacity in law to make a religious gift, there remains the need to show respect for genuinely held beliefs and values. Good reasons are required to interfere in matters of conscience and spiritual belief. A person's religion is no less real to them because some of their beliefs may be coloured by illness and their conscience is no less offended when they are not permitted to practise their religion. In MS's case, both his conventional and unconventional religious beliefs are well-established and unlikely to change in time. This is not a situation where ambiguous beliefs are being reinforced or acted on precipitously, or it is likely that he will regret his tithe in the foreseeable future. His religion is now part of his life and is embedded in his existence. What he wishes is now his will. Even if his choice is founded on a belief that facts exist which do not, it is now his authentic voice and a true expression of his mind and the world within which he moves; and, like everyone, he needs to find peace.

Thirdly, in some cases it may be upsetting or damaging to the individual to attempt to modify their beliefs if they are performing a protective function. A not uncommon example would be an increased risk of suicide.

Because proceedings involve a person's personal welfare, an objective 'rational' decision is one based on the subjective personal feelings of the relevant people: how they will feel if the judge chooses one alternative rather than another; the effect on their happiness, self-esteem and so on.

Only a patient may lack 'insight' if one artificially defines the word as referring only to the patient's awareness of the abnormality of their experiences and the fact that their symptoms are evidence of the presence of a mental illness which requires treatment. If one prefers the natural meaning of seeing within and understanding — understanding one's own mental processes or those of another, which is the meaning adopted by psychologists — then a doctor and a judge may also lack insight. The content of any judgment and any medical report consists of the contents of the patient's mind as elicited and interpreted by the contents of the judge's or doctor's mind. If the judge or doctor is uninterested in the patient's problems and the underlying causes, being interested only in obtaining enough information to sustain a judgment or diagnosis, such a narrow field of view necessarily leads to a narrow understanding of the overall situation.

²⁷⁷ *Re P (capacity to tithe inheritance)* [2014] EWCOP B14 (COP), [2014] All ER (D) 46 (Apr), (2014) 17 CCLR 229, [2014] WTLR 931.

If it is fundamental to the person's happiness to be at liberty then considerable weight must be given to this. The importance of individual liberty is of the same fundamental importance to incapacitated people who still have clear wishes and preferences about where and how they live as it is for those who remain able to make capacitous decisions. This desire to determine one's own interests is common to almost all human beings. Society is made up of individuals, and each individual wills certain ends for themselves and their loved ones, and not others, and has distinctive feelings, personal goals, traits, habits and experiences. Because this is so, most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this.

The enduring impression left after spending many years visiting psychiatric wards is not one of fear or dangerousness, but of suffering and an often disarming kindness on the part of those who have lost their liberty. Although compelled to submit to the will of others, and forced to accept medication which, if mentally beneficial, often produces severe physical discomfort, and may physically disable for life, most patients remain dignified and courteous, and retain the compassion to respond to the plight of others in a similarly unfortunate situation. Equally remarkable is their striving to be free members of society after many years outside society, even when many other higher faculties are profoundly impaired. A hospital is not a prison but for the individual concerned both involve detention and a complete loss of that right most important to them, so that Byron's words — 'Eternal spirit of the chainless Mind! / Brightest in dungeons, Liberty! thou art' — are often an apt description of the individual's predicament. This desire for autonomy, and many people cannot conceive of a life which is worthwhile and fulfilling without such self-determination, is not to be confused with any desire to abuse liberty, and so not to be caught up in contemporary controversies about how the law should respond to those who show a disregard for the law and for civic responsibility. While it is sometimes necessary to deprive an individual of their liberty on the ground of mental disorder, and one must have the courage to do that where necessary, one must always be appreciative of the enormity of the act — of the fact that the right enjoyed by those others present, and denied to this individual, is the most important right known to English law.

The critical error which a judge must avoid is an analysis of the person's best interests which disregards or downplays their wishes, feelings, values and beliefs in the perverted belief that objectivity is undermined by subjective considerations.

What we are seeking is objective analysis not objective outcomes. The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is their welfare in the context of their wishes, feelings, beliefs and values that is important.

This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests, not one's own. Meaningful sustainable progress, as opposed to the mere management of symptoms, requires engaging with the person and their life and exploring how they can be assisted to live a life which they find fulfilling. This requires the judge to emotionally evaluate their evidence and to try to feel and understand what the case and possible outcomes mean for them. Empathy and compassion become instruments of justice and in this context a more intelligent justice.

One may hear lawyers say that such cases 'turns on the judge's values'.

Whatever the truth of that observation as a statement of reality it is misleading as a statement of law. The judge's role is to ascertain the values, beliefs wishes and feelings of the relevant individual and then to decide what is in their best interests having regard to their values, beliefs, wishes and feelings, not the judge's.

If the facts of two residence cases are identical except that one of the individuals places their health and safety first and the other their liberty, their different values may well mean it is in the best interests of one to live in a care home and the other in their own home.

The only value the judge needs is not to impose what they themselves value on the two individuals. The judge is their servant. As William Hazlitt once said, 'The love of liberty is the love of others. The love of power is the love of ourselves'.

D – PRINCIPLES OF MENTAL LAWS

When legislating or working in this area, it is useful to bear the following principles in mind:²⁷⁸

1. It is unsatisfactory to seek to determine principles by reason only, without regard for human experience of the world within which principles are formulated and applied. Our value judgments are judgments about experienced objects.²⁷⁹
2. There are many reasons to limit state intervention in people's lives: errors in law spread their negative effects throughout the nation as opposed to individual errors that are limited in scope; the damage of erroneous laws affect citizens more than legislators, who are thus less inclined to repeal them; it takes longer to repair the damage done by legislation than the damage done by individuals by their own private choices; because of the constant watch of critics, politicians are less inclined to publicly admit error and undo the damage done; politicians are more inclined than citizens to make decisions based on political gain and prejudice, rather than principle.²⁸⁰
3. An effective democratic Constitution separates powers, the aim being to keep executive powers in check and under proper scrutiny, and so to secure good government. This is necessary because the 'whole art of government consists in the art of being honest',²⁸¹ and 'it is not by the consolidation, or concentration of powers, but by their distribution, that good government is effected.'²⁸²
4. Promoting liberty, protecting individuals from harm caused by those at liberty, and those not at liberty from abuse by those who are, alleviating suffering, and restoring to health those whose health has declined, are all legitimate objectives, in that they reflect values embraced by virtually all members of our society.²⁸³
5. We are, however, 'faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others.'²⁸⁴ Whether individuals 'should be allowed certain liberties at all depends on the priority given by society to different values, and the crucial point is the criterion by which it is decided that a particular liberty should or should not be allowed, or that its exercise is in need of restraint.'²⁸⁵

278 A Eldergill, *Is Anyone Safe? Civil Compulsion under the Draft Mental Health Bill*, 'Journal of Mental Health Law', January 2003; A Eldergill in *Court of Protection Handbook*, ed. A Ruck-Keene (LAG, London), 2014, pp76–79.

279 J Dewey, *The Quest for Certainty* (Milton, Balch & Co, 1929), at p 265.

280 Benjamin Constant: *Political Writings* (trans. and ed. B Fontana), Cambridge University Press 1988.

281 Thomas Jefferson: *Rights of British America, 1774*. *The Writings of Thomas Jefferson*, Memorial Edition (ed., Lipscomb & Bergh), Washington, DC, 1903-04.

282 Thomas Jefferson: *Autobiography, 1821*. *The Writings of Thomas Jefferson*, Memorial Edition (ed., Lipscomb & Bergh), Washington, DC, 1903-04, 1:122.

283 Eldergill, AC, *Mental Health Review Tribunals — Law and Practice* (Sweet & Maxwell, 1997), p.45.

284 Berlin, Sir I, *Four Essays on Liberty* (Oxford University Press, 1969), p.168.

285 Dias, RWM., *Jurisprudence* (Butterworths, 5th ed., 1985), p.109.

6. When enacting mental health legislation, the legislature has generally sought to erect a balanced legal structure that harmonises three things: individual liberty; bringing treatment to bear where treatment is necessary and can be beneficial; the protection of the public.²⁸⁶ Those we describe as ‘patients’ are themselves members of the public, so that the law must seek to ensure that members of the public are not unnecessarily detained, and also that they are protected from those who must necessarily be detained.
7. The purpose of compulsory powers, including ‘best interests’ interventions, is not to eliminate that element of risk in human life which is a consequence of being free to act and to make choices and decisions. Nor, strange though it may sound, is their purpose to protect an individual from risks which arise when their understanding of substantial risks, or their capacity to control behaviour associated with such risks, is significantly impaired by mental disorder. That is its function but not its purpose: compulsory powers are means not ends. The purpose of compulsory powers is to increase human happiness or to reduce human suffering.
8. Consequently, when decision-making for incapacitated people we are seeking the outcome which maximises the individual’s happiness not, if different, the one which is safest. All personal welfare decisions involve balancing competing risks of unhappiness of which the risk of physical harm is but one. Deprivation of liberty and compulsory treatment risk the loss of employment, family contact, self-esteem and dignity; unnecessary loss of liberty; institutionalisation; social isolation; and disabling adverse effects.
9. The use of compulsion has been permitted when significant harm is foreseeable if an individual remains at liberty. While we must do our best to assess the risks to a person’s physical safety in any decisions we make for them in truth it is difficult to impossible to predict outcomes.
10. Other risks are, constitutionally, matters for citizens to weigh in their own minds. The purpose of compulsion is not to eliminate that element of risk in human life that is simply part of being free to act and to make choices and decisions. A person who obeys our laws is entitled to place a high premium on their liberty, even to value it more highly than their health. Subject to the stated limits, people are entitled to make what others regard as errors of judgement, and to behave in a manner which a doctor regards as not in their best interests, in the sense that it does not best promote health.
11. This desire to determine one’s own interests is common to human beings, and so not to be portrayed as an abuse of liberty. On the one hand stands liberty, a right which the legislature and the law should always favour and guard, on the other licence, a wilful use of liberty to contravene the law, which the law must of necessity always punish.

286 Hansard, H.C. Vol. 605, col. 276.

12. Any power given to one person over another is capable of being abused. No legislative body should be deluded by the integrity of their own purposes, and conclude that unlimited powers will never be abused because they themselves are not disposed to abuse them.²⁸⁷ Mankind soon learns to make interested uses of every right and power which they possess or may assume.²⁸⁸
13. This risk of abuse is multiplied if the individual is not free to escape abuse, is incapacitated or otherwise vulnerable, or their word is not given the same weight as that of others. Children and adults with mental health problems are particularly at risk and the law has usually afforded them special protection.
14. This protection involves imposing legal duties on those with power, conferring legal rights on those in their power, and independent scrutiny of how these powers and duties are exercised. The effectiveness of such schemes depends on whether, and to what extent, they are observed.
15. This is a matter of constitutional importance, for the observance of legal rights and the rule of law are the cornerstones of all liberal democracies. The rule of law 'implies the subordination of all authorities, legislative, executive [and] judicial ... to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual.'²⁸⁹
16. In any legal system, 'it implies limitations on legislative power, safeguards against abuse of executive power, adequate and equal opportunities of access to legal advice and assistance, ... proper protection of the individual and group rights and liberties, and equality before the law ... It means more than that the government maintains and enforces law and order, but that the government is, itself, subject to rules of law and cannot itself disregard the law or remake it to suit itself.'²⁹⁰
17. In framing these principles and laws, the legislature has sought to be just, justice being 'a firm and continuous desire to render to everyone that which is his due.'²⁹¹
18. When new laws are necessary, they should impose minimum powers, duties and rights; provide mechanisms for enforcing duties and remedies for abuse of powers; be unambiguous, just, in plain language, and as short as possible.
19. Because there is a long record of experimentation in human conduct, cumulative verifications give these principles a well-earned prestige. Lightly to disregard them is the height of foolishness.²⁹²

287 Thomas Jefferson: Notes on Virginia Q.XIII, 1782. Memorial Edition (supra), 2:164.

288 Thomas Jefferson: Notes on Virginia Q.XIII, 1782. Memorial Edition (supra), 2:164.

289 David M Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980), p.1093.

290 Ibid.

291 Justinian, *Inst.*, 1, 1.

292 Dewey, J, *Human Nature and Conduct* (Allen & Unwin, 1922).



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The European Convention on Human Rights

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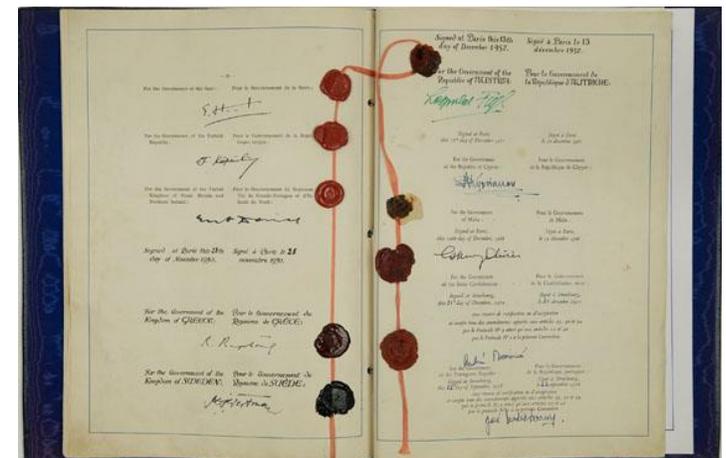
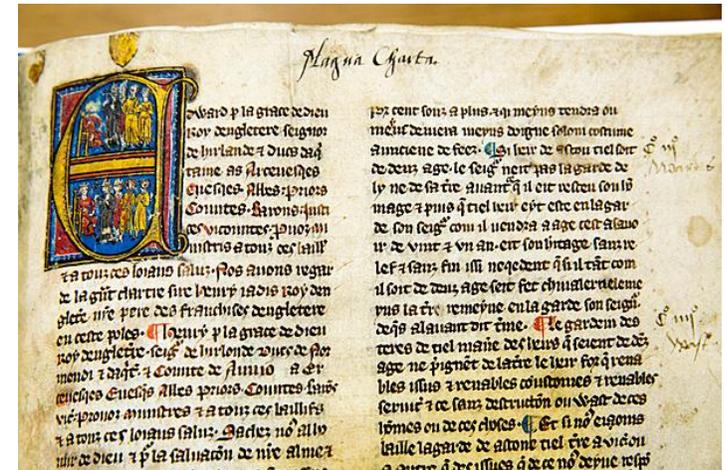
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The Convention

- ▶ The European Convention on Human Rights is an international treaty under which the member states of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction.
- ▶ The Convention was signed on 4 November 1950 in Rome and entered into force in 1953. It is the modern day Magna Carta and one of the most important documents in legal history.
- ▶ The European Court of Human Rights is an international court set up in 1959. It rules on individual or state applications which allege violations of Convention rights.





Article 2 (Right to Life)

- ▶ 'Everyone's right to life shall be protected by law.'

The negative obligation

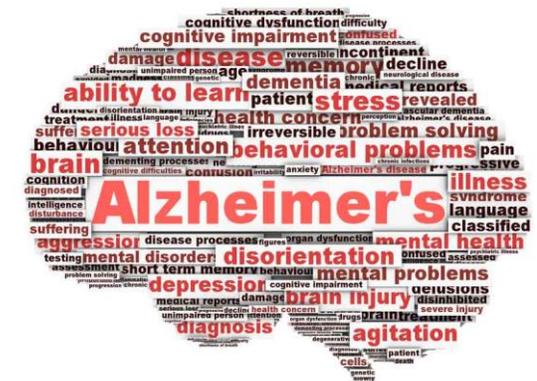
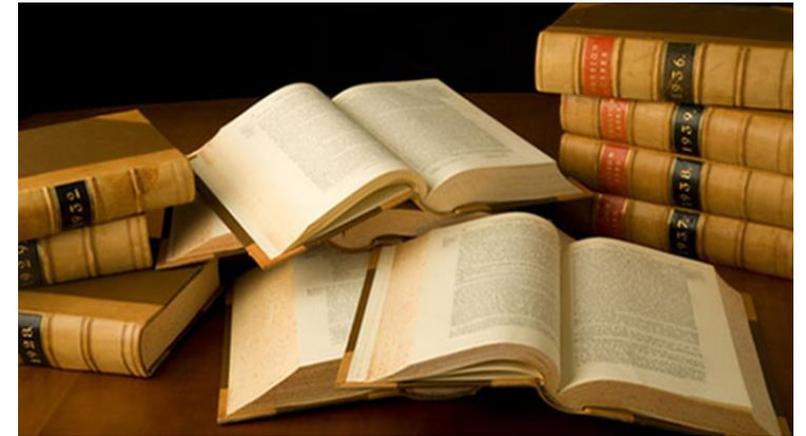
- ▶ State agents must refrain from acts of a life-threatening nature and acts which place the health of individuals at grave risk.

The positive obligation

- ▶ States also have positive obligations under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction.
- ▶ Mental health patients and persons in custody are in a vulnerable position and the authorities are under a duty to protect them. This duty includes making regulations which compel hospitals to adopt appropriate measures for the protection of patients' lives and appropriate investigation of patient deaths.
- ▶ This positive obligation must not be interpreted in a disproportionate way given the unpredictability of human behaviour and the operational choices faced by states in terms of priorities and resources (*Keenan v United Kingdom*, 2001).

Dodov v Bulgaria (2008)

- ▶ This case concerned the disappearance from a state-run nursing home for the elderly of a patient called Mrs Stoyanova who was suffering from Alzheimer's disease.
- ▶ Nursing home staff had been instructed not to leave her unattended. However, a nursing orderly left her alone in the home's courtyard and, on returning to fetch her a few minutes later, found that she was no longer there. Mrs Stoyanova has never been seen since.
- ▶ The court found a violation of Article 2. Given the instructions never to leave her unattended, there was a direct link between the failure to supervise her and her disappearance. Furthermore, the legal system had not provided her son with the means to establish the facts surrounding his mother's disappearance and to bring to account those responsible, as required by Article 2.

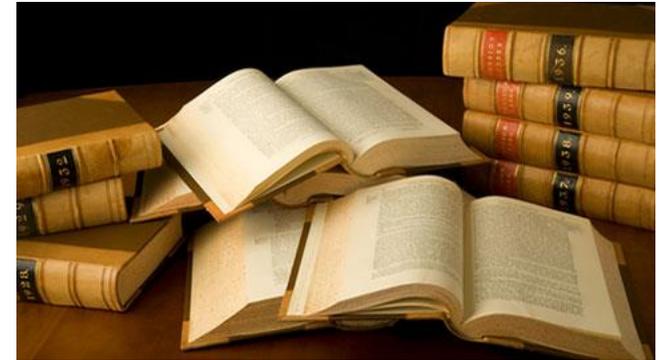


Valentin Câmpeanu v Romania (2014)

A young Roma man suffering from severe mental disabilities and HIV infection had spent his entire life in state care, having been abandoned at birth and placed in an orphanage. He was placed in a psychiatric hospital which had no facilities to treat HIV where he died at the age of 18. The conditions were known to be appalling.

The Grand Chamber found that there had been a violation of Article 2 in both its substantive and procedural aspects (no effective investigation).

Mr Câmpeanu had been placed in medical institutions which were not equipped to provide him with adequate care for his condition; he had been transferred from one unit to another without proper diagnosis; and the authorities had failed to ensure his appropriate treatment with anti-retroviral medication. The authorities were aware of the lack of personnel and heating and insufficient food in the psychiatric hospital and had unreasonably put his life in danger.



Prisons and Article 2

There have been many cases dealing with prison suicides, e.g.

- ▶ *Keenan v United Kingdom (2001)*
- ▶ *Renolde v France (2008)*
- ▶ *Jasinska v Poland (2010)*
- ▶ *De Donder and De Clippel v Belgium (2011)*
- ▶ *Ketreb v France (2012)*
- ▶ *Coselav v Turkey (2012)*
- ▶ *Isenc v France (2016)*

These cases are summarised in the handout. Several of them involve the inappropriate seclusion or segregation of mentally ill detainees.

Principles

- ▶ Regard must be had to the particular vulnerability of mentally ill detainees.
- ▶ The state has an obligation to take preventive operational measures to protect an individual whose life is at risk.
- ▶ The court will examine whether the authorities knew or ought to have known there was a real and immediate risk of the detainee committing suicide and whether they did all that could be reasonably expected of them, having regard to the nature of the risk.

Article 3 (Inhuman/Degrading Treatment)

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Article 3 is cast in absolute terms, without exception, proviso or possibility of derogation. It is one of the most fundamental Convention provisions and enshrines the core values of the democratic societies making up the Council of Europe. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative.

The negative obligation

- ▶ State agents must refrain from acts which subject the citizen to inhuman or degrading treatment.

The positive obligation

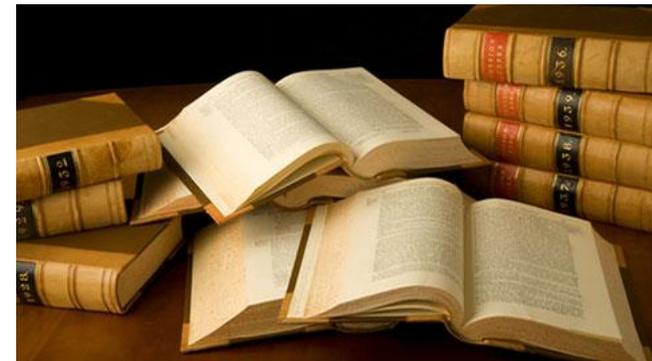
- ▶ The state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility. There is a particular need for states to take such measures in the context of psychiatric hospitals, where patients are typically in a position of inferiority and helplessness (*Herczegfalvy v Austria*, 1992).
- ▶ The Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population. However, the court will have regard for healthcare standards set down within the framework of the Council of Europe. In effect, there is no guarantee to high quality healthcare or a particular treatment (*Wasilewski v Poland*, 1999) but a minimum standard of healthcare is guaranteed to vulnerable detainees, in particular those suffering from mental disorder.

Dordevic v Croatia (2012)

Dalibor Dordedic was a man with learning and physical disabilities aged in his mid-30s who suffered a sustained program of abuse and harassment at the hands of children attending a school some 70 metres from his home.

The court considered that this harassment, which on one occasion caused him physical injuries, when combined with feelings of fear and helplessness, was sufficiently serious to invoke the protection of Article 3. According to the court, Article 3:

'requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals ... These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.'



Medical treatment

As a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading

***Herczegfalvy v Austria*
(1992)**



Conditions of detention

The court has reiterated on many occasions that the state is required to ensure that all persons deprived of their liberty:

- ▶ are detained in conditions which are compatible with respect for their human dignity;
- ▶ that the manner and method of the execution of the measure does not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; and that
- ▶ Given the practical demands of imprisonment or confinement, their health and well-being are adequately secured.



PSYCHIATRIC HOSPITAL CONDITIONS

Patients were likely to catch scabies or become infested with lice, sometimes two patients had to share a bed, two showers for 70–100 patients, poor food (*Parascineti v Romania, 2012*).

SECLUSION IN A PSYCHIATRIC HOSPITAL

Patient deprived of adequate furnishing and clothing, cell insanitary and inadequately lit and ventilated. Friendly settlement (*A v United Kingdom, 1980*).

Seclusion cell contained only a bed and a flush toilet and no table or chair. It had only one small window which was situated above eye-level. Detainee had his daily exercise in a courtyard separate from other inmates. Meals were served in his cell (*Dhoest v Belgium, 1997*).

SOCIAL CARE HOMES

- ▶ Residents' diet contained no milk or eggs and only rarely fruit and vegetables; building inadequately heated and in winter Mr Stanev had to sleep in his coat; could shower only once a week in an unhygienic and dilapidated bathroom; toilets in an execrable state; residents led passive, monotonous lives.
- ▶ Held that Article 3 prohibits the inhuman and degrading treatment of anyone in the care of the authorities. The lack of financial resources was not a relevant argument which justified keeping Mr Stanev in such conditions. Taken as a whole, his living conditions for a long period of approximately seven years amounted to degrading treatment, in violation of Article 3 (*Stanev v Bulgaria, 2012*).



Article 5(1)

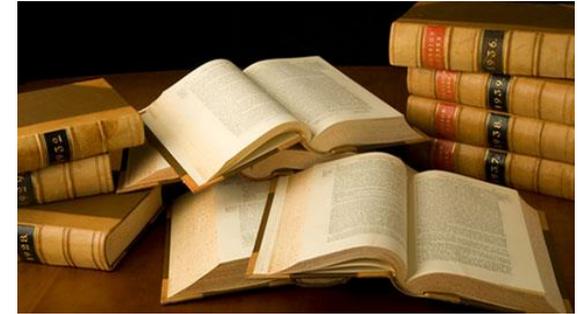
'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(e) the lawful detention of ... persons of unsound mind'

The case law confirms that Article 5(1) is concerned only with deprivations of liberty and not with restrictions of liberty or movement which do not amount to a deprivation of liberty, which are governed by Article 2 of Protocol 4. One must therefore ask two questions:

- **1 Is this person deprived of their liberty?** If not, Article 5 and its safeguards do not apply.
- **2 If they are, is the deprivation of liberty lawful,** i.e. does it comply with the requirements of Article 5.

Ashingdane v United Kingdom (1985)



The applicant complained about his prolonged detention in a high secure hospital (Broadmoor) after he had been declared fit for transfer to an ordinary psychiatric hospital (Oakwood).

The court held that, because he would still be detained at Oakwood, it could not be said that, pending transfer, he was being maintained in detention although medically and administratively judged fit for a return to liberty.

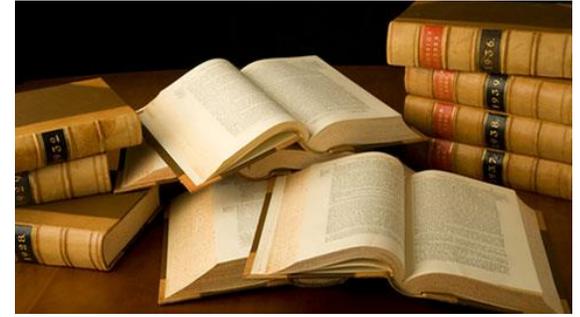
Article 5 is not concerned with the conditions of detention or with modifications of the conditions of lawful detention. Such matters fall outside the scope of Article 5§1 of the Convention.



What is a deprivation of liberty?

1. Deprivation of liberty requires that the person has been confined in a particular restricted space 'for a not negligible length of time. This is the 'objective condition'.
2. In addition, a 'subjective condition' must be met. This is that the person has not validly consented to their confinement.
3. A person cannot consent to being confined if they lack capacity to consent to it.
4. The distinction between deprivation of liberty and restriction of liberty is one of degree or intensity, not one of nature or substance.
5. The starting-point is the specific situation of the individual concerned. Account must be taken of a whole range of factors arising in the particular case, such as the type, duration, effects and manner of implementation of the measure in question.
6. Of considerable importance is whether the professionals exercise 'complete and effective control' over the person's his care and movements, so that the individual is 'under continuous supervision and control and is not free to leave.'

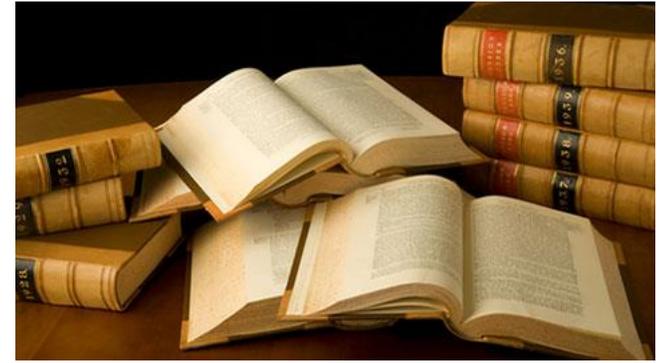
Nielsen v Denmark (1988)



The mother of the applicant Jon Nielsen, who was 12 years old, held sole parental rights. She requested his admission to the State Hospital's Child Psychiatric Ward. With his father's support, he complained that he had been deprived of his liberty. The court did not agree:

1. He was not detained as 'a person of unsound mind'. He had 'a nervous condition' or 'neurosis' and his treatment 'consisted of regular talks and environmental therapy', not medication. The ward was not used for compulsory admissions or to treat patients with a psychosis.
2. The restrictions on his freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital. He could leave the ward, with permission, to go for instance to the library. He went with other children, accompanied by a staff member, to visit playgrounds and museums. He was able to visit his mother and father regularly and his old school friends. In general, conditions in the ward were said to be 'as similar as possible to a real home'.
3. As to his hospitalisation, he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, which was a situation clearly not covered by Article 5§ 1.

HM v Switzerland (2002)

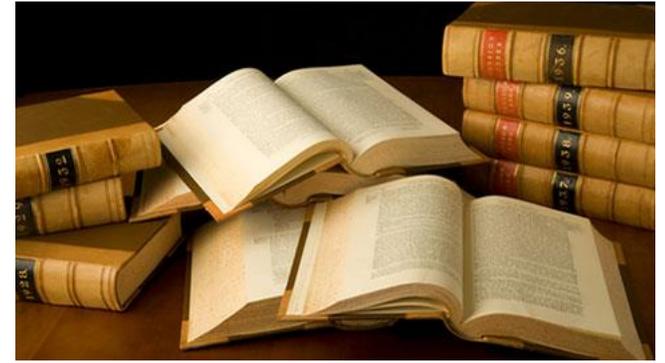


HM suffered from 'senile dementia' She complained of an unlawful deprivation of liberty following her placement in a nursing home on account of neglect.

The court held that the applicant's placement in the nursing home had not amounted to a deprivation of liberty for the following reasons:

1. She was not placed in the secure ward of the nursing home. She enjoyed freedom of movement and was able to maintain social contact with the outside world.
2. She had been undecided about where she wanted to live. She 'was hardly aware of the effects of her stay' and had stated that she had no reason to be unhappy with the nursing home. After moving there, she agreed to stay.
3. Her placement had been a responsible measure taken by the competent authorities in the her interests, in order to provide her with necessary medical care and satisfactory living conditions and standards of hygiene (§48).

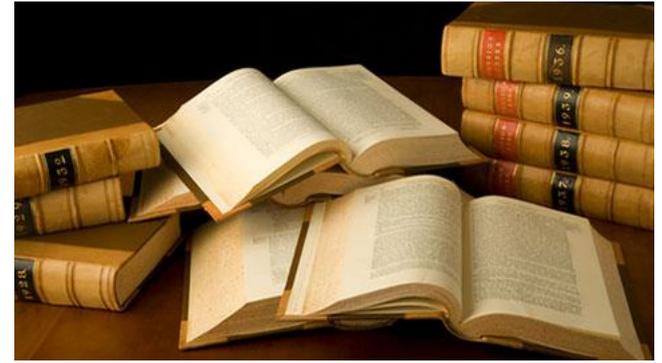
HL v the United Kingdom (2004)



The applicant was autistic and unable to speak, and his level of understanding was limited. In July 1997, while at a day centre, he started harming himself. He was detained in a psychiatric hospital intensive behavioural unit as an 'informal patient', i.e. without any detention order being made under the Mental Health Act 1983. Contact between him and his long-term carers was initially prohibited and then restricted to one visit a week. He was sedated to ensure that he remained 'tractable' and kept under continuous observation. It was made clear that, if he tried to leave the hospital, staff would prevent him and arrange an assessment for his detention under the 1983 Act. Because he was an 'informal' patient he had no statutory rights of appeal and no statutory safeguards.

The court found a deprivation of liberty. The contemporaneous evidence indicated both his carers' wish to have him immediately released to their care and, equally, the clear intention of his consultant and health care professionals to exercise strict control over his assessment, treatment, contacts, movement and residence. The key factor was that the health care professionals treating and managing HL exercised complete and effective control over his care and movements throughout the relevant period. Any suggestion to the contrary had been fairly described by a judge on an earlier occasion as 'stretching credulity to breaking point' and a 'fairy tale'.

Storck v Germany (2005)

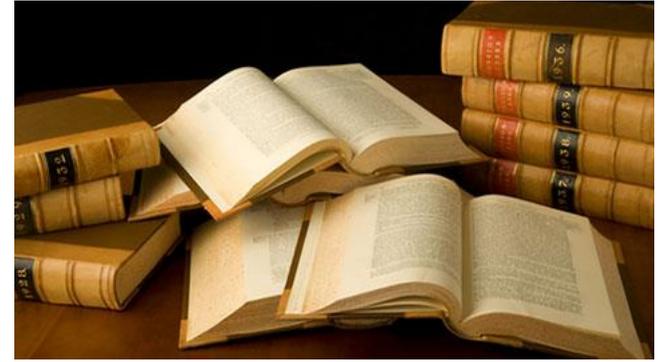


The applicant, Waltraud Storck had spent almost 20 years of her life in psychiatric institutions and hospitals. At her father's request, she was placed in the locked ward of a private psychiatric clinic from 29 July 1977 to 5 April 1979 following various family conflicts. The court found that Article 5 was engaged:

Ms Storck had been placed on a locked ward. She had been under the continuous supervision and control of clinic personnel and had not been free to leave during her entire stay of some 20 months. After attempting to flee, she was 'fettered' in order to secure her stay. When she once succeeded in escaping, she was brought back by police. She was not able to maintain regular social contacts with the outside world. Objectively, she must be considered to have been deprived of her liberty.

As to the subjective condition, she was not under guardianship and had been considered to have the capacity to consent or object to her admission and treatment in hospital. Given her attempts to flee, the evidence indicated that she had not agreed to her continued stay. Her lack of consent was the decisive feature which distinguished her case from that of HM in *HM v Switzerland*. In the alternative, if she lacked or had lost capacity to consent to her stay, 'she could, in any event, not be considered as having validly agreed' to it: see *HL v United Kingdom*.

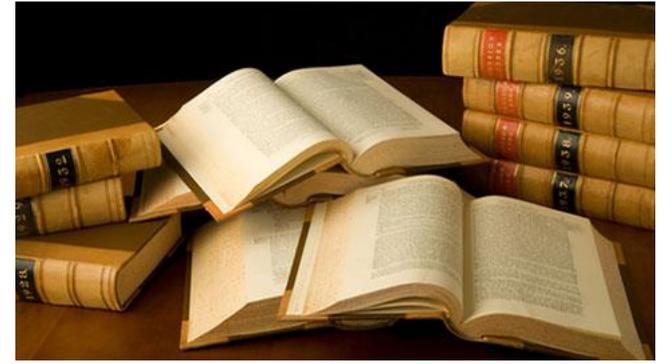
Shtukaturov v Russia (2008)



The applicant was admitted to hospital on 4 November 2005. His admission was requested by his mother as the guardian of a legally incapable person. In terms of domestic law it was therefore a voluntary admission and did not require court approval. The applicant claimed that he had been confined against his will and that his placement amounted to a deprivation of his liberty. The facts were that he was placed in a locked facility. After attempting to flee in January 2006, he was tied to his bed and given an increased dose of sedative medication. He was not allowed to communicate with the outside world. He perceived his confinement as a deprivation of liberty, had never regarded his detention as consensual, and unequivocally objected to it throughout his stay. The objective condition was satisfied.

In relation to the subjective condition, i.e. the absence of a valid consent to confinement, his guardian had consented and the court observed that the applicant lacked *de jure* legal capacity to decide for himself, being legally incapable of expressing his opinion. However, that did not necessarily mean that he 'was *de facto* unable to understand his situation'. On several occasions he requested his discharge, he contacted the hospital administration and a lawyer with a view to obtaining his release, and once attempted to escape. The court was unable to accept the Government's view that the applicant agreed to his continued stay in the hospital.

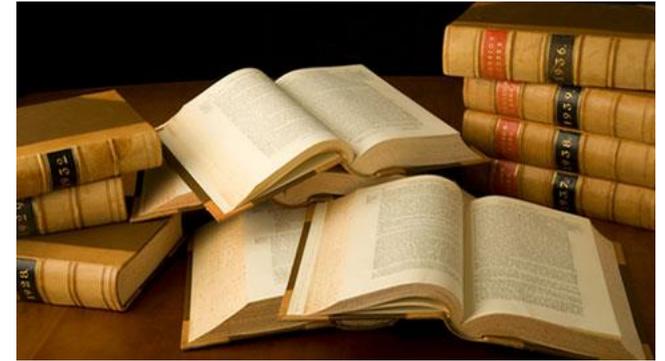
Stanev v Bulgaria (2012)



The Bulgarian courts had found that Mr Stanev was partially incapacitated in that he was unable to manage his own affairs adequately or to realise the consequences of his actions because of his schizophrenia. Without consulting or informing him, his guardian had him placed in the Pastra social care home for men with psychiatric disorders, in a remote mountain location. This placement was of indefinite duration and he had lived there for more than eight years. He was listed in the municipal registers as being permanently resident.

The court held that there was a deprivation of liberty, finding on the evidence that Mr Stanev was under constant supervision and was not free to leave the home without permission whenever he wished. It considered that the involvement of the authorities, the rules on leave of absence, the duration of the placement and the applicant's lack of consent were all particularly relevant factors. Although Mr Stanev was able to go out, the time he spent away from the institution and the places he could go were always subject to controls and restrictions. When he did not return from leave in 2006, the home's management asked the police to search for and return him, and staff returned him to the home without regard for his wishes. In terms of the subjective condition, Mr Stanev was not asked for his opinion on the placement and never explicitly consented to it. The court 'was not convinced that he ever consented to the placement, even tacitly'.

DD v Lithuania (2012)



The applicant had suffered from mental disorder since the age of 16 and had had more than 20 hospital admissions. A guardian had been appointed for her following a declaration that she was mentally incapacitated. In 2004, without her consent she was placed in a social care home where she remained at the time of the hearing. The government argued that the care home was providing social services, not compulsory psychiatric treatment, and that the restrictions on DD were necessary because of the severity of her mental illness, were in her interests and were no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering mental health problems.

The court found a deprivation. The 'key factor' was that the home's 'management had exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted ... to this day.' She was not free to leave without permission and on at least one occasion had been brought back by the police. The director of the home had full control over who she could see and from whom she could receive telephone calls. One one occasion she was restrained, placed in a secure ward, given drugs and tied down for a period of 15 to 30 minutes. In terms of the subjective condition, although she had been deprived of her legal capacity, she was still able to express an opinion on her situation and had never agreed to her continued residence.



Is the deprivation of liberty lawful?

The leading case is *Winterwerp v Netherlands* (1979). In that case, the court set down four conditions that must be satisfied for a person's detention on the basis of unsoundness of mind to be lawful under Article 5§1(e):

1. The deprivation of liberty must be lawful.
2. Except in emergency cases, the individual concerned must be reliably shown to be of 'unsound mind', that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.
3. The mental disorder must be of a kind or degree warranting compulsory confinement.
4. The validity of continued confinement depends upon the persistence of such a disorder.



4

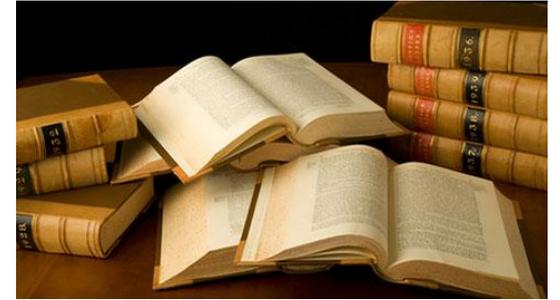


1. Lawfulness

The first condition is that the deprivation of liberty must be lawful.

- ▶ Lawfulness presupposes conformity with domestic law and the Convention.
- ▶ As regards conformity with domestic law, 'lawful' covers procedural as well as substantive rules.
- ▶ As regards conformity with the Convention, the implied principles are the rule of law and, connected to it, the principles of legal certainty, proportionality and protection from arbitrariness, which is the very aim of Article 5 (Plesó v Hungary, 2012).
- ▶ The law must be sufficiently clear and precise (legal certainty). The conditions for a deprivation of liberty under domestic law must be clearly defined and the law foreseeable in its application.
- ▶ The authorities should consider less intrusive measures than detention (proportionality).
- ▶ Arbitrariness may arise where there is no connection between the ground relied on and the place and conditions of detention. In principle the detention of a person as a mental health patient will only be lawful under Art. 5(1)(e) if effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons (Ashingdane v. United Kingdom, 1985).

Case law on 'lawfulness'



- ▶ In ***Halilovic v Bosnia and Herzegovina (2009)***, the appellant's detention for four years and five months was pursuant to an administrative decision, as opposed to a decision of the competent civil court, as required by the amended domestic legislation. It breached Article 5(1).
- ▶ In ***Aerts v Belgium (1998)***, national legislation provided only for the detention of a mentally ill person in a prison as a provisional measure. The applicant was detained for 7 months in a prison psychiatric wing pending transfer to his designated Social Protection Centre. The court held this was unlawful under Article 5. The prison psychiatric wing was not an appropriate institution for the treatment of the mentally ill and the treatment there had done him harm. The proper relationship between the aim of the detention and the location and conditions in which it took place was deficient



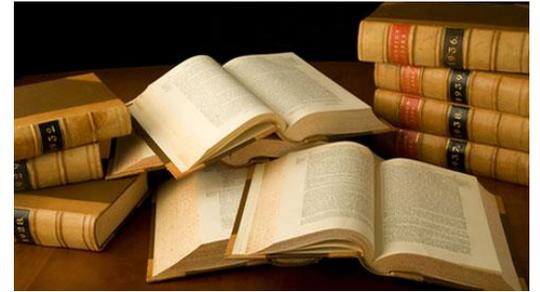
2. Reliable evidence of unsoundness of mind

The second condition is that, except in emergency cases, the individual concerned must be reliably shown to be of 'unsound mind', that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.

The very nature of what has to be established before the competent national authority — a true mental disorder — calls for objective medical expertise. Except in an emergency, no deprivation of liberty conforms with Article 5§1 (e) if it has been ordered without seeking the opinion of a medical expert.

A mental condition must be of a certain gravity in order to be considered as a 'true' mental disorder (Ruiz Rivera v Switzerland, 2012)

Case law on second condition



- ▶ In ***X v United Kingdom (1981)***, a patient was subject to special restrictions because of a risk of serious harm to others. He complained that it had been unlawful for the Home Secretary to recall him to a high-secure hospital without any doctor having certified first that he was of unsound mind. This argument was rejected. The *Winterwerp judgment* expressly identified “emergency cases” as constituting an exception to the principle.
- ▶ The applicant in ***Kay v United Kingdom (1994)*** also complained about his recall to the same high-secure hospital without a prior medical assessment, in his case on the expiration of a lengthy prison sentence. The court found that his recall was unlawful. In the absence of any emergency, there were no particular circumstances to justify the omission.
- ▶ In ***X v Finland (2012)***, the safeguards against arbitrariness as regards the need for her continued confinement were found to be inadequate. The two doctors who decided to prolong her stay were from the hospital where she was confined and there had been no independent psychiatric opinion.



3. Of a kind or degree warranting confinement

The third condition is that the mental disorder must be of a kind or degree warranting compulsory confinement.

- ▶ The term 'a person of unsound mind' does not lend itself to precise definition because psychiatry is an evolving field, both medically and in terms of social attitudes. However, it cannot be taken to permit the detention of someone simply because their views or behaviour deviate from established norms (*Rakevich v Russia*, 2003).
- ▶ The detention of a mentally disordered person may be necessary not only where s/he needs therapy, medication or other clinical treatment to cure or alleviate their condition, but also where the person needs control and supervision to prevent them from, for example, causing harm to themselves or others (*Hutchison Reid v United Kingdom*, 2003).
- ▶ In deciding whether an individual should be detained as a person 'of unsound mind', the national authorities have a certain discretion because it is in the first place for them to evaluate the evidence adduced in a particular case (*Plesó v Hungary*, 2012; *HL v United Kingdom*, 2004).

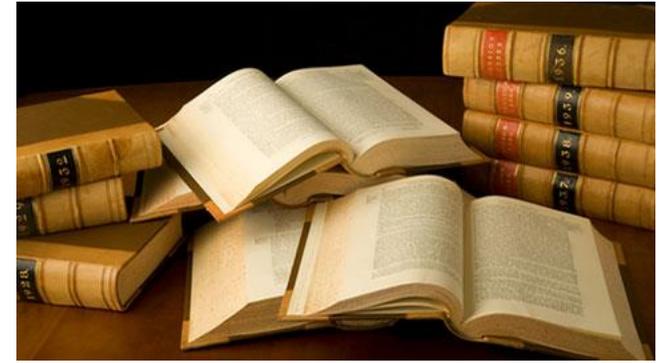


1. Persistence of such a disorder

The fourth condition is that the validity of continued confinement depends upon the persistence of such a disorder.

- ▶ When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant's confinement (*Luberti v Italy*, 1984).
- ▶ However, the continuation of a deprivation of liberty for purely administrative reasons is not justified (*RL and M-JD v France*, 2004).

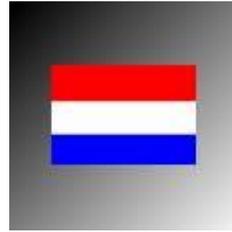
Case law on fourth condition



- ▶ In the ***Luberti Case (1984)***, the court accepted that terminating the confinement of an individual whom a court has previously found to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to that fact, and the very serious nature of the offence committed by the applicant when mentally ill, the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.
- ▶ In ***Johnson v United Kingdom (1997)***, a tribunal ordered the applicant's discharge from a high secure hospital subject to a condition that he reside in a hostel. He was still in hospital 3½ years later because no hostel had been found for him. The court said that was of paramount importance that appropriate safeguards were in place to ensure that a person's discharge in such cases was not unreasonably delayed. There had been a breach of Article 5.

Article 5(2)

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



Van der Leer (1990)

- The word ‘arrest’ covers persons detained on the ground of unsoundness of mind



Article 5(4)

- ▶ Article 5(4) provides that, 'Everyone who is **deprived of his liberty** by arrest or detention shall be entitled to take **proceedings** by which the **lawfulness of his detention** shall be **decided speedily** by a **court** and his **release ordered / if the detention is not lawful.**'
- ▶ Article 5§4 is the *habeas corpus* provision of the Convention. It provides detained persons with the right to seek a judicial review of their detention and this extends to both the procedural and substantive justifications of the deprivation of liberty (*Idalov v Russia*, 2012).
- ▶ Furthermore, the notion of 'lawfulness' in Article 5§4 has the same meaning as in Article 5§1. Consequently, the detained person is entitled to a review of the 'lawfulness' of their detention not just in terms of the requirements of domestic law but also the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1 (*Suso Musa v Malta*, 2013).



The Article 5(4) principles



1. The Article 5§1(e) criteria for 'lawful detention' necessitates that the review should be made by reference to a mental health patient's contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments (*X v United Kingdom*, 1981).
2. A person compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings 'at reasonable intervals' to put in issue the lawfulness of their detention (*Ruiz Rivera v Switzerland*, 2014).
3. A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own (*X v Finland*, 2012).
4. The 'court' to which the detained person has access does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country (*Weeks v United Kingdom*, 1987). However, the procedure must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty (*A and Others v United Kingdom*, 2009).



The Article 5(4) principles

5. The 'court' must:
 - ▶ be independent both of the executive and of the parties to the case (*Stephens v Malta (no. 1)*, 2009); and
 - ▶ have the power to order release if detention is unlawful. A mere power of recommendation is insufficient (*Benjamin and Wilson v United Kingdom*, 2002).
7. The review must comply with both the substantial and procedural rules of national legislation and be conducted in conformity with the aim of Article 5, which is to protect the individual against arbitrariness (*Koendjibiharie v Netherlands*, 1990).
8. It is essential that the person concerned has the opportunity to be heard either in person or, where necessary, through some form of representation.
9. Special procedural safeguards (e.g. legal aid and/or representation) may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (*Megyeri v Germany*, 1992).



The Article 5(4) principles



10. The individual has the right to a speedy judicial decision. Whether a decision has been made 'speedily' must be determined in the light of the circumstances of the particular case (*RMD v Switzerland*, 1997).
11. The notion of 'speedily' (à bref délai) indicates a lesser urgency than that of 'promptly' (aussitôt) in Article 5§3 (*E v Norway*, 1990). However, where a decision to detain a person has been taken by a non-judicial authority, the standard of 'speediness' comes closer to the standard of 'promptness' under Article 5§3 (*Shcherbina v Russia*, 2014).
12. Where the judicial determination involves complicated issues — such as the detained person's medical condition — this may be taken into account when considering how long is 'reasonable' under Article 5§4.
13. In assessing the speedy character required by Article 5§4, factors such as the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state's responsibility may be taken into consideration (*Mooren v Germany*, 2009).
14. Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities (*E v Norway*, 1990).

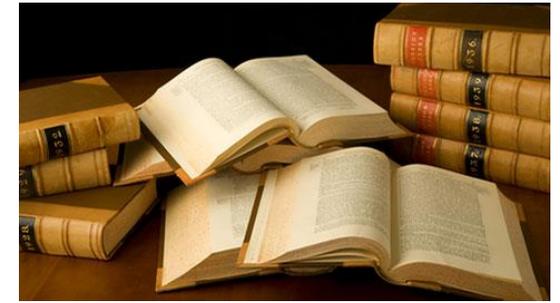


Article 6

Article 6(1) provides that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

- ▶ Article 5(4) entitles a person to a review of their deprivation of liberty but many persons suffering mental ill-health are subject to restrictions of other kinds, e.g. findings in relation to legal capacity and guardianship.
- ▶ Article 6 is an important protection for citizens in relation to legal proceedings which do not involve challenging a deprivation of liberty.

Case law on Article 6



- ▶ In ***Shtukaturov v Russia (2008)***, the applicant had a history of mental illness. Following a request filed by his mother, the Russian courts declared him legally incapable. The court found that the procedures breached Article 6. He had not been given any opportunity to participate in the proceedings. His attendance had been indispensable not only to give him the opportunity to present his case, but also to allow the judge to form an opinion on his mental capacity.
- ▶ In ***Stanev v Bulgaria (2012)***, the court observed that, according to a recent study, 18 out of 20 national European legal systems allowed direct access to the courts for any partially incapacitated person who wished to have their status reviewed. In 17 countries such access was even open to those declared fully incapable. Article 6§1 should be interpreted therefore as guaranteeing in principle that anyone in Mr Stanev's position must have direct access to a court to seek restoration of their legal capacity. There had been a violation of Article 6§1.
- ▶ ***Blokhin v Russia (2016)*** concerned the detention for 30 days in a temporary detention centre for juvenile offenders of a 12-year old boy suffering from a mental and neuro-behavioural disorder. He was questioned by the police in the absence of his guardian, legal counsel or a teacher. He was not given the opportunity to cross-examine the two witnesses against him. The court found a breach.



Article 8

Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence.

There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article

- ▶ Article 8 'secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality' (*Sidabras v Lithuania*, 2004).
- ▶ It protects the moral and physical integrity of the individual, including the right to live privately away from unwanted attention (*X and Y v Netherlands*, 1985).
- ▶ States are under a positive obligation to secure the right to effective respect for physical and psychological integrity.
- ▶ This obligation may require the state to take measures to provide effective and accessible protection of the right to respect for private life, through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures (*Tysiāc v Poland*, 2007).

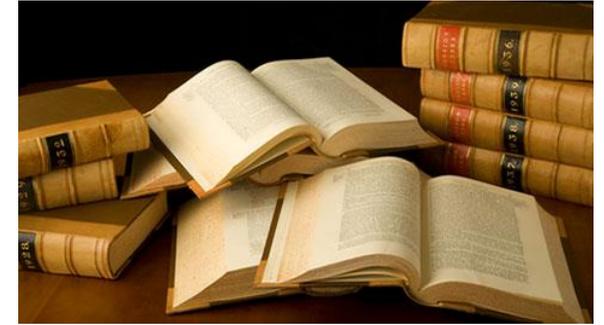


Article 8 principles



- ▶ The right to respect for one's private life includes the right to refuse medical treatment or to request a particular form of medical treatment (*Glass v United Kingdom*, 2004)
- ▶ When considering whether an interference is proportionate, the burden lies on the state to justify its action.
- ▶ The 'proportionality' test entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of an individual suffering mental ill-health with those of the whole community.
- ▶ Unlike Articles 5 and 6, Article 8 contains no explicit procedural requirements. However, 'the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8'.
- ▶ The extent of the state's margin of appreciation turns partly on the quality of the decision-making process and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life (*Shtukaturv v Russia*, 2008)

Shtukaturov v Russia (2008)

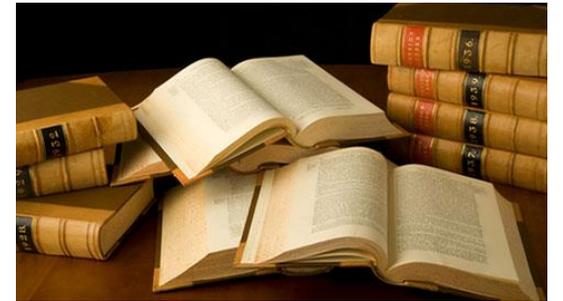


The applicant had a history of mental illness. A Russian court declared him legally incapable on 28 December 2004. This decision deprived him of his capacity to act independently in almost all areas of life: he was no longer able to buy or sell any property on his own, to work, to travel, to choose his place of residence, to join associations or to marry. Even his liberty could be limited without his consent and without any judicial supervision.

The court found a violation of Article 8 as a result of the applicant being fully deprived of his legal capacity. The principles for the legal protection of incapable adults set down by the Council of Europe's Committee of Ministers recommended that legislation should provide a 'tailor-made' response to each individual case. However, Russian legislation distinguished only between full capacity and full incapacity and made no allowances for borderline situations.

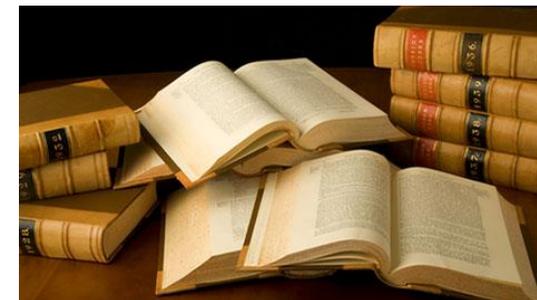
Consequently, the Mr Shtukaturov became fully dependent on his official guardian in almost all areas of his private life for an indefinite period when that was disproportionate to the government's legitimate aim of protecting his interests and health of others. Furthermore, his participation in the decision-making process had been 'reduced to zero'.

Other Article 8 cases



- ▶ In ***Grare v France (1983)***, a voluntary in-patient complained that his treatment with antipsychotic drugs resulted in unpleasant side-effects which violated Article 8. It was held that, even if the treatment regime constituted an invasion of his private life, it was justified in the interests of his health and public order.
- ▶ In ***Acmanne v Belgium (1983)***, compulsory tuberculosis screening was held not to breach Article 8 although it interfered with the individual's private life.
- ▶ In ***TV v Finland (1994)***, it was held that access by prison and medical staff to information regarding the applicant's HIV status could be justified under Article 8(2). Such access was lawful, necessary to protect the rights and freedoms of others and proportionate.
- ▶ In ***Szuluk v United Kingdom (2009)***, a prisoner who had undergone brain surgery discovered that his correspondence with the specialist supervising his hospital treatment had been monitored by a prison medical officer. The court found a violation of his right to respect for his correspondence under Article 8.

Other Article 8 cases



- ▶ In ***Herczegfalvy v Austria (1992)***, the applicant complained about a psychiatric hospital's practice of sending all of his letters to the curator for him to select which ones to pass on. The court held that the domestic law did not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society. In particular, the very vaguely worded statutory provisions did not specify the scope or conditions of exercise of this discretionary power. There had been a violation of Article 8.
- ▶ The case of ***A-MV v Finland (2017)*** concerned an intellectually disabled man's complaint about the Finnish courts' refusal to replace his court-appointed mentor, which had the effect that he had been prevented from deciding where, and with whom, he would like to live. The court found no violation of Article 8. The Finnish courts' decision to refuse to replace the mentor was reached following a concrete and careful consideration of the applicant's situation. The applicant had been involved at all stages of the proceedings and his rights, will and preferences had been taken into account by competent, independent and impartial domestic courts.

Academy of European Law



LEGAL RIGHTS OF CITIZENS SUFFERING MENTAL ILL-HEALTH

WORKSHOP SCENARIOS AND QUESTIONS

Professor Anselm Eldergill

Judge, Court of Protection, London

Trier, 9 June 2017



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CASE STUDIES

Following the United Kingdom's decision to leave the European Union, there is a vacancy at the table. It has been filled by a small republic called Xenophobia which has ratified the European Convention on Human Rights and the United Nations Convention on the Rights of Persons with Disabilities. A number of complaints have been lodged by Xenophobic citizens with the European Court of Human Rights in relation to their treatment by the state. Please consider the following applications.

T v Xenophobia

T has been detained in a medium-secure psychiatric hospital for 15 years. He is diagnosed as suffering from chronic schizophrenia as a result of which he is inclined to serious self-neglect. The doctor in charge of his treatment states that he has no independent living skills and would be vulnerable to significant abuse outside hospital. Nine years ago T hit another patient, causing him grievous bodily harm, and his doctor is also of the opinion that the current regime is necessary to protect other people from harm. He does accept that a low-secure open hospital would be able to provide for T's needs, and more appropriate, but no place is or is likely to become available. T's brother, who is his only relative, agrees that T requires treatment in hospital.

An unpaid advocate, H, appointed under a new scheme set up following Xenophobia's admission to the EU, has not succeeded in persuading state authorities to investigate his concerns about T's treatment. The letter replying to him states, 'Dr P is a recognised expert in the diagnosis, care and treatment of persons suffering from mental disorder. It would be inappropriate for the Department of Health to interfere in matters of clinical judgement. Furthermore, T's treatment is a therapeutic necessity and so fully complies with Convention requirements: see *Herczegfalvy v Austria (1992)*.'

H makes the following complaints to the European Court of Human Rights:

1. T's medical condition is such that he is suitable for an open hospital. For some years he has not suffered from any form of mental disorder that requires his detention in a medium-secure hospital. His continued detention there breaches Article 5 because the Convention requires a person's release once he has recovered sufficiently and the original justification for the detention no longer exists.
2. The failure of T's doctor to grant him any periods of leave of absence (for example, weekend leave to see his brother) is inhuman and degrading.
3. The fact that T can only apply to a court for his release every three years, and there are no automatic reviews if he does not apply, breaches Article 5; as does the fact that the court has no power to order his transfer to another hospital or to grant him leave of absence.
4. The fact that no legal representation is available in such court proceedings breaches Article 5. Unpaid, informal, advocacy is insufficient.

5. It took five months for the last court to determine his application and the hearing only lasted one hour, which violated Article 5§4.
6. The medication prescribed for him breaches Article 3. It has caused him very severe and disabling side-effects. Moreover, there are no safeguards in this respect. For example, he has no right to an independent second-opinion.

X and Y v Xenophobia

X and Y are brothers aged 21 and 20 respectively who as children were in care. According to medical reports, both of them lack capacity in relation to ‘anything other than the most trivial, day-to-day aspects of their lives. Their current placements were made by social services on a ‘best interests’ basis, without court order. Their present circumstances are as follows:

<p>X has a mental age of 2½ and communicates with difficulty, hardly at all in sentences.</p>	<p>Y has an overall mental age of 4-5 and exhibits challenging behaviour and autistic traits.</p>
<p>X is living with excellent adult foster parents in their own house.</p>	<p>Y is living in a specialist 6-bedroom house where he is one of four residents. It was classified as a social care home or nursing home.</p>
<p>X has his own bedroom, the door to which is never locked. X has never attempted to leave the house on his own and shows no wish to. Were he to attempt to leave, his foster parents would restrain him.</p>	<p>Y is not locked within the house. However, sometimes he has to be prevented from going out by staff and occasionally this leads to a physical altercation. On other occasions he also sometimes requires physical restraint or confinement in his room.</p>
<p>X is not receiving any medication.</p>	<p>Y is receiving an antipsychotic, risperidone, ‘for the purpose of controlling his anxiety’.</p>
<p>X attends a unit of further education each day and is transported there by one of his foster parents.</p>	<p>Y attends the same unit of further education as X and is transported by two members of staff.</p>
<p>X is continuously supervised by one or other foster parents.</p>	<p>Y is continuously supervised by professional staff.</p>

Z, the mother of X and Y, has suddenly reappeared on the scene, having not seen them for ten years. She has just been released from prison where she was serving a two-year sentence for Class A drug offences. Social services refuse her contact with them on the basis that it is not in their interests.

Z complains to the court that:

1. X and Y are being deprived of their liberty for the purposes of Article 5§1 because they are under continuous supervision, care and control and are not free to leave their places of residence. Furthermore, this is unlawful because there has been no proper legal process and nor is situation subject to periodical judicial review.
2. The denial of contact with them constitutes a breach of her rights under Article 8.

AB v Xenophobia

AB is aged 85. She suffers from advanced Alzheimer's disease. She lives at home on a very busy main road with her daughter CB, who she recognises some days. She has good social services support and is well fed and cared for. The front door is locked because she was wandering outside daily, getting lost and being returned home by police officers. Sometimes she tries to 'go home', referring to an address where she lived after getting married, and often dresses in the morning to go to university. Her daughter gives AB her prescribed anti-psychotic medication covertly in order to avoid confrontations, because AB refused to take it when its purpose was explained to her. CB takes AB on holiday regularly, and to a day centre, each day. She pays for this and the car they use from the proceeds of sale of AB's previous property.

AB's son BB is CB's step-brother. They have never got on and he complains that his mother is being unlawfully detained by CB. Social services investigate his complaint and inform him that the current arrangements are in his mother's best interests and that her doctor has confirmed this. They ask him not to try to visit her for the time being so as to avoid destabilising the care arrangements.

There is no legislation in place which allows BB to challenge the way in which care is provided to an incapacitated adult.

BB complains that his mother is deprived of her liberty and also that both her and his Article 8 rights have been infringed. The state and CB argue that the Convention is not intended to impinge on private family arrangements. Indeed, it would breach Article 8, and show a lack of respect for AB's and CB's private and family life, for the state to interfere and require them to submit themselves to state inspections, reviews and court proceedings. The state also argues that any deprivation of liberty is not attributable to it. Alternatively, if that is wrong, *Dodov v Bulgaria (2008)*¹ places it under a duty to protect AB's life which the current regime does in a proportionate way.

1 *Dodov v Bulgaria*, no. 59548/00, 17 January 2008.

P v Xenophobia

P is aged 15. She suffers from anorexia and on weighs under 5 stones. Against her wishes, her mother arranged her admission to a private hospital for treatment where she has been confined to her bed for four weeks. She is also not allowed day time clothes and now must earn privileges such as sitting in a chair and ward-based activities by gaining weight.

P complains that she is deprived of her liberty in violation of Article 5. The government and her mother deny this. They rely on the following passage from the judgment in *Nielsen v Denmark (1988)*:²

72 ... Regarding the weight which should be given to the applicant's views as to his hospitalisation, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5 (art. 5-1)

73. The Court concludes that the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5 (art. 5), but was a responsible exercise by his mother of her custodial rights in the interest of the child. Accordingly, Article 5 (art. 5) is not applicable in the case.'

The state also argues that any deprivation of liberty is not attributable to it because the admission was a private arrangement which it was not aware of at the time.

Q v Xenophobia

Having been convicted of rape and manslaughter ten years ago, Q was admitted by court order to the state high-secure hospital. The court found that he was experiencing auditory hallucinations (the voices instructed him to rape his victim) and persecutory delusions (he believed that the murder victim was a KGB agent sent to kill him).

The Xenophobic criminal code states that a person in Q's situation may only be released if a district judge is satisfied that the offender no longer poses a serious risk to others by reason of mental disorder'.

Q complains that this statutory provision is discriminatory and violates Article 14 of the UNCRPD. It is lawful for a statute to provide that no offender may be released if he remains a serious risk to others but what one cannot do is to discriminate against disabled people by a law which says that no disabled person may be released if they remain a serious risk to others.

He relies on the opinion of the Office of High Commissioner of Human Rights (OHCHR):

2 Nielsen v Denmark, no. 10929/84, 28 November 1988, Series A no. 144, [1988] ECHR 23, (1988) 11 EHRR 175.

‘unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person’s disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by Article 14 of the CRPD.’

Q also relies on the fact that the ECHR has often had regard to international conventions, such as the UNCRPD, because they set baseline standards compatible with the human rights of individuals. He says that the European Court should, indeed must, apply the UNCRPD.

The government contends that it is impossible to enact legislation of the kind suggested or to separate his dangerousness from his disability. Q is dangerous because of the nature of his mental illness. It would be wholly artificial to pretend that his disability is not the issue.

J v Xenophobia

J has an intellectual disability. He is aged 27 and lives on his own with social services support. Recently he inherited €200,000. He receives some state disability benefits but does not work and has no other income. His recent inheritance triggered an application by his mother to the district court for an ‘Order of Incapacity’. A court official considered her application form and a medical certificate of incapacity provided by the family doctor. Having noted that no objections had been received, he made the order on the papers. J was sent a copy of the application and details of how to object but did not understand the procedure.

Having been appointed as his guardian, his mother has invested the inheritance in five year bonds so that he has a ‘nest-egg’ for life and a small amount of extra income each month which does not affect his entitlement to benefits.

J would like to buy a flat and live there with a woman he met recently. His mother refuses to agree to this or to provide money from his account to finance it. Nor will she agree to him living with his partner or to him giving a tithe of 10% of his inheritance to his local church. She says that she is acting lawfully and in his best interests and it would also not be in his interests to spend his money on court proceedings. She will review her decision in a year when she has been able to evaluate whether the new relationship is likely to last and can also establish the direction of property prices in the area.

The Xenophobic Order of Incapacity Act 1956 states, ‘With regard to the incapacitated individual’s personal welfare, property, financial and legal affairs, a guardian has the same authority over the incapacitated person as a person with parental authority has over a 14-year old child. No incapacitated person may marry or apply for the order of incapacity to be discharged without their guardian’s consent.’ When J telephones the district court he is told that his mother’s interpretation and actions are fully compliant with the law.

A friend helps J to write to the European Court of Human Rights. He says that he thinks that his legal rights have been ignored and complains that he has been unfairly treated. Is he correct?

J is still awaiting a decision from the European Court of Human Rights two years later. He complains that the court has not determined his application speedily and therefore is in breach of the European Court of Human Rights.

Académie de droit européen



LES DROITS LÉGAUX DES PERSONNES ATTEINTES DE DÉFICIENCES MENTALES

SCÉNARIOS ET QUESTIONS DE L'ATELIER

Professeur Anselm Eldergill

Juge, Cour de protection, Londres

Trèves, 9 juin 2017



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ÉTUDES DE CAS

Après la décision du Royaume-Uni de quitter l'Union européenne, une place restait vacante. Elle a été comblée par une petite république appelée Xénophobie, qui a ratifié la Convention européenne des droits de l'homme et la Convention des Nations unies relative aux droits des personnes handicapées. La Cour européenne des droits de l'homme a reçu plusieurs plaintes de citoyens xénophobes au sujet du traitement que leur État leur infligeait. Veuillez examiner les requêtes suivantes.

T c. Xénophobie

T est enfermé dans un hôpital psychiatrique de sécurité moyenne depuis 15 ans. Il souffre de schizophrénie chronique, ce qui a pour effet qu'il a tendance à se négliger gravement. Le médecin responsable de son traitement affirme qu'il est incapable de mener une vie autonome et qu'en dehors d'un hôpital, il risquerait d'être victime d'abus considérables. Il y a neuf ans, T a frappé un autre patient jusqu'à lui infliger de graves lésions corporelles et son médecin pense également que le régime mis en place est indispensable pour protéger les autres personnes. Il admet qu'un hôpital ouvert de faible sécurité pourrait pourvoir aux besoins de T et serait plus approprié, mais aucune place n'est disponible ou susceptible de se libérer. Le frère de T, qui est son seul parent, reconnaît que T nécessite un traitement hospitalier.

H, un avocat pro deo désigné dans le cadre d'un nouveau système instauré à la suite de l'adhésion de la Xénophobie à l'UE, n'a pas réussi à persuader les autorités nationales de diligenter une enquête sur ses préoccupations quant au traitement de T. La réponse qu'il a reçue indique : « Le docteur P est un spécialiste reconnu dans le diagnostic, la prise en charge et le traitement des personnes atteintes de troubles mentaux. Le ministère de la santé ne saurait s'immiscer dans une question d'évaluation clinique. De surcroît, le traitement de T est une mesure dictée par une nécessité thérapeutique et respecte donc parfaitement les exigences de la Convention. Nous vous invitons à vous reporter à ce sujet à l'affaire *Herczegfalvy c. Autriche* (1992). »

H soumet les plaintes suivantes à la Cour européenne des droits de l'homme :

1. L'état de santé de T est tel qu'un hôpital ouvert serait approprié. Il ne présente plus depuis plusieurs années aucune forme de troubles mentaux qui exigerait son enfermement dans un hôpital de sécurité moyenne. Le maintien de sa détention dans un tel établissement viole l'article 5 car la Convention prescrit qu'une personne soit libérée lorsqu'elle s'est suffisamment rétablie et que la motivation initiale de la détention a disparu.
2. Le fait que le médecin de T ne lui a accordé aucune période de sortie autorisée (par exemple, un congé le week-end pour aller voir son frère) est inhumain et dégradant.
3. Le fait que T ne peut demander sa libération devant un tribunal que tous les trois ans et qu'aucun réexamen automatique de sa détention n'a lieu s'il n'introduit pas de

demande viole l'article 5, de même que l'impossibilité pour le tribunal d'ordonner qu'il soit transféré dans un autre hôpital ou qu'une sortie lui soit autorisée.

4. Le fait qu'aucune représentation en justice n'est disponible dans une procédure judiciaire de ce type viole l'article 5. Un conseil informel non rétribué n'est pas suffisant.
5. Le dernier tribunal a mis cinq mois pour se prononcer sur sa demande et l'audience n'a duré qu'une heure, ce qui constitue une violation de l'article 5, paragraphe 4.
6. Les médicaments prescrits à T violent l'article 3 en ce qu'ils ont provoqué chez lui des effets secondaires extrêmement lourds et invalidants. Il n'existe en outre aucune garantie à cet égard. T n'a par exemple pas droit à un deuxième avis indépendant.

X et Y c. Xénophobie

X et Y, deux frères âgés respectivement de 21 et 20 ans, ont été placés alors qu'ils étaient encore enfants. D'après leurs dossiers médicaux, ils sont dépourvus de capacités dans « tous les domaines dépassant les aspects quotidiens les plus banaux de leur vie ». Leur placement a été décidé par les services sociaux au titre de leur « intérêt supérieur », sans passer par un tribunal. Leur situation actuelle respective est la suivante :

<p>X a un âge mental de 2 ans et demi et communique avec difficultés. Il peut à peine former une phrase.</p>	<p>Y a un âge mental global de 4 à 5 ans et présente un comportement difficile et certaines caractéristiques autistiques.</p>
<p>X vit dans l'habitation personnelle d'excellents parents d'accueil.</p>	<p>Y vit dans un foyer spécialisé de 6 chambres, qui accueille au total 4 résidents et qui a été reconnu comme établissement d'aide sociale ou maison de soins.</p>
<p>X a sa propre chambre, dont la porte n'est jamais fermée à clé. Il n'a jamais essayé de sortir seul de la maison et ne manifeste pas l'envie de le faire. S'il essayait de sortir, ses parents d'accueil l'en empêcheraient.</p>	<p>Y n'est pas enfermé à l'intérieur du foyer. Parfois, le personnel doit cependant l'empêcher de sortir, et dans certains cas, cela a déjà conduit à une altercation physique. Dans d'autres cas, il a aussi besoin d'une contrainte physique ou d'un confinement dans sa chambre.</p>
<p>X ne prend pas de médicaments.</p>	<p>Y prend un antipsychotique, la rispéridone, « pour maîtriser ses angoisses ».</p>

X fréquente quotidiennement un centre d'éducation complémentaire, où il est amené par l'un de ses parents d'accueil.	Y fréquente le même centre d'éducation complémentaire, où il est amené par deux membres du personnel.
X est sous la surveillance permanente de l'un ou l'autre de ses parents d'accueil.	Y est sous la surveillance permanente de personnel professionnel.

Z, la mère de X et Y, qui ne les a pas vus depuis dix ans, a soudainement refait surface. Elle vient d'être libérée de prison, où elle purgeait une peine de deux ans pour une infraction liée à la drogue de première catégorie. Les services sociaux refusent qu'elle prenne contact avec ses fils au motif que cela ne servirait pas leurs intérêts.

Z soumet les plaintes suivantes au tribunal :

1. X et Y sont privés de liberté au sens de l'article 5, paragraphe 1, parce qu'ils font en permanence l'objet d'une surveillance, d'une prise en charge et d'un contrôle et ils ne sont pas libres de quitter leur lieu de résidence. Ce traitement est en outre illicite parce qu'aucune procédure judiciaire en bonne et due forme n'a été suivie et que la situation juridique n'est pas réexaminée régulièrement par la justice.
2. Le refus de contact constitue une violation des droits que leur confère l'article 8.

AB c. Xénophobie

À 85 ans, AB souffre de la maladie d'Alzheimer à un stade avancé. Elle vit dans sa maison, le long d'une grand-route très fréquentée, avec sa fille CB, qu'elle reconnaît certains jours. Elle reçoit une aide de qualité des services sociaux et elle bénéficie d'une bonne alimentation et d'une bonne prise en charge. Sa porte avant est fermée à clé parce qu'elle partait tous les jours se promener, mais elle se perdait et elle devait se faire raccompagner chez elle par des policiers. Elle essaie parfois de « rentrer chez elle », en parlant d'une adresse où elle a habité peu après son mariage, et elle s'habille souvent le matin pour aller à l'université. Sa fille lui donne les médicaments antipsychotiques qui lui ont été prescrits sans qu'AB le sache pour éviter les disputes, car quand on lui a expliqué leur utilité, elle avait refusé de les prendre. CB emmène régulièrement AB en vacances et la conduit quotidiennement dans un centre de jour. Elle paie les frais y afférents et la voiture qu'elle utilise à cette fin en puisant dans le produit de la vente de l'ancienne maison d'AB.

Le fils d'AB, BB, est le demi-frère de CB. Ils ne se sont jamais bien entendus et BB affirme que CB détient sa mère de façon illicite. Après une enquête sur sa plainte, les services sociaux l'informent que les arrangements en place correspondent à l'intérêt supérieur de sa mère, ce qui a été confirmé par son médecin. Ils lui demandent d'éviter de lui rendre visite temporairement pour ne pas perturber les modalités de sa prise en charge.

Il n'existe aucune législation qui permettrait à BB de contester le type de soins qui sont fournis à un adulte en situation d'incapacité.

BB dépose une plainte selon laquelle sa mère est privée de liberté et les droits que l'article 8 leur confère, à sa mère et lui, sont bafoués. L'État et CB rétorquent que la Convention n'a pas vocation à empiéter sur les arrangements familiaux privés. L'article 8 serait en effet violé, en ce que la vie privée et familiale d'AB et CB ne serait pas respectée, si l'État intervenait et leur imposait de se soumettre à des contrôles publics, des examens et des procédures judiciaires. L'État soutient par ailleurs qu'une éventuelle privation de liberté ne lui est pas imputable. À titre subsidiaire, si cette conclusion n'est pas admise, l'arrêt dans l'affaire *Dodov c. Bulgarie*¹ (2008) l'oblige à protéger la vie d'AB, ce que le régime en place fait de façon proportionnée.

P c. Xénophobie

À 15 ans, P souffre d'anorexie et pèse à peine 30 kg. Sa mère a obtenu, contre son gré, son admission dans un hôpital privé où elle doit rester alitée pendant quatre semaines pour son traitement. Il lui est interdit de porter des vêtements de jour et elle doit gagner chaque privilège, comme le droit de s'asseoir dans un fauteuil ou de participer aux activités dans le parc, en prenant du poids.

P émet une plainte au motif qu'elle est privée de liberté en violation de l'article 5. Le gouvernement et sa mère contestent cette accusation en s'appuyant sur le passage suivant de l'arrêt rendu dans l'affaire *Nielsen c. Danemark*² (1988) :

72. (...) Quant à l'importance à accorder aux vues de l'intéressé sur son hospitalisation, il se trouvait encore à un âge où il est normal qu'un parent se prononce, au besoin, contre le gré de son enfant. Rien ne prouve que la mère ait agi de mauvaise foi. Elle a pris sa décision en suivant les conseils de médecins compétents. Un enfant comme le requérant doit pouvoir être hospitalisé à la demande du titulaire de l'autorité parentale, hypothèse manifestement non couverte par le paragraphe 1 de l'article 5 (art. 5-1). (...)

73. La Cour conclut que l'hospitalisation incriminée ne constituait pas une privation de liberté au sens de l'article 5 (art. 5), mais relevait de l'exercice, par une mère consciente de ses responsabilités, de ses droits parentaux dans l'intérêt de l'enfant. Le texte précité n'entre donc pas en jeu.

L'État affirme en outre qu'une éventuelle privation de liberté ne lui est pas imputable car l'hospitalisation relève d'un arrangement privé, dont il n'avait pas connaissance au moment des faits.

Q c. Xénophobie

Après avoir été condamné pour viol et meurtre il y a dix ans, Q a été admis à l'hôpital de haute sécurité de l'État en vertu d'une décision judiciaire. Le tribunal avait conclu qu'il souffrait d'hallucinations auditives (les voix lui avaient ordonné de violer sa victime) et de délires de persécution (il pensait que la victime du meurtre était un agent du KGB envoyé pour le tuer).

1 Dodov c. Bulgarie, requête n° 59548/00, 17 janvier 2008.

2 Nielsen c. Danemark, requête n° 10929/84, 28 novembre 1988, Série A n° 144, [1988] Cour EDH 23, (1988) 11 EHRR 175.

D'après le code pénal de Xénophobie, un coupable dans la situation de Q ne peut être libéré que si un juge régional a la conviction qu'il ne représente plus une menace grave pour autrui en raison de ses troubles mentaux.

Q estime que cette disposition légale est discriminatoire et viole l'article 14 de la CDPH des Nations unies. À ses yeux, il est licite qu'un loi dispose qu'un coupable ne peut être libéré s'il continue de représenter une menace grave pour autrui, mais pas qu'une discrimination soit pratiquée à l'égard des personnes handicapées en vertu d'une loi selon laquelle une personne handicapée ne peut être libérée si elle continue de représenter une menace grave pour autrui.

Q invoque l'avis du Haut-Commissariat aux droits de l'homme (HCDH) :

« (...) il y a internement illégal quand la privation de liberté est fondée sur la combinaison entre un handicap mental ou intellectuel et d'autres éléments comme le risque de dommage pour l'intéressé ou pour autrui ou la nécessité de soins et de traitement. Comme les mesures en question sont en partie justifiées par le handicap de l'intéressé, elles sont jugées discriminatoires et incompatibles avec l'interdiction de la privation de liberté en raison du handicap et avec le droit à la liberté, sur la base de l'égalité avec les autres, consacrés par l'article 14. »

Q compte également sur le fait que la Cour EDH fait régulièrement référence à différentes conventions internationales, comme la CDPH des Nations unies, parce qu'elles édictent certaines normes de base qui coïncident avec les droits de l'homme. Il affirme que la Cour européenne devrait appliquer la CDPH des Nations unies et qu'elle en a même l'obligation.

Le gouvernement soutient qu'il est impossible d'élaborer une législation comme Q la propose ou de distinguer sa dangerosité de son handicap. Q est dangereux à cause de la nature de sa maladie mentale et il serait tout à fait artificiel de prétendre que le problème ne réside pas dans son handicap.

J c. Xénophobie

J, âgé de 27 ans, a un handicap intellectuel et vit seul avec une aide des services sociaux. Il a récemment hérité de 200 000 euros. Il perçoit une allocation pour handicap de l'État, mais il ne travaille pas et n'a pas d'autres revenus. À la suite de son héritage, sa mère a sollicité une « ordonnance d'incapacité » au tribunal régional. Un employé de justice a examiné cette demande et un certificat médical d'incapacité établi par le médecin de famille. Constatant l'absence d'objections, il a ensuite délivré formellement cette ordonnance. Une copie de la demande, qui expliquait comment s'y opposer, avait été envoyée à J, mais il n'a pas compris la procédure.

La mère de J, qui avait été désignée en tant que tutrice, a investi l'héritage dans des obligations à cinq ans afin qu'il dispose d'un pécule pour l'avenir et d'une petite rentrée mensuelle supplémentaire, qui n'affecte pas son droit à une allocation.

J voudrait acheter un appartement pour y vivre avec une femme qu'il a rencontrée récemment. Sa mère refuse de donner son accord à ce projet ou de prélever de l'argent sur

son compte pour le financer. Elle n'accepte pas non plus qu'il vive avec sa partenaire ou qu'il fasse don de 10 % de son héritage à l'église locale. Elle affirme qu'elle agit dans la légalité et dans l'intérêt supérieur de J et qu'il ne serait pas non plus dans l'intérêt de J de dépenser son argent dans une procédure judiciaire. Elle est disposée à revoir sa position dans un an, quand elle aura pu évaluer si la nouvelle relation de J est durable et examiner la tendance des prix immobiliers dans la région.

La loi xénophobe de 1956 sur l'ordonnance d'incapacité prévoit : « Un tuteur a le même pouvoir à l'égard d'une personne reconnue en état d'incapacité, en ce qui concerne le bien-être personnel, les biens et la situation financière et juridique de cette personne, qu'un titulaire de l'autorité parentale à l'égard d'un enfant âgé de 14 ans. Une personne reconnue en état d'incapacité ne peut se marier ou demander la révocation de l'ordonnance d'incapacité sans le consentement de son tuteur. » Lorsque J téléphone au tribunal régional, on lui dit que l'interprétation et les décisions de sa mère sont parfaitement conformes à la loi.

Un ami aide J à écrire à la Cour européenne des droits de l'homme. Il affirme que d'après lui, ses droits légaux ont été ignorés et il formule une plainte au motif qu'il aurait été soumis à un traitement inéquitable. A-t-il raison ?

Deux ans plus tard, J attend toujours la décision de la Cour européenne des droits de l'homme. Il se plaint que la Cour n'a pas statué rapidement sur sa requête et qu'elle a donc violé la Convention européenne des droits de l'homme.



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Disability in Employment

Philip Rostant

Employment Judge

Employment Tribunals England and Wales



2

UNCRPD and Employment-Article 27

Appropriate steps, including through legislation to...

- **Prohibit discrimination** on the basis of disability;
- **Protect the rights** of persons with disabilities;
- Ensure that **reasonable accommodation** is provided to persons with disabilities in the workplace;
- Promote access to training, vocational guidance, work experience and other **measures designed to improve access by people with disabilities to the job market.**

Ending Discrimination-Promoting Participation

UNCRPD-Art 27



Council Directive 2000/78/EC of 27
November 2000

Council Directive 2000/78/EC of 27 November 2000 (the Framework Directive)

- Article 1
- The purpose of this Directive is to lay down a general framework for **combating discrimination** on the grounds of, ...**disability**, ...as regards employment and occupation, with a view to putting into effect in the Member States the **principle of equal treatment**.

The Framework Directive

Article 2

Concept of discrimination

For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no **direct** or **indirect discrimination** whatsoever on any of the grounds referred to in Article 1.

+

harassment (Article 2(3))

victimisation (Article 11).

reasonable accommodation (Article 5)

A claim of disability discrimination

Preliminary considerations

- Disability
- Nature of claim
- Nature of the disability
- Knowledge of disability

The Concept of Disability

A medical model



The Concept of Disability

A social model



The Concept of Disability



Proving disability

- Impairment
- Long-term
- Functional deficit and/or
- Barriers hindering full and effective participation {in society}
- In the workplace

Proving discrimination

Framework Directive-Art 10.

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, **when persons who consider themselves wronged** because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts from which it may be presumed that there has been direct or indirect discrimination**, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Knowledge of disability?

- Direct discrimination
- Indirect discrimination
- Harassment
- Reasonable accommodation

Reasonable accommodation(1)

Recital 16

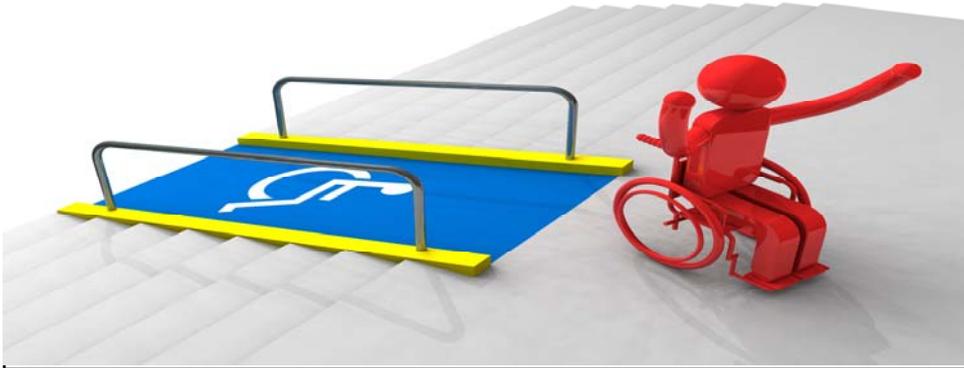
The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

Reasonable accommodation(2)

- **Article 5**
- Measure to ensure **compliance with the principle of equal treatment**
- Requires employers to take **appropriate measures**, where **necessary**, to enable a person with a disability to have **access** to, **participate** in, or **advance** in **employment**, or to undergo **training**.
- **Unless** such measures would impose a **disproportionate burden** on the employer.

Appropriate and necessary

- Measure must address the barrier or difficulty.
- Without the measure, the person with the disability is prevented or hindered from participation.



Disproportionate burden

- The duty is only to provide *reasonable* accommodation



Structured approach



Direct Discrimination

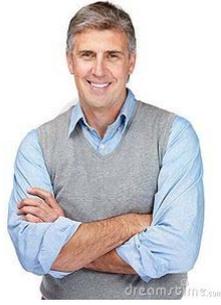
Article 2(2)

“2. For the purposes of paragraph 1:

direct discrimination shall be taken to occur where one person is treated **less favourably** than another is, has been or would be treated in a **comparable situation**, on **any of the grounds** referred to in Article 1;”

Direct Discrimination

Comparable situation



10 years relevant experience
University degree
Further professional qualifications



10 years relevant experience
University degree
Further professional qualifications
History of depression

Direct Discrimination

Treated less favourably



Direct Discrimination

On any of the grounds



Depression?

Indirect Discrimination

Article 2(2)

(b) **indirect discrimination** shall be taken to occur where an **apparently neutral provision, criterion or practice** would put persons having... a **particular disability**,... at a **particular disadvantage** compared with other persons unless:

- (i) that provision, criterion or practice is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate and necessary**,

Discrimination by association (1)

- “Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled.”

Case C-303/06 *Coleman*.

Discrimination by association (2)

- “the concept of ‘discrimination on the grounds of ethnic origin’,... must be interpreted as being intended to apply in circumstances such as those at issue before the referring court —irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure”.

C-83/14 *CHEZ Razpredelenie Bulgaria AD*

Harassment

Article 2(3)

- Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment...

Harassment

Unwanted conduct



Harassment

Related to any of the grounds



Harassment

Purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment



Victimisation

Article 11

“Victimisation

*Member States shall introduce into their national legal systems such measures as are necessary to protect employees against **dismissal or other adverse treatment** by the employer as a **reaction to a complaint** within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”*

Victimisation

Dismissal or other adverse treatment



Positive action

- Article 7
- 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
- 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

The End

Thank You



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Le handicap au travail

Philip Rostant

Juge du travail

Tribunaux du travail d'Angleterre et du Pays de Galles



2

La CDPH et l'emploi - Article 27

Mesures appropriées, y compris des mesures législatives, pour...

- **Interdire la discrimination** fondée sur le handicap
- **Protéger le droit** des personnes handicapées
- Faire en sorte que des **aménagements raisonnables** soient apportés aux lieux de travail en faveur des personnes handicapées
- Promouvoir l'accès à la formation, à l'orientation professionnelle, à l'expérience professionnelle et autres **mesures visant à favoriser l'accès des personnes handicapées au marché du travail**

Faire cesser la discrimination - Promouvoir la participation

Article 27 de la CDPH



Directive 2000/78/CE du Conseil du
27 novembre 2000

La directive du Conseil 2000/78/CE du 27 novembre 2000 (« directive-cadre »)

- Article premier
- La présente directive a pour objet d'établir un cadre général pour **lutter contre la discrimination** fondée sur (...) l'**handicap** (...) en ce qui concerne l'emploi et le travail, en vue de mettre en œuvre, dans les États membres, le **principe de l'égalité de traitement**.

La directive-cadre

Article 2

Concept de discrimination

Aux fins de la présente directive, on entend par « principe de l'égalité de traitement » l'absence de toute **discrimination directe** ou **indirecte**, fondée sur un des motifs visés à l'article 1^{er}.

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Harcèlement (article 2, paragraphe 3)

Rétorsions (article 11)

Aménagements raisonnables (article 5)

Action pour discrimination fondée sur le handicap

Considérations liminaires

- Handicap
- Nature de l'action
- Nature du handicap
- Connaissance du handicap

Le concept de handicap

Modèle médical



Le concept de handicap

Modèle social



Le concept de handicap



La preuve du handicap

- Limitation
- Longue durée
- Déficience fonctionnelle et/ou
- Barrières faisant obstacle à la pleine et effective participation {à la société}
- Sur le lieu de travail

La preuve de la discrimination

Article 10 de la directive-cadre

Les États membres prennent les mesures nécessaires, conformément à leur système judiciaire, afin que, **dès lors qu'une personne s'estime lésée** par le non-respect à son égard du principe de l'égalité de traitement et **établit**, devant une juridiction ou une autre instance compétente, **des faits qui permettent de présumer l'existence d'une discrimination directe ou indirecte**, il incombe à la partie défenderesse de prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement.

Connaissance du handicap ?

- Discrimination directe
- Discrimination indirecte
- Harcèlement
- Aménagements raisonnables

Aménagements raisonnables (1)

Considérant 16

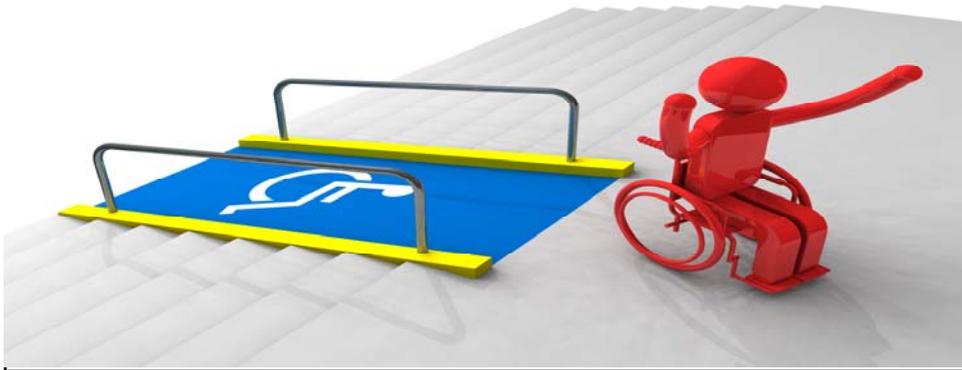
La mise en place de mesures destinées à tenir compte des besoins des personnes handicapées au travail remplit un rôle majeur dans la lutte contre la discrimination fondée sur un handicap.

Aménagements raisonnables (2)

- **Article 5**
- Mesure visant à garantir le **respect du principe de l'égalité de traitement**
- Obligation pour les employeurs de prendre les **mesures appropriées**, en fonction des **besoins**, pour permettre à une personne handicapée d'**accéder** à un **emploi**, de l'**exercer** ou d'y **progresser**, ou pour qu'une **formation** lui soit dispensée
- **Sauf** si ces mesures imposent aux employeurs une **charge disproportionnée**

Caractère approprié et nécessaire

- La mesure doit résoudre l'obstacle ou la difficulté
- Sans la mesure, la participation de la personne handicapée serait empêchée ou entravée



Charge disproportionnée

- L'obligation consiste uniquement à prévoir des aménagements *raisonnables*



Approche structurée



Discrimination directe

Article 2, paragraphe 2

« 2. Aux fins du paragraphe 1 :

a) une **discrimination directe** se produit lorsqu'une personne est traitée de manière **moins favorable** qu'une autre ne l'est, ne l'a été ou ne le serait dans une **situation comparable**, sur la base de **l'un des motifs** visés à l'article 1^{er} »

Discrimination directe

Situation comparable



10 ans d'expérience pertinente
Diplôme universitaire
Qualifications professionnelles
complémentaires



10 ans d'expérience pertinente
Diplôme universitaire
Qualifications professionnelles
complémentaires
Antécédents de dépression

Discrimination directe

Une personne est traitée de manière moins favorable



Discrimination directe

Sur la base de l'un des motifs



Dépression ?

Discrimination indirecte

Article 2, paragraphe 2

b) une **discrimination indirecte** se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes (...) d'un handicap [donné] par rapport à d'autres personnes, à moins que :

- i) cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un objectif légitime et que les moyens de réaliser cet objectif ne soient appropriés et nécessaires,

Discrimination par association (1)

- « La directive 2000/78 et, notamment, ses articles 1^{er} et 2, paragraphes 1 et 2, sous a), doivent être interprétés en ce sens que l'interdiction de discrimination directe qu'ils prévoient n'est pas limitée aux seules personnes qui sont elles-mêmes handicapées. »

Affaire C-303/06, *Coleman*

Discrimination par association (2)

- « la notion de «discrimination fondée sur l'origine ethnique» (...) doit être interprétée en ce sens que, dans des circonstances telles que celles en cause au principal (...), ladite notion a vocation à s'appliquer, indifféremment, selon que ladite mesure collective touche les personnes qui ont une certaine origine ethnique ou celles qui, sans posséder ladite origine, subissent, conjointement avec les premières, le traitement moins favorable ou le désavantage particulier résultant de cette mesure. »

Affaire C-83/14, *CHEZ Razpredelenie Bulgaria AD*

Harcèlement

Article 2, paragraphe 3

- Le harcèlement est considéré comme une forme de discrimination au sens du paragraphe 1 lorsqu'un **comportement indésirable lié à l'un des motifs** visés à l'article 1^{er} se manifeste, qui a pour **objet** ou pour **effet de porter atteinte à la dignité d'une personne et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.**

Harcèlement

Comportement indésirable



Harcèlement

Lié à l'un des motifs



Harcèlement

*A pour **objet** ou pour **effet** de **porter atteinte à la dignité d'une personne et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant***



Rétorsions

Article 11

« *Protection contre les rétorsions*

Les États membres introduisent dans leur système juridique interne les mesures nécessaires pour protéger les travailleurs contre tout licenciement ou tout autre traitement défavorable par l'employeur en réaction à une plainte formulée au niveau de l'entreprise ou à une action en justice visant à faire respecter le principe de l'égalité de traitement. »

Rétorsions

Licenciement ou autre traitement défavorable



Action positive

- Article 7
- 1. Pour assurer la pleine égalité dans la vie professionnelle, le principe de l'égalité de traitement n'empêche pas un État membre de maintenir ou d'adopter des mesures spécifiques destinées à prévenir ou à compenser des désavantages liés à l'un des motifs visés à l'article 1^{er}.
- 2. En ce qui concerne les personnes handicapées, le principe d'égalité de traitement ne fait pas obstacle au droit des États membres de maintenir ou d'adopter des dispositions concernant la protection de la santé et de la sécurité sur le lieu de travail ni aux mesures visant à créer ou à maintenir des dispositions ou des facilités en vue de sauvegarder ou d'encourager leur insertion dans le monde du travail.

Fin

Merci



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Behinderung im Beschäftigungsbereich

Philip Rostant

Arbeitsrichter

Arbeitsgerichte England und Wales



UN-BRK und Beschäftigung – Artikel 27

Geeignete Schritte, einschließlich des Erlasses von Rechtsvorschriften, um:

- **Diskriminierung** aufgrund von Behinderung **zu verbieten**;
- **die Rechte** von Menschen mit Behinderungen **zu schützen**;
- sicherzustellen, dass am Arbeitsplatz **angemessene Vorkehrungen** für Menschen mit Behinderungen getroffen werden;
- den Zugang zu Berufsausbildung, Berufsberatung, Berufserfahrung sowie anderen **Maßnahmen zur Verbesserung des Zugangs von Menschen mit Behinderungen zum Arbeitsmarkt** zu fördern.

Diskriminierung beenden – Teilhabe fördern

UN-BRK – Artikel 27



**Richtlinie 2000/78/EG des Rates vom
27. November 2000**

Richtlinie 2000/78/EG des Rates vom 27. November 2000 (Rahmenrichtlinie)

- Artikel 1
- Zweck dieser Richtlinie ist die Schaffung eines allgemeinen Rahmens zur **Bekämpfung der Diskriminierung** wegen (...) **einer Behinderung** (...) in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des **Grundsatzes der Gleichbehandlung** in den Mitgliedstaaten.

Die Rahmenrichtlinie

Artikel 2

Der Begriff „Diskriminierung“

Im Sinne dieser Richtlinie bedeutet „Gleichbehandlungsgrundsatz“, dass es keine **unmittelbare** oder **mittelbare Diskriminierung** wegen eines der in Artikel 1 genannten Gründe geben darf.

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Belästigung (Artikel 2 Absatz 3)

Viktimisierung (Artikel 11)

Angemessene Vorkehrungen (Artikel 5)

Eine Klage wegen Diskriminierung aufgrund einer Behinderung

Vorüberlegungen

- Behinderung
- Art der Klage
- Art der Behinderung
- Wissen über Behinderung

Der Begriff „Behinderung“

Ein medizinisches Modell



Der Begriff „Behinderung“

Ein soziales Modell

**DAS
PROBLEM**



Der Begriff „Behinderung“



Behinderung beweisen

- Beeinträchtigung
- Lang andauernd
- Funktionelles Defizit und/oder
- Barrieren, die die volle und wirksame Teilhabe {an der Gesellschaft} verhindern
- Am Arbeitsplatz

Diskriminierung beweisen

Rahmenrichtlinie – Artikel 10

Die Mitgliedstaaten ergreifen im Einklang mit dem System ihrer nationalen Gerichtsbarkeit die erforderlichen Maßnahmen, nach denen dann, **wenn Personen, die sich** durch die Verletzung des Gleichbehandlungsgrundsatzes **für beschwert halten** und bei einem Gericht bzw. einer anderen zuständigen Stelle **Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen**, es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

Wissen über Behinderung?

- Unmittelbare Diskriminierung
- Mittelbare Diskriminierung
- Belästigung
- Angemessene Vorkehrungen

Angemessene Vorkehrungen (1)

Erwägungsgrund 16

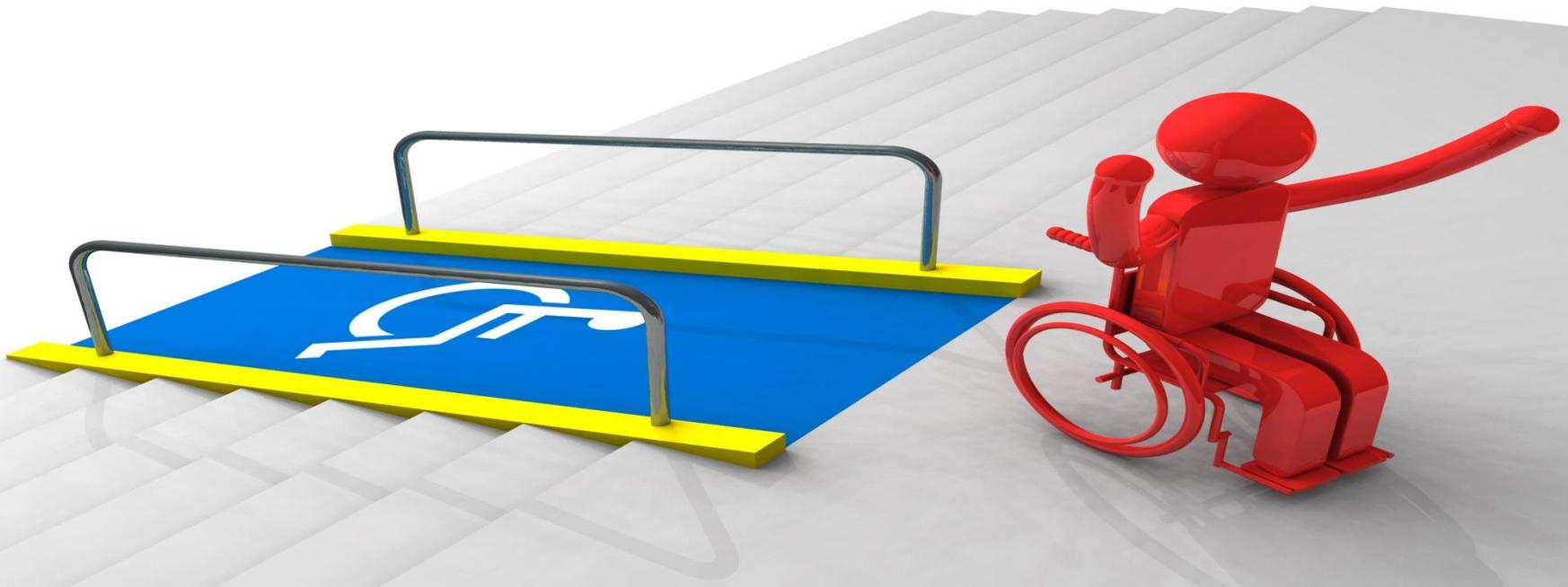
Maßnahmen, die darauf abstellen, den Bedürfnissen von Menschen mit Behinderung am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen wegen einer Behinderung.

Angemessene Vorkehrungen (2)

- **Artikel 5**
- Maßnahme zur Gewährleistung der **Anwendung des Gleichbehandlungsgrundsatzes**
- Besagt, dass der Arbeitgeber – wo **erforderlich** – die **geeigneten Maßnahmen** zu ergreifen hat, um den Menschen mit Behinderung den **Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg** und die **Teilnahme an Aus- und Weiterbildungsmaßnahmen** zu ermöglichen.
- **Es sei denn**, diese Maßnahmen würden den Arbeitgeber **unverhältnismäßig belasten**.

Geeignet und erforderlich

- Maßnahme muss zum Abbau der Barriere oder Schwierigkeit dienen.
- Ohne die Maßnahme sind die Menschen mit Behinderungen an der Teilhabe gehindert.



Unverhältnismäßige Belastung

- Es besteht nur die Verpflichtung, *angemessene* Vorkehrungen zu treffen.



Strukturiertes Vorgehen



Unmittelbare Diskriminierung

Artikel 2 Absatz 2

„(2) *Im Sinne des Absatzes 1*

*liegt eine **unmittelbare Diskriminierung** vor, wenn eine Person **wegen eines der in Artikel 1 genannten Gründe** in einer **vergleichbaren Situation** eine **weniger günstige** Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;“*

Unmittelbare Diskriminierung

Vergleichbare Situation



10 Jahre einschlägige Erfahrung
Universitätsabschluss
Weitere berufliche Qualifikationen



10 Jahre einschlägige Erfahrung
Universitätsabschluss
Weitere berufliche Qualifikationen
An einer Depression erkrankt

Unmittelbare Diskriminierung

Eine weniger günstige Behandlung erfahren



Unmittelbare Diskriminierung

Wegen eines der Gründe



Depression?

Mittelbare Diskriminierung

Artikel 2 Absatz 2

- b) liegt eine **mittelbare Diskriminierung** vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit ... einer bestimmten Behinderung ... gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:
- i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich,

Diskriminierung durch Assoziierung (1)

- „[D]ie Richtlinie 2000/78 und insbesondere ihre Art. 1 und 2 Abs. 1 und 2 Buchst. a [sind] dahin auszulegen (...), dass das dort vorgesehene Verbot der unmittelbaren Diskriminierung nicht auf Personen beschränkt ist, die selbst behindert sind.“

Rechtssache C-303/06 *Coleman*.

Diskriminierung durch Assoziierung (2)

- „der Begriff der „Diskriminierung aufgrund der ethnischen Herkunft“ (...) [ist] dahin auszulegen (...), dass er auf einen Sachverhalt wie den im Ausgangsverfahren fraglichen (...) unterschiedslos anzuwenden ist, gleichviel ob die fragliche Maßnahme Personen einer bestimmten ethnischen Herkunft oder Personen anderer Herkunft betrifft, die durch diese Maßnahme zusammen mit Ersteren weniger günstig behandelt oder in besonderer Weise benachteiligt werden.“

C-83/14 CHEZ Razpredelenie Bulgaria AD

Belästigung

Artikel 2 Absatz 3

- Unerwünschte Verhaltensweisen, die mit einem der Gründe nach Artikel 1 in Zusammenhang stehen und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird, sind Belästigungen, die als Diskriminierung im Sinne von Absatz 1 gelten...

Belästigung

Unerwünschte Verhaltensweisen



Belästigung

Mit einem der Gründe in Zusammenhang stehen



Belästigung

Bezwecken oder *bewirken*, dass die *Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird*



Viktimisierung

Artikel 11

„Viktimisierung

Die Mitgliedstaaten treffen im Rahmen ihrer nationalen Rechtsordnung die erforderlichen Maßnahmen, um die Arbeitnehmer vor Entlassung oder anderen Benachteiligungen durch den Arbeitgeber zu schützen, die als Reaktion auf eine Beschwerde innerhalb des betreffenden Unternehmens oder auf die Einleitung eines Verfahrens zur Durchsetzung des Gleichbehandlungsgrundsatzes erfolgen.“

Viktimisierung

Entlassung oder andere Benachteiligungen



Positive Maßnahmen

- Artikel 7
- (1) Der Gleichbehandlungsgrundsatz hindert die Mitgliedstaaten nicht daran, zur Gewährleistung der völligen Gleichstellung im Berufsleben spezifische Maßnahmen beizubehalten oder einzuführen, mit denen Benachteiligungen wegen eines in Artikel 1 genannten Diskriminierungsgrunds verhindert oder ausgeglichen werden.
- (2) Im Falle von Menschen mit Behinderung steht der Gleichbehandlungsgrundsatz weder dem Recht der Mitgliedstaaten entgegen, Bestimmungen zum Schutz der Gesundheit und der Sicherheit am Arbeitsplatz beizubehalten oder zu erlassen, noch steht er Maßnahmen entgegen, mit denen Bestimmungen oder Vorkehrungen eingeführt oder beibehalten werden sollen, die einer Eingliederung von Menschen mit Behinderung in die Arbeitswelt dienen oder diese Eingliederung fördern.

Ende

Vielen Dank

Étude de cas

Introduction

Vous venez de découvrir une action pour discrimination, qui a été introduite par Klaus contre son ancien employeur, Sadistisch Fitness-Studios GmbH (SFS), le propriétaire de la salle de sport de Trèves où il travaillait avant son licenciement.

Klaus a présenté ses preuves à l'audience, de même que Philipp, le directeur régional, et Magda, la directrice administrative de la salle de sport, qui était également la supérieure hiérarchique directe de Klaus. Ursula, qui dirigeait la salle de sport au moment des faits, n'a pas assisté à l'audience. Lorsque l'affaire est arrivée devant le tribunal, elle avait quitté son poste chez SFS pour devenir coach de fitness particulière pour un milliardaire installé aux Bermudes.

Les faits ci-après ont été établis.

1. Ursula est une ancienne athlète professionnelle et elle était restée en grande forme. Klaus travaillait dans l'administration.
2. La salle de sport possède une zone d'accueil moderne de type paysager. Le bureau de Klaus se trouvait au premier étage et, pour le rejoindre à partir du bureau administratif principal situé au rez-de-chaussée, il devait traverser la zone d'accueil et monter une volée d'escaliers ouverte. Klaus devait régulièrement circuler entre les deux bureaux, passant d'un à l'autre plusieurs fois par jour, et lors de ces déplacements, les clients qui arrivaient à la salle de sport et qui repartaient pouvaient parfaitement le voir. L'alternative à l'escalier ouvert était un ascenseur.
3. Klaus est séropositif et présente une importante surcharge pondérale, bien qu'il ne soit pas obèse au sens médical. Il a déclaré au tribunal qu'il était extrêmement fatiguant pour lui d'emprunter l'escalier, surtout s'il devait le faire plusieurs fois en un court laps de temps, et qu'il était parfois essoufflé. C'était encore pire s'il devait porter des objets lourds, comme des dossiers ou des paquets de bouteilles d'eau. Par conséquent, il utilisait presque toujours l'ascenseur, même si c'était souvent plus lent que de passer par l'escalier car il n'existait qu'un seul ascenseur et il desservait plusieurs étages.
4. La société SFS était préoccupée par les résultats financiers de la salle de sport en question, qui est en concurrence avec deux autres salles à Trèves. Lorsqu'elle a été engagée, Ursula a décidé d'améliorer l'image de la salle. Elle a décidé que tous les membres du personnel, y compris les employés de l'accueil et de l'administration, devaient porter un survêtement SFS sur le lieu de travail. Klaus détestait cette mesure. Il estimait qu'il avait l'air ridicule en survêtement à cause de son poids. Ses collègues, qui n'en avaient jamais parlé auparavant, ont commencé à émettre des commentaires sur sa tenue. Au premier abord, ces commentaires étaient sympathiques. Ses collègues lui suggéraient par exemple d'enlever le haut du survêtement lorsqu'il était dans le bureau administratif principal, hors de la vue des usagers de la salle de sport, parce qu'il « faisait certainement très chaud pour lui ». La personne chargée de commander les survêtements lui a également

demandé si elle devait choisir une plus grande taille parce que le survêtement qu'elle lui avait fourni « semblait assez inconfortable ». Une autre fois, il a entendu deux collègues, plus jeunes, qui discutaient de l'obligation de porter un survêtement et l'une d'elles a affirmé que cela ne la dérangeait pas, mais qu'elle pensait que cela pourrait contrarier d'autres personnes car « un survêtement ne va pas à tout le monde ». Aux yeux de Klaus, ces observations étaient indéliques et perturbantes.

5. Lors d'une réunion du personnel, Ursula a déclaré que l'utilisation de l'ascenseur par les employés qui n'allaient qu'au premier étage était improductive et renvoyait une image négative pour les usagers de la salle de sport. Elle a donné l'ordre que les employés qui n'allaient qu'au premier étage prennent l'escalier, sauf s'ils transportaient un objet lourd. Un après-midi, elle a vu Klaus qui traversait la zone d'accueil pour aller attendre l'ascenseur. Elle l'a interpellé pour lui rappeler qu'il devait utiliser l'escalier s'il montait seulement un étage et plusieurs clients ont pu l'entendre. Klaus a pris l'escalier à contrecœur. Plus tard dans la journée, il s'est plaint à Ursula, affirmant qu'il n'était pas raisonnable d'exiger qu'il prenne l'escalier à chaque fois et qu'une exception devrait être tolérée pour lui. Ursula ne l'a pas accepté et elle a averti que si elle voyait à nouveau Klaus utiliser l'ascenseur, une sanction disciplinaire lui serait imposée.

6. Quelques semaines plus tard, à la fin d'un après-midi chaud, Ursula a repéré Klaus qui sortait de l'ascenseur au premier étage, en portant un paquet de six bouteilles d'eau de 33 cl. Elle l'a immédiatement convoqué dans son bureau. Klaus lui a expliqué qu'il ne pensait pas avoir enfreint la règle sur l'utilisation de l'ascenseur puisqu'il portait un objet lourd. Il lui a également fait remarquer que sa collègue Karin avait le droit de prendre l'ascenseur quand elle portait des bouteilles d'eau. Ursula n'a pas été convaincue et n'a pas reconnu que les bouteilles d'eau étaient lourdes. Elle a dit à Klaus qu'un « vrai homme » arrêterait de se plaindre et de ronchonner et se remettrait en forme. Elle l'a averti que si elle le voyait encore utiliser l'ascenseur en violation de la règle, il serait licencié.

7. Klaus a contesté cet avertissement auprès de Philipp, le directeur régional. Dans son recours, il a affirmé que d'après lui, Ursula l'avait discriminé en raison de son poids et il s'agissait d'une discrimination fondée sur le handicap. Son recours a été rejeté.

8. Quelques mois plus tard, un plan de restructuration a été adopté. Ursula a annoncé que la salle de sport n'enregistrait pas d'assez bons résultats et que certaines personnes devaient être licenciées pour faire des économies. La salle de sport emploie à la fois des instructeurs de fitness et des collaborateurs administratifs. Ursula a décidé que les instructeurs de fitness devaient rester, mais qu'elle pouvait économiser sur l'administration.

9. Klaus a été l'un des trois collaborateurs désignés par Magda, la directrice administrative, pour être licenciés. En même temps, la salle de sport avait un poste vacant pour un instructeur de fitness stagiaire, qui a été proposé en premier lieu aux trois collaborateurs administratifs licenciés. Tous trois ont postulé. Ursula faisait partie du panel de sélection. Klaus n'a pas été retenu et, lorsqu'il a demandé pourquoi, il lui a été répondu que son image ne correspondait pas à l'emploi et qu'il

n'était pas non plus certain qu'il possédait les aptitudes physiques requises. La personne choisie avait 27 ans et était mince, mais elle fumait beaucoup.

10. Un poste de responsable était également vacant au restaurant de la salle de sport. Klaus avait une expérience dans la restauration et il a été la seule personne à introduire sa candidature pour ce poste. Ursula était également responsable de la désignation pour cette fonction et elle a refusé de nommer Klaus. Elle n'a pas révélé sa motivation et Klaus soupçonne qu'elle est inquiète à cause de sa séropositivité, qu'il avait signalée initialement quand il a été engagé pour son emploi administratif.

Questions

1. Pensez-vous que Klaus est une personne handicapée ? Si oui, quelle est la déficience qui provoque son handicap ?

Pour les questions suivantes, il doit être considéré que Klaus répond à la définition d'une personne handicapée.

2. En appliquant les règles appropriées sur la charge de la preuve, évaluez les chances que les allégations suivantes de Klaus soient admises.

2.1 Discrimination directe fondée sur le handicap, fondée sur l'orientation sexuelle et fondée sur le sexe

2.2 Harcèlement lié au handicap

2.3 Manquement à l'obligation d'aménagements raisonnables

2.4 Discrimination indirecte fondée sur le handicap

2.5 Rétorsion

Si les faits suivants sont également établis, vos conclusions, y compris sur l'existence d'un handicap, sont-elles modifiées ?

1. Bien qu'il ne l'ait pas mentionné lorsqu'il a été interrogé pour le poste d'entraîneur de fitness stagiaire, Klaus est un nageur assidu et il nage un kilomètre tous les jours avant d'aller travailler.

2. Vous déterminez que Magda n'a pas été honnête lorsqu'elle a dit, au tribunal, qu'elle a choisi seule les collaborateurs administratifs qui devaient être licenciés et qu'Ursula n'est absolument pas intervenue dans cette décision.

3. SFS produit des preuves démontrant que si les employés administratifs prenaient l'ascenseur à chaque fois qu'ils devaient se rendre à l'étage, ils passeraient en moyenne 30 minutes par jour à l'attendre.

Case Study

Introduction

You have just finished hearing a case of discrimination brought by Klaus. The case was against his former employer Sadistisch Fitness-Studios GmbH (SFS) which owned the gymnasium in Trier where he worked until he was dismissed.

Klaus gave evidence at the hearing as did Philipp the regional manager, and Klaus's immediate line manager Magda, the head of administration at the gymnasium. Ursula, the manager of the gymnasium at the relevant time did not attend the hearing. By the time the case came to court, she had left the employment of SFS to work as the private fitness coach for a billionaire based in Bermuda.

The following facts have been established.

- 1 Ursula is a former professional athlete and remains very fit. Klaus was employed in administration.
2. The gymnasium has a modern open plan reception area. Klaus's office was on the first floor and to reach it from the main administration office on the ground floor he had to cross reception and go up an open flight of stairs. Klaus regularly had to go between the two offices several times a day and when he did so it was in full view of the customers of the gymnasium who were arriving and leaving. The alternative to the open plan stairs was to take the lift.
3. Klaus is HIV positive and is significantly overweight although not clinically obese. He told the Court that he found using the stairs, particularly if he had to do so several times in a short space of time, very tiring and he sometimes got out of breath. This was made even worse if he had to carry anything of any weight, such as paper files or packets of bottled water. For this reason, he almost always used the lift, even though it was often slower than taking the stairs due to the fact that was the only lift and it served several floors.
4. SFS was concerned about the financial performance of this particular gymnasium, which is in competition with two others in Trier. When she was appointed, Ursula set about improving the image of the gymnasium. She directed that all staff, even those working in reception and in administration must wear SFS tracksuits at work. Klaus hated this. He thought he looked ridiculous in a track suit because of his weight. His colleagues, who had never mentioned it before, now started making comments about his clothing. The comments were, prima facie, sympathetic. For instance, he was encouraged to take off the tracksuit top when he was in the main administration office, out of sight to gymnasium users, because he must "find it very hot". He was also asked by the person in charge of ordering tracksuits for the staff whether she should look for a larger size because the one she had ordered for him "looks a bit uncomfortable". On another occasion, in his hearing, two of his younger colleagues discussed the requirement to wear tracksuits and one of them said that she did not mind but that she thought that other people

might mind because “tracksuits do not look good on everybody”. Klaus found these comments insensitive and upsetting.

5. At a staff meeting, Ursula announced that the use of the lift by staff only going as far as the first floor was inefficient and presented a bad image for the gymnasium users. She directed that all staff only going to the first floor must use the stairs, unless they were carrying anything heavy. One afternoon, she saw Klaus walk across reception and stand waiting for the lift. She called across to him, in the hearing of several customers, to remind him that she expected him to take the stairs if he was only going up one floor. Reluctantly Klaus took the stairs. Later that day he complained to Ursula that it was unreasonable to require him to use the stairs every time and that an exception should be made for him. Ursula did not agree and said that if she saw Klaus using the lift again he would be disciplined.

6. A few weeks later, at the end of a long hot afternoon, Ursula spotted Klaus, carrying a packet of six 33cl bottles of mineral water, coming out of the lift on the first floor. She immediately called him in to her office. Klaus explained that he thought that he was not breaking the rule about using the lift because he was carrying a heavy object. He also pointed out that his colleague, Karin, was permitted to use the lift when she was carrying water bottles. Ursula was not impressed. She did not agree that the water bottles were heavy. She told Klaus that a “real man” would stop complaining and sulking and get fit. She warned Klaus that if she saw him using the lift again, against the rule, he would be dismissed.

7. Klaus appealed this warning to the Regional Manager Philipp. In his appeal he said that he believed that Ursula had discriminated against him because of his weight and that he believed that that was discrimination because of disability. His appeal was dismissed.

8. A few months later, there was a redundancy exercise. Ursula announced that the gymnasium was not performing well enough and that to save money some staff would have to be dismissed. The gymnasium employs fitness instructors, as well as administration staff. She decided that the fitness instructors must remain but that she could make savings in administration.

9. Klaus was one of three administration staff selected for redundancy by Magda the head of administration. At the time of his selection, the gymnasium had a vacancy for a trainee fitness instructor, which was first offered to the three redundant administration staff. All three applied. Ursula was on the selection panel. Klaus was not selected. When he asked why, he was told that his image was wrong for the job and also that it was not clear that he had the necessary levels of personal fitness. The person selected was 27 and, although slim, is a heavy smoker.

10. There was also a vacancy for a manager for the restaurant in the gymnasium. Klaus has previous experience in catering and applied for the vacancy. He was the only person to do so. Ursula was also responsible for appointing to this post. She refused to appoint Klaus. She failed to give a reason and Klaus suspects that it is because she is concerned about his HIV positive status, which he had declared when first appointed to his administrative post.

Questions

1. Do you think that Klaus is a person with a disability? If so, what is the impairment that results in his disability?

For the remaining questions, assume that Klaus meets the definition of disability.

2. Applying the appropriate burden of proof, assess the chances of any of Klaus's following claims succeeding.

2.1 Direct Discrimination because of disability, because of sexual orientation and because of sex.

2.2 Harassment related to disability

2.3 Breach of the duty to make a reasonable accommodation

2.4 Indirect Discrimination because of disability

2.5 Victimization

Does your approach change to any of your findings, including your decision on disability, if the following facts are also established?

1. Klaus is a very keen swimmer and swims a kilometer every day before work although he did not mention that when he was interviewed for the trainee fitness coach job.

2. You conclude that Magda was not being truthful when she said in court that the selection decision for the redundant administration staff was made by her alone and that Ursula was not involved at all.

3. SFS produces evidence that if administrative staff used the lift every time they needed to go upstairs they would, on average spend 30 minutes a day waiting for it to come.

Philip Rostant