418DV82

Speakers' contributions

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES
Criminal and administrative context

SEMINAR FOR MEMBERS OF THE JUDICIARY

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Table of Contents

1. John Horan
    - **Article 13, A Practitioner's Perspective**
    - **Case study: Advancing the rights of persons with disabilities / *Estudio de caso: Promover los derechos de las personas con discapacidad***
    - **Equal members of the human family: Disabled people's right to a fair legal hearing**
    - **Court of Appeal in Northern Ireland case of *Galo v. Bombardier Aerospace UK*, 2 June 2016**

2. Matylda Pogorzelska

    The right to access to justice in the EU law

3. Aaron Greenberg

    Children with Disabilities' Access to justice / *Acceso a la justicia para los niños con discapacidad*

4. Pirkko Mahlamäki

    Women with disabilities – violence against women with disabilities

5. Maroš Matiaško
    - **Persons with disabilities and their right to equal recognition before the law**
    - **Detention of persons with disabilities and their treatment in detention**
    - **Case study: Supported decision-making / *Estudio de caso: Apoyo en la toma de decisions***

6. Inés Sánchez-Dopico and Xavier Orno

    The right to political participation of people with disabilities / *El derecho a la participación política de las personas con discapacidad*

7. Sara Iglesias Sánchez
    - **Effective participation of persons with disabilities in criminal proceedings / *La participación efectiva de las personas con discapacidad en el proceso penal***
    - **Case study: How to safeguard the rights of victims with disabilities in court proceedings / *Estudio de caso: ¿Cómo salvaguardar los derechos de las víctimas con discapacidad en los procedimientos judiciales?***

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CLOISTERS

Article 13

A Practitioner's Perspective

John Horan

Barrister

Article 13(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.

Problems

- What does Article 13 mean?
- How is it “squared” to current practice that Courts and Tribunals in EU countries currently use?
- How does the EU language help in real life problems which the Court has to deal with?

“Real Life Problems”

- Disabled People are just more likely to be:
  - Claimants in discrimination cases in the employment, education, goods and services and public functions.
  - Investigated in a Criminal case a Defendant or Victim.
  - Involved in a civil, family, employment or welfare benefit case,

UK's problems

- Brexit
- The Equal Treatment Bench Book
  - Chap 2, 3 (Physical Disability), 4 (Mental Disability) App B (Disability Glossary)
  - Theory vs Practice – stark contrast
  - Training – Article 13(2) vs what actually happens
  - Appellant Judge – "Wednesbury" unreasonableness

My disabled life

- Practitioner of Cloisters, UK
- Active disability rights campaigner
- ERA regular!

How is the UNCRPD to be read?

- Lawyer's question
- Interpretation of Statutes or Common Law
- Human Rights Activist views?
- EU Government views?
- Judge's views?

No!

- Purposive
  - Vienna Convention
  - preamble and purpose
  - Article 1
  - Preamble A, B, C, E, F, H, K, M, L, O, T and V

Article 1

- “The purpose of the present 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.”

Preamble

- F, K
- “Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.”

So ?

- Human, objective moral, realistic and effective
- Rackham and Galo said that this is right

International is EU law

- Article 218 of TFEU:
  - Provides a procedure whereby the EU and States can make International Law EU Law!
  - EU Law has primacy over domestic law in the domestic jurisdiction

Which means

- Direct effect where Treaty is “a clear and unconditional prohibition which is not a policy but a negative obligation”
  - UHCRPD?
- All domestic laws must be read compatibly with Community law regardless of whether or not they were enacted to give effect to Community obligations!

So…?

- Real issues:
  - Who decides? When?
  - What information must the decision-maker have? Medical Expert?
  - Who pays? Article 13(1)
  - What appeal? Article 5(2) Rights?
  - The Equal Treatment Bench Book

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CASE STUDY

1. A is a landlord and is pursuing B for arrears of rent and possession of a residential property which B has let from A.

2. B is representing herself and it is unclear from the papers what her grounds of defence are. In particular her Particulars of Claim document makes it clear that she has been absent from work but does not give a clear reason why and her witness statement is short and does not address the point. She is a litigant in person and appears to not have instructed a lawyer – the reasons why are not clear from the papers.

3. On reviewing the case more thoroughly you discover a medical report from a psychiatrist who says that she has a long history of clinical depression with occasional psychotic episodes. This is disputed from what you see, by A.

4. When the trial is called on, it is clear that A is keen to proceed with the matter. B is monosyllabic and, as far as you can see, answers *"yes"* to the question *"do you want to proceed with this case now?"* but it is unclear whether that is with the full ramifications of this in mind.

5. As the hearing progresses A, through their lawyer, makes the application that, in his view, she does not have the mental faculties necessary to conduct proceedings herself. He asks that the proceedings be adjourned and that the costs thrown away be borne by B.

6. Discuss:

    6.1. At what stage ought the issue of UNCRPD Article 13 rights be raised by the Court?

    6.2. What about the Claimant should have told the Court that potential reasonable adjustments should have been made in the Court procedures?

    6.3. What reasonable adjustments should have been made?

    6.4. Do you think that an expert's report should be required? If so, from whom?

    6.5. What do you make of A's application? What about his applications that B should pick-up the costs?

6.6. Who should pay for the proceedings up until now? Who should pay for the expert's report? Who should pay for the balance of the proceedings?

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Cloisters

CASO DE ESTUDIO

1. A es un arrendador y reclama a B los pagos atrasados del alquiler de una propiedad residencial que B ha alquilado a A.

2. B se representa a sí misma y no queda claro en la documentación cuáles son sus argumentos de defensa. En concreto, los datos del documento de demanda dejan claro que ha estado ausente del trabajo pero no da un motivo claro al respecto y su declaración es corta y no toca este punto. Ella se representa a sí misma y parece que no ha contratado a un abogado, los motivos de esto no quedan claros en la documentación.

3. Al revisar el caso más a fondo descubre un informe médico de un psiquiatra que dice que tiene un largo historial de depresión clínica con episodios psicóticos ocasionales. Por lo que ves, A niega esto.

4. Cuando se celebra el juicio, está claro que A tiene muchas ganas de continuar con el asunto. B es monosilábica y, por lo que ves, contesta «sí» a la pregunta «¿quiere seguir adelante con este caso ahora?» pero no está claro si es teniendo en cuenta todas las repercusiones en mente.

5. A medida que avanza la vista A, mediante su abogado, alega que, a su juicio, B no tiene las facultades mentales necesarias para encargarse del procedimiento por sí misma. Pide que se suspenda el procedimiento y que se le impongan las costas a B.

6. Discusión:

    6.1. ¿En qué momento debería el tribunal haber sacado a colación el tema de los derechos establecidos por la convención UNCRPD en su artículo 13?

    6.2. ¿Debería el demandante haber comunicado al Juzgado que se deberían haber realizado posibles ajustes razonables en el procedimiento?

    6.3. ¿Qué ajustes razonables se deberían haber realizado?

    6.4. ¿Crees que hace falta el informe de un experto? En caso afirmativo, ¿de quién?

6.5. ¿Qué piensas de la petición de A? ¿Y sobre su solicitud de que las costas corran por parte de B?

6.6. ¿Quién debería pagar por el procedimiento hasta la fecha? ¿Quién debe pagar el informe del experto? ¿Quién debe pagar el saldo restante del procedimiento?

John Horan

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Equal members of the human family: Disabled people's right to a fair legal hearing

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Abstract

UK barrister John Horan, who was disabled as the result of a stroke, uses the example of his own case to argue that discrimination on the grounds of disability in courts, tribunals and regulatory panels will only be stopped if judges and their peers take a realistic approach based on morality and humanity. He supports his argument with references to the United Nations Convention on the Rights of Persons with Disabilities, the Equal Treatment Bench Book developed by the Judiciary of the UK and other sources. This is his personal view.

1. I have a secret double life, about which I am not ashamed to speak. I am a practising barrister from the England and Wales Bar, with a speciality in domestic and international discrimination law. I have lectured and written articles on these subjects for many years. But every Saturday morning, I leave my wig and gown at the door, cycle from my flat and take up the reins as a volunteer at Oxfam's charity bookshop in Kentish Town, where I live in London.
2. I first started 11 years ago and the benefits are legion: I believe in the work that Oxfam does, it's lovely to see my Kentish Town community talking intellectually to one another; but also it serves me well because I love second-hand books.
3. A couple of years ago I was unpacking a new box of donated books – gold dust for us at Oxfam – and my eyes were drawn to a copy of Paula Giddings' 1985 book *When and Where I Enter: The Impact of Black Women on Race and Sex in America*. It was an early edition, and Giddings' recollections about individual women as active participants in changing racist practices, and their attitude to the sufferings of black women, was very moving. But I was struck most by the point that Giddings made in the first preface of the book: that in order for her to write as she did, as a historian at a well-known American university, it was necessary to try to be both objective and subjective, otherwise American black women's story would never be told. In law, as in history, there is both the objective and the subjective story. Objectively, there are things that we all agree form part of the lawyer's discourse and the judge's opinions. Subjectively, there is a point where an individual tells their story and – almost more importantly than that – describes the deep impact that those events have had on them. It struck me that disabled people's stories, subjective, were an important part of the stories that we tell, and the law that forms a part of the world in which we life. Disabled people need to have their stories heard if society is to take their needs and duties justly into account.

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4. On the day before the new Millennium I had a stroke and it changed my life. I was mixing a gin and tonic for my cousin, Jessica. I brought her drink over to her, settled down on a comfy chair and then reached out for my drink – but I didn't. I then cried out

"What the hell?!" – but I didn't. I was paralysed down my right-hand side so completely that I couldn't stand up or form a sentence. I couldn't even swallow.

5. Many people, myself included, thought that such a severe stroke was the end of my life, and certainly thought I could never practise law again. The earliest days, and what happened to me, are perhaps subjects for another essay, but by 2002 I was back at my chambers in Cloisters, London, practising law as a barrister with a new zeal. I believed in justice in the law courts for all discriminated people. It had been like the ripples that spread from a pebble dropped in water: first it was other people with my particular disability; then it was all disabled people; and then it was all discriminated people, no matter what the cause of the discrimination. I believed that I could make a difference for claimants in the courts and tribunals that existed in the UK to uphold their rights.
6. Turn forward the clock some two or three years and I was pursuing a case for a client in the Court of Appeal – for free – that was based on her gender. We won her case, albeit on a new point of law that stemmed from comments that the three Court of Appeal Judges made about the powers of the Employment Appeal Tribunal. While listening to my argument, which the judges rejected, I was stopped 33 times in mid-sentence by a judge's intervention in the half hour that those submissions took. I know this because I have seen the transcript that was taken at the time, and that is the number of sentences that were stopped by the judge before I actually said anything meaningful. When I sat down at the end I was shaking.
7. The Court of Appeal judges allowed my client's appeal, and did not question with me my conduct of the case, either in open court or outside. However, unbeknown to me, the lead judge approached my Head of Chambers and asked him to pursue a complaint with the Bar Standards Board on the basis that my advocacy had not advanced my client's case one jot. My Head of Chambers, quite rightly, refused. So the lead judge complained on behalf of the Court of Appeal to the English Bar Standards Board himself.
8. I first heard about the complaint six months after the hearing, about a month before the Board met to examine it for the first time. When it got to the final hearing able counsel[1] pointed out that, in fact:
   8.1. as a disabled advocate my performance had been perfectly adequate;
   8.2. no reasonable adjustments had even been considered by the Court of Appeal judges; and,
   8.3. even if it were right that my performance had been under par on the day, a "normal" able-bodied advocate would have to be guilty of more than a single performance in what was then a 13-year stint at the Bar.

9. The Bar Standards Board at first ignored these points, and banned me from appearing in the High Court, the Court of Appeal, Privy Council and Supreme Court. The Board also stipulated that before every case that I might undertake in lower courts, I had to write to my client and the judge in the court, informing them of my disability and my recent medical history. It was not a complete block on my career but affected it profoundly and I still feel the machinations of it. I felt profoundly humiliated – here was I only trying to do some good and this was the treatment that this Court of Appeal judge and this Bar Standards Board gave me. How would you like it?
10. I appealed this decision. It took 14 months. A matter of days before the hearing, and having sought senior counsel's advice, the Appeal Panel quashed entirely the lower panel's verdict and any sanction against me. This may have been due to the opinion of

[1] Karon Monaghan QC of Matrix Chambers and Alison Foster QC of 39 Essex Street.

Antony White QC[2] that if they did anything else they would be as guilty of discrimination due to my disability as the lower panel had been. The Appeal Panel decision quashed the Bar Standards Board ruling without hearing from me.

11. Remarkably, despite this extraordinary decision, the Bar Standards Board refused in correspondence to accept that they had behaved in any way that was inappropriate towards me – and certainly not a way that was discriminatory. Although I had won the case, it remained for me to pursue the Bar Standards Board in the Employment Tribunal. They litigated against me with some force – bombarding me, through their solicitors, with likely areas of cross-examination being prepared for me by a QC (who was head of his chambers) about largely irrelevant points. Eventually, we were a month away from a seven-day Employment Tribunal hearing when they settled for a payment to me of £5,000 and a formal admission from them that they had discriminated against me. The whole process had taken four and a half years. I was exhausted as only a litigant can be exhausted.
12. The Bar Standard Board, despite the terms of the settlement, did not apologise to me and have not to this day. It is scarcely surprising that it burns just as it did when the settlement was reached all those years ago. My estimation of the Bar Standard Board as an organisation has diminished. It seems to me that they should have at least recognised that the decision which they made and then maintained for all those years – and was, as they eventually admitted, discriminatory – was also morally wrong. In fact, during my Employment Tribunal case the Bar Standard Board introduced mandatory training in equal opportunities for their Board members – and although they have never admitted it, I think I have the right to say that it was probably because of my case. I can never know because they have never admitted that they were wrong, and that they were wrong on a point of morality.

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13. Why do I tell this story? Why is the discrimination that happened to me so important? Clearly it means something to me: I have the compulsion to tell the story. I have the urge to be a witness.
14. Telling the story about discrimination is a compulsion for most disabled people. I recall how the website for stroke survivors "Different Strokes"[3] used to have a page where it invited stroke survivors to tell their story. They did this in their thousands. It was almost as if they felt compelled to do so.
15. But it is more than just a compulsion to tell their story: it is the desire to have the society in which we live be quiet for a time, and then, when the disabled person has told their story, to seek justice. I believe in this profoundly: it is why I continue to practise at the Bar of England and Wales.

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16. There is a view among able-bodied lawyers that, no matter the morality of the situation when a disabled person tells his or her story, in terms of law, the courts must be "impartial". In particular, courts must be impartial in deciding the proper interpretation of a word or phrase of a particular statute, rule book, or case. The court will give no weight to the fact that, in the particular case, the action is brought by a disabled person. The majority of lawyers say that the fact that a person is disabled has no relevance at all to the way in which the European or domestic court goes about interpreting anything.

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[2] Of Matrix Chambers.
[3] www.differentstrokes.co.uk.

17. Of course, in a sense that is right – it makes no difference that it is a case brought by a disabled person or which the disabled person defends. The disabled person's point of view is irrelevant. What matters is the court's view.
18. But lawyers, when talking among themselves, have a rather different question, which yields surprising results: how is an individual phrase, whether it be a phrase from a convention, a statute or a rule book, to be interpreted? In England, the way this was done was, broadly speaking, of looking up the common meaning of the phrase, and that was an end of it. But in Europe. the system was different: under Article 31 of the Vienna Convention, the European or international court must look to the purpose of the individual convention, and that purpose can be found by looking at any article which has the word "purpose" in the title and, critically, the preamble. It is not right to say that the purpose is whatever suits the individual lawyer running the individual case.
19. Of course the purpose of the UN Convention on the Rights of Persons with Disabilities 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 (Article 1 of the Convention). But – and it is an important but – certain guidelines are also indicated by the preamble.
20. *"a. Recalling the principles proclaimed by the Charter of the United Nations which recognised the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world."*[4]
21. Surely there can be no doubt that such a statement in the preamble means that the articles which follow must be interpreted with humanity and morality. Certainly the President of the English Employment Appeal Tribunal in *Rackham*[5] thought it so.
    "f. Recognising the importance of the principles and policy guidance contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules of the Equalisation of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and other actions at the national, regional and international levels to further equalise opportunities for disabled persons with disabilities;
    …k. Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world: …"
22. Taken together these two recitals are surprising and thought-provoking. The people who had responsibility for drafting this preamble clearly thought that there was a problem with the UN's involvement in at least two instruments that had "served" the rights of disabled people beforehand – the fact that disabled people continued to face barriers all over the world in their participation as equal members of their society, and what is more, violations of their human rights. That the UN itself, in such a formal document read by lawyers around the world, drew the reader's mind to its concerns, speaks to the UN placing itself morally in a conceptual space that acknowledges past moral failures. It is true that the UN does not take part of the "blame" – but, that said, it goes a long way down that road, even for the preamble to a Convention. I assert that this means that part of the purpose of the UNCRPD is to be realistic about whether or not a particular rule will in fact help disabled people fully and equally enjoy all human rights and fundamental freedoms, as their able-bodied peers do. Again the President of the EAT in *Rackham* agreed.

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[4] Preface of the UN Convention on the Rights of Persons with Disabilities (30 March 2007), hereinafter "UNCRPD".
[5] *Rackham v. NHS Professionals Limited* UKEAT/0110/15.

23. This agreement looks like the solution to a lawyer's argument and not much more until you realise two things:
    23.1. If it is how the purpose of the Convention is to be decided and therefore the meaning of the Convention is to be determined with that in mind, then it is also the purpose of the domestic legislation as well. And not just the domestic legislation – all rules, regulations and guidance is to be interpreted with the purpose of the Convention in mind. It applies to every statute, statutory instrument, case, regulation, rule and guidance which in any way has the effect of helping disabled people enjoy their fundamental freedoms.
    23.2. It is fundamentally moral and human and realistic, in the sense that disabled people use these terms when they try and assert their rights. In disability discrimination, what wins ultimately is morality, not law.

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24. Under Article 13(1) of the UNCRPD
    "State parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including 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".
25. In *Rackham*, and again in the Northern Ireland Court of Appeal case of *Galo*[6], the courts linked the protection of disabled rights under Article 13 UNCRPD and the UK-drafted Equal Treatment Bench Book. They did so with the help, in part, of submissions like these above by the claimants in both cases. The President of the EAT in the jurisdiction of England and Wales found that, in fact, Mr Rackham had been afforded an appropriate consideration of those rights: the case is up for appeal to the England and Wales Court of Appeal sometime this year.
26. However, in *Galo*, the three-man Court of Appeal panel, on learning, in part, that there had been no *ground rules* hearing at the beginning of the case – which the Equal Treatment Bench Book suggests is at the least good practice – determined that Mr Galo (who has Asperger's syndrome) did not benefit from a fair procedural hearing at his various preliminary hearings or final hearing, and therefore allowed the appeal.
27. But they also took time to comment on the state of the law and, more importantly, the state of the judges and legal practitioners that they saw around them in Northern Ireland, whatever their field of practice: criminal, civil, family, employment or other.
28. They said:
    "59. The duty is cast on the tribunal to make its own decisions in these matters. There were clear indiciae of observed agitation and frustration on the part of the appellant. These should have put the tribunal on notice of the need to investigate the precise nature and diagnosis of his condition. That said, this case highlights perhaps the need for there to be better training of both judiciary and the legal profession in the needs of the disabled".
29. Later on they said:
    "61. ..we find it a matter of great concern that no reference appears to have been made to the Equal Treatment Bench Book by the (Court)… That is an unsatisfactory state of affairs. We have formed the clear impression that the Equal Treatment Bench Book does not appear to be part of the culture of these hearings. That is a circumstance which must fundamentally change with a structural correction to ensure that this situation does not recur. Had there been proper cognisance of the contents of the Equal

[6] *Galo v. Bombardier Aerospace UK* GLI9979.

Treatment Bench Book, we are satisfied that a different approach would have been adopted to this case."

30. This – given the context of it being a judgment given by the Court of Appeal – is very strong stuff indeed. What it says, I think, is that there is a fundamental link between taking seriously a disabled person's disability and the judge making reasonable adjustments of the court process early on – with compassion for the disabled person and based upon evidence. That is the moral thing to do.
31. Already there has been widespread acceptance in Northern Ireland among practitioners and judges that there needs to be a change in the courts' procedure and the judges' attitudes. What transpires will be of great interest to myself, and also to Mike Potter, a friend and fellow member of Cloisters, who is the barrister responsible for *Galo*. But I will allow myself three comments here:
    31.1. In terms of the procedure both of the individual case in readying itself for a full trial, and the procedure to allow legal practitioners and judges access to training in the needs of the disabled people who form part of the society in which they work, the procedural changes seem comparatively easy. It may be that we are living in a time in which we have to face some cutbacks, due to what is argued to be an austere economic climate – but these are fundamental human rights, and they must be respected or the UK will fail to recognise the inherent dignity and worth, much less the equal rights, of the disabled community that forms part of the human family. This is not my view: it is the view of the drafting team of the Convention on the Rights of People with Disabilities.
    31.2. It may be that judges as a whole worry about changing the rules of engagement so that disabled people can be recognised as an equal part of this human family not due to any legal reason but out of discomfort. It is important that judges have the respect of all in the human family. This is true whether they are specialists in criminal, civil, employment or family law. From my experience with the Bar Standards Board it is not enough simply to change the rules and to ignore judges' roles in past cases. It may be that the new procedure is really great but then the people affected in the past by the old rule, in this case disabled people, need to know why this change has been brought about. The adoption by the judiciary of the new procedure must be explain the disabled people as the human and moral thing to do. It is perhaps not what a fly-by-night businessman would do but judges are more than that. They have morality and humanity as two of their highest goals. To admit that – looked at as a whole – judges were wrong, is paradoxically to assert this humanity and morality.
    31.3. After all, judges and legal practitioners must bear in mind that admitting they were at fault is not without precedent in this area. If you look back at paragraph k of the preamble to the UNCRPD you can see the UN doing exactly that. The point is not to make the best gloss on a judge's decisions of the past: the point is to make a better world of the future – and that a world that is free from discrimination.

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Judgment: approved by the Court for handing down | *Delivered:* **02/06/16**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE INDUSTRIAL TRIBUNAL DATED 12 DECEMBER 2014 AND RELATED DECISIONS

BETWEEN:

PATRICK GALO

Claimant/Appellant;

-and-

BOMBARDIER AEROSPACE UK

Respondent.

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal from the decision of an Industrial Tribunal ("IT") which dismissed the claim of the appellant (a Slovakian national) for:

- Unlawful racial discrimination.
- Unlawful disability discrimination.
- Victimisation.
- Harassment on grounds of his disability and race.
- Detriment.
- Unfair dismissal.

[2] It is common case that the appellant suffers from a disability, namely Asperger's Syndrome ("AS").

[3] This appeal raises the question of the fairness of hearings relating to a person with such a disability. In light of the findings later set out in this judgment, it has been unnecessary for us to make a substantive ruling on the claims themselves other than the procedural fairness of the hearing.

The grounds of appeal

[4] The appeal before this court may only proceed on a point of law.

[5] In essence the case made out on behalf of the appellant was that he was not accorded a fair hearing of his claim because the Tribunal failed to take properly into account his disability and his medical evidence, in circumstances where he was not represented from August 2014 onwards and in particular at the Tribunal hearing.

[6] In particular, the appellant submitted that a range of Tribunal acts and omissions were tainted with unlawfulness including:

- Failure to make reasonable adjustments for his disability.
- Unreasonably failing to adjourn the case on a number of occasions.
- Placing unfair and oppressive demands on the appellant in relation to the hearing and in the course of the hearing week.
- Striking out all claims except his unfair dismissal claim.
- Proceeding to hear his unfair dismissal claim in his absence and in the face of medical evidence supportive of an adjournment.
- Dismissing his unfair dismissal claim.

Representation

[7] Mr Potter appeared on behalf of the appellant. Mr Wolfe QC appeared on behalf of the respondent. We are grateful to both counsel for the industry they had clearly invested in the preparation of this case and for their skilful skeleton arguments and oral submissions. In particular, we commend counsel for the array of authorities, commentaries, directives and legislation put before us. We also thank the Employment Lawyers Group for providing this appellant with *pro bono* representation in these exceptional circumstances.

Factual background

[8] The appellant was employed by Bombardier Aerospace UK ("the respondent") as a composite operator from 29 October 2007 until his employment was terminated on foot of allegations of gross misconduct, which allegedly occurred on 8 and 21 March 2013. On the former date he is alleged to have thrown an item of work equipment behind him. In the latter incident he is alleged to have attended with the occupational health doctor, Dr Jenkinson, and during his examination shouted "shit" into the face of the doctor and repeatedly shouted at him "you had better be clear".

[9] These incidents led to the appellant being suspended on full pay from March 2013. On 17 April 2013 he lodged proceedings in the IT complaining of victimisation as well as disability/race/religious belief and political opinion discrimination. The latter two allegations were subsequently withdrawn.

[10] On 23 April 2013 he lodged a further complaint with the IT on the grounds that he had been unfairly dismissed and that his treatment constituted victimisation, disability discrimination, harassment and detriment.

[11] On 30 June 2014 the Tribunal consolidated these two cases.

[12] So far as the internal processing of his case by the respondent was developed, the appellant had lodged a grievance with the respondent on 12 April 2013 alleging victimisation and discrimination. This was investigated by the respondent and found to be without foundation. On 23 January 2014 at a disciplinary hearing the respondent determined that the appellant's behaviour had constituted gross misconduct and his employment was terminated. An appeal was convened on 19 August 2014, adjourned, reconvened on 11 September 2014 and on 15 September 2014 his dismissal was affirmed.

[13] It is of substantial significance for the purposes of this case to observe that the respondent had secured a report on the appellant from a clinical psychologist, Dr Wendy Lusty. She had assessed the appellant on 22 August 2013 and 3 September 2013 and proceeded to provide a report dated 12 September 2013.

[14] In the course of that report Dr Lusty referred to a psychology report dated 10 April 2013 provided by Joanne Douglas, Chartered Educational Psychologist. Ms Douglas had opined that the appellant met the diagnostic criteria for an Autistic Spectrum Disorder; sub-group Asperger's Syndrome.

[15] Dr Lusty noted that the appellant had a psychiatric history dating back to his teenage years and observed as follows --

- In interviewing the appellant she found that he was challenging for a number of reasons including great difficulty with open questions demanding that they be reframed as specific questions and responding in a similar way to questions that addressed issues of feelings.

- The appellant was easily irritated by questions he found difficult or deemed to be inappropriate. He often responded by pedantic questioning of the exact meanings of questions or instructions. These responses were frequently in an irritable and abrupt manner.

- He rarely made any eye contact.

- Although his knowledge of English was good, he did at times struggle to find the words he wanted.

- He interpreted verbalisation in literal terms.

- He described coping with situations where his expectations were not fulfilled as emotionally and physically exhausting. In such situations he feels very vulnerable and experiences marked anxiety, frustration and anger.

- His verbal reasoning abilities were in the low average range and above those of only 16% of his peers.

[16] Dr Lusty made a diagnosis of AS and added:

- It is likely that the periods of acute anxiety that he suffers may interfere with his capacity to concentrate and remember at times.

- He displays difficulty understanding and responding appropriately to verbal communication particularly where some flexibility and thinking is required such as responding to open questions or hypothetical scenarios. These impairments would have an effect on learning and understanding verbal material in everyday life, such as understanding figures of speech.

- He has significant difficulty in everyday life in dealing with minor challenges or changes.

- The way in which the appellant thinks, communicates and behaves socially is significantly different in nature to most people. He experiences very high levels of distress in everyday situations and as a result is highly avoidant.

Case Management Hearings ("CMH") before the Industrial Tribunal

[17] On 25 July 2013 a CMH was held when a date for the substantive hearing was fixed for 18 November 2013. This was subsequently altered to 27-31 January 2014.

[18] On 19 November 2013 a CMH was held where the respondent conceded that the appellant suffered from a disability. It seems to be the situation that no enquiry was made as to the precise nature of that disability notwithstanding that the respondent would have had the report of Dr Lusty at this stage.

[19] On 22 January 2014 a further CMH occurred where the appellant was represented by a solicitor. At this stage, there was nothing in his documentation before the IT which would have indicated medical issues leading to an understanding of the precise nature of his disability. No application was made by the solicitor for reasonable adjustment in light of his disability.

[20] On 30 June 2014, during a further CMH, the appellant was directed to provide a witness statement by 26 August 2014 as part of a planned process of sequential exchange. This instruction included a direction to produce a schedule of loss by 15 August 2014.

[21] It is not clear if anyone at this CMH was aware of the nature of his disability, and certainly those representing him did not make an application for any particular adjustments in order to ensure his effective participation in the process.

[22] On 9 September 2014 a CMH was convened to address the appellant's failure to provide witness statements. He was not present because he was due to attend a medical appointment. He did not seek a postponement of this hearing. Accordingly it proceeded in his absence. The Tribunal extended the time for his witness statement to 23 September 2014 but did so in terms of an "unless order" which warned him that his claim would be dismissed if he did not comply with the time limits. Subsequently it was agreed to further extend the time limit for delivery of the witness statement until 30 September 2014.

[23] It is to be noted that even by this stage no attempt appears to have been made to engage with or address his disability of AS.

[24] On 16 October 2014 a CMH was convened because the appellant was still in default of the requirement to provide a witness statement and the respondent now sought to have his complaint struck out for failure to comply with the "unless order".

[25] At this CMH the appellant produced a medical report from Dr Andrew Harper dated 15 October 2014 which recorded as follows:

> "The patient … is currently undergoing legal proceedings. He has struggled to comply with all of the courts requests. He tells me this is due to difficulty concentrating and completing tasks. He is under review with psychiatry for depression and post-traumatic stress related to the legal proceedings. We have not received any letters yet detailing the diagnosis."

[26] Inexplicably this report made no reference to his AS condition.

[27] The Tribunal refused the application by the respondent to strike out the proceedings and dispensed with the need to furnish written witness statements. It appeared to be conscious to some degree of the presence of a disability in that it referred to its desire to "alleviate any pressure on the applicant in this particular regard" but once again no reference was made to AS.

[28] Discovery issues were raised at this CMH and the parties were ordered to provide each other with documentation relevant to any issue in the matter not later than 23 October 2014.

[29] It has to be observed, however, that once again no specific reference appears to have been made to any adjustments in the process required to deal with his condition. It is highly questionable if anyone had really taken on board his learning difficulties. For example, in making the order to disclose documentation, it does not appear to have been explained to him that this could be done by obtaining a comparator in the workplace or perhaps even obtain the wage slips of one or two other people in order to establish his loss.

[30] The applicant applied to adjourn the substantive hearing but that was refused because the Tribunal found that it was not grounded on sufficient medical evidence. It determined that a postponement would adversely affect the respondent being able to assemble witnesses. The pending maternity leave of the respondent's solicitor was asserted as another reason why further delay would not be helpful. It was explained to the appellant that if he wished to advance a further claim for postponement it would need to be based on fresh medical evidence and that "any such medical opinion would be expected to inform the Tribunal as to when the Tribunal would be in a position to conduct his case".

[31] On 29 October 2014 the appellant wrote to the Tribunal seeking to overturn the decision to dispense with use of witness statements and to renew his application to adjourn.

[32] Having received the respondent's disclosure on 17 October 2014, on 5 November 2014 the appellant issued a request for further disclosure against the respondent. The respondent wrote to the Tribunal expressing concern at the fact that the appellant appeared to be continually ignoring directions and orders of the Tribunal. The Tribunal responded, indicating that these matters would be dealt with at the commencement of the full hearing on 10 November 2014.

[33] On 6 November 2014 the Tribunal replied to the appellant indicating that any application for a postponement would have to be based on "an up-to-date medical report giving details of his medical condition, each as of why he could not attend the Tribunal and an indication of when he would be fit to attend".

The IT Hearing

[34] On the first day of the hearing on 10 November 2014, the appellant again applied for an adjournment relying on Dr Harper's report of 15 October 2014 and a report of 24 October 2014 from Dr McHugh, consultant psychiatrist, which recorded:

> "This man was referred to the Primary Mental Health Team and seen at the Bradbury Health and Well-

> Being Centre on 2/10/14. He was assessed by myself and has subsequently been referred for assessment to the Cognitive Behavioural Therapy Team."

It is worthy of note that neither of these reports made any reference to AS.

[35] The Tribunal refused the application for the adjournment, indicating that the new report from Dr McHugh "did not add anything to the information before us", and adding "there was no information regarding the nature of the claimant's condition, how it affected his ability to appear before the Tribunal or when he might be fit to attend." The Tribunal invoked the authority of Teinaz v Wandsworth London Borough Council [2002] ICR 1471 as authority for the proposition that the Tribunal had to be satisfied on the medical evidence that the appellant was unable to be present on a genuine basis and the onus was on him to prove the need for such an adjournment.

[36] The Tribunal also observed that, judged by his presence before them and his ability to articulate arguments on his own behalf, it did not appear he was unable to present his case. We pause to observe that had the IT been in possession of Dr Lusty's report or obtained its own report on the appellant such a conclusion would have been unlikely.

[37] The Tribunal rejected an application by the respondent to strike out the appellant's claim, but did order that by 9.30 am on 12 November 2014 i.e. within 1.5 days, the appellant had to provide:

- Particulars relating to any new employment.
- His earnings from any such employment.
- Steps taken to mitigate his loss.
- Details of Social Security benefit he had received.

[38] It was noted that he had been in default of providing a properly formulated schedule of loss since 15 August 2014, and that discovery had been revisited on 16 October 2014.

[39] On 11 November 2014 the appellant made a further application for discovery. The Tribunal noted that he had failed to specify the material he was seeking on discovery or how any further discovery might be relevant to the issue.

[40] On this date the appellant informed the Tribunal he would be unable to:

- Commence the substantive hearing because of his medical condition.

- He required a visual aid i.e. he wished to submit a witness statement.

[41] After he had sought advice from the Labour Relations Authority, the Tribunal agreed to postpone the hearing until 13 November 2014 to afford him an opportunity to compose his thoughts and formulate a witness statement.

[42] It is noted that yet again-even at this very late stage—no requirement for specific adjustments in the procedure for his case had been considered.

[43] On 13 November 2014, at the appointed time for the Tribunal to commence, the appellant failed to appear. Accordingly, the hearing commenced at 10.15 am. He had not provided the information about his earnings etc. The Tribunal, upon application by the respondent, struck out all of his complaints except for the claim of unfair dismissal which we assume they determined to hear because the onus was on the respondent to establish reasonable grounds.

[44] The reasons why the Tribunal decided to proceed in his absence were:

- The delay already encountered.

- The medical evidence showed that he was not medically fit to attend for the foreseeable future (although this must have been a subsequent conclusion as such evidence was not yet before the IT when the decision was taken) and therefore any adjournment was open ended.

- The respondent had two witnesses who were leaving the company and it would be difficult to bring them to court at a later hearing.

- The maternity leave needs of the respondent's solicitor.

[45] At 10.57 am the appellant sent a further e-mail with a new medical from Dr Martin at the University Health Centre which recorded:

> "I believe you are looking a reasonable timeframe at which Patrik would be deemed medically fit to attend the Tribunal. I see Dr McHugh and Dr Harper have already submitted letters. Further to their letters, Patrik is awaiting referral for further assessment and treatment and at present (having met with Patrik on several occasions) I do not feel that he is medically fit to attend a Tribunal for the foreseeable future. He may need specialist medical assessment organised by the Tribunal to ensure that he is medically fit to attend. I hope this is of help, but may I suggest that you contact Dr McHugh who has already submitted a letter to yourselves for further assessment."

[46] At 2.50 pm the appellant attended and handed in a further copy of Dr Martin's report together with written submissions for further grounds for postponement. By this time the Tribunal had already sat and completed its hearing. His outstanding claim was subsequently dismissed.

Principles governing this matter

[47] We are satisfied at the outset that the issues in this case are governed by the obligation of every tribunal and court to act fairly. This principle of fairness was most recently and authoritatively dealt with in R (Osborn) v Parole Board and Others [2014] AC 1115.

[48] This was a case concerning the rights of prisoners to have an oral hearing before the Parole Board but the judgment has much wider application in the context of fairness as a whole.

[49] Lord Reed's careful analysis of the common law duty of fairness and of the relationship between the ECtHR and English Law set out between paragraphs [54]-[63] contains important elements for guidance in the instant case and can be distilled as follow:

- The protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system. Where domestic law fails to reflect fully the requirements of the Convention, it is open to Parliament to legislate in order to fulfil the United Kingdom's international obligations and the courts have also taken account of those obligations in the development of the common law and the interpretation of legislation.

- The importance of the continuing development of the common law, in areas falling within the scope of the Convention guarantees, continues unabated. Whilst the courts endeavour to apply and, if need be, develop the common law, and interpret and apply statutory provisions so as to arrive at a result which is in compliance with UK international obligations, the starting point is our own legal principles rather than the judgments of the international court.

[50] Later in that judgment, Lord Reed adumbrated certain other principles which are equally relevant to this case, namely:

- In considering whether a fair procedure has been followed by a decision-making body (*such as the Tribunal in this case*), the function of the court on appeal is not merely to review the reasonableness of the decision-maker's judgement of what fairness requires. The court must determine for itself whether a fair procedure was followed.

- The purpose of procedural fairness is to ensure there will be better decisions as a result of the decision-maker receiving all relevant information and that such information is properly tested.

- Equally, it is also important to remove wherever possible feelings of resentment aroused if a party to proceedings is placed in a position where he finds it impossible to influence the result.

- Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which had governed their actions.

[51] We trust we do not do a disserve to the industry of counsel by commenting that the basic principle to be followed in a case of this genre is the common law duty of fairness fed no doubt by the increased emphasis on fairness arising out of:

- The Human Rights Act 1998 including Article 6 involving the right to a fair hearing and Article 14 placing a positive obligation on States to ensure there is a benefit from anti-discrimination.

- The European Union Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation with particular reference to Article 9(1).

- The UN Convention on the Rights of Persons with Disabilities which reads at Article 13:

> "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 accommodation, 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.
>
> 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 …."

- The Disability Discrimination Act 1995 and the application of the judicial acts exclusion.

- The European Union Charter on Fundamental Rights.

- The Equality Act 2010.

[52] For many years now the courts in Northern Ireland have recognised the particular need to ensure fairness in hearings where one or more parties suffers from a disability. As far back as 2006 in Re G and A (Care Order: Freeing Order: Parents with a Learning Disability) [2006] NI Fam. 8 paragraph [5], cited with approval in In The Matter of D (A Child) No. 3) [2016] EWFC 1, the court said at paragraph 5(2):

> "People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasises the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens and must be enabled to use mainstream services and be included in the life of the community as far as possible. The courts must reflect this and recognise their need for individual support and the necessity to remove barriers to inclusion that create disadvantage and discrimination. To that extent courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives. They must be supported in ways that take account of their individual needs and to help them to be as independent as possible."

[53] That theme has echoed through a number of the authorities cited to us including in particular CPS v Fraser (UKEAT/0021/13), R v Isleworth Crown Court ex parte King [2001] EWCA Admin 22 and Rackham v MHS Professional Ltd (UKEAT/0110/15 LA). From these authorities the following principles and guidelines can be discerned.

(1) It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.

(2) Courts needs to focus on the impact of a mental health disability in the conduct of litigation. Courts must recognise the fact that this may have influenced the claimant's ability to conduct proceedings in a rational manner.

(3) Courts and Tribunals can, and regularly do, have regard to general, non-binding guidance and practical advice of the kind given in the Equal Treatment Bench Book published by the Judicial College (Revised 2013) (hereinafter called "the ETBB") in considering how best

to accommodate disabled litigants in the court or tribunal process. It is clear, therefore, that courts and tribunals should pay particular attention to the ETBB when the question of disability, including mental disability, arises.

(4) The ETBB provides helpful information for judges about the problems experienced by such litigants in accessing the courts or tribunals or participating in proceedings. The authors point out that "this may lead to erroneous perceptions such as that the person is being awkward or untruthful and inconsistent. In fact the problem may come down to a difficulty in communication or understanding." The ETBB has regularly been revised and updated. It has a section dealing with mental disabilities describing the different ways in which mental disability may arise and manifest itself .It points out that adjustments to court or trial procedures may be required to accommodate the needs of persons with such disabilities. Memory, communication skills and the individual's response to perceived aggression may all be affected. Practical advice is given to particular situations when they arise. Decisions concerning case and hearing management "…. should address the particular needs of the individual concerned insofar as these are reasonable. The individual should be given an opportunity to express their needs. Expert evidence may be required." (paragraph [20]). It is recognised that if a litigant has a condition that is worsened by stress, the difficulties will almost certainly become greater if he/she is acting in person (paragraph [25]).

(5) The presence of a McKenzie Friend in civil or family proceedings or an independent mental health advocate in a Tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. A more tolerant approach to the use of a lay representative may assist.

(6) A modified approach may be necessary when seeking to obtain reliable evidence from a person with mental health problems especially those who are mentally frail. It is necessary to ascertain whether any communication difficulties are the result of mental impairment. Section 7 of the ETBB stresses the need for particular assistance to be given in relation to those with mental disabilities, specific learning difficulties and mental capacity issues .

(7) An early "ground rules hearing" is indicated in the ETBB at Chapter 5. Such a hearing would involve a preliminary consideration of the procedure that the tribunal or court will adopt, tailored to the particular circumstances of the litigant. Thus, for example, the Tribunal may consider:

- The approach to questioning of the claimant and to the method of cross-examination by him/her. Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.

- How questioning is to be controlled by the Tribunal.

- The manner, tenor, tone, language and duration of questioning appropriate to the witness's problems.

- Whether it is necessary for the Tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.

- The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and be advised as to the availability of pro bono assistance/McKenzie Friends/voluntary sector help.

- Recognition must be given to the possibility that those with learning disabilities need extra time, even if represented, to ensure that matters are carefully understood by them.

- Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.

- As happened in the Rackham case, consideration should be given to the need for respondent's counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed "reasonable adjustments".

- The Tribunal must keep the adjustments needed under review.

Conclusions

[54] We must determine for ourselves whether a fair procedure has been followed in this instance and ensure that we are not merely reviewing the reasonableness of the decision-maker's judgement of what fairness required.

[55] We have come to the conclusion that the requirements of procedural fairness were not met in this case. Our reasons for so doing are as follows.

[56] First, this was, and should have been recognised as such from the outset, a case involving a person under a disability of mental health. The respondent had accepted this position from an early stage, namely 2013. There was already in existence a fulsome report from Dr Lusty to this effect. As soon as this emerged, enquiries should have been made as to whether reasonable adjustments to the

process were necessary. In particular, an early "ground rules" case management discussion should have been convened to meet the specific challenges of this man's AS condition. Had this been done, we are confident that the procedure to be adopted and the adjustments that were necessary would have been considered through a completely different prism from that which occurred.

[57] Secondly, had this been done, we are satisfied that the sort of measure that surfaced in Rackham's case would have been considered. How was the evidence in chief to be taken? Was the claimant to be provided with questions in advance of cross-examination? Should greater latitude have been given in the timeframe provided for compliance with the orders or indeed should the orders have been made in the form that they were, given his condition? Would there have been greater understanding of his failure to comply with various directions and more thought have been given to how compliance might have been achieved? How was the Tribunal to put itself in a position to receive all the relevant information from this appellant?

[58] In particular, no positive thought appears to have been given to the need to obtain a report on the appellant's condition. In truth, the cost of obtaining a report would probably have been obviated once it became clear that Dr Lusty had prepared a very comprehensive report on his condition. Such a report would have been sufficient to have governed a fresh and different attitude to the appellant's case and to how it was to be managed.

[59] We pause to observe that it is not a sufficient argument to state that, even when the appellant was represented, no application for adjustment was made on his behalf. The duty is cast on the Tribunal to make its own decision in these matters. There were clear indiciae of observed agitation and frustration on the part of the appellant. These should have put the Tribunal on notice of the need to investigate the precise nature and diagnosis of his condition. That said, this case highlights perhaps the need for there to be better training of both judiciary and the legal profession in the needs of the disabled.

[60] Thirdly, the fact of the matter is that everyone was aware that there was a disability of some kind from an early stage and yet it seems from the records of the CMHs that not only was there a complete failure to record (or indeed even become fully aware of) the nature of his AS, but no tailored directions were given at any time. Even if Dr Lusty's report had not been available, which it clearly was, there is no reason why one of the other doctors could not have been requested to attend in order to assist the Tribunal as to the real problem. We record that even as late as the 30 June 2014 CMH it is clear that the condition of AS had not been fully identified to the Tribunal.

[61] Fourthly, we find it a matter of great concern that no reference appears to have been made to the ETBB by the IT. The Secretary to the Vice President of the Office of the Industrial Tribunals and Fair Employment Tribunal has indicated by e-

mail to the court that, whilst the Tribunal has the 2004 edition of the ETBB, the up-to-date 2013 version does not appear to have been forwarded to the Tribunal. That is an unsatisfactory state of affairs. We have formed the clear impression that the ETBB does not appear to be part of the culture of these hearings. That is a circumstance which must fundamentally change with a structural correction to ensure that this situation does not recur. Had there been proper cognisance of the contents of the ETBB, we are satisfied that a different approach would have been adopted to this case.

[62] Fifthly, no attempt was made, as we see it, to explore the possibility of alternative representation for this man once he lost the services of his solicitor in August 2014. This is a matter that should have been dealt with as soon as it became apparent that he was without representation. Steps ought to have been taken at least to appraise him of the possibilities of getting assistance from the *pro bono* services of the Bar and solicitors professions, the Equality Commission for Northern Ireland , the exceptions that apply to the granting of legal aid and even the use of a McKenzie Friend.

[63] Sixthly, the report of Dr Martin was clear medical evidence that the appellant was not in a position to proceed. The Tribunal had observed the distress and agitation being exhibited by the appellant on 11 November 2014. The determination by the Tribunal at paragraph 3.46 of its decision that his failure to attend on 13 November "was deliberate and the timing of his e-mail scheduled to disrupt any planned hearing" was patently unjustified given the medical evidence. In such circumstances we can understand how this would generate a feeling of resentment or injustice on the part of the appellant.

[64] Finally, the conclusion that the Tribunal "would not have any power to oblige the claimant to undergo an assessment" does not really address the issue. There was already a good assessment from Dr Lusty. Even without this there was no attempt to invite any of the doctors to attend to outline his condition in detail or to invite the appellant to undergo examination by a doctor on behalf of the IT and thus to permit the Tribunal to come to its own conclusion as to his mental state.

[65] One final matter. Counsel cited to us some authorities on the question of the discretion of a tribunal/court to grant or refuse adjournments. In particular our attention was drawn to Cathaill v Transport for London [2013] IRLR 3010, Teinaz v Wandsworth London Borough Council [2002] ICR 1471 and Kotecha v Insurety t/a Capital Health Care UKEAT/0537/09 [2010] All ER (D) 94. We do not need to deal with these matters in detail simply because the issue of procedural fairness goes much wider than the narrow issue of failing to adjourn. We simply pause to observe that we do not accept the assertion of Mr Potter that it is unlawful for a tribunal to insist that a condition for adjournment is that a medical report is produced outlining the reasons why the appellant is unfit to attend, together with a prognosis as to when he will be fit to attend. There is nothing improper *per se* in a court doing this where otherwise a court would be in the impossible position of having no idea when

the court could be convened for a hearing. Moreover, in circumstances where no adequate medical evidence can be produced, it would not of itself be unlawful for a tribunal to take a view as to the litigant's fitness to present a case based on seeing and hearing from him in person, albeit that would probably be a rarity.

[66] In the circumstances of this case we have concluded that this appellant did not benefit from a fair procedural hearing in the course of the various CMHs and the hearing. We, therefore, allow the appeal, and refer the matter back for a hearing before a differently constituted Tribunal who will doubtless take the steps outlined in this judgment.

The right to access to justice in the EU law

Trier, 13-15 June 2018

Dr. Matylda Pogorzelska

EU Agency for Fundamental Rights

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FRA's role and tasks

(Council Regulation (EC) 168/2007 of 15 /02/2007)

- **Independent, evidence-based advice:** assistance and expertise on fundamental rights issues to EU institutions and EU Member States when they implement EU law
- **Information & data collection**: research & comparative analysis
- promote **dialogue with civil society** to **raise public awareness of rights** and actively disseminate information about its work

Mission to help make fundamental rights a reality for everyone in the EU

Charter of Fundamental Rights of the EU

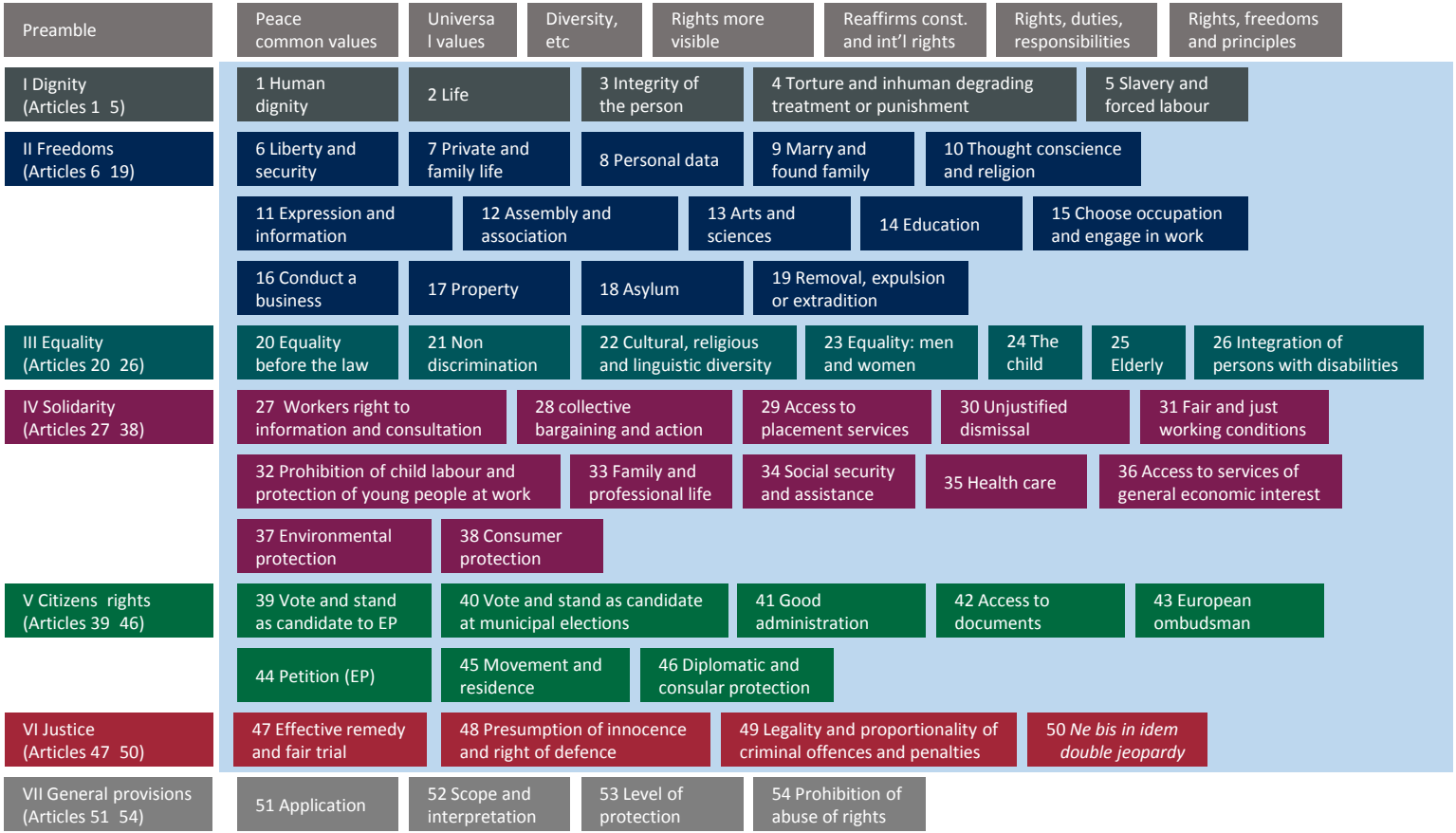
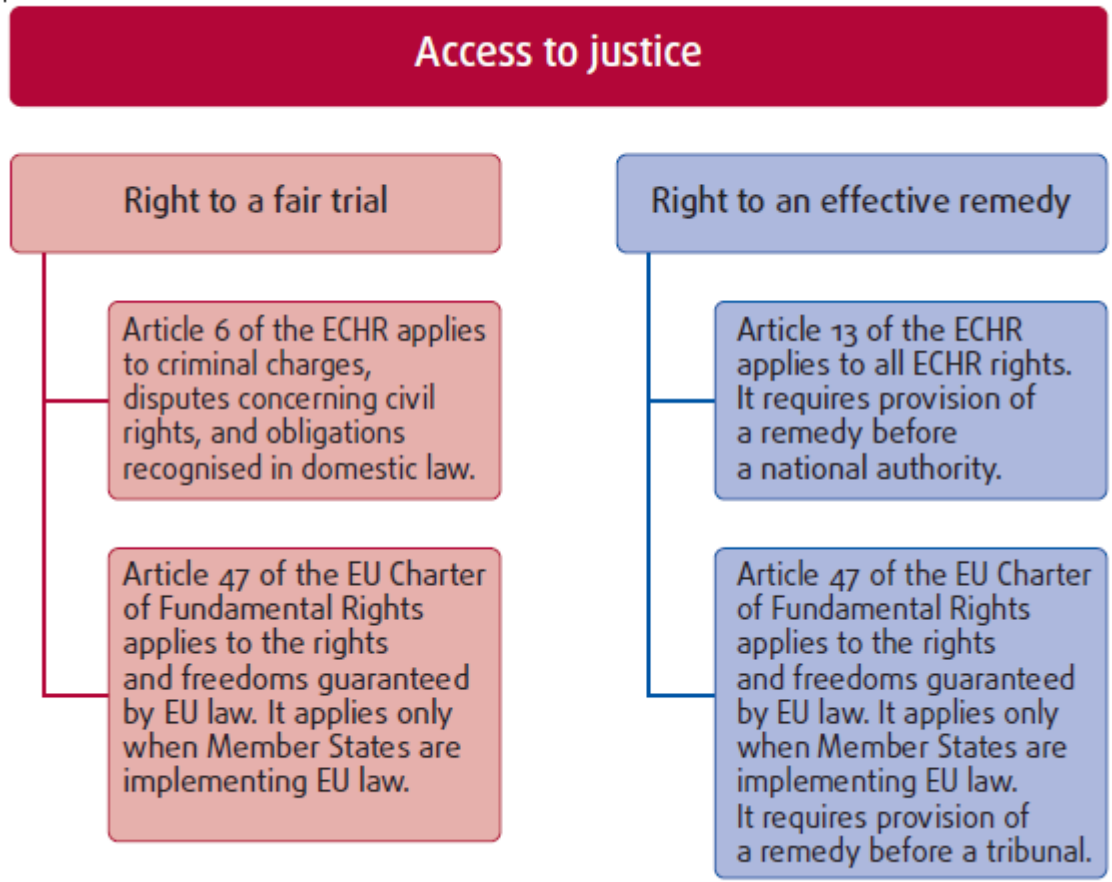


Figure: Access to justice rights under EU and CoE law



Access to justice for persons with disabilities in the EU law

EU Charter

- Right to liberty and security (Art. 6), equality before the law (Art. 20), non-discrimination(Art. 20) and right to an effective remedy (Art. 47)

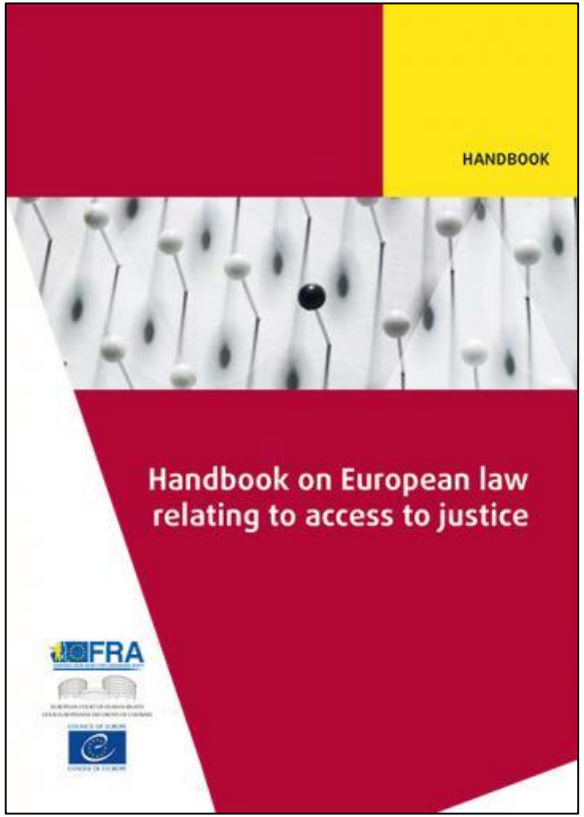
EU secondary law

- rights of victims of crime with disabilities (Directive 2012/29/EU)
- procedural rights of defendants with disabilities (Criminal Procedural Roadmap)

- CoE and EU law draw on the UN Convention on the Rights of Persons with Disabilities (CRPD) and its principles (EU itself and all EU MS ratified the CRPD)
- Accessibility is a key principle of the CRPD. Parties to the CRPD must ensure that persons with disabilities have access – on an equal basis with others – to the physical environment, information and communications, and services and facilities. The CRPD also requires reasonable accommodations to be made to ensure that persons with disabilities can access a court and participate in legal proceedings on an equal basis with others.
- The CRPD, ECHR and EU Charter contain procedural protections for persons detained because of mental health problems, and to ensure that individuals who lack legal capacity can access justice.
- Under EU law, Article 47 of the EU Charter sets out the general right of access to justice. Persons with disabilities are also protected against discrimination by Article 20 of the Charter and Article 21, which prohibits discrimination on the ground of disability, reinforce persons with disabilities' right to access justice.
- Under CoE law, persons with disabilities have the right to access justice under Article 6 of the ECHR. Article 14 of the ECHR prohibits discrimination on various grounds in relation to ECHR rights. It does not expressly refer to disability, but the ECtHR has included disability in its interpretation of 'other' grounds protected under the Article.

- Under CoE and EU law, the prohibitions on discrimination mean that states must take positive action to ensure that persons with disabilities can access their rights in practice. The action required depends on the circumstances. For example, providing free legal representation to persons with disabilities may be required to guarantee the right to a fair trial if individuals have difficulties understanding the complexities of the proceedings
- Additionally, under EU law, secondary EU law provides specific rights for persons with disabilities.
    - E.g. Victims' Rights Directive stipulates that victims with disabilities should be able to access the full rights in the directive.
- The EU has also legislated specific protections for persons with disabilities in criminal proceedings.
    - For example, the Directive on the right to information in criminal proceedings obliges Member States to ensure that the information is provided in simple and accessible language, taking into account the particular needs of vulnerable suspects or vulnerable accused persons. The Directive on the right to interpretation and translation in criminal proceedings requires giving appropriate assistance to persons with hearing or speech impediments.
    - Additionally, the Directive on the right of access to a lawyer requires Member States to ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in its application.
    - Finally, the Commission adopted a Recommendation in which it recommends procedural safeguards for vulnerable persons suspected or accused in criminal proceedings

To find out more about the European standards...



To find out more about the standards...

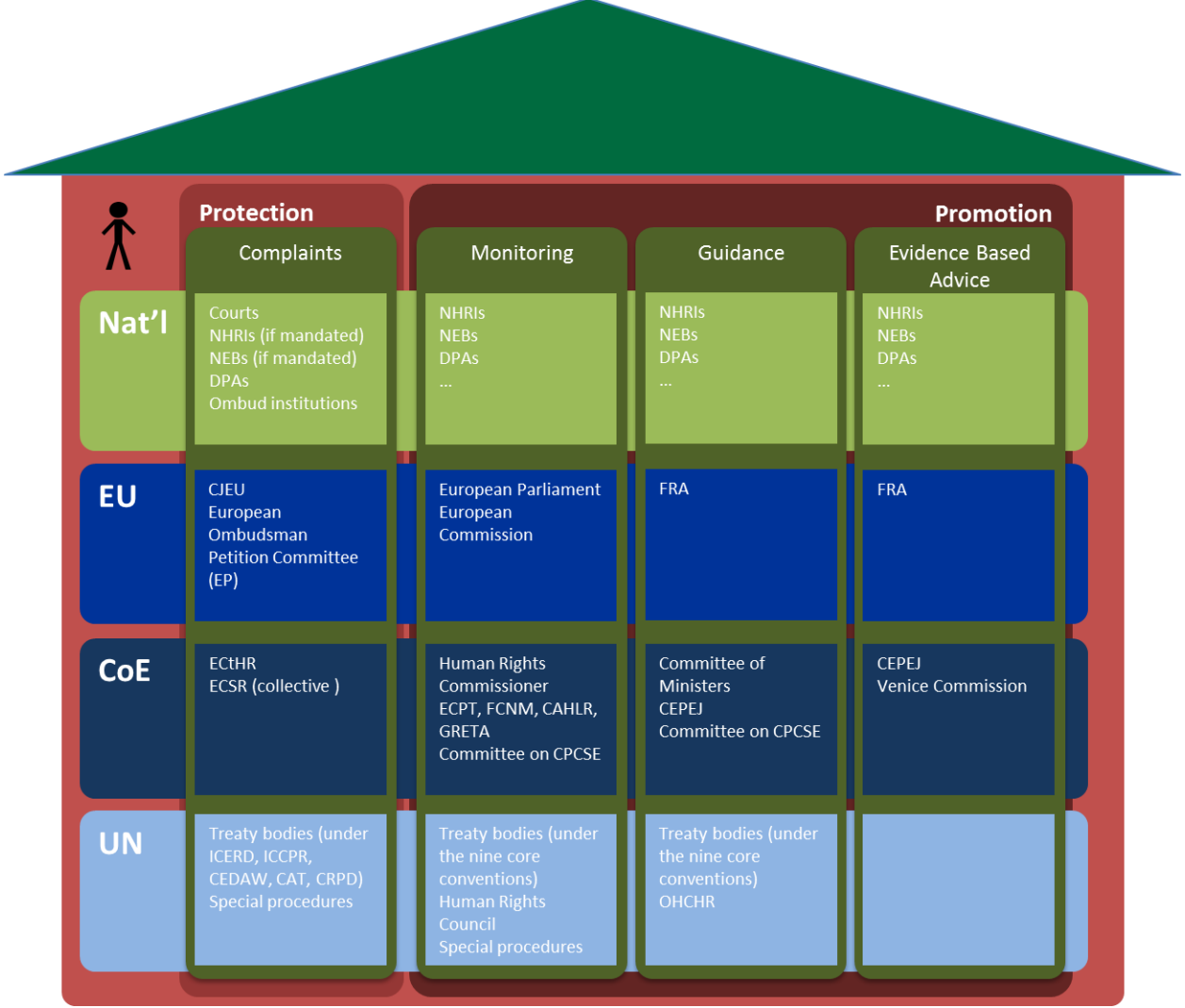
Access to justice is an important element of the rule of law.

It enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings.

This handbook summarises the key European legal principles in the area of access to justice as stemming from the case law of the CJEU and ECtHR, focusing primarily on civil and criminal law

Specific section on access to justice for persons with disabilities

To find out more about what happens in practice...


Protection
Promotion
Complaints
Monitoring
Guidance
Evidence Based Advice
Nat'l
Courts
NHRIs (if mandated)
NEBs (if mandated)
DPAs
Ombud institutions
NHRIs
NEBs
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...
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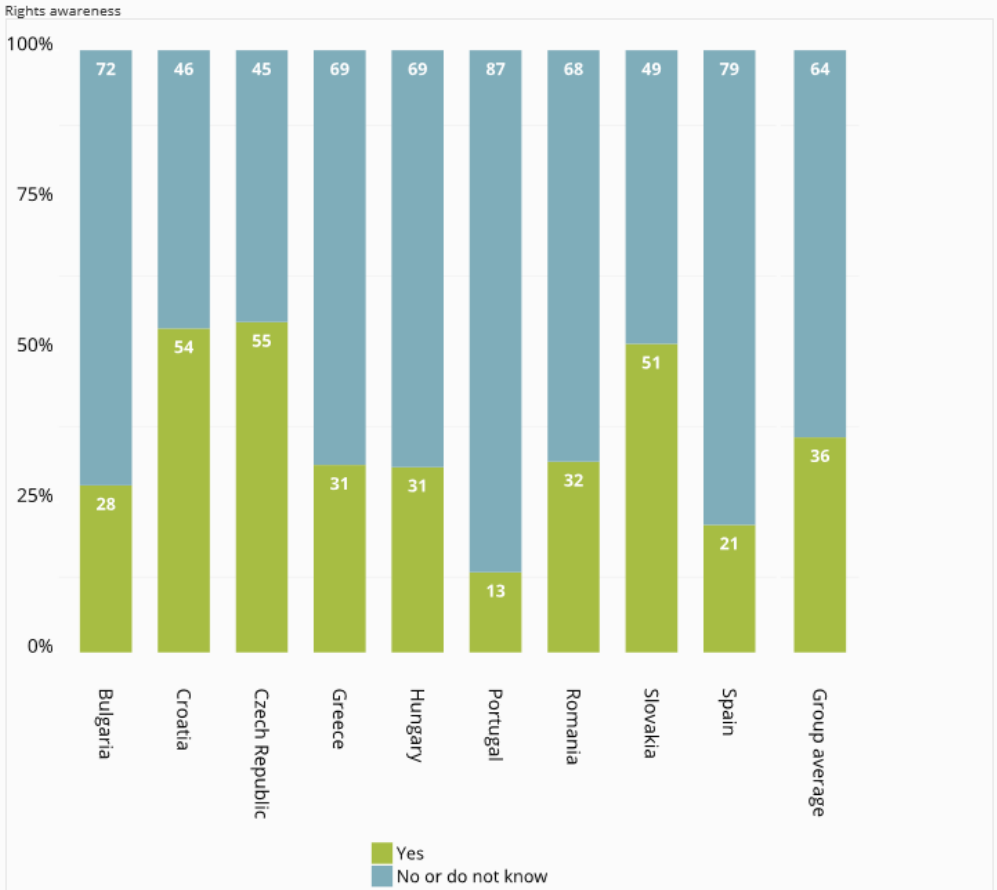
...
NHRIs
NEBs
DPAs
...
EU
CJEU
European Ombudsman
Petition Committee (EP)
European Parliament
European Commission
FRA
FRA
CoE
ECtHR
ECSR (collective)
Human Rights Commissioner
ECPT, FCNM, CAHLR, GRETA
Committee on CPCSE
Committee of Ministers
CEPEJ
Committee on CPCSE
CEPEJ
Venice Commission
UN
Treaty bodies (under ICERD, ICCPR, CEDAW, CAT, CRPD)
Special procedures
Treaty bodies (under the nine core conventions)
Human Rights Council
Special procedures
Treaty bodies (under the nine core conventions)
OHCHR

Challenges in accessing remedies in practice

- Lack of awareness of rights
- Lack of knowledge about where and how to complain
- Practical barriers
  - Lengthy procedures
  - Costs associated with bringing complaints

As far as you are aware, is there a law in your country that forbids discrimination based on skin colour, ethnic origin or religion?



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SELECT CHART TYPE

EU map

EU chart

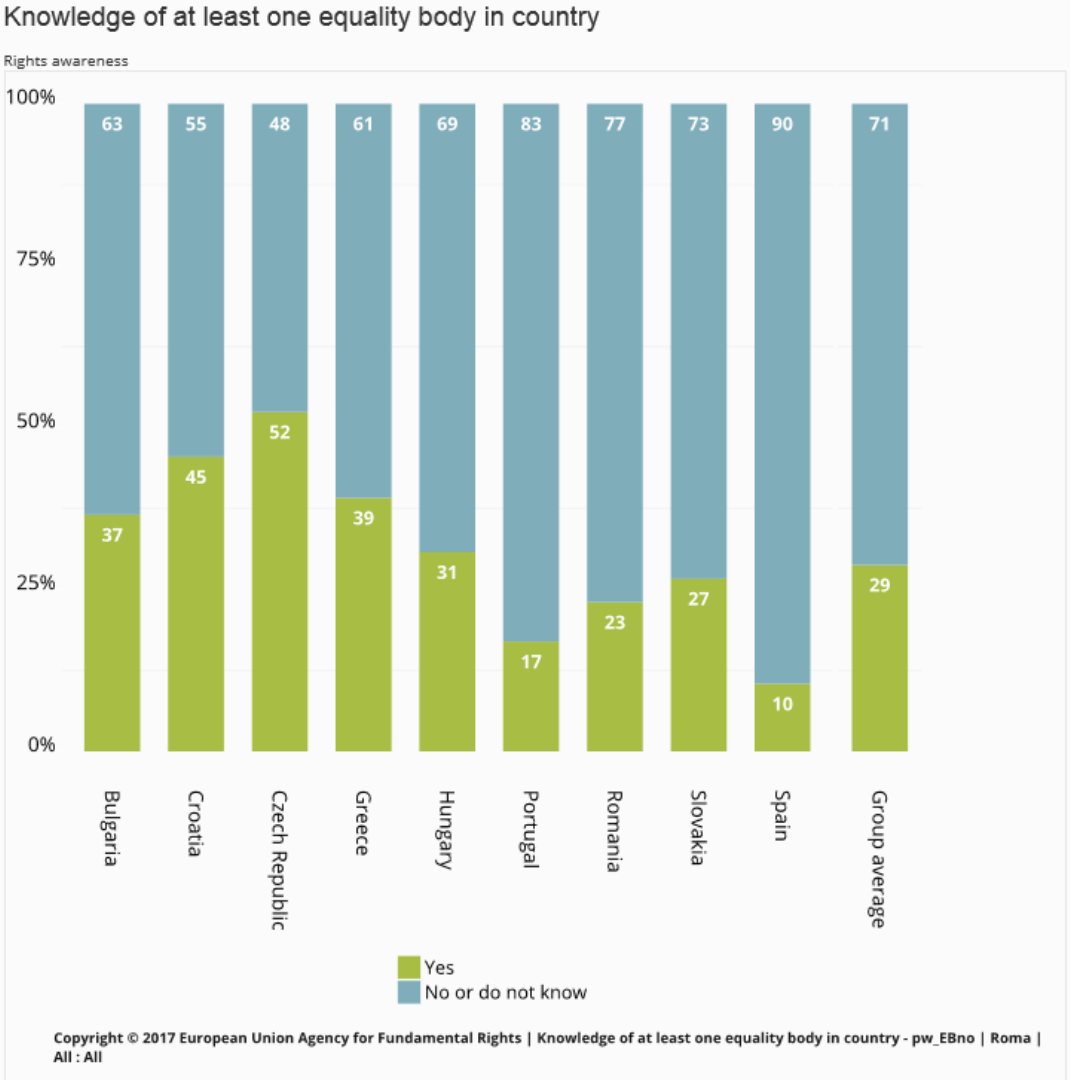
Country detail

Compare countries

Data table

Union Minorities and Discrimination Survey

face-to-face interviews with 25,515 respondents with different ethnic minority and immigrant backgrounds across all 28 EU Member States



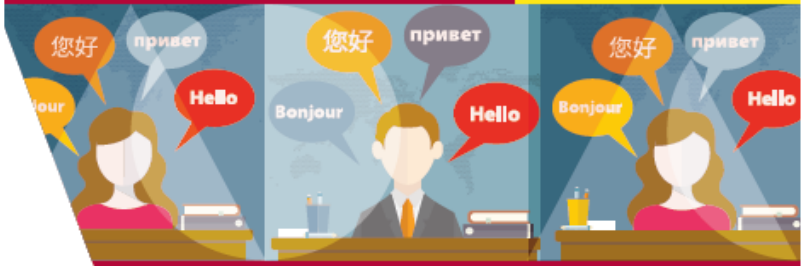
FRA's Second European Union Minorities and Discrimination Survey

face-to-face interviews with 25,515 respondents with different ethnic minority and immigrant backgrounds across all 28 EU Member States

Additional barriers for persons with disabilities

- Inaccessible complaints mechanisms:
  - In 2014, only 6 EUMS provided information about how and where to complain about voting problems on accessible websites
- Deprivation of legal capacity
- Lack of support to lodge complaints
- Insufficient training for staff involved in complaints procedures

JUSTICE



Rights of suspected and accused persons across the EU: translation, interpretation and information

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Contents

FOREWORD 3
EXECUTIVE SUMMARY AND FRA OPINIONS 9
INTRODUCTION 15
1 INTERNATIONAL AND EUROPEAN STANDARDS 19
1.1. United Nations and Council of Europe 19
1.2. European Union 24
2 RIGHT TO INTERPRETATION AND TRANSLATION IN MEMBER STATES' LAWS 31
2.1. Providing interpretation and translation services in the pre-trial phase of criminal proceedings 31
2.2. Notion of essential documents 35
2.3. Providing interpretation and translation services for communications with legal counsel 41
2.4. Quality safeguards 44
2.5. Access to remedies 56
Conclusions and FRA Opinions 59
3 RIGHT TO INFORMATION IN MEMBER STATES' LAWS 63
3.1. Providing information on procedural rights 63
3.2. Providing information on the accusation 67
3.3. Letter of Rights 69
3.4. Right of access to materials of the case 76
3.5. Access to remedies 86
Conclusions and FRA Opinions 89
4 VULNERABLE SUSPECTED AND ACCUSED PERSONS 91
4.1. Persons with physical disabilities 92
4.2. Persons with intellectual disabilities 95
4.3. Children 97
Conclusion and FRA Opinion 100
CONCLUDING REMARKS 101
REFERENCES 103
ANNEX: RIGHTS SET OUT IN THE LETTER OF RIGHTS IN EU MEMBER STATES 109

Criminal justice

Criminal procedures roadmap

Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, OJ C 295/1, 4 December 2009, adopted by the Council on 30 November 2009, and incorporated into the Stockholm Programme

A
Interpretation and translation

Directive 2010/64/EU
20 October 2010

Transposition deadline
27 October 2013

B
Right to information on rights and charges

Directive 2012/13/EU
22 May 2012

Transposition deadline
2 June 2014

C (1) + D
Lawyer and right to have third party informed

Directive 2013/48/EU
22 October 2013

Transposition deadline
27 November 2016

E (1)
Special safeguards for children

Directive 2016/800
11 May 2016

Transposition deadline
11 June 2019

F
Green paper on detention

COM(2011) 327 final
14 June 2011

C (2)
Legal aid for suspects and accused persons and in EAW proceedings

Directive 2016/1919
26 October 2016

Transposition deadline
25 May 2019

E
Presumption of innocence presence at trial,

Directive, 2016/343
9 March 2016

Transposition deadline
1 April 2018

E (2)
Recommendation on procedural safeguards for vulnerable persons

C(2013) 8178
27 November 2013

C (3)
Recommendation on legal aid

C(2013) 8179
27 November 2013

Criminal justice

EAW
European Arrest Warrant

Framework Decision
2002/584/JHA
13 June 2002

Transposition deadline
1 January 2004

ToP
Transfer of prisoners

Framework Decision
2008/909/JHA
27 November 2008

Transposition deadline
5 December 2011

PAS
Probation and alternative sanctions

Framework Decision
2008/947/JHA
27 November 2008

Transposition deadline
6 December 2011

ESO
European Supervision Order

Framework Decision
2009/829/JHA
23 October 2009

Transposition deadline
11 November 2012

EIO
European Investigation Order

Directive 2014/41/EU
3 April 2014

Transposition deadline
22 May 2017

CoPC
Freezing and confiscation of tools/proceeds of crime

Directive 2014/42/EU
3 April 2014

Transposition deadline
4 October 2016

EPPO
Establishment of the European Public Prosecutor's Office

Regulation 2017/1939
12 October 2017

Past transp. deadline | Adopted | Proposed | Recommendations | Green paper

DK not taking part | UK not taking part | IE not taking part | FRA AWP2015 | FRA opinions

Headings in italics indicate non-established acronyms

FRA evidence

FRA's findings show that most Member States' laws contain general references to the needs of persons with disabilities and children. However, national legislators rarely introduce more detailed rules, and other policy documents provide little guidance on how to accommodate these needs. Examples of promising practices identified during this research include: transcribing written materials into braille for individuals with visual impairments; providing pre-prepared audio-files containing the text of the Letter of Rights; offering easy-to-read versions of such letters and of other written information about rights; and using letters of rights that are specifically adapted for children.

FRA Opinion 9

While Directives 2010/64/EU and 2012/13/EU do not provide specific guidance on how to ensure that the needs of vulnerable suspects and accused persons are taken into account, EU Member States taking steps to ensure the protection of the rights of suspects or accused persons whose vulnerability affects their ability to follow proceedings and make themselves understood should ensure compliance with their international human rights law obligations. In particular, Member States should adhere to the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC) – and the interpretative elaborations made by the expert bodies monitoring these conventions. EU Member States are also encouraged to follow guidelines developed by the Council of Europe in this field, particularly its Guidelines on child-friendly justice. *In this context, the effective implementation of the new* Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings *will be essential. EU Member States are also encouraged to follow the guidance set out in the European Commission* Recommendation on the procedural safeguards for vulnerable suspected and accused persons in criminal proceedings *who are not able to understand and to effectively participate in such proceedings due to age, their mental or physical condition or disabilities.*

Thank you!

Matylda.Pogorzelska@fra.europa.eu

FRA
EUROPEAN UNION AGENCY
FOR FUNDAMENTAL RIGHTS

Children with Disabilities' Access to justice

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES
Criminal and administrative context

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 13-15 June 2018

International legal framework

Key government commitments on access to justice

***Universal Declaration of Human Rights*, 1948**

- Article 8: Everyone has the right to an effective remedy by national tribunals for acts that violate the fundamental rights granted by the constitution or by law.

***International Covenant on Civil and Political Rights*, 1976**

- Article 2: State Parties must ensure that anyone whose rights or freedoms have been violated has an effective remedy.

***Convention on the Rights of the Child*, 1989**

- Article 3: In all actions concerning children undertaken by courts of law, the best interests of the child shall be a primary consideration.
- Article 12: Children have the right to be heard in judicial and administrative proceedings affecting them.
- Article 37: No child shall be deprived of liberty unlawfully or arbitrarily. Children deprived of liberty have the right to legal assistance and to challenge their detention.
- Article 40: Every child accused of or convicted breaking the law has the right to be treated in a manner that safeguards their sense of dignity and worth.

Out of an Estimated 5.1 million children with disabilities in Europe and Central Asia only one third has been officially identified as having disabilities. 4 million are hidden.

Medical approach means that responses aim to correct 'defects,' rather than help children reach their potential.

Some **teachers refuse to educate children with disabilities**, and some **parents fear that their children's education will suffer if they share a classroom with a child who has a disability**.

<u>As a result…</u>
Family separation

Institutional care

Millions are out of school and many are consigned to so-called 'special schools.'

Little to no recourse in the justice system

Eastern and Central Europe and Central Asia has the world's highest proportion of children separated from their families:

Approximately 664,000 children live in residential care across the Region.

This is 666 children per 100,000 - over 5 times the global average of 120 children per 100,000 - living in residential care.

Child care reforms are having an impact, with marked falls in the rate of children in institutional care in 11 countries in Central and Eastern Europe and Central Asia between 2005 and 2012 (more than 50 per cent in Moldova; more than 40 per cent in Bulgaria).

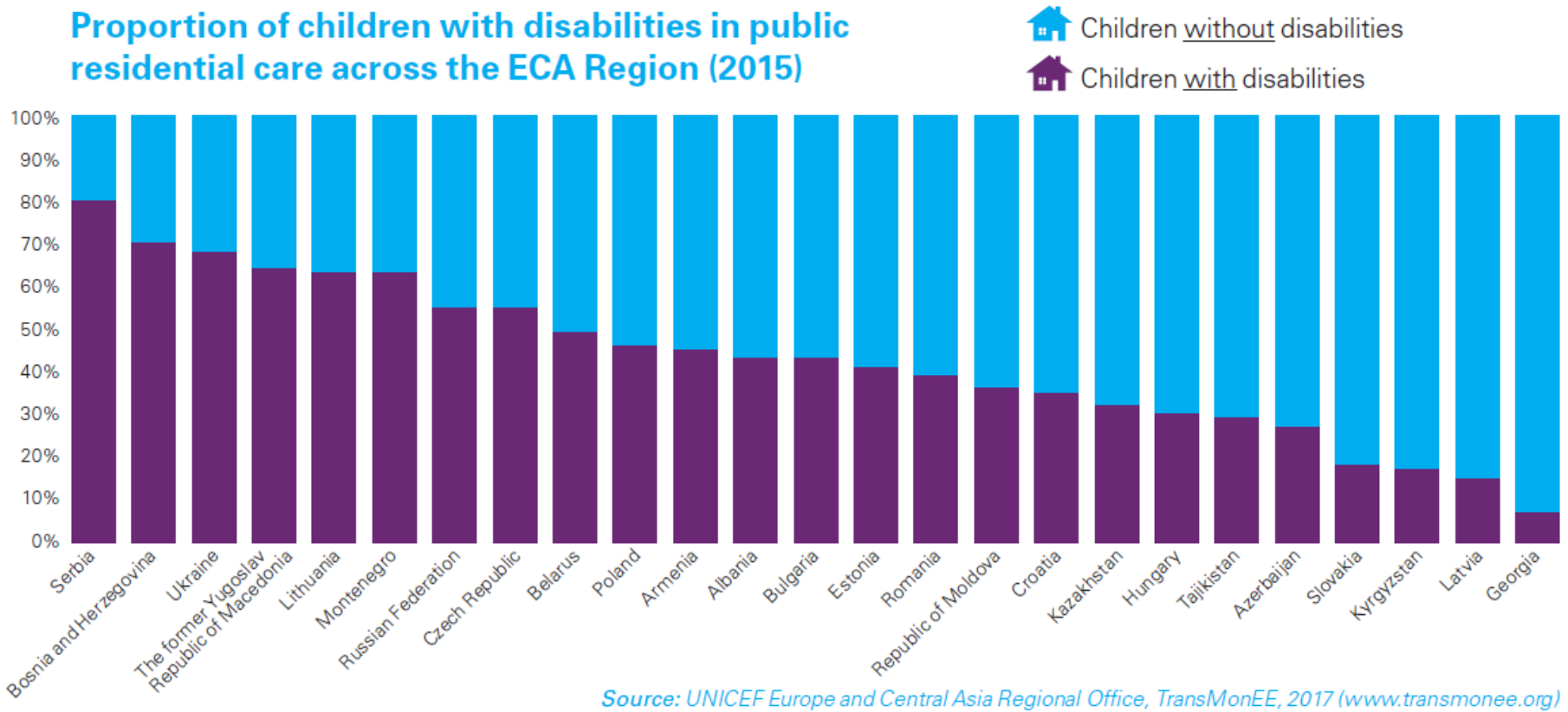
While progress is being made…

The proportion of children with disability in institutional care is growing as compared with other children.

This disparity highlights the challenges States and communities are facing to ensure children with Disabilities have access to community based services that support their healthy development and fulfil their fundamental rights.

An Access to Justice Issue?

Proportion of children with disabilities in public residential care across the ECA Region (2015)



Source: *UNICEF Europe and Central Asia Regional Office, TransMonEE, 2017 (www.transmonee.org)*
**Data for Albania are from 2014; Montenegro, Slovenia from 2013; Lithuania from 2011*

Few children in Europe and Central Asia seek justice

- Children face tremendous obstacles
- Disabling norms and attitudes
- Children and their families know little about child rights and where to seek redress
- Judicial and administrative procedures not adapted to children’s needs

Ensuring Access to Justice for Children with disabilities

- Reasonable accommodation
- Information to children/parents/ public on justice systems and processes
- Support to children with disabilities and their families

Specific actions

- Reliable and comparable data
- Work with NHRIs;
- Provide legal aid /assistance
- Training of professionals
- Challenge stereotypes/misconceptions
- Dismantle barriers to inclusion
- Child-sensitive procedures

Strategic litigation works. The right to be treated equally

- Anisa’s case (Albania)
- Erjon’s case (Albania)
- Dojchin’s case (Bulgaria)


unicef
for every child
Europe and Central Asia
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Unicef and Access to justice-our response

- Promotes equitable Access to justice for all children
- Supports training of professionals, such as the police, social workers, judges and lawyers
- Supports/Works with Ombudspersons/NHRIs
- Informs children about their rights and supports legal aid for the most vulnerable

In Montenegro,

the UNICEF-supported 'It's about ability' campaign increased **public acceptance** of inclusion of children with disabilities in regular education from **36 percent** in **2010** to **80 percent** in **2013**.

In Moldova,

the number of children with disabilities and special educational needs attending regular schools **quadrupled** between **2012** and **2017**.

Conclusion

- Access to justice is a human rights issue
- Legal awareness is the foundation for fighting injustice
- Remedies must be available to redress violations
- shift social norms
- strengthen accountability mechanisms

Thank you

Acceso a la justicia para los niños con discapacidad

ACCESO A LA JUSTICIA PARA LAS PERSONAS CON DISCAPACIDAD

Contexto penal y administrativo

SEMINARIO PARA MIEMBROS DE LA JUDICATURA

Tréveris, 13-15 junio de 2018

Marco jurídico internacional

Compromisos clave del Gobierno sobre el acceso a la justicia

***Declaración Universal de los Derechos Humanos,* 1948**

- Artículo 8: Todo el mundo tiene derecho a una reparación eficaz por parte de los tribunales nacionales por actos que violen los derechos fundamentales concedidos por la constitución o la ley.

***Pacto Internacional de Derechos Civiles y Políticos*, 1976**

- Artículo 2: Los Estados partes deben asegurarse de que cualquier persona que haya visto violados sus derechos o libertados reciba una reparación eficaz.

***Convención sobre los Derechos del Niño,* 1989**

- Artículo 3: En todas las medidas relacionadas con los niños adoptadas por los tribunales de justicia, los mejores intereses del niño serán una consideración prioritaria.
- Artículo 12: Los niños tienen derecho a ser escuchados en los procedimientos judiciales y administrativos que les afecten.
- Artículo 37: Ningún niño deberá ser privado de su libertad de manera ilícita o arbitraria. Los niños privados de su libertad tienen derecho a recibir asistencia jurídica y a impugnar su detención.
- Artículo 40: Todos los niños acusados de delitos contra la ley tienen derecho a ser tratados de forma que se proteja su sentido de la dignidad y el valor.

De los 5,1 millones de niños con discapacidad que se estima que viven en Europa y Asia Central, solo un tercio ha sido identificado oficialmente como tal. Cuatro millones permanecen ocultos.

El enfoque médico pretende corregir los "defectos" en lugar de ayudar a los niños a alcanzar su potencial.

Algunos **docentes se niegan a educar a niños con discapacidad** y ciertos **padres temen que la educación de sus hijos se vea afectada si comparten aula con un niño con discapacidad**.

<u>Como consecuencia...</u>
Separación familiar

Atención institucional

Millones sin escolarizar y muchos consignados a las denominadas "escuelas especiales".

Recursos escasos o inexistentes en el sistema judicial

Europa Oriental y Central y Asia Central tienen los índices más altos del mundo de niños separados de sus familias.

Aproximadamente 664 000 niños viven en centros de asistencia residencial en toda la región.

Esto supone 666 niños de cada 100 000, casi cinco veces más que la media internacional de 120 niños por cada 100 000 viviendo en centros de asistencia residencial.

Las reformas sobre la asistencia infantil están teniendo su efecto, con descensos pronunciados en el índice de niños en centros de asistencia residencial en 11 comunidades de Europa Oriental y Central y Asia Central entre 2005 y 2012 (más del 50 % en Moldavia y más del 40 % en Bulgaria).

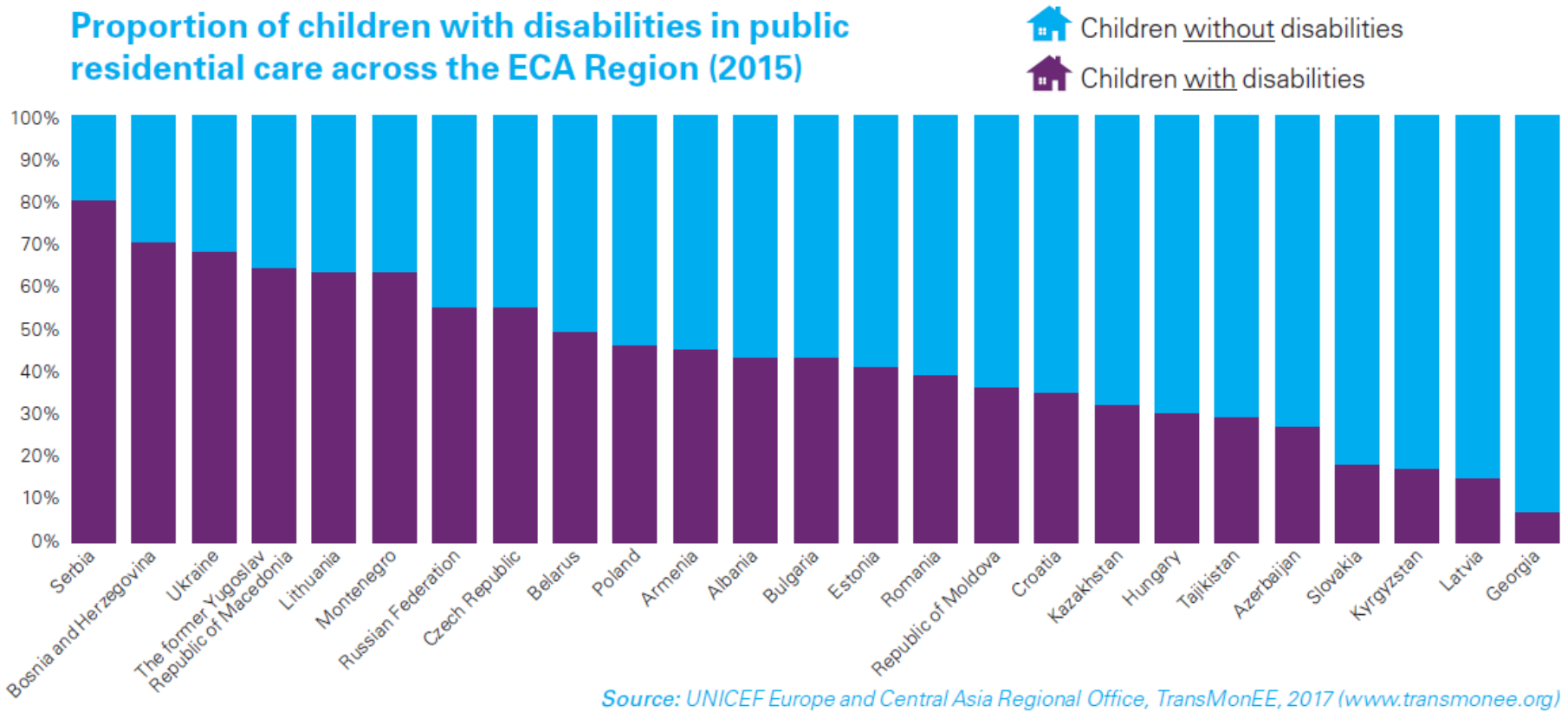
Aunque se están haciendo progresos...

La proporción de niños con discapacidad en la atención institucional aumenta en comparación con otros niños.

Esta disparidad destaca las dificultadas a las que se enfrentan los Estados y las comunidades para garantizar que los niños con discapacidad tengan acceso a los servicios comunitarios que respaldan su desarrollo saludable y satisfacer sus derechos fundamentales.

¿Acceso a la justicia?

Proportion of children with disabilities in public residential care across the ECA Region (2015)



Source: *UNICEF Europe and Central Asia Regional Office, TransMonEE, 2017 (www.transmonee.org)*
**Data for Albania are from 2014; Montenegro, Slovenia from 2013; Lithuania from 2011*

Pocos niños en Europa y Asia Central acuden a la justicia

- Los niños se enfrentan a grandes obstáculos
- Normas y actitudes incapacitantes
- Los niños y sus familias saben poco sobre los derechos infantiles o dónde solicitar una compensación
- Los procedimientos judiciales y administrativos no están adaptados a las necesidades de los niños

Garantía del acceso a la justicia para los niños con discapacidad

- Adaptación razonable
- Información a los niños/padres/público sobre los sistemas y procesos judiciales
- Apoyo a los niños con discapacidad y a sus familias

Medidas específicas

- Datos fiables y comparables
- Trabajar con INDH
- Prestar ayuda/asistencia legal
- Formación de profesionales
- Desafiar los estereotipos/ideas equivocadas
- Desmantelar las barreras a la inclusión
- Procedimientos que tengan en cuenta al niño

El litigio estratégico funciona. Derecho a recibir un trato igualitario

- Caso de Anisa (Albania)
- Caso de Erjon (Albania)
- Caso de Dojchin (Bulgaria)


unicef
for every child
Europe and Central Asia
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Unicef y el Acceso a la justicia: nuestra respuesta

- Fomentar un acceso igualitario a la justicia para todos los niños
- Apoyar la formación de profesionales como policía, trabajadores sociales, jueces y abogados
- Apoyar/trabajar con defensores del menor/INDH
- Informar a los niños de sus derechos y apoyar la ayuda legal para los más vulnerables

En Montenegro,

la campaña apoyada por UNICEF "Es cuestión de habilidad" incrementó la **aceptación pública** de la inclusión de los niños con discapacidad en la educación regulada del **36 %** en **2010** al **80 %** en **2013**.

En Moldavia,

el número de niños con discapacidad y necesidades educativas especiales que asiste a los centros educativos regulados se **cuadruplicó** entre **2012** y **2017**.

Conclusión

- El acceso a la justicia es una cuestión de derechos humanos
- La concienciación jurídica es la base de la lucha contra la injusticia
- Debe haber recursos disponibles para compensar las infracciones
- Cambio en las normas sociales
- Refuerzo de los mecanismos de responsabilidad

Gracias

Women with disabilities - violence against women with disabilities

This publication has been produced with the financial support of the European Union's REC Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

Outline

CRPD, General Comment no 3 (2016) on Art 6 CRPD

CRPD General Comment no 6 (2018) on Art 5 CRPD

CEDAW General Comment no 35 (2017) update on GC 19

Concepts: intersectionality, equality, vulnerability, empowerment, transformative or inclusive justice

Violence against women with disabilities, prevention, victim support, access to justice

Pirkko Mahlamäki.

Women and children with disabilities in CRPD

- Preamble: p, q, r, s,
- Art. 4 (3) • Art. 5 (2) • Art. 6 • Art. 7
- Art. 16 (1), (2), (4) • Art. 18 (2)
- Art 23 1 (c), 3, 4 and 5
- Art 25
- Art 28 2 (b)

Pirkko Mahlamäki

General Comment nr 3 (2016)

- Adopted on 26 August 2016 by the Committee on the Rights of Persons with Disabilities (CRPD Committee)
- Strong evidence to affirm that women and girls with disabilities face barriers in most areas of life. These barriers create situations of multiple and intersecting forms of discrimination against women and girls with disabilities

Pirkko Mahlamäki

particularly with regard to **equal access** to education, access to economic opportunities, access to social interaction, access **to justice and equal recognition** before the law, the ability to participate politically and **the ability to exercise control over their own lives** across a range of contexts

Pirkko Mahlamäki

- Focus on State obligations, but also part of prohibition of discrimination
- To be applied in conformity with CRPD, no reservations
- Barriers caused by disbelief when reporting sexual violence (par 17 (e))
- Training of professionals in justice sector (par. 26)

Pirkko Mahlamäki

Multiple and intersectional discrimination

Multiple discrimination encompasses those situations where a person can experience discrimination on two or more grounds.

Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable.

Pirkko Mahlamäki

Intersectionality

- Legal recognition
- Related to stereotyping see par. 8 GC 3

  "Gender stereotypes can limit women's capacity to develop their own abilities, pursue professional careers and make choices about their lives and life plans. Both hostile/negative and seemingly benign stereotypes can be harmful. Harmful gender stereotypes need to be recognized and addressed in order to promote gender equality."

Pirkko Mahlamäki

Formal equality

Combat direct discrimination by treating persons in a similar situation similarly and persons in different situations differently,

helps to combat negative stereotyping and prejudices, but it cannot offer solutions for the “dilemma of difference.”

Pirkko Mahlamäki.

Substantive and transformative equality

Substantive equality approach **seeks to address structural and indirect discrimination and takes into account power relations**.

Substantive equality acknowledges that the “dilemma of difference” requires both, ignoring and acknowledging differences among human beings, in order to achieve *de facto* equality.

Pirkko Mahlamäki

Inclusive equality

The Convention is based on this new model of equality, transformative or inclusive equality **-> GC 6**

A model that acknowledges that individuals, on a general basis, experience discrimination as members of a (or several) social group(s) and that these groups are not homogeneous.

Pirkko Mahlamäki,
Handikappforum rf.

Inclusive equality

11. Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (…) (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (…)

Pirkko Mahlamäki

Transformation to change

‘transformative equality’ -> need to change dominant rules that reaffirm exclusion and to go beyond the equal-different approach.

Pirkko Mahlamäki

Solutions

Non-discrimination measures need to target individuals as well as groups. The CRPD is the first human rights treaty to acknowledge explicitly intersectional discrimination

European case law following this change

CRPD provides not only independent normative structure but also interpretative framework for national judges.

Pirkko Mahlamäki

CEDAW Committee General Comment 35 (2017) update 19

Discrimination against women (Art 1 CEDAW) includes gender-based violence

> ..directed against a woman because she is a woman or affects women disproportionately', and,

as such, is a violation of their human rights.

GC para 7: goes beyond non discrimination towards empowerment - interpretation tool

Pirkko Mahlamäki

Report of the Special Rapporteur on the rights of persons with disabilities on sexual and reproductive health and rights of girls and young women with disabilities (A/72/133)

VIOLENCE AGAINST WOMEN AND GIRLS WITH DISABILITIES

Pirkko Mahlamäki

Increased risk

Children with disabilities are almost four times more likely to experience violence than children without disabilities.

The risk is consistently higher in the case of deaf, blind and autistic girls, girls with psychosocial and intellectual disabilities and girls with multiple impairments.

Pirkko Mahlamäki

Challenges

Sexual assault is often underreported, even more so in cases of women with disabilities

"when, as survivors of sexual violence, they report the abuse or seek assistance or protection from judicial or law enforcement officials, their testimony, especially that of girls and women with intellectual disabilities, is generally not considered credible, and they are therefore disregarded as competent witnesses, resulting in perpetrators avoiding prosecution."

Pirkko Mahlamäki

Barriers to access

Physical and communication barriers in the justice system hinder access to justice by girls and young women with disabilities and their ability to seek and obtain redress.

lack of accessibility and reasonable and procedural accommodations, such as sign language interpretation, alternative forms of communication and support services that are age- and gender-sensitive.

Pirkko Mahlamäki

Stereotypes, prejudices

“Owing to prejudices and stereotypes, courts commonly discount the testimony of girls and young women with disabilities in sexual assault cases,

questioning whether girls and young women with intellectual disabilities can understand the oath when testifying to discrediting the testimony of blind witnesses because they are not “able” to know/perceive the sequence of events”

Pirkko Mahlamäki

Health Care: Section IV under B

FAMILY PLANNING AND BIRTH CONTROL

Pirkko Mahlamäki.

- Relation to respect for dignity, agency and legal capacity GC 3 para 45: Forced contraception and sterilization can result in sexual violence.
- Par 18 CEDAW GC 28: Violations of sexual and reproductive rights may amount to torture or inhuman treatment.
- Supported decision making: right to be provided with assistance to raise children

Pirkko Mahlamäki

Recommendations - Committee

1) combat multiple discrimination through repealing discriminatory laws, policies and practices that prevent women with disabilities from enjoying all the rights of the CRPD;
2) adopt appropriate laws, policies and actions to ensure the rights of women with disabilities are included in all policies;

Pirkko Mahlamäki

Recommendations contd.

3) remove all barriers that prevent or restrict the participation of women with disabilities and ensure that women with disabilities, through their representative organisations, are included in the design, implementation and monitoring of all programmes which have an impact on their lives;

Pirkko Mahlamäki

- policy making with a gender perspective;
- awareness raising and training of professionals;
- accessibility (e.g. shelters, emergency numbers)
- reasonable accommodation;
- access to justice including also a gender perspective and procedural accommodation;
- provision of effective remedies

Thank you kindly for your time and attention!

Ms Pirkko Mahlamäki

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Persons with disabilities and their right to equal recognition before the law

Maroš Matiaško

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Equality before the law

- It is recognised as a **basic general principle** of human rights protection and **is indispensable for the exercise of other human rights** (interdependence)
- Relates to „autonomy“ of persons
- From legal perspective the issue of:

  a) „possessing legal personality“ (*legal standing*) and

  b) capacity to „exercise rights and duties“ (*decision-making or legal agency*)

International human rights law – Article 12 UN CRPD

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

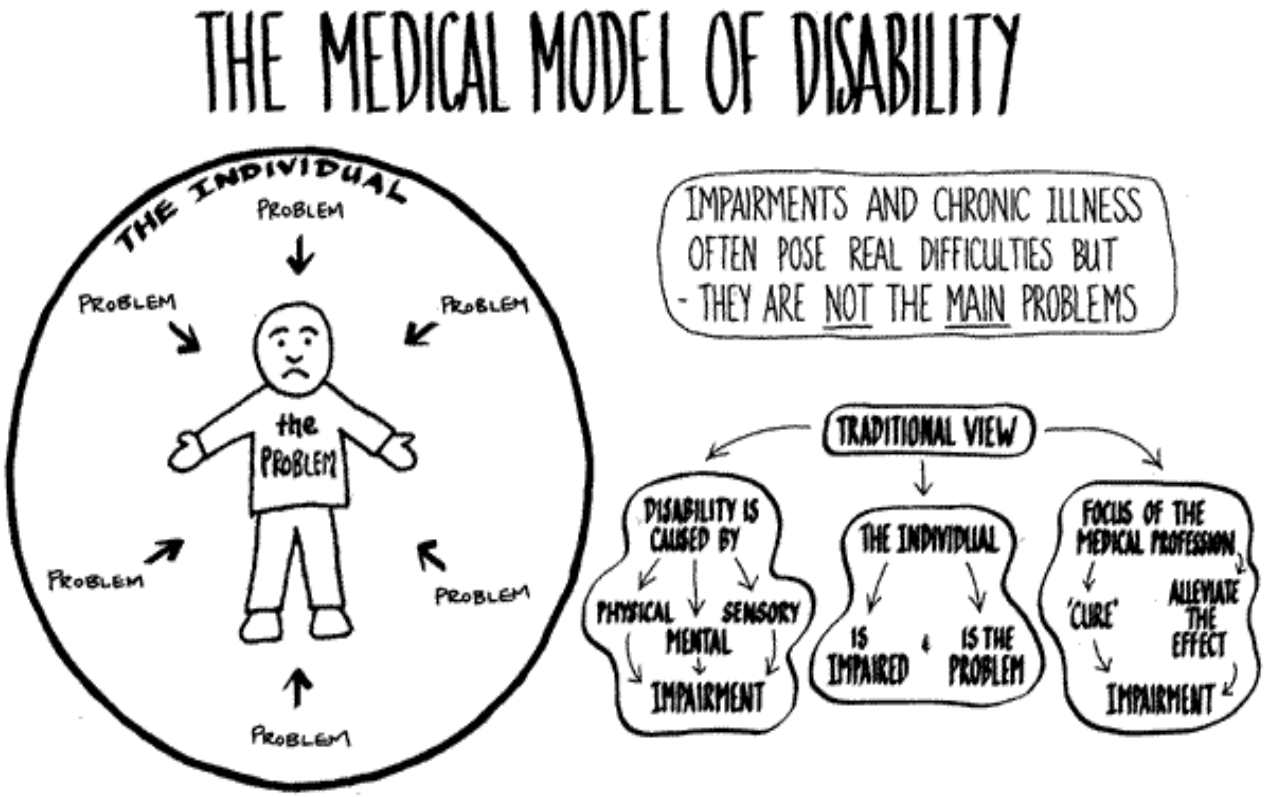
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

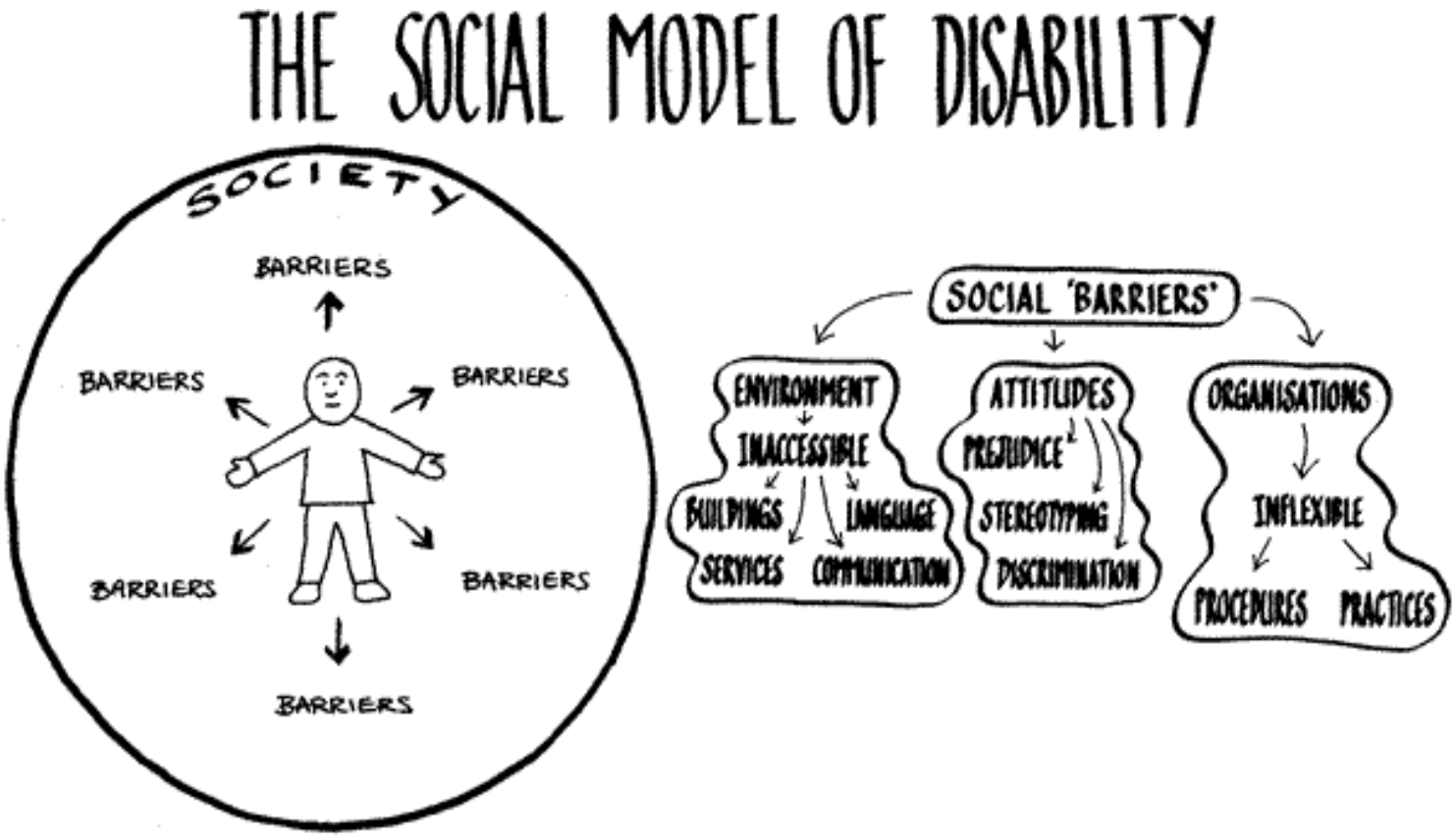
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse ….

5. … 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.

Paradigm shift



Paradigm shift



Substitute decision-making CRPD Committee GC no. 1

- Substitute decision-making regimes can take many different forms
- plenary guardianship, judicial interdiction and partial guardianship.
- these regimes have certain common characteristics:

(i) Legal capacity is removed from a person, even if this is in respect of a single decision;

(ii) A substitute decision-maker can be appointed by someone other than the person concerned,

(iii) and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

Obligations of State parties CRPD Committee GC no. 1

- States parties' obligation to replace substitute decision-making regimes by supported decision-making requires both
- the abolition of substitute decision-making regimes and the
- development of supported decision-making alternatives.
- The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

What is support (GC no. 1)

- “Support” is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity.
- PWD may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, or assistance with communication.
- Support to persons with disabilities might include measures relating to universal design and accessibility — for example, requiring private and public actors, such as banks and financial institutions, to provide information in an understandable format or to provide professional sign language interpretation — in order to enable PWD to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions.
- Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.
- Support relates to advanced planning – advanced directives.

EUROPEAN COURT OF HUMAN RIGHTS

European Convention on Human Rights

- Legal capacity and guardianship usually understood from perspective of Article 8 ECHR (right to private and family life)
- Interdependence, other rights can be seriously affected (case studies)
- We have to distinguish:

- Substantive aspects
- Procedural aspects

Substantive aspects

i) Was there an interference?

ii) Was it in accordance with the law?

iii) Did it pursue a legitimate aim?

iv) Was it proportional?

Interference and lawfulness

- **The measure itself:**

„The applicant has been entirely deprived of legal capacity since 1983. There is no doubt that this is a serious interference with his rights under Article 8 § 1.“ *Matter v. Slovakia*, 1999, § 68

„… especially in view of various serious limitations to the applicant's personal autonomy which that measure entailed.“ (Lashin v. Russia, 2013, § 77).

- **The institution of the proceedings itself:**

„The Court …considers that the institution of the proceedings with a view to divesting the second applicant of legal capacity amounted to an interference with her private life within the meaning of Article 8 of the Convention.“ (*X. and Y. v. Croatia*, 2011, § 103)

Legitimate aim, margin and proceduralisation

- **Legitimate aim and margin:**

„The Court accepts that depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure … the national authorities have a certain margin of appreciation “ (*Lashin v. Russia*, 2013, § 80).

The extent of the State’s margin in this context depends on **two** major factors:

- **First**, where the measure under examination has such **a drastic effect** on the applicant’s personal autonomy as in the present case (compare *X. and Y. v. Croatia*, 2011, § 102), the Court is prepared to subject the reasoning of the domestic authorities to a somewhat **stricter scrutiny**.

- **Second**, the Court will pay special attention to the quality of the domestic procedure (see *Shtukaturov v. Russia*, 2008, § 91). Whilst Article 8 of the Convention 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 (*Lashin v. Russia*, 2013, § 81).

Proportionality assessment - mental disability

- **Mental disability cannot be the sole reason:**

„The Court does not cast doubt on the competence of the doctors who examined the applicant and accepts that the applicant was seriously ill. However, in the Court's opinion **the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation**" (*Shtukaturov v. Russia*, 2008, § 94)

„it is clear that the applicant suffered from a serious and persistent mental disorder: he had delusory ideas, was a vexatious litigant, etc. On the other hand, the Serbskiy Institute report of 1999 did not refer to any particular incident of violent, self-destructive or otherwise grossly irresponsible behaviour on the part of the applicant since 1996, and did not allege that the applicant was completely unable to take care of himself" (*Lashin v. Russia*, 2013, § 91).

Proportionality assessment – procedural aspects

- **Access to court:**

„… in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6 § 1 of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity (Stanev v. Bulgaria, § 245).

- **Participatory rights:**

„Further, the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity" (*Shtukaturov v. Russia*, 2008, § 72).

Personal contact

- **A judge must have a personal contact:**

„it was indispensable for the judge to have **at least a brief visual contact** with the applicant, **and preferably to question him**. The Court concludes that the decision of the judge to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6 § 1“ (*Shtukaturov v. Russia*, 2008, § 73)

„The Court considers that judges adopting decisions with serious consequences for a person’s private life, such as those entailed by divesting someone of legal capacity, **should in principle also have personal contact** with those persons.“ (*X. and Y. v. Croatia*, 2011, § 84)

Proportionality assessment – procedural aspects

- **Recent expert opinion:**

An expert opinion prepared before one year and four months is no „actual“ (*H. F. v. Slovakia*, 2005, § 41)

- **An expert must be neutral:**

„where the opinion of an expert is likely to play a decisive role in the proceedings, as in the case at hand, the expert's neutrality becomes an important requirement which should be given due consideration. Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention. … an expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake (*Lashin v. Russia*, 2013, § 87).

- **What should be the content of the expert report:**

„An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports“ (*Sýkora v. Czech Republic*, 2012, § 103).

Access to justice and standing of NGOs

- The application was lodged by a NGO on behalf of a young Roma man, who died in 2004 at the age of 18.
- He had been placed in an orphanage at birth after being abandoned by his mother. When still a young child he was diagnosed as being HIV-positive and as suffering from severe mental disability. On reaching adulthood he had to leave the centre for disabled children. After a number of institutions had refused to accept him because of his condition, he was eventually admitted to a medical and social care centre, which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition. A few days later, he was admitted to a psychiatric hospital after displaying hyper-aggressive behaviour.
- There he was seen by a team of monitors from the NGO who reported finding him alone in an unheated room, with a bed but no bedding and dressed only in a pyjama top. Although he could not eat or use the toilet without assistance, the hospital staff refused to help him for fear of contracting HIV. He was refusing food and medication and so was only receiving glucose through a drip. The NGO monitors concluded that the hospital had failed to provide him with the most basic treatment and care. He died that same evening.

Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]

- (1) Although formally Mr Campeanu was considered to be a person with full legal capacity, it appears clear that in practice he was not capable of introducing any proceedings by himself;
- (2) During the domestic proceedings, the organisation's capacity to act on behalf of Mr Campeanu was not challenged or even questioned;
- (3) Mr Campeanu had no known next-of-kin, and owing to the failure of the state, no legal guardian had been appointed to take care of his interests, despite the legal requirement to do so;
- (4) The main complaint concerns Article 2, which Mr Campeanu evidently could not pursue because of his death.

Bulgarian Helsinki Committee

- Alarmed by a BBC documentary denouncing the situation of children with mental disabilities in an institution in Bulgaria, the NGO Bulgarian Helsinki Committee requested the State Prosecutor to investigate the conditions under which these children were accommodated in the home, and the deaths occurring there.
- In cooperation with the applicant organization, the State Prosecutor inspected various homes for disabled children. The association monitored the criminal investigations and lodged appeals against a number of decisions not to prosecute and discontinuance orders.
- Because a final judgment discontinued the investigations, the NGO took the case to the European Court of Human Rights.

- In *Bulgarian Helsinki Committee,* the ECtHR found three out of the four criteria fulfilled, but ultimately distinguished the present case from *Campeanu* because the applicant organisation had had no contact with the victims before they died, and the applicant organization had never enjoyed any formal status in the domestic proceedings.

CASE STUDIES

Kocherov

- The decisions were based on a number of considerations. In particular,
- the second applicant showed signs of anxiety in her parents' presence and had difficulties communicating with them. They concluded that "it would be stressful for the child to be placed with the family of her parents, who she had never lived with and had so far had no chance to get used to"
- by that time it had only been a month since the first applicant had left a specialist institution, where he had lived for all his life with the result that, in the District Court's opinion, he had "no skills or experience in bringing children up and taking care of them"
- The remaining reasons given by the domestic courts included the applicant's psychiatric diagnosis; the fact that the applicant's mother was legally incapacitated and could freely visit the first applicant's flat; and the first applicant's financial means being insufficient to support the second applicant

- **Communication dificulties:**

the Court is not persuaded that the domestic courts convincingly demonstrated that the second applicant's transfer into the first applicant's care would be stressful for her to the extent that it made it necessary for her to remain in public care for another year.

In the Court's view, they chose a formalistic approach, simply endorsing the position of the representative of the children's home, supported by the municipal custody and guardianship agency and public prosecutor, and silently ignoring all evidence and arguments to the contrary advanced by the first applicant.

- **Lack of skills:**

… documents, as well as a representative of the care home, confirmed that during his years at the home, the first applicant had lived in a separate room which he had kept in order. He had cooked for himself, maintained a household, and overall had been quite independent and fully able to care for himself. Moreover, he had not been confined to the care home, and had been authorised to leave the premises.

He had worked part-time at the home, and had very positive references. He had also worked part-time outside in the city. The evidence also showed that as soon as he had been allocated a flat, he had carried out the necessary repair works, registered the second applicant there, obtained compulsory medical insurance for her and collected all the necessary documents to put her on a waiting list for a place at a kindergarten

… **the domestic courts limited their finding in that regard to a mere reference to the first applicant's very prolonged residence in a specialist institution. In the Court's view, that fact alone cannot be regarded as a sufficient ground to justify the domestic courts' decision to restrict his parental authority over the second applicant and to prolong her time in care.**

A.-M.V. v. Finland

- In this regard, the Court takes note, in particular, of the fact that according to the expert evidence, the applicant's decision-making skills had been assessed as corresponding to those of a child between six and nine years of age. The Court also observes that it is apparent from the factual circumstances and the findings of the domestic courts that, apart from the fact that the former foster parents were well known and close to the applicant, the plan to move to a remote and isolated place in the North of Finland would have entailed a radical change in the applicant's living conditions.
- 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.

Alajos Kiss v. Hungary

- 42. The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing (*Hirst v. the United Kingdom (no. 2) [GC]*, op. cit., § 82). **In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question** (cf. also the example of those suffering different treatment on the ground of their gender - *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94, race - *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 182, ECHR 2007-..., or sexual orientation - *E.B. v. France* [GC], no. 43546/02, § 94, ECHR 2008-...). **The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs** (cf. *Shtukaturov v. Russia*, no. 44009/05, § 95, 27 March 2008).

The right to liberty and security

Detention of persons with disabilities and their treatment in detention

Maroš Matiaško

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What are we going to discuss?

1. Deprivation of liberty of persons with disabilities

2. Lawfulness of detention

3. Treatment in detention

Deprivation of liberty

Article 14 UN CRPD:

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

… (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**.

Article 5(1)(e) ECHR:

… No one shall be deprived of his liberty save in the following cases … (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) ECHR

- The reason why the Convention allows these individuals, [persons of unsound mind], 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 (*Guzzardi v. Italy*, § 98 *in fine*).

- 2 steps test

i) Does the measure **constitute a deprivation of liberty?**

A deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms (*Guzzardi v. Italy*, § 95).

ii) If yes, **was it lawful?**

Article 5(1)(e) ECHR – what constitutes deprivation of liberty?

(a) an ***objective*** element of a person's confinement in a particular restricted space for a not negligible length of time

(b) a ***subjective*** element, namely that the person has not validly consented to the confinement in question

(c) the deprivation of liberty must be ***imputable*** to the State

Objective element

(a) 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 type, duration, effects and manner of implementation of the measure in question**. The distinction between a deprivation of and a restriction upon liberty is merely one of **degree or intensity** and not one of nature or substance (*Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39, and *Ashingdane v. the United Kingdom*, 28 May 1985, § 41, Series A no. 93; *Storck v. Germany*, no. 61603/00, § 71).

(b) whether the person is in a ward which is ‘locked’ or ‘lockable’ **is relevant but not determinative** (see *H.L. v. the United Kingdom*, no. 45508/99, § 92, ECHR 2004-IX).

(c) key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the person **exercise complete and effective control** (see *H.L. v. the United Kingdom*, no. 45508/99, § 91, ECHR 2004-IX).

(d) effective control over, e.g. health care, social care, stay (freedom to leave), movement and finances.

Subjective element

(a) A person may give a valid consent to their confinement only if they have capacity to do so (*Storck v. Germany*, no. 61603/00, §§ 76 and 77).
(b) Where a person has capacity, consent to their confinement may be inferred from the fact that the person does not object (*H.L. v. the United Kingdom*, no. 45508/99, § 93, ECHR 2004-IX; *Storck v. Germany*, no. 61603/00, § 77).
(c) No such conclusion may be drawn in the case of a patient lacking capacity to consent (*H.L. v. the United Kingdom*, no. 45508/99, § 90, ECHR 2004-IX).
(d) Express refusal of consent by a person who has capacity will be determinative of this aspect of 'deprivation of liberty' (*Storck v. Germany*, no. 61603/00, § 77).
(e) The fact that the person may have given himself up to be taken into detention does not mean that he has consented to his detention, whether he has capacity (*Storck v. Germany*, no. 61603/00, § 75) or not (*H.L. v. the United Kingdom*, no. 45508/99, § 90, ECHR 2004-IX).
(f) 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.

Deprivation of liberty

Case study

Lawfulness – Article 5(1)(e)

- An individual cannot be deprived of his liberty as being of “unsound mind” unless the following **three** minimum conditions are satisfied (*Stanev v. Bulgaria* [GC], § 145; *D.D. v. Lithuania*, § 156; *Kallweit v. Germany*, § 45; *Shtukaturov v. Russia*, § 114; *Varbanov v. Bulgaria*, § 45; and *Winterwerp v. the Netherlands*, § 39):

(i) the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required;

(ii) the individual’s mental disorder must be of a kind to warrant compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances;

(iii) the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

- The detention of persons of unsound mind must be effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons (*L.B. v. Belgium*, § 93; *Ashingdane v. the United Kingdom*, § 44; *O.H. v. Germany*, § 79).

Legal representation

- The Court does not consider … that the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, could satisfy the requirements of necessary “legal assistance” for persons confined under the head of “unsound mind”, … because an effective legal representation of persons with disabilities requires an **enhanced duty of supervision of their legal representatives by the competent domestic courts.**

- Accordingly, …, **contact** between the representative and the applicant was necessary or even crucial … (*Sýkora v. the Czech Republic*, no. 23419/07, §§ 102 and 108, 22 November 2012, with further references).

- the legal aid representative never met the applicant, made no submissions on her behalf and, although he attended the hearing, acted rather as a passive observer of the proceedings. Although the domestic authorities were well aware of these omissions, they failed to react by taking the appropriate measure for securing the applicant’s effective legal representation. The Court therefore finds that the applicant’s representative’s passive attitude, in respect of which the domestic authorities failed to take the necessary action, deprived the applicant of effective legal assistance in the proceedings concerning her involuntary confinement in the hospital (*M.S. (no.2) v. Croatia*, § 156)

Participation

- … although the judge conducting the proceedings visited the applicant in the hospital, the documents submitted before the Court do not show that he made **any appropriate accommodations** to secure her effective access to justice (… Article 13 CRDP). In particular, there is no evidence that **he informed the applicant of her rights or gave any consideration to the possibility for her to participate in the hearing** (*M.S. (no. 2) v. Croatia*, § 157)

- She was thus not given an opportunity to comment on the expert's findings at the court hearing which resulted in the delivery of the decision on her involuntary retention in a psychiatric hospital (compare *Rudenko*, § 114). Moreover, taking into consideration the applicant's clear and undisputed refusal to undergo any treatment and the domestic courts' awareness of this fact, which was reflected in their decisions, the need to ensure the applicant's right to be heard was ever more pressing.

- … the Court is not able to accept that there was a valid reason justifying the applicant's exclusion from the hearing, particularly since it notes that during her interview with the judge of the County Court, the applicant did not demonstrate that her condition was such as to prevent her from directly engaging in a discussion of her situation (Article 13 CRDP; and compare *S. v. Estonia*, no. 17779/08, § 45, 4 October 2011).

Strong procedural guarantees

- In the light of the **vulnerability** of individuals suffering from mental disorders and the need to adduce **very weighty reasons** to justify any restriction of their rights, the proceedings resulting in the involuntary placement of an individual in a psychiatric facility **must necessarily provide clearly effective guarantees against arbitrariness**.

- This position is supported by the fact that hospitalisation in a specialised medical institution frequently results in an interference with an individual's private life and physical integrity through medical interventions against the individual's will (X v. Finland, no. 34806/04, § 212, 3 July 2012; Zagidulina v. Russia, no. 11737/06, § 53, 2 May 2013; and Anatoliy Rudenko v. Ukraine, no. 50264/08, § 104, 17 April 2014).

TREATMENT IN DETENTION

Reasonable accommodation

- where the authorities decide to place and keep a disabled person in continued detention, they should demonstrate **special care in guaranteeing such conditions as correspond to the special needs resulting from his or her disability** (see Farbtuhs v. Latvia, no. 4672/02, § 56, 2 December 2004; Jasinskis v. Latvia, no. 45744/08, § 59, 21 December 2010; Z.H. v. Hungary, no. 28973/11, § 29, 8 November 2012).

- 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;

Forced medical treatment

- Under Article 8 ECHR:

the forced administration of medication represents a serious interference with a person's physical integrity, and must accordingly be based on a "law" that guarantees proper safeguards against arbitrariness.

- What if the decision to confine the applicant for involuntary treatment included an automatic authorisation to proceed to forcible administration of medication if the applicant refused the treatment?

- What if the decision-making was solely in the hands of the doctors treating the patient, who could take even quite radical measures regardless of the applicant's wishes?

- What if their decision-making was free from any kind of immediate judicial scrutiny: the applicant did not have any remedy available whereby she could require a court to rule on the lawfulness, including proportionality, of the forced administration of medication, or to have it discontinued?

Forced medical treatment

- The Court finds that the forced administration of medication in the present case was implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of sufficient safeguards against forced medication by doctors deprived the applicant of the minimum degree of protection to which she was entitled under the rule of law in a democratic society (see *X. v. Finland*, § 221).

Use of restraints

- recourse to physical force which has not been made **strictly necessary by their own conduct** diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see Krastanov v. Bulgaria, no. 50222/99, § 53, 30 September 2004).

- regarding the use of restraining belts, the Court accepted that aggressive behaviour on the part of an intoxicated individual **may require recourse to the use of restraining belts**, provided of course that checks are periodically carried out on the welfare of the immobilised individual. The application of such restraints **must, however, be necessary** under the circumstances and its length must not be excessive (see Wiktorko v. Poland, § 55).

- using restraints is **a serious measure** which must **always** be justified by preventing imminent harm to the patient or the surroundings and must be proportionate to such an aim. **Mere restlessness cannot therefore justify strapping a person to a bed** for almost two hours (Bureš v. Czech Republic, § 96).

THANK YOU

Q & A

DON'T TAKE AWAY MY PARENTAL RESPONSIBILITY – KOCHEROV FAMILY

The applicants, Vitaliy Kocherov and Anna Sergeyeva, father and daughter, are Russian nationals who were born in 1966 and 2007 respectively and live in St Petersburg. The case concerned their complaint about the restriction of Mr Kocherov's parental authority on account of his disability. Mr Kocherov has a mild mental disability. Between 1983 and January 2012 he lived in a neuropsychological care home in St Petersburg. In 2007 he married a woman who was also a resident of the care home and had been deprived of her legal capacity on account of her mental disability.

In May 2007 she gave birth to their daughter Anna, who in July 2007 was placed in a children's home as a child without parental care. In August 2007 Mr Kocherov was registered as her father. He gave his consent for her to stay at the children's home until it became possible for him to take care of her. Throughout her stay there he maintained regular contact with her.

In 2008 the marriage between Mr Kocherov and his wife was declared void on account of her legal incapacity. In February 2012 Mr Kocherov was discharged from the care home and moved into a social tenancy flat which had been provided to him at his request. In the meantime, he informed the children's home of his intention to take his daughter into his care once he was discharged and had moved into his flat. The children's home applied to a district court to have his parental authority restricted. In the proceedings before the court, the representatives of the children's home submitted, in particular, that the child had difficulties communicating with her parents and that she felt anxiety and stress in their presence. Mr Kocherov submitted, in particular, an export report which had been prepared with a view to determining whether he could be discharged from the care home and which concluded that his state of health enabled him to fully exercise his parental authority. Furthermore, he submitted a report by the custody and guardianship authority which found the conditions in his flat to be appropriate for his daughter.

In March 2012 the district court decided to restrict, for the time being, Mr Kocherov's parental authority over his daughter. It notably found that at the time it would not be in the best interest of the child to be taken into his care, relying in particular on the submissions by the representatives of the children's home. Mr Kocherov's appeal against the judgment was dismissed. After having lodged his application with the European Court of Human Rights, the restriction of Mr Kocherov's parental authority – who in the meantime had remarried his wife after her legal capacity had been restored – was eventually repealed in April 2013. His daughter has been living with him ever since May 2013.
Relying in particular on Article 8 (right to respect for private and family life), the applicants complained about the restriction of Mr Kocherov's parental authority.

I WANT TO LIVE IN THE NORTH

The applicant, A.-M.V., is a Finnish national who was born in 1990. He is intellectually disabled. A.-M.V. was taken into public care in 2001 and placed with a foster family. However, in 2007 the child welfare authorities decided to remove him from the family and to place him in a disabled children's home – with one of his brothers – in his home town in southern Finland. This was because the foster parents had made important decisions without consulting the authorities, namely they had moved to a remote village in the far north of Finland and had planned on placing him in a vocational school 300 km away.

In February 2011 a mentor, who had been appointed by a court when A.-M.V. turned 18, took a decision concerning A.-M.V.'s place of residence which, according to him, was against his own will. A.-M.V. wished to move from him his home town in the south to live in the north with his former foster parents. His mentor considered, however, that it was in his best interests for him to live in his home town where other members of his family lived and where he had better educational and work opportunities; he could spend holidays with his former foster parents.

A.-M.V. thus brought court proceedings asking to replace the mentor by another person insofar as matters concerning the choice of his place of residence and education were concerned. This request was ultimately refused in 2013 by the domestic courts. Having considered expert testimony (by a psychologist) and having heard A.-M.V. in person as well as several witnesses, they concluded that he was clearly unable to understand the significance of the planned move to a remote part of the country. It notably took into account the level of his intellectual capacity, assessed as equal to that of a six to nine year old child, and the fact that he had no particular complaints about his current situation in his home town where he lived in a special unit for intellectually disabled adults, went to work, had hobbies and a support network of relatives, friends and staff from the social welfare authorities. Lastly, the courts expressed doubts as to whether his opinion was genuinely his own or his foster parents. There was thus no reason to replace the mentor by another person as far as matters concerning the applicant's place of residence and his education were concerned.

STORY FROM BULGARIAN MOUNTAINS

The applicant, Rusi Kosev Stanev, is a Bulgarian national who was born in 1956 and lives in Pastra in the municipality of Rila, south-western Bulgaria. In 2000 and 2001 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 as his family did not wish to take on guardianship responsibilities for him.

Without consulting or informing Mr Stanev, on 10 December 2002 his guardian had him placed in the Pastra social care home for men with psychiatric disorders, in a remote mountain location near the village of Pastra. He has lived there ever since. 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. He was then returned by staff members.

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, following a medical report of 15 June 2005 which stated that he showed signs of having schizophrenia. Mr Stanev tried unsuccessfully to have his partial guardianship over-turned by asking the Mayor of Rila to bring a court case. His application for judicial review of the mayor's refusal was rejected on the ground that an application could be made by his guardian. Mr Stanev has made several oral requests to his guardian to apply for release which have all been refused.

The applicant, Alajos Kiss, is a Hungarian national who was born in 1954 and lives in Rózsaszentmárton (Hungary). Diagnosed with a psychiatric condition in 1991, he was placed under partial guardianship in May 2005 on the basis of the civil code. In February 2006, the applicant realised that he had been omitted from the electoral register drawn up in view of the 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.

NO ME QUITÉIS LA PATRIA POTESTAD - FAMILIA KOCHEROV

Los demandantes, Vitaliy Kocherov y Anna Sergeyeva, padre e hija, son ciudadanos rusos nacidos en 1966 y 2007 respectivamente y que viven en San Petersburgo. El caso estaba relacionado con su reclamación sobre la restricción de la patria potestad del señor Kocherov por culpa de su discapacidad. El señor Kocherov tiene una ligera discapacidad mental. Entre 1983 y enero de 2012 vivió en un centro asistencial neuropsicológico en San Petersburgo. En 2007 se casó con una mujer que también era residente del centro asistencial a la que se había retirado su capacidad jurídica a cuenta de su discapacidad mental.

En mayo de 2007 dio a luz a su hija Anna, quien en julio de 2007 fue dejada en un hogar de menores como niña sin cuidado parental. En agosto de 2007 se inscribió al señor Kocherov como su padre. Prestó su consentimiento para que se quedara en el hogar de menores hasta que le fuera posible ocuparse de ella. Durante su estancia en dicho hogar, mantuvo el contacto con ella.

En 2008 se declaró nulo el matrimonio entre el señor Kocherov y su esposa a cuenta de su incapacidad legal. En febrero de 2012 el señor Kocherov recibió el alta del centro asistencial y se mudó a un piso de alquiler social que se le asignó previa solicitud por su parte. Mientras tanto, informó al hogar de menores de su intención de llevarse a su hija para cuidarla una vez le dieran el alta y se hubiera mudado al piso. El hogar de menores solicitó a un tribunal de distrito que le retiraran la patria potestad. En el procedimiento ante el juzgado, los representantes del hogar de menores alegaron, en concreto, que la niña tenía dificultades para comunicarse con sus padres y que sentía ansiedad y estrés en su presencia. El señor Kocherov presentó, en concreto, un informe de un perito que se había preparado con vistas a determinar si se le podía dar el alta del centro asistencial y que concluía que su estado de salud le permitía ejercitar plenamente su patria potestad. Además, presentó un informe de la autoridad de guardia y custodia que decía que las condiciones en el piso eran apropiadas para su hija.

En marzo de 2012 el tribunal de distrito decidió restringir, por el momento, la patria potestad del señor Kocherov sobre su hija. En concreto determinó que, por el momento, no era en el mejor interés de la menor que la tuviera a su cargo, basándose en particular en el informe presentado por los representantes del hogar de menores. La apelación del señor Kocherov a esta sentencia fue rechazada. Después de haber interpuesto su solicitud en el Tribunal Europeo de Derechos Humanos, la restricción sobre la patria potestad del señor Kocherov, quien mientras tanto se volvió a casar con su esposa después de que le restituyeran la capacidad legal, fue revocada en abril de 2013. Su hija vive con él desde mayo de 2013.
Basándose en particular en el artículo 8 (derecho al respeto de la vida privada y familiar), los solicitantes reclamaron la restricción de la patria potestad del señor Kocherov.

QUIERO VIVIR EN EL NORTE

El demandante, A.-M.V., es ciudadano finlandés nacido en 1990. Tiene una discapacidad intelectual. Se puso a A.-M.V. Bajo servicios sociales en 2001 y se le reubicó con una familia de acogida. Sin embargo, en 2007 las autoridades de bienestar de niños decidieron quitárselo a la familia a la familia y llevarlo a un hogar de menores con discapacidades – con uno de sus hermanos – en su pueblo natal al sur de Finlandia. Esto se debe a que los padres de acogida habían tomado una importante decisión sin consultarlo con las autoridades, a saber: se mudaron a un pueblo remoto en el norte de Finlandia y habían planeado internarlo en una escuela de formación profesional a 300 km de distancia.

En febrero de 2011, un mentor, que había sido nombrado por los tribunales cuando A.-M.V. cumplió 18, tomó una decisión relativa al lugar de residencia de A.-M.V.'s que, según él, iba en contra de su propia voluntad. A.-M.V. Deseaba mudarse de su pueblo natal en el sur para vivir en el norte con sus antiguos padres de acogida. Su mentor consideraba, sin embargo, que lo mejor para él era vivir en su pueblo natal donde vivían otros miembros de su familia y donde tenía mejores oportunidades educativas y de trabajo; podría pasar las vacaciones con sus antiguos padres de acogida.

Por tanto, A.-M.V. Inició un procedimiento judicial demandando el cambio del mentor por otra persona en lo que respecta a la elección de su lugar de residencia y educación. Los tribunales nacionales en última instancia rechazaron en 2013 esta solicitud. Habiendo considerado el testimonio de expertos (de un psicólogo) y habiendo escuchado a A.-M.V. en persona, así como a varios testigos, concluyeron que claramente, no era capaz de comprender las implicaciones de mudarse a una parte remota del país. En particular, tuvieron en cuenta el nivel de su capacidad intelectual, evaluada como equivalente a la de un niño de seis a nueve años, y el hecho de que no tenía quejas particulares sobre su situación actual en su pueblo natal, donde vivía en una unidad especial para adultos con discapacidades intelectuales, iba a trabajar, tenía hobbies y una red de familiares, amigos y personal de los servicios sociales que le apoyaban. Por último, los expertos expresaron dudas sobre si su opinión era en realidad suya o si era de sus padres de acogida. Por tanto, no había motivos para cambiar al mentor por otra persona en lo relativo al lugar de residencia y educación del solicitante.

HISTORIA DE LAS MONTAÑAS DE BULGARIA

El demandante, Rusi Kosev Stanev, es un ciudadano búlgaro nacido en 1956 que vive en Pastra, en el municipio de Rila, en el suroeste de Bulgaria. En 2000 y 2001 los tribunales de Bulgaria dictaminaron que el señor Stanev estaba parcialmente incapacitado, basándose en que había sufrido esquizofrenia desde 1975 y era incapaz de gestionar sus propios asuntos de manera adecuada o darse cuenta de las consecuencias de sus actos. En 2002 se le puso bajo la tutela parcial de un miembro del consejo ya que su familia no deseaba encargarse de las responsabilidades de su tutela.

Sin consultárselo o informar al señor Stanev, el 10 de diciembre de 2002 su tutor lo ingresó en el centro de asistencia social de Pastra para hombres con desórdenes psiquiátricos, en una remota montaña cerca del pueblo de Pastra. Desde entonces, ha vivido allí. Por consiguiente, el director del centro se convirtió en su tutor. Sólo se le permitía al señor Stanev dejar la institución con el permiso previo del director. En una ocasión, cuando no regresó después de un período de permiso organizado, el director se puso en contacto con la policía, que lo localizó. Miembros del personal lo trajeron de vuelta.

El señor Stanev intentó que le restauraran su capacidad legal en noviembre de 2004. En 2005 los fiscales rechazaron presentar el caso a los tribunales, alegando que no podría valerse por sí mismo y que la institución era el sitio más apropiado para él, siguiendo un informe médico del 15 de junio de 2005 que decía que mostraba signos de padecer esquizofrenia. El señor Stanev intentó sin éxito que revocasen su tutela parcial pidiéndole al alcalde de Rila que iniciase un procedimiento judicial. Se rechazó su solicitud de revisión judicial por parte del alcalde basándose en que su tutor podía hacer la solicitud. El señor Stanev ha realizado varias solicitudes orales a su tutor para que solicite su liberación, todas ellas han sido rechazadas.

DADME EL DERECHO AL VOTO

El demandante, Alajos Kiss, es un ciudadano húngaro que nació en 1954 y vive en Rózsaszentmárton (Hungría). Se le diagnosticó una enfermedad psiquiátrica en 1991, se le puso bajo tutela parcial en mayo de 2005 basándose en el código civil. En febrero de 2006 el demandante se dio cuenta de que se le había omitido en el censo electoral en vista de las próximas elecciones legislativas.

Su queja a la oficina electoral no tuvo éxito. También se quejó al tribunal de distrito, que en marzo de 2006 desestimó su caso, observando que, bajo la constitución de Hungría, las personas que están bajo tutelaje no tienen derecho a votar. Cuando se celebraron las elecciones legislativas en abril de 2006 el demandante no pudo participar.

The right to political participation of people with disabilities

Photo of people with disabilities appearing before the Constitutional Court in Spain

This publication has been produced with the financial support of the European Union's REC Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

Plena inclusión

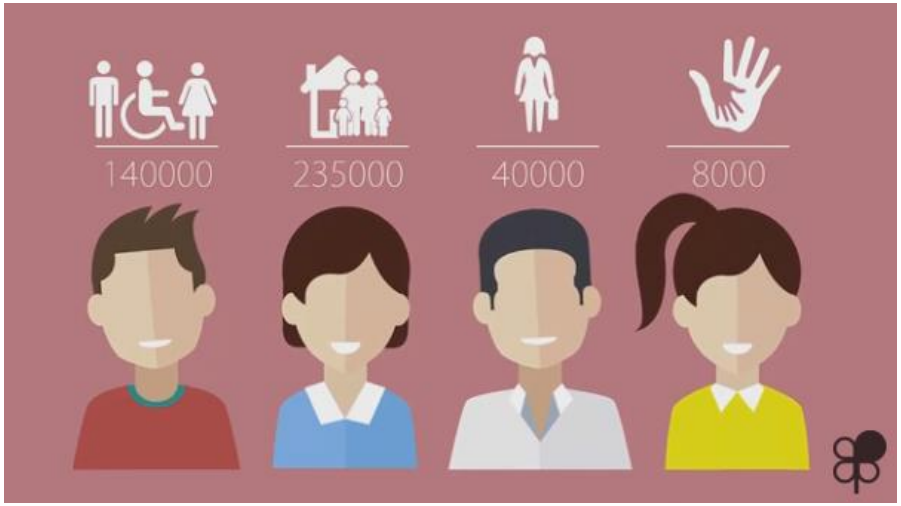
Plena inclusión is an umbrella organization for people with intellectual or developmental disabilities and their families.

https://www.youtube.com/watch?v=wBYDzx12f-Y

https://www.youtube.com/watch?v=TbZ1fUWAXwg

Image of a person with intellectual disability

Data of the number of Plena inclusión member organizations



Data on the number of people that belogs to our movement

Eleanor Roosevelt photograph with a text of The Universal Declaration of Human Rights

The International Covenant on civil and Political Rights recognices the right of **every citizen**:

- To take part in the conduct of public affairs;
- To vote and to be elected, and
- To have access to public service in his country.

Image of people with disabilities silhouettes and the legend “Convention on the rights of people with disabilities”.

States Parties shall guarantee that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, **including the right and opportunity for persons with disabilities to vote and be elected.**

Organic Law 5/1985, of the General Electoral Regime

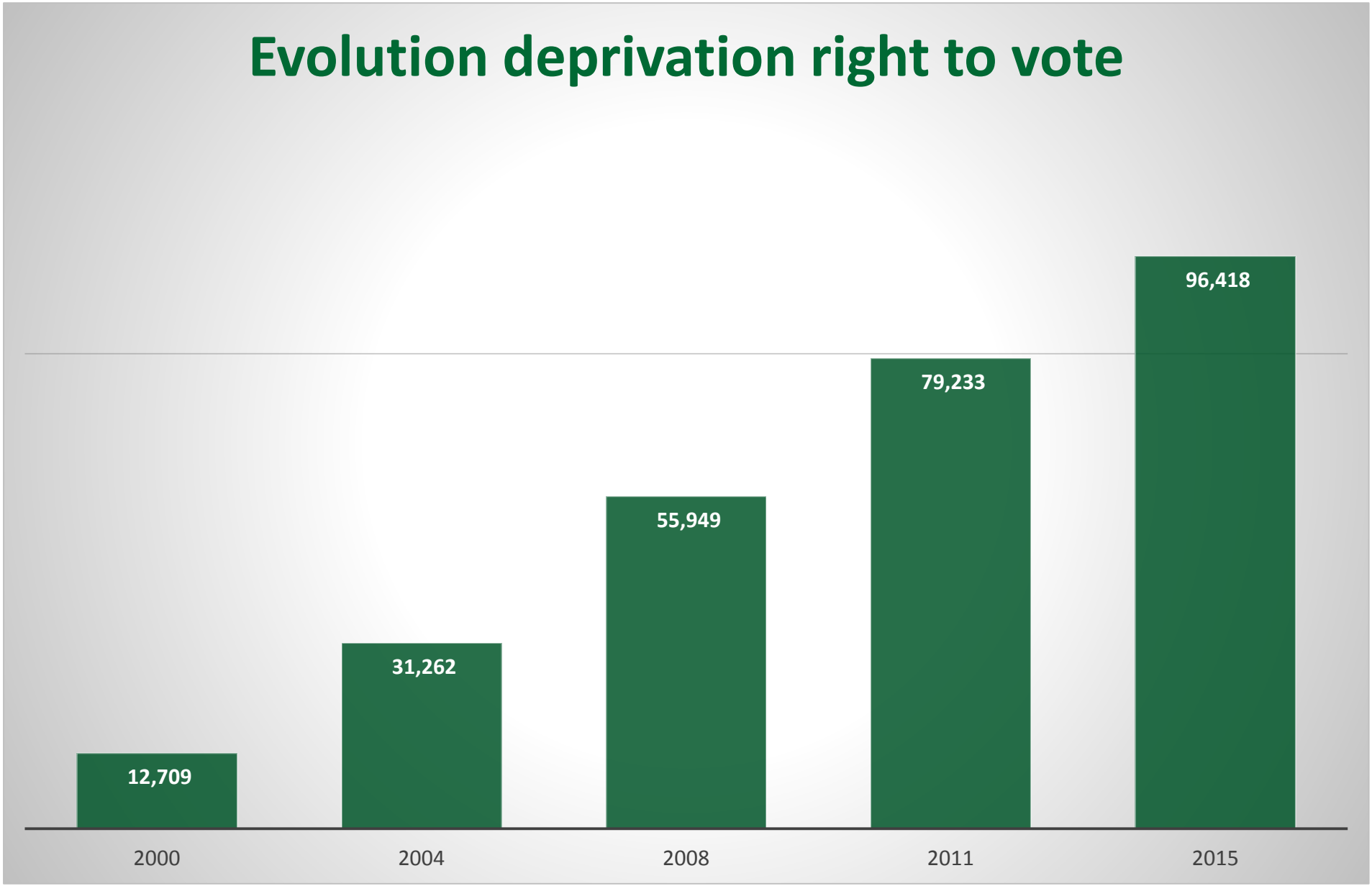
1. Do not have the right to vote and be voted for:
[…]
b) Who is assesed as incapable on the basis of a final judgement, provided that it expressly declares the inability to exercise the right to vote.

Image of different people with the message: more inclusion, more voices, more democracy.

<u>It is possible to deny the status of citizen to a person</u> based on the subjective perception of their capacity. Sometimes also, due to their limitations when expressing their will and preferences, or cognitive and attitudinal barriers generated from society and public institutions themselves.

Image of figures of different people with the legend: being different is not a problem, the problem is being treated differently.

Evolution deprivation right to vote



Data of Spanish people who can’t exercise the right to vote

States may legitimately establish restrictions on the exercise of political rights, but with certain limits.

Any restriction must be established by law and must be based on objective and reasonable criteria.

The argument: the principle of proportionality.

It is considered a proportional measure to preserve the integrity of the political system.

Image of a dartboard

Comitee on the Rights of Persons with Disabilities Communication 4/2011

- **There aren't no legitimate grounds based on discrimination**: evaluation of voting capacity based on discriminatory criteria made only to the population with disabilities

- **Capable people are being deprived of the right to vote**: only 5% of people with intellectual disabilities have great needs for support.

- **Legal norms can not be approved to avoid borderline cases**, especially when they affect the exercise of a fundamental right.

Spain is not fulfilling the obligation to provide support that allows people to exercise their right.

Article 29.a.i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.

Home of the web ”My vote counts” of Plena inclusión.

Lack of cognitive accessibility of electoral processes

Survey of about 400 people highlights the lack of cognitive accessibility in the electoral processes and the subsequent difficulty to exercise their vote.

70% of the people surveyed went with other people and more than 90% had already exercised their right to vote before, but **more than 40% found it difficult to understand the information.**

Almost 70% did not find information that would facilitate how to get the **electoral college**.

Nearly 50% said there was **no information** about the opening hours to vote or a support person to explain how to do it.

Regarding the election of **ballots**, almost 70% said that it was not easy to find the ballot of the party they wanted to vote for.

http://www.plenainclusion.org/informate/publicaciones/cuestionario-de-accesibilidad-cognitiva-en-colegios-electorales

LOREG reform. Proposed law of Communities and Autonomous Cities. Assembly of Madrid.

Supresión de los apartados b) y c) de su punto primero y la supresión del punto segundo.

Dos. Se añade una disposición adicional séptima con la siguiente redacción:
«A partir de la entrada en vigor de la Ley de modificación de la LOREG para adaptarla a la Convención Internacional sobre los Derechos de las Personas con Discapacidad, quedan sin efecto las limitaciones en el ejercicio del derecho de sufragio establecidas por decisión judicial fundamentadas jurídicamente en el apartado 3.1. b) y c) de la Ley Orgánica 5/1985, de 19 de junio, ahora suprimidos. **Las personas a las que se les hubiere limitado o anulado su derecho de sufragio por razón de discapacidad quedan reintegradas plenamente en el mismo por ministerio de la Ley.»**

http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-150-1.PDF

Enmiendas PP:

http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-150-4.PDF

Image of a row of colorful silhouettes waiting to vote.

Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly […]

Article 29

Image of a lot of hands in different colours.

My name is Xavier Orno, I was born in Barcelona and I am 32 years old.

Photo of Xavi and a workmate in the State Congress of Cognitive Accessibility

I am a member of the Dincat Rights Watch and a technician in the area of active citizenship and supports for people.

I participate in events, round tables and give talks related to intellectual disability and rights.

I participate in the adaptation of texts in easy to read and I evaluate the accessibility of different environments.

Logotipo Dincat Plena inclusión Catalunya

Logotipo Lectura Fácil

I am a member of the Advisory Board of the Síndic de Greuges, the ombudsman in Catalonia.

SÍNDIC
EL DEFENSOR DE LES PERSONES

Logo of the Síndic de Greuges.

I am also a member of a political party.

Drawing of a politician.

Years ago I worked in a special employment center as a manipulated laborer.

My co-workers explained me that there was a group of self-advocates.

Photography manipulated workshop

Image of a meeting

In the meetings, we talked about the things that happened to us and what we wanted to do as a group.

A very powerful group of people who fought for the rights of people with disabilities throughout Catalonia: the Observatori de Drets de Dincat.

They proposed to join me and I accepted.

Infographic on the rights of people with disabilities

One of the issues was the right to vote and changes in legal capacity.

Another question: how many people with intellectual or developmental disabilities are in an active political party?

Photo of a person with intellectual disability voting.

Why do not you join a political party and defend us from within?

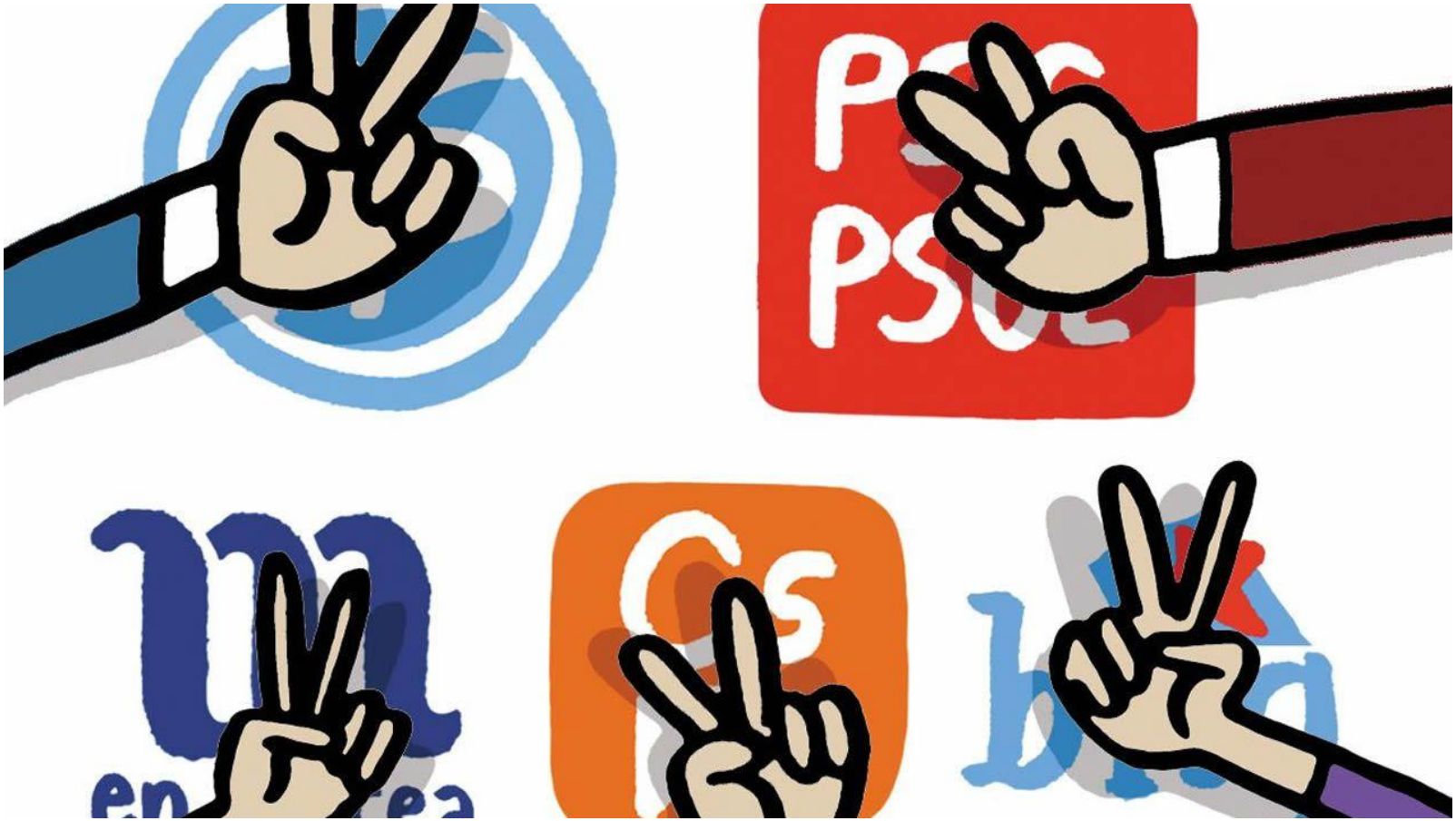


Image with logos of different Spanish political parties.

The important thing is that they have given me the opportunity to speak, express my opinions or asses and participate.

After all, it is about claiming rights but also about demonstrating that we can fulfill our duties.

Logo “Empower-us” Global Network to support Self-Advocacy of Inclusion International.

Referencias

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dincat

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El derecho a la participación política de las personas con discapacidad

Foto de personas con discapacidad manifestándose ante el Tribunal Constitucional en España

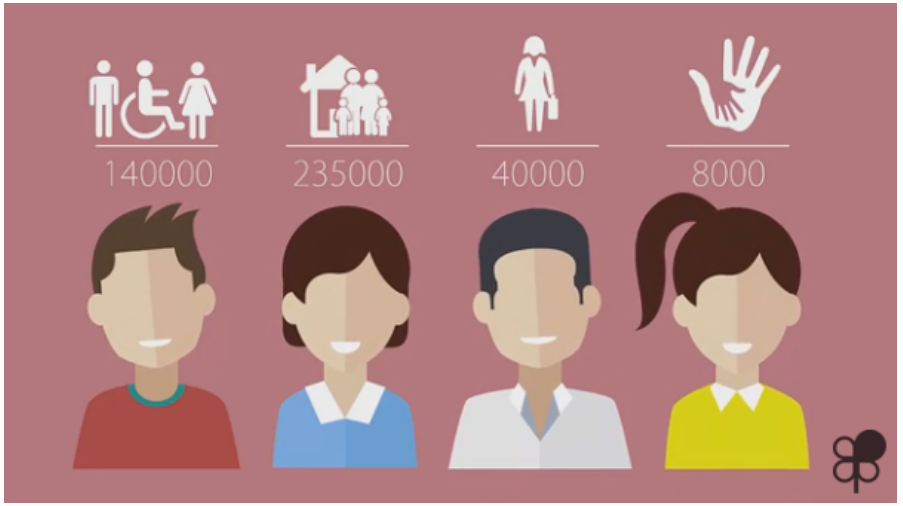
Esta publicación se ha elaborado con el apoyo económico del Programa «Derechos, Igualdad y Ciudadanía», 2014-2020, de la Unión Europea. El contenido de esta publicación es responsabilidad exclusiva del autor y en modo alguno refleja las opiniones de la Comisión Europea. El contenido es responsabilidad exclusiva del autor.

Plena inclusión

Es una organización representativa de personas con discapacidad intelectual o del desarrollo y sus familias.

https://www.youtube.com/watch?v=wBYDzx12f-Y

https://www.youtube.com/watch?v=TbZ1fUWAXwg



Fotografía Eleanor Roosevelt con un texto de la declaración universal de derechos humanos

Pacto Internacional de Derechos Civiles y Políticos reconoce y ampara el derecho de **todo ciudadano** a:

- Participar en la dirección de los asuntos públicos;
- Votar y a ser elegido, y
- Tener acceso a la función pública.

Imagen siluetas persona con discapacidad y leyenda Convención sobre los derechos de las personas con discapacidad.

Los Estados se comprometen a asegurar que las personas con discapacidad puedan participar plena y efectivamente en la vida política y pública en igualdad de condiciones con las demás, directamente o a través de representantes libremente elegidos, **incluidos el derecho y la posibilidad de las personas con discapacidad a votar y ser elegidas**.

Ley Orgánica 5/1985, del Régimen Electoral General

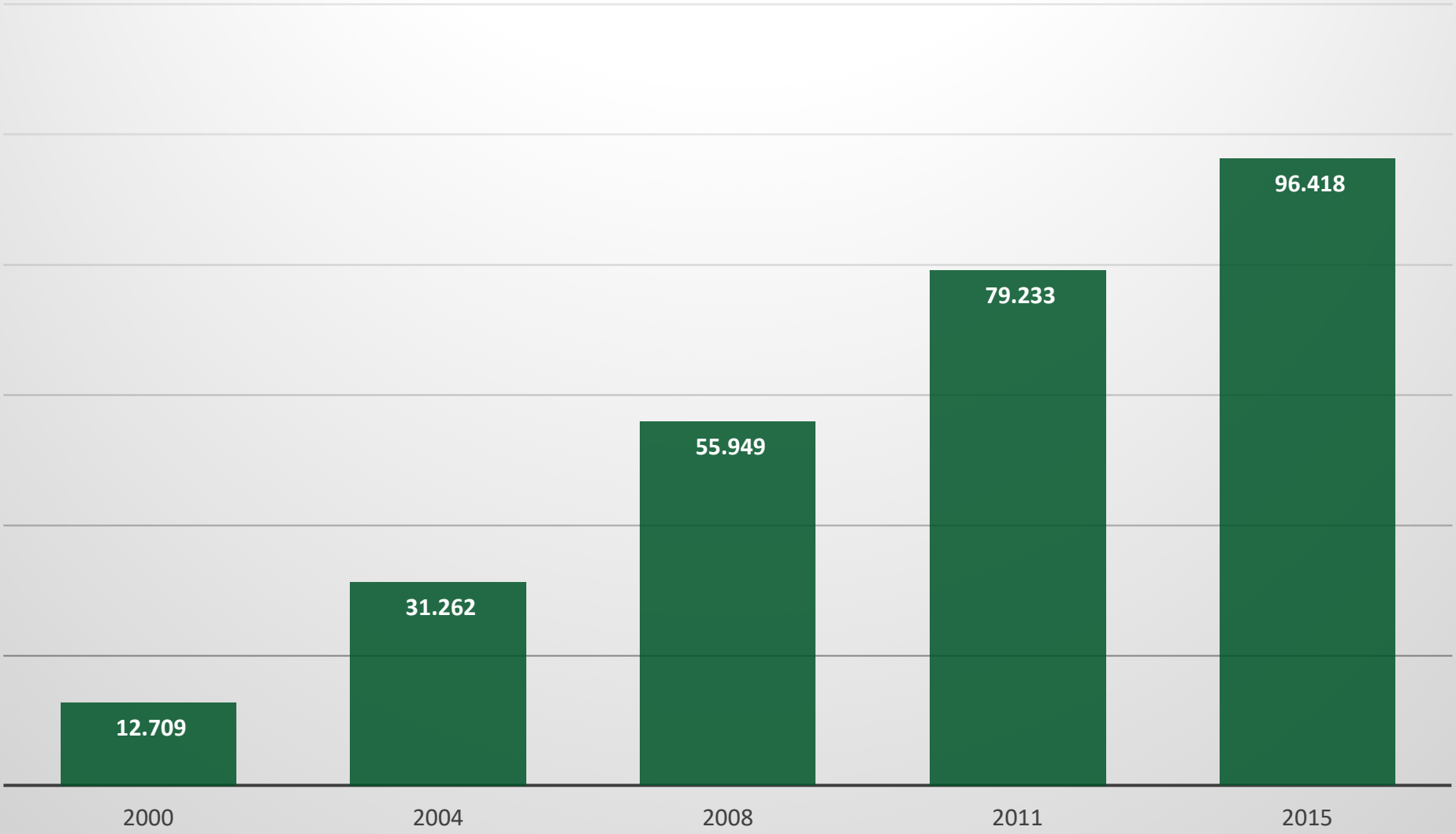
1. Carecen de derecho de sufragio:
[…]
b) Los declarados incapaces en virtud de sentencia judicial firme, siempre que la misma declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

Imagen de personas diferentes con el mensaje: más inclusión, más voces, más democracia.

<u>Es posible negar la condición de ciudadano a una persona</u> sobre la base la percepción subjetiva de su capacidad. A veces también, debido a sus limitaciones a la hora de expresar su voluntad y sus preferencias, o a barreras cognitivas o actitudinales generadas desde la propia sociedad e instituciones públicas.

Imagen de figuras de personas diversas con la leyenda: ser diferente no es un problema, el problema es ser tratado diferente.

Evolución privación derecho al voto



Un Estado puede legítimamente establecer restricciones al ejercicio de los derechos políticos, pero con determinados límites.

Cualquier restricción deberá estar establecida por la Ley y debe basarse en criterios objetivos y razonables.

El argumento: el principio de proporcionalidad.

Se considera una medida proporcional para preservar la integridad del sistema político.

Imagen de una diana

Comité sobre los Derechos de las Personas con discapacidad en la Comunicación 4/2011

- Ninguna restricción es legítima si está basada en una discriminación: evaluación de la capacidad de voto basada en criterios discriminatorios realizados únicamente a la población con discapacidad.

- Se está privando del derecho al voto a personas capaces: únicamente el 5% de las personas con discapacidad intelectual presentan grandes necesidades de apoyo.

- Las normas legales no se pueden aprobar para evitar casos-límite, especialmente cuando afectan al ejercicio de un derecho fundamental.

España está incumpliendo la obligación de proveer de apoyos que permitan a las personas ejercitar su derecho.

Artículo 29.a.i) La garantía de que los procedimientos, instalaciones y materiales electorales sean adecuados, accesibles y fáciles de entender y utilizar;

Portada de la web de Plena inclusión: Mi voto cuenta.

Falta de accesibilidad cognitiva de los procesos electorales

Encuesta a cerca de 400 personas acusa la falta de accesibilidad cognitiva en los procesos electorales y la consecuente dificultad para ejercer su voto.

El 70% de las personas encuestadas fueron acompañadas y más del 90% ya habían ejercido su derecho a voto antes, pero más del 40% encontró **dificultades para comprender la información**.

Casi un 70% no encontró información que facilitase su llegada al **colegio electoral** que le correspondía.

Cerca de la mitad dijeron que no existía información facilitada sobre en qué **horario** se podía votar o alguna persona de apoyo que les explicase cómo hacerlo.

En relación a la elección de papeletas, casi un 70% aseguró que no fue fácil encontrar la **papeleta** del partido al que querían votar.

http://www.plenainclusion.org/informate/publicaciones/cuestionario-de-accesibilidad-cognitiva-en-colegios-electorales

Reforma LOREG. Proposición de ley de Comunidades y Ciudades Autónomas. Asamblea de Madrid.

Supresión de los apartados b) y c) de su punto primero y la supresión del punto segundo.

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http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-150-1.PDF

Enmiendas PP:

http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-150-4.PDF

Imagen de una fila de siluetas de colores esperando para votar

Me llamo **Xavier Orno**, nací en Barcelona y tengo 32 años.

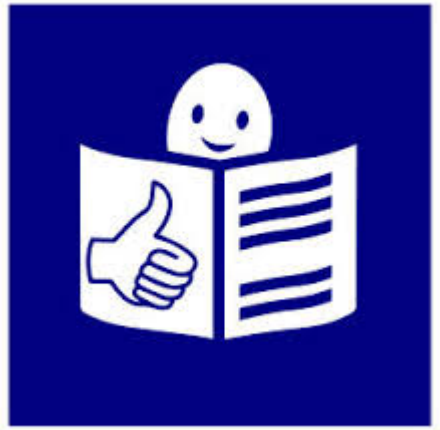
Foto de Xavi y un compañero en el Congreso Estatal de Accesibilidad Cognitiva

Soy miembro del Observatorio de Derechos de Dincat y técnico del área de ciudadanía activa y apoyos.

Participo en actos, mesas redondas y doy charlas relacionadas con la discapacidad intelectual y derechos.

Participo en la adaptación de textos en lectura fácil y evalúo la accesibilidad de entornos.

Logotipo Dincat Plena inclusión Catalunya



Logotipo Lectura Fácil

Soy miembro del Consejo Asesor del Síndic de Greuges, el defensor del pueblo en Cataluña.

Logotipo del Síndic de Greuges.

También soy militante de un partido político.

Dibujo de un político.

Hace años yo trabajaba en un centro especial de empleo como peón de manipulados.

Los compañeros de trabajo me explicaron que existía un grupo que de autogestores.

Fotografía taller de manipulados

Imagen de una reunión

Allí hablamos de las cosas que nos pasaban y de lo que queríamos hacer como grupo.

Un grupo de personas muy potente que luchaba por los derechos de las personas por discapacidad a nivel de toda Cataluña: el Observatori de Drets de Dincat.

Me propusieron unirme y acepté.

Infografía sobre los derechos de las personas con discapacidad

Uno de los temas era del derecho al voto y las modificaciones de la capacidad jurídica.

Otra pregunta: ¿cuántas personas con discapacidad intelectual o del desarrollo están en un partido político de manera activa?

Foto de una persona con discapacidad intelectual votando.

¿Por qué no te apuntas a un partido político y nos defiendes desde dentro?

Imagen con logotipos de distintos partidos políticos españoles.

Lo importante es que me han dado la oportunidad de hablar, opinar o valorar y participar.

A fin de cuentas, se trata de reivindicar los derechos pero también de demostrar que podemos cumplir con los deberes.

Logo “Empower-us” Red Mundial de apoyo a los auto-representantes de Inclusion International.

Referencias

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Voto particular Adela Asua (Auto del TC 196/16).

Sentencia Audiencia Provincial Valencia 304/14.

Estudio temático preparado por la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos sobre la participación de las personas con discapacidad en la vida política y pública (2011).

Informe del Comité de Bioética de España sobre la necesidad de adaptar la legislación española a la Convención de Derechos de las Personas con Discapacidad: http://assets.comitedebioetica.es/files/documentacion/es/informe_final_CDPD.pdf

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Procedural Rights of Persons with Disabilities

Effective participation of persons with disabilities in criminal proceedings

Sara Iglesias Sánchez
Legal Secretary ECJ

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Outline

- EU law relating to victims with disabilities
- Directive on the right to interpretation and translation in criminal proceedings
- Effective legal representation

EU law relating to victims/accused persons with disabilities

EU Law and disability

- The Charter of Fundamental Rights
- The UNCPD
- Non-discrimination law – directive 2000/78
- Transversal approach – the vulnerability perspective >> EU criminal law

EU law relating to victims with disabilities

- The Charter
  - Article 21- Disability as suspect ground
  - Article 26- integration of persons with disabilities
  - Article 47 – fair trial effective remedy
  - Article 48 – rights of the defense
- The European Convention of Human Rights
- UN Convention on the Rights of Persons with Disabilities
  - Non discrimination
  - Accessibility
  - Conform interpretation and parameter of legality

Disability and access to justice
Article 13 UNCPD

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 the investigative and other preliminary stages.
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.

EU law relating to victims

- Directive 2004/80 relating to compensation to crime victims
- Directive 2011/99/EU on the European protection order
- Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims
- Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography
- **Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (victims directive)**

EU law relating to victims with disabilities

Victims directive

- Precedent: Framework Decision 2001/220
- Stockholm program
- Resolution of the Council of 10.june 2011 on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (the Budapest Roadmap)

EU law relating to victims with disabilities

Victims directive

- Essential elements:
  - The new directive is based on Article 82(2) TFEU: minimum rules to facilitate mutual recognition of judgments and judicial decisions in criminal matters having a cross –border dimension
  - Minimum rules: Member States can extend the rights in this Directive (recital 11)
  - Balance with procedural rights : the rights of this Directive are without prejudice to the rights of the offender (recital 12)

EU law relating to victims with disabilities

Victims directive : general structure and content

- Provision of information and support (chapter 2)
  - Right to understand and to be understood (art 3)
  - Right to receive information from the first contact with a competent authority (art 4)
  - Right of victims when making a complaint (art 5)
  - Right to receive information about their case (art 6)
  - Right to interpretation and translation (art 7)
  - Right to access victim support services (arts 8 and 9)

EU law relating to victims with disabilities

Participation in Criminal proceedings (chapter 3)

Right to be heard (article 10)

Rights in the event of a decision not to prosecute (art 11)

Right to safeguards in the context of restorative justice services (art 12)

Right to legal aid (art 13)

Right to reimbursement of expenses (art 14)

Right to return of property (art 15)

Right to decision on compensation fr0m the offender in the course of criminal proceedings (art 16)

Rights of victims resident in another MS (art 17)

EU law relating to victims with disabilities

Protection of victims and recognition of victims with specific protection needs (chapter 4)

- Right to protection (art 18)
- Right to avoid contact with offender (art 19)
- Right to protection during criminal investigation (art 20)
- Right to protection of privacy (art 21)
- Individual assessment to identify specific needs (art 22)
- Right to protection of victims with specific needs during criminal proceedings (art 23)
- Right to protection of child victims

EU law relating to victims with disabilities

Victims with disabilities:

- Specific provisions

- Even if not explicitly mentioned, relevance of disability under a vulnerability approach

EU law relating to victims with disabilities

Victims with disabilities:

non discrimination and recognition

Recital 9

- No discrimination of any kind based on any ground such as …, disability, ….
- In all contacts with a competent authority … the personal situation and immediate needs, ..disability .. of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity.

EU law relating to victims with disabilities

Victims with disabilities: accessibility

Recital 15

- In applying this Directive, Member States should ensure that victims with disabilities are able to benefit fully from the rights set out in this Directive, on an equal basis with others, including by facilitating the accessibility to premises where criminal proceedings are conducted and access to information.

EU law relating to victims with disabilities

Victims with disabilities:

right to understand and be understood

Article 3(2)

- Member States shall ensure that communications with victims are given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood.

EU law relating to victims with disabilities

Victims with disabilities:

right to understand and be understood

Recital 21

- It should also be ensured that the victim can be understood during proceedings. In this respect, the victim's knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy and any mental or physical impairment should be taken into account. Particular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments. Equally, limitations on a victim's ability to communicate information should be taken into account during criminal proceedings.

EU law relating to victims with disabilities

Victims with disabilities: individual assessment

Article 22(3)

- In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

EU criminal law: procedural rights

- Directive 2010/64 on the right to interpretation and translation in criminal proceedings
- Directive 2012/13 on the right to information in criminal proceedings
- Directive 2013/48 on the right to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
- Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
- Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings

2013 **Commission Recommendation on the rights of vulnerable persons suspected or accused in criminal proceedings**

- Prompt identification
- Non-discrimination
- Presumption of vulnerability
- Right to information
- Right of access to a lawyer
- Right to medical assistance
- Recording of questioning
- Deprivation of liberty
- Privacy

Directive on the right to interpretation and translation in criminal proceedings

- The contents of the Directive:
  - Right to Interpretation before investigative and judicial authorities; with legal counsel; right to challenge
  - Right to translation of essential documents
  - Quality of the interpretation and translation

Directive on the right to interpretation and translation in criminal proceedings

- This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings. (R 17)

Directive on the right to interpretation and translation in criminal proceedings

Recital 27

- The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice.
- The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.

Directive on the right to interpretation and translation in criminal proceedings

- Article 2(3) The right to interpretation … includes appropriate assistance for persons with hearing or speech impediments

Effective legal representation

- Directive 2013/48 on the right to a lawyer in criminal proceedings
- 2013 Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings
- Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings

Effective legal representation

Directive on the right to a lawyer in criminal proceedings

- access to a lawyer / confidentiality
- right to have a third party informed of the deprivation of liberty
- Right to communicate with third persons while deprived of liberty
- Right to communicate with consular authorities while deprived of liberty
- Waiver- limitations

Effective legal representation

right to a lawyer in criminal proceedings

Recital 51

- The duty of care towards suspects or accused persons who are in a potentially weak position underpins a fair administration of justice.
- The prosecution, law enforcement and judicial authorities should therefore facilitate the effective exercise by such persons of the rights provided for in this Directive,
- for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to have a third party informed upon deprivation of liberty, and by taking appropriate steps to ensure those rights are guaranteed.

Effective legal representation

Article 13 **Vulnerable persons**

- Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive.

Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings

Recital 18

- practical arrangements :legal aid could be granted following a request by a suspect, an accused person or a requested person.
- Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid.

Recital 27

- Non discrimination on grounds of disability
- Respect and implementation in light of the Charter, including integration of people with disabilities

Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings

Article 9 **Vulnerable persons**

- Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

THANKS FOR YOUR ATTENTION!

Los derechos procesales de las personas con discapacidad

La participación efectiva de las personas con discapacidad en el proceso penal

Sara Iglesias Sánchez
Letrado, TJE

El contenido es responsabilidad exclusiva del autor.

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Resumen

- El derecho de la UE sobre víctimas con discapacidad
- Directiva relativa al derecho a interpretación y a traducción en los procesos penales
- Tutela judicial efectiva

El derecho de la UE sobre víctimas / acusados con discapacidad

El derecho de la UE y la discapacidad

- La Carta de los Derechos Fundamentales
- La CPD de la ONU
- Derecho de la no discriminación – Directiva 2000/78
- Enfoque transversal: la perspectiva de la vulnerabilidad >> Derecho penal de la UE

El derecho de la UE sobre víctimas con discapacidad

- La Carta
  - Artículo 21: la discapacidad como motivo de sospecha
  - Artículo 26: integración de las personas con discapacidad
  - Artículo 47: juicio imparcial y recurso efectivo
  - Artículo 48: derechos de la defensa
- El Convenio Europeo de Derechos Humanos
- Convención de la ONU sobre los derechos de las personas con discapacidad
  - No discriminación
  - Accesibilidad
  - Interpretación conforme y parámetro de legalidad

La discapacidad y el acceso a la justicia
Artículo 13 de la CPD de la ONU

1. Los Estados Partes asegurarán que las personas con discapacidad tengan acceso a la justicia en igualdad de condiciones con las demás, incluso mediante ajustes de procedimiento y adecuados a la edad, para facilitar el desempeño de las funciones efectivas de esas personas como participantes directos e indirectos, incluida la declaración como testigos, en todos los procedimientos judiciales, con inclusión de la etapa de investigación y otras etapas preliminares.
2. A fin de asegurar que las personas con discapacidad tengan acceso efectivo a la justicia, los Estados Partes promoverán la capacitación adecuada de los que trabajan en la administración de justicia, incluido el personal policial y penitenciario.

El derecho de la UE sobre las víctimas

- Directiva 2004/80 sobre indemnización a las víctimas de delitos
- Directiva 2011/99/UE sobre la orden europea de protección
- Directiva 2011/36/UE relativa a la prevención y lucha contra la trata de seres humanos y a la protección de las víctimas
- Directiva 2011/93/UE relativa a la lucha contra los abusos sexuales y la explotación sexual de los menores y la pornografía infantil
- **Directiva 2012/29, por la que se establecen normas mínimas sobre los derechos, el apoyo y la protección de las víctimas de delitos, y por la que se sustituye la Decisión marco 2001/220/JAI del Consejo (Directiva relativa a las víctimas)**

El derecho de la UE sobre víctimas con discapacidad

Directiva relativa a las víctimas

- Precedente: Decisión marco 2001/220
- Programa de Estocolmo
- Resolución del Consejo de 10 de junio de 2011 sobre un Plan de trabajo para reforzar los derechos y la protección de las víctimas, en particular en los procesos penales (Plan de trabajo de Budapest)

El derecho de la UE sobre víctimas con discapacidad

Directiva relativa a las víctimas

- Elementos fundamentales:
  - La nueva Directiva está basada en el apartado 2 del artículo 82 del TFUE: normas mínimas para facilitar el reconocimiento mutuo de las sentencias y resoluciones judiciales en asuntos penales con dimensión transfronteriza
  - Normas mínimas: Los Estados miembros pueden ampliar los derechos establecidos en esta Directiva (considerando 11)
  - Equilibrio con los derechos procesales: los derechos de esta Directiva se han de entender sin perjuicio de los derechos del infractor (considerando 12)

El derecho de la UE sobre víctimas con discapacidad

Directiva relativa a las víctimas: estructura general y contenido

- Suministro de información y apoyo (capítulo 2)
  - Derecho a entender y a ser entendido (art. 3)
  - Derecho a recibir información desde el primer contacto con una autoridad competente (art. 4)
  - Derecho de las víctimas cuando interpongan una denuncia (art. 5)
  - Derecho a recibir información sobre su causa (art. 6)
  - Derecho a traducción e interpretación (art. 7)
  - Derecho de acceso a los servicios de apoyo a las víctimas (art. 8 y 9)

El derecho de la UE sobre víctimas con discapacidad

Participación en el proceso penal (capítulo 3)

- Derecho a ser oído (art. 10)
- Derechos en caso de que se adopte una decisión de no continuar el procesamiento (art. 11)
- Derecho a garantías en el contexto de los servicios de justicia reparadora (art. 12)
- Derecho a justicia gratuita (art. 13)
- Derecho al reembolso de gasto (art. 14)
- Derecho a la restitución de bienes (art. 15)
- Derecho a obtener una decisión relativa a la indemnización por parte del infractor en el curso del proceso penal (art. 16)
- Derechos de las víctimas residentes en otro Estado miembro (art. 17)

El derecho de la UE sobre víctimas con discapacidad

Protección de las víctimas y reconocimiento de las víctimas con necesidad de protección especial (capítulo 4)

- Derecho a la protección (art. 18)
- Derecho a evitar el contacto entre víctima e infractor (art. 19)
- Derecho a la protección de las víctimas durante las investigaciones penales (art. 20)
- Derecho a la protección de la intimidad (art. 21)
- Evaluación individual a fin de determinar sus necesidades especiales de protección (art. 22)
- Derecho a la protección de las víctimas con necesidades especiales de protección durante el proceso penal (art. 23)
- Derecho a la protección de las víctimas menores de edad

El derecho de la UE sobre víctimas con discapacidad

Víctimas con discapacidad:

– Disposiciones específicas

– Aunque no se mencione de manera explícita, relevancia de la discapacidad en un enfoque de vulnerabilidad

El derecho de la UE sobre víctimas con discapacidad

Víctimas con discapacidad:

no discriminación y reconocimiento

Considerando 9

- Sin discriminación de ningún tipo por motivos como… la discapacidad…
- En todos los contactos con una autoridad competente… se deben tener en cuenta la situación personal y las necesidades inmediatas… discapacidad… de las víctimas de delitos, al mismo tiempo que se respetan plenamente su integridad física, psíquica y moral.

El derecho de la UE sobre víctimas con discapacidad

Víctimas con discapacidad: accesibilidad

Considerando 15

- En la aplicación de la presente Directiva, los Estados miembros deben velar por que las víctimas con discapacidad puedan disfrutar plenamente de los derechos establecidos en la presente Directiva, en pie de igualdad con los demás, lo que incluye la facilitación del acceso a los locales en que tengan lugar los procesos penales, así como el acceso a la información.

El derecho de la UE sobre víctimas con discapacidad

Víctimas con discapacidad:

derecho a entender y a ser entendido

Apartado 2 del artículo 3

- Los Estados miembros garantizarán que las comunicaciones con las víctimas se hagan en lenguaje sencillo y accesible, oralmente o por escrito. Estas comunicaciones tendrán en cuenta las características personales de la víctima, incluida cualquier discapacidad que pueda afectar a su capacidad de entender o de ser entendida.

El derecho de la UE sobre víctimas con discapacidad

Víctimas con discapacidad:

derecho a entender y a ser entendido

Considerando 21

- Asimismo, debe garantizarse que la víctima pueda ser entendida durante las actuaciones. este respecto, debe tenerse en cuenta el conocimiento que tenga la víctima de la lengua utilizada para facilitar información, su edad, madurez, capacidad intelectual y emocional, alfabetización y cualquier incapacidad mental o física. Deben tenerse en cuenta, en particular, las dificultades de comprensión o de comunicación que puedan ser debidas a algún tipo de discapacidad, como las limitaciones auditivas o de expresión oral. Del mismo modo, durante los procesos penales deben tenerse en cuenta las limitaciones de la capacidad de la víctima para comunicar información.

El derecho de la UE sobre víctimas con discapacidad

Víctimas con discapacidad: evaluación individual

Apartado 3 del artículo 22

- En el contexto de la evaluación individual, se prestará especial atención a las víctimas que hayan sufrido un daño considerable debido a la gravedad del delito; las víctimas afectadas por un delito motivado por prejuicios o por motivos de discriminación, relacionado en particular con sus características personales, y las víctimas cuya relación con el infractor o su dependencia del mismo las haga especialmente vulnerables. A este respecto, serán objeto de debida consideración las víctimas de terrorismo, delincuencia organizada, trata de personas, violencia de género, violencia en las relaciones personales, violencia o explotación sexual y delitos por motivos de odio, así como las víctimas con discapacidad.

Derecho penal de la UE: derechos procesales

- Directiva 2010/64 relativa al derecho a interpretación y a traducción en los procesos penales
- Directiva 2012/13 relativa al derecho a la información en los procesos penales
- Directiva 2013/48 sobre el derecho a la asistencia de letrado en los procesos penales y en los procedimientos relativos a la orden de detención europea, y sobre el derecho a que se informe a un tercero en el momento de la privación de libertad y a comunicarse con terceros y con autoridades consulares durante la privación de libertad
- Directiva 2016/343 por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia y el derecho a estar presente en el juicio
- Directiva 2016/800 relativa a las garantías procesales de los menores sospechosos o acusados en los procesos penales
- Directiva 2016/1919 relativa a la asistencia jurídica gratuita a los sospechosos y acusados en los procesos penales

Recomendación de la Comisión de 2013 relativa a los derechos de las personas vulnerables sospechosas o acusadas en procesos penales

- Identificación rápida
- No discriminación
- Presunción de vulnerabilidad
- Derecho a la información
- Derecho a la asistencia de un letrado
- Derecho a asistencia médica
- Grabación de los interrogatorios
- Privación de libertad
- Privacidad

Directiva relativa al derecho a interpretación y a traducción en los procesos penales

- Contenido de la Directiva:
  - Derecho a interpretación ante las autoridades de la investigación y judiciales; en presencia de un abogado; derecho a recurrir
  - Derecho a la traducción de documentos esenciales
  - Calidad de la traducción y la interpretación

Directiva relativa al derecho a interpretación y a traducción en los procesos penales

- La presente Directiva debe garantizar una asistencia lingüística gratuita y adecuada, que permita a los sospechosos o acusados que no hablen o no entiendan la lengua del proceso penal el pleno ejercicio del derecho a la defensa y que salvaguarde la equidad del proceso (considerando 17).

Directiva relativa al derecho a interpretación y a traducción en los procesos penales

Considerando 27

- El deber de velar por los sospechosos o acusados que se encuentran en una posible posición de fragilidad, en particular debido a impedimentos físicos que afecten a su capacidad de comunicarse de manera efectiva, fundamenta la administración equitativa de justicia.
- Por tanto, la fiscalía y las autoridades policiales y judiciales deben garantizar que dichas personas puedan ejercer de manera efectiva los derechos que se establecen en la presente Directiva, por ejemplo teniendo en cuenta cualquier posible vulnerabilidad que afecte a su capacidad de seguir el procedimiento y de hacerse entender, y tomando las medidas necesarias para garantizar dichos derechos.

Directiva relativa al derecho a interpretación y a traducción en los procesos penales

- Apartado 3 del art. 2: El derecho a interpretación… incluye la asistencia a personas con limitaciones auditivas o de expresión oral.

Tutela judicial efectiva

- Directiva 2013/48 sobre el derecho a la asistencia de letrado en los procesos penales
- Recomendación de la Comisión de 2013 sobre el derecho a la asistencia jurídica gratuita de los sospechosos o acusados en los procesos penales
- Directiva 2016/1919 relativa a la asistencia jurídica gratuita a los sospechosos y acusados en los procesos penales

Tutela judicial efectiva

Directiva relativa al derecho a la asistencia de letrado en los procesos penales

- Asistencia de letrado / confidencialidad
- Derecho a que se informe a un tercero en el momento de la privación de libertad
- Derecho a comunicarse con terceros durante la privación de libertad
- Derecho a comunicarse con autoridades consulares durante la privación de libertad
- Renuncia – limitaciones

Tutela judicial efectiva

Derecho a la asistencia de letrado en los procesos penales

Considerando 51

- El deber de velar por los sospechosos o acusados que se encuentran en una posible situación vulnerable está en la base de una administración equitativa de justicia.
- Por tanto, la fiscalía y las autoridades policiales y judiciales deben propiciar que dichas personas puedan ejercer de manera efectiva los derechos que se establecen en la presente Directiva,
- por ejemplo teniendo en cuenta cualquier posible vulnerabilidad que afecte a su capacidad de ejercer el derecho a la asistencia de letrado y de que se informe a un tercero en el momento de su privación de libertad, y tomando las medidas necesarias para garantizar dichos derechos.

Tutela judicial efectiva

Artículo 13 **Personas vulnerables**

- Los Estados miembros garantizarán que, cuando se aplique la presente Directiva, se tomen en consideración las necesidades específicas de los sospechosos y acusados que sean vulnerables.

Directiva 2016/1919 relativa a la asistencia jurídica gratuita a los sospechosos y acusados en los procesos penales

Considerando 18

- Disposiciones prácticas: pueden establecer que la asistencia jurídica gratuita se conceda previa solicitud del sospechoso, acusado o persona buscada.
- Habida cuenta en particular de las necesidades de las personas vulnerables, dicha solicitud no debe, sin embargo, considerarse un requisito sustantivo, para la concesión de la asistencia jurídica gratuita.

Considerando 27

- No discriminación por motivos de discapacidad.
- Respeto y aplicación en virtud de la Carta, incluida la integración de las personas con discapacidad.

Directiva 2016/1919 relativa a la asistencia jurídica gratuita a los sospechosos y acusados en los procesos penales

Artículo 9 **Personas vulnerables**

- Los Estados miembros garantizarán que en la aplicación de la presente Directiva, se tomen en consideración las necesidades específicas de los sospechosos, los acusados y personas buscadas que sean vulnerables.

¡GRACIAS POR SU ATENCIÓN!

Case Study:

How to safeguard the rights of victims with disabilities in court proceedings

Facts:

Isabel is a young woman with a mild intellectual disability. She has lived for several years with her sister Lina and her family, she is not legally incapacitated and manages her own finances without any assistance. She had some savings coming from her inheritance and from her income as a part time worker in a local shop.

Isabel first reported to the police in 2013 that her brother in law, Braulio, had fraudulently incited her to transfer him repeatedly amounts of money, which he claimed to invest with the promise to give her back the money plus the returns. The case was not prosecuted because Isabel's declaration was considered inconsistent.

After a quarrel with the husband of her sister, Isabel moved out and now lives with her cousins who have convinced her to report the fraud to the police. Isabel has reported again the same facts and has declared that the situation with her brother in law continued several years. Over the course of six years between 2012 and 2018, the transfers totalled 21.500 euros. Moreover, Isabel claims that Braulio threatened her life if she ever reported the fraud.

The public prosecutor decided to bring a case against Braulio for fraud, but not with regard to the allegations of threats, since Isabel could neither prove nor consistently explain the threats suffered.

Braulio denies having committed any fraud and claims that the transfers were made by Isabel in order to help with housing and holiday expenses incurred together with his family. Braulio's representation has also claimed that, in any case, the alleged offense is in part time-barred, since most of the money was transferred before 2013 (the crime of fraud having a time limitation of 5 years).

Isabel would like to participate in the criminal proceedings, but she does not know in which capacity. She denies having transferred the money in order to contribute to common expenses. She disagrees with the decision of the prosecutor not to prosecute the threats. She also disagrees that the offences are time barred: she already reported in 2013, she did not understand that the case was discontinued. She is however terrified to encounter her brother in law during trial.

Discussion:

Which EU law provisions may be relevant in this case and for which purposes?

Which EU rights are at stake for Isabel?

Can we identify any breach of such rights?

Which remedies may be available for Isabel? (note that this may depend on the national legal system)

What can be the consequences if the EU provisions which are relevant in this case have not been properly transposed into national law?

Are there any unclear aspects regarding the interpretation of the pertinent EU law provisions? Please, draft a question to be asked in the form of preliminary question.

Case Study:

¿Cómo salvaguardar los derechos de las víctimas con discapacidad en los procedimientos judiciales?

Hechos:

Isabel es una joven con discapacidad intelectual leve. Durante varios años, ha vivido con su hermana Lina y la familia de esta. Isabel no está incapacitada legalmente y se ocupa de sus propias finanzas sin ayuda de otras personas. Isabel disponía de algunos ahorros procedentes de una herencia y de sus ingresos como trabajadora a tiempo parcial en una tienda local.

En 2013 Isabel denunció por primera vez a la policía que su cuñado, Braulio, le había incitado a realizar, de forma fraudulenta, repetidas transferencias bancarias. Braulio decía estar invirtiendo el dinero y le había prometido devolverle las sumas transferidas junto con las ganancias correspondientes. El caso no llegó a los tribunales, ya que las declaraciones de Isabel fueron consideradas incoherentes.

Tras una discusión con su cuñado, Isabel abandonó el domicilio de su hermana y reside actualmente con sus primos, quienes le han animado a denunciar la estafa a la policía. Isabel ha denunciado de nuevo los mismos hechos y ha declarado que la situación se ha perpetuado varios años más. A lo largo de seis años, entre 2012 y 2018, las transferencias se eleven a 21.500 euros. Además, Isabel sostiene que Braulio la ha amenazado de muerte si le denunciara.

El Fiscal ha presentado cargos por estafa, pero no en relación con las amenazas, ya que Isabel no las ha podido probar ni explicar de forma coherente.

Braulio niega que haya existido estafa y afirma que las transferencias fueron realizadas por Isabel para contribuir con los gastos domésticos y de diversas vacaciones que disfrutó junto con su familia. Además, la representación de Braulio sostiene que, en todo caso, el delito habría prescrito por lo que respecta a la mayor parte de las transferencias, que fueron realizadas antes de 2013 (ya que la estafa prescribe a los 5 años).

Isabel querría participar en el procedimiento penal, pero no tiene claro en qué capacidad. Niega haber transferido el dinero voluntariamente para cubrir gastos comunes. No está de acuerdo con la decisión de no perseguir las amenazas. Tampoco está de acuerdo con que exista prescripción, ya que ella ya había denunciado los hechos en 2013 y no entiende por qué no siguió el procedimiento. Está sin embargo aterrorizada de encontrar a su cuñado durante el procedimiento.

Discusión:

¿Qué disposiciones de Derecho de la Unión pueden ser relevantes en este caso y para qué propósitos?

¿Qué derechos otorgados por el Derecho de la Unión se encuentran afectados?

¿Podemos identificar alguna violación de dichos derechos?

¿Qué barreras puede encontrar Isabel para participar en el procedimiento?

¿Qué vías legales existen para Isabel? (entendiendo que pueden variar dependiendo del ordenamiento jurídico nacional)

¿Cuáles pueden ser las consecuencias si las disposiciones de Derecho de la Unión relevantes no han sido correctamente traspuestas en derecho nacional?

¿Existen aspectos poco claros en la interpretación de las disposiciones relevantes de Derecho de la Unión? Proponga una cuestión prejudicial relativa a estos aspectos.