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Speakers' contributions

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 5-7 June 2019



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Table of Contents

1. Victoria Lee
The CRPD & access to justice for persons with disabilities
The right to political participation of persons with disabilities
2. Angela Vernia
The right to access to justice of persons with disabilities in EU law / *Il diritto di accesso alla giustizia delle persone con disabilità nel diritto dell'Unione Europea*
Case study: Applying EU disability law in practice / *Caso di studio: Applicazione pratica del diritto dell'UE in materia di disabilità*
3. Clíona de Bhailís
Article 12 UNCRPD Equal recognition before the law / *Articolo 12 UNCRPD Eguale riconoscimento di fronte alla legge*
Case study: supported decision-making / *Caso di studio: Supporto al processo decisionale*
4. Chiara Giovannini
EU public procurement law and accessibility standards
5. Alejandro Moledo
Accessibility in the UNCRPD and EU law
6. Ann Frye
The right to personal mobility
Case study / *Caso di studio*
7. Julie Brohéé
Disability in employment under EU law
Case study: Using the preliminary reference proceedings in EU law to address discrimination on the grounds of disability / *Caso di studio: Utilizzare il procedimento di riferimento preliminare nel diritto dell'UE per affrontare la discriminazione basata sulla disabilità*
8. Anselm Eldergill
ECHR and Mental Health
The European Convention on Human Rights, the UNCRPD & the legal rights of citizens suffering mental ill-health
The rights of people with disabilities in criminal proceedings: ECHR & CRPD
Case studies / *Casi di studio*



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ERA training
June 2019, Trier

The CRPD & ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

Victoria Lee, OHCHR



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Persons with disabilities have traditionally been perceived as:

Uneducable abnormal

In need of protection Patients

without skill Unable to vote

A burden A danger to self and others

In need of institutional care

Lacking capacity to decide for themselves

Having a less valuable life

Outline

- Human rights based approach to disability enshrined in the CRPD
- Article 13 of the CRPD

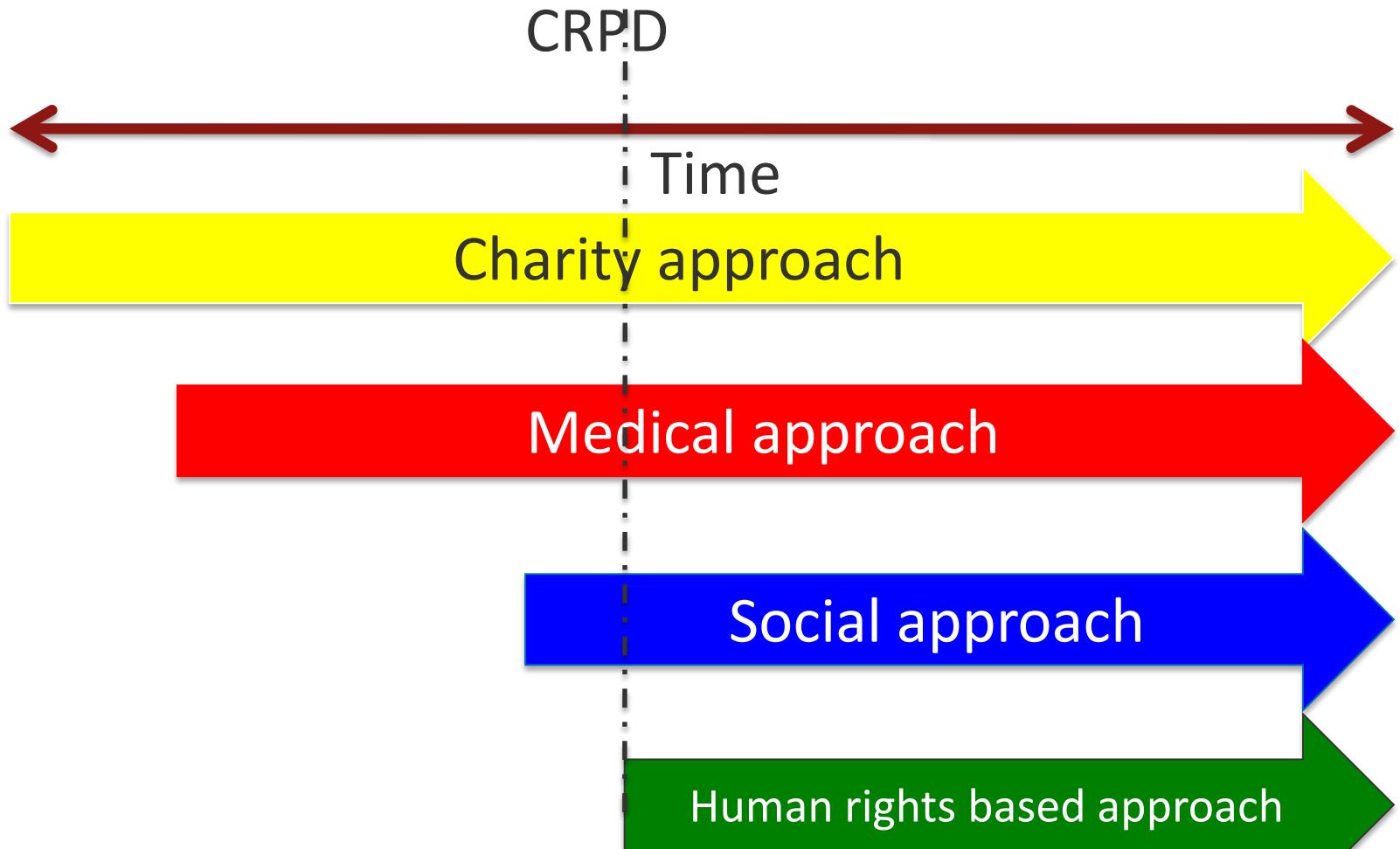


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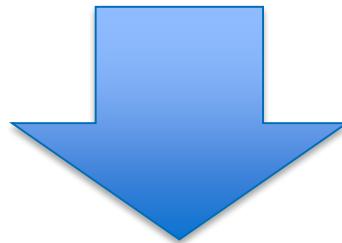
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How have we approached persons with disabilities over the years?



Medical model:

Persons with disabilities as **objects of treatment**
Need to be cured, corrected, “normalized”

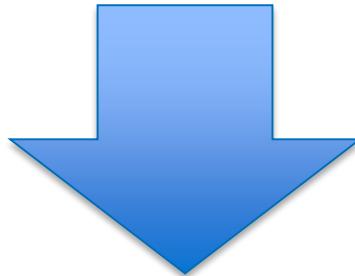


- Doctor knows best
- Segregation
- No voice / No choice

Charity model:

Persons with disabilities are **objects of charity/welfare**:

They need help, compassion, benevolence



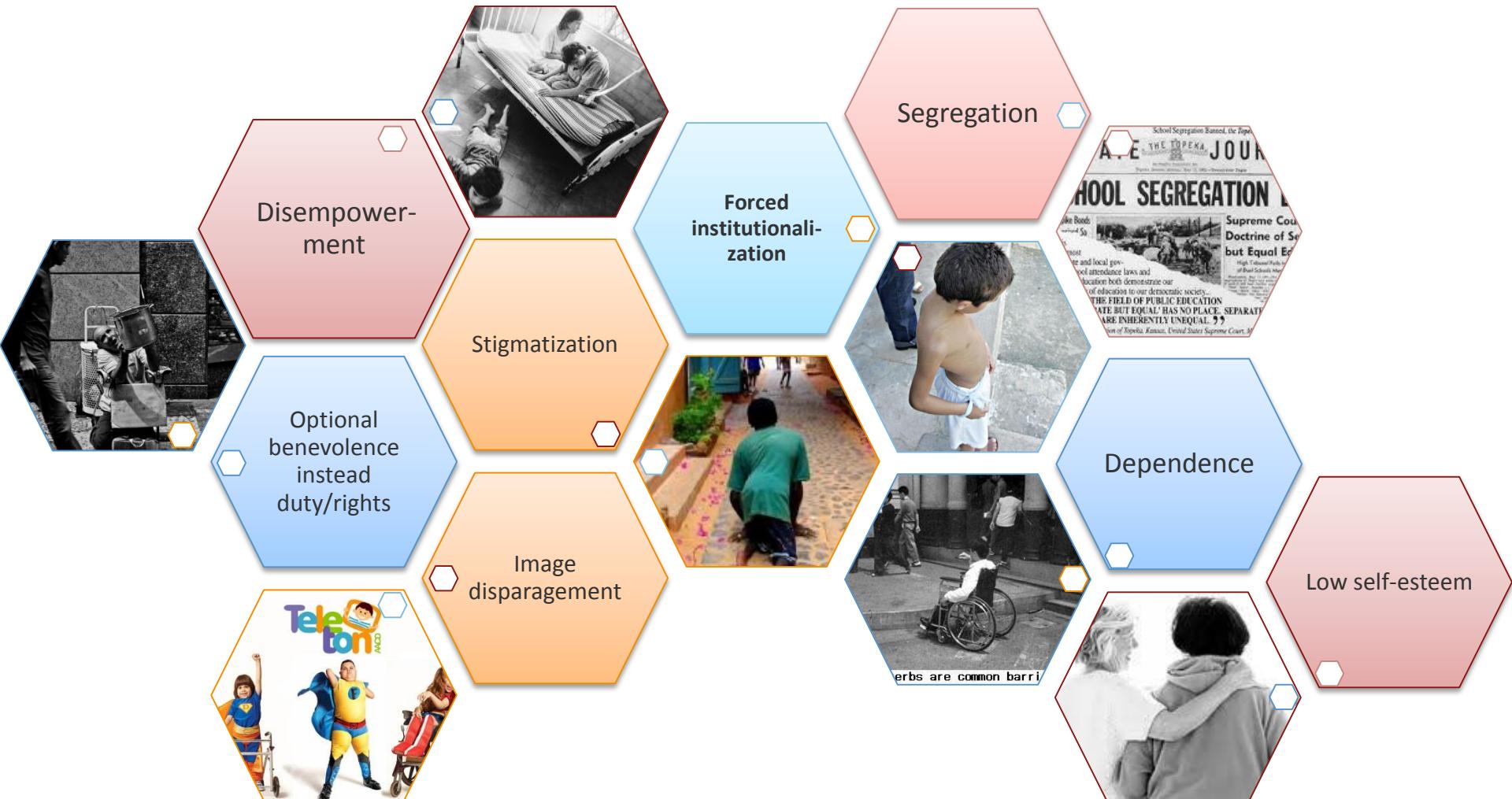
- Caregiver knows best
- Segregation
- No voice / No choice



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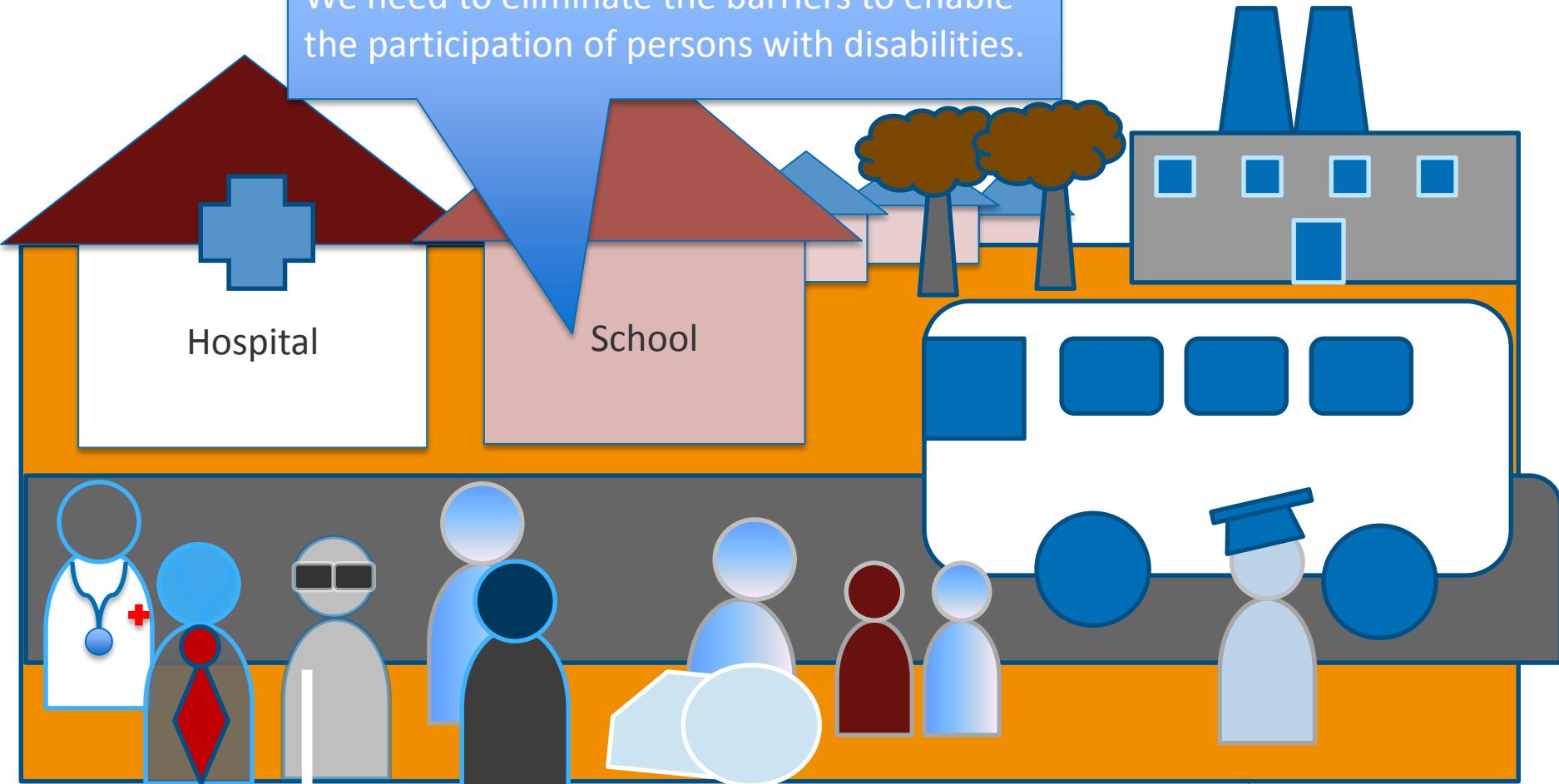


Consequences of charity/medical approaches

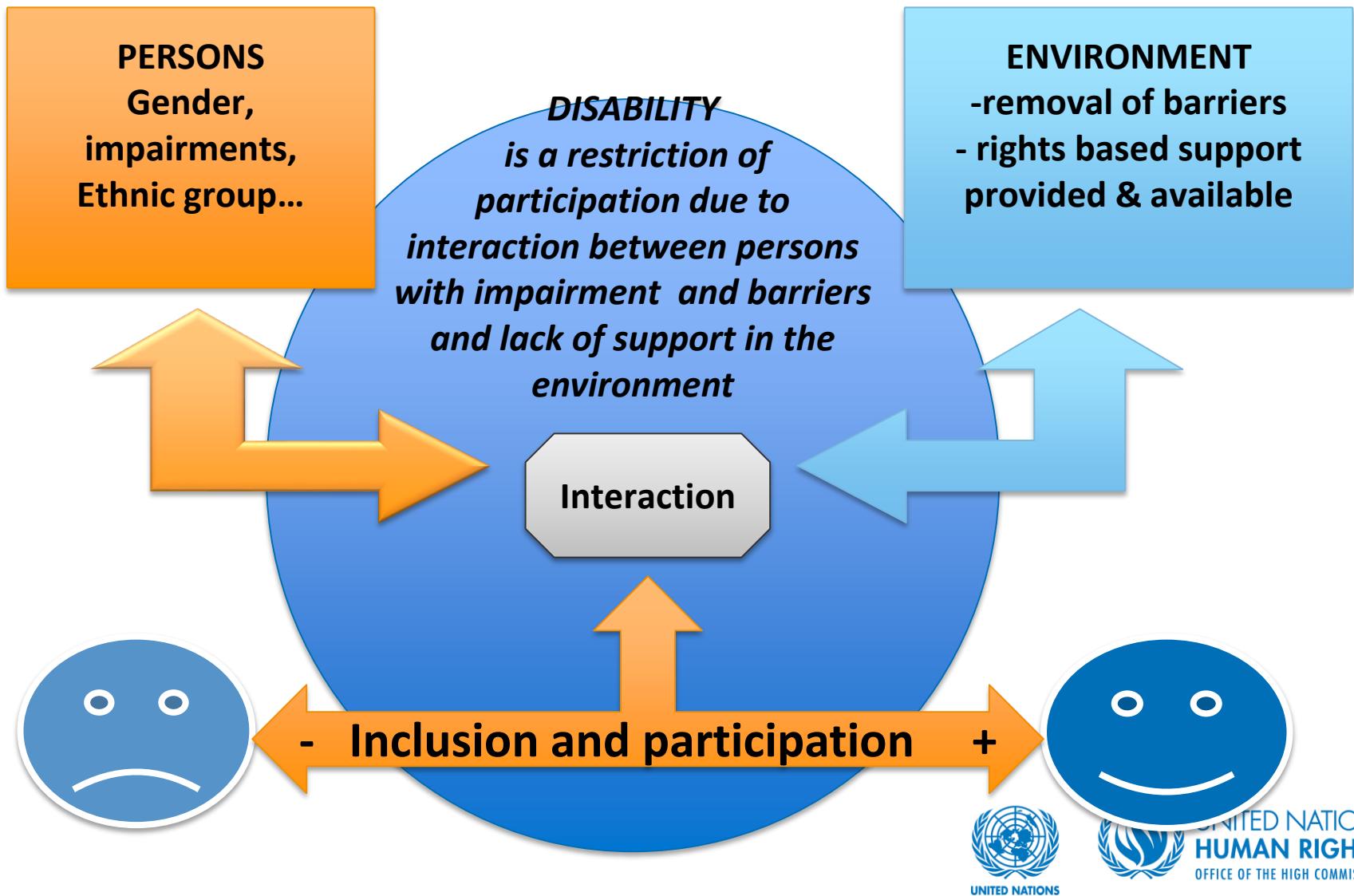


Social approach

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

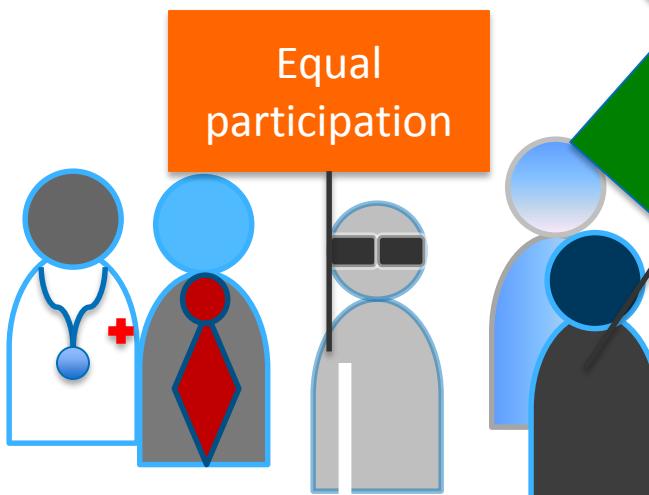


What is disability for the CRPD?



Human rights based approach

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



Convention
Now!

Non-
discrimination



Human rights based approach

Convention on the Rights of Persons with Disabilities:

Persons with disabilities are subjects of their rights, they have the same rights as everyone else.

No double standards

No higher standards

Inclusion for ALL



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Human rights based approach

- Persons with disabilities enjoy and exercise their rights on an equal basis with others
- They have the right to receive support in the exercise of their rights- this includes the right to refuse support
- Justiciability and enforceability of rights



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~~Uneducable~~ right to inclusive education, art 24

~~abnormal~~ Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, art 3

~~In need of protection~~ right to protection against violence, abuse & exploitation, like everyone else art 16, and right to make their own choices, art 12

~~Patients~~ Members of society with right to full and effective participation and inclusion, art 3, 4(3)

~~without skill~~ skillful ~~Unable to vote~~ Voters with equal voice, art 29

~~A burden~~ ~~A danger to self & others~~ right to liberty, art 14

~~In need of institutional care~~ right to live in the community with support, art 19

~~Lacking capacity to decide for themselves~~ right to make their own decisions, with support if requested, art 12

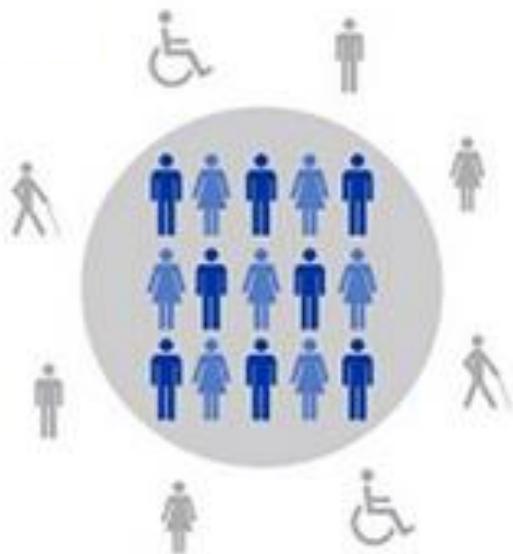


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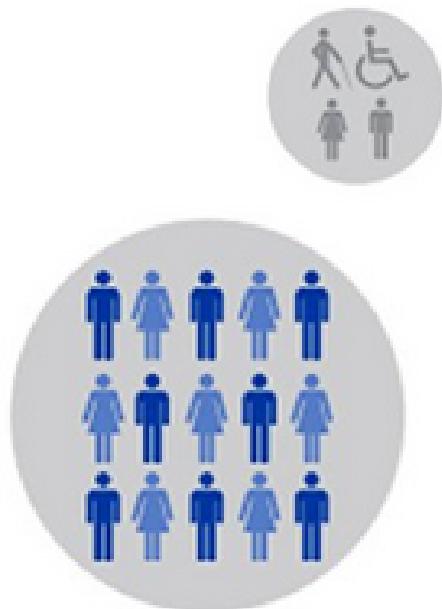


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CRPD



or



or



CRPD

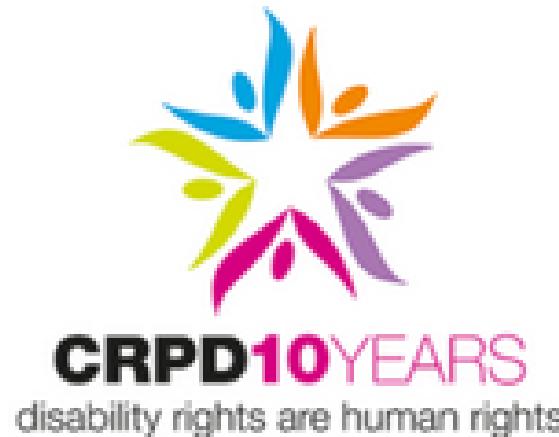


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TRANSFORMATIVE



- Human rights based approach
- Participation

TRANSFORMATIVE

- Article 5 – equality & non-discrimination

Challenges traditional notions of equality

- Formal equality
- Substantive equality



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Inclusive equality

- Focus on the individual – lived experience
 - Recognises multiple & intersecting identities
 - Ensures participation or rights holders
- Beyond the individual - power/culture/system
 - redressing disadvantage
 - addressing stigma, stereotyping, prejudice and violence on the basis of disability

See General Comment no 6, CRPD Committee, 2017



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FORMAL EQUALITY



SUBSTANTIVE EQUALITY

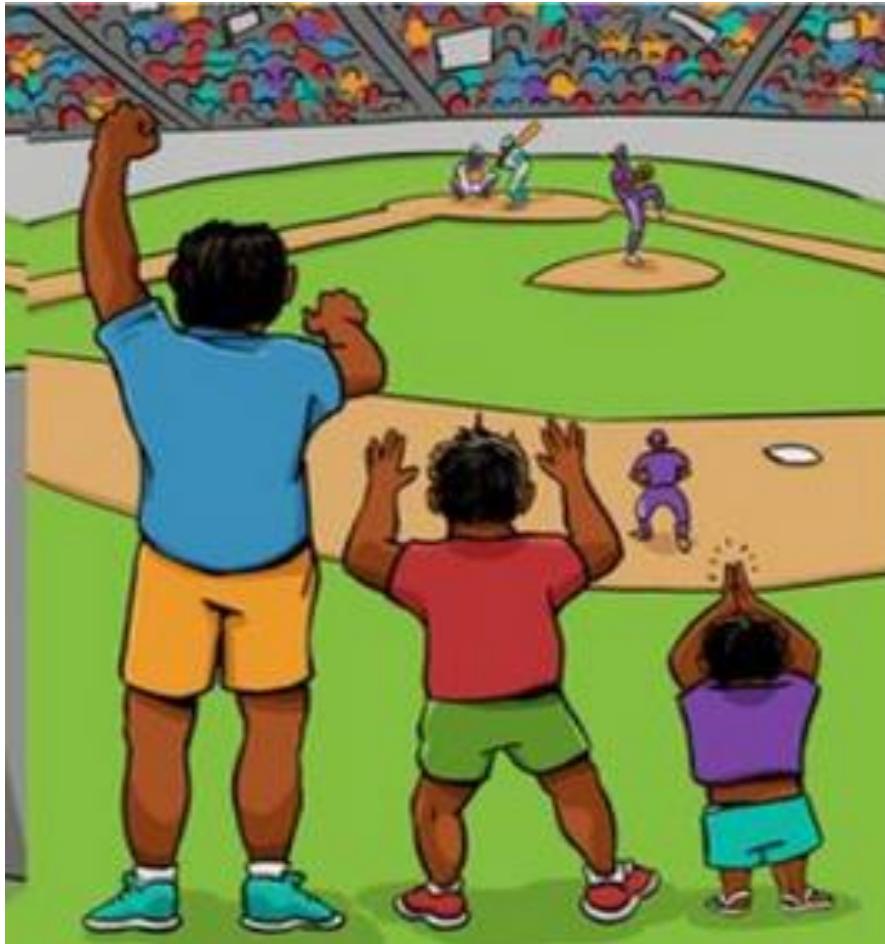


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INCLUSIVE EQUALITY



TRANSFORMATIVE

Challenges traditional notions of autonomy & independence:

- Recognises we do not live and function disparately
- Recognises & de-stigmatises support
- Recognises & values community

No individual can attain autonomy without the assistance of others.



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CRPD – Shield & Sword

Shield: CRPD protects rights
– fends off limits & conditionalities to exercising rights on an equal basis with others

Sword: CRPD enables rights
- Provides the tools to exercise rights on an equal basis with others



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CRPD positive measures

- Universal design
- Accessibility
- Accommodations
 - Reasonable accommodation
 - Procedural accommodation
- Support / supported decision-making
 - Rights based
 - Voluntary = right to refuse support
 - Informal/formal



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Discrimination on the basis of disability

Any **distinction, exclusion or restriction**
on the basis of disability
which has the **purpose or effect**
of impairing or nullifying
the recognition, enjoyment or exercise
on an equal basis with others

of all human rights and fundamental freedoms in
the political, economic, social, cultural, civil or any
other field.

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



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Reasonable accommodation



Reasonable accommodation

Elements

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



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Article 13, CRPD - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
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.



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Access to justice

- A right to *access* justice - a prerequisite for the exercise of all rights - that guarantees the justiciability of rights and their enforceability;
- A right to access *justice*, in reference to the universal notion of justice - non-discrimination, equality and equity.

In both contexts, people with disabilities face challenges.



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Persons with disabilities denied justice

- Laws to be applied are inherently discriminatory
 - Reinforce discrimination & exclusion
 - Denial of legal standing
 - Denial of right to complaint
- Justice system itself not inclusive
 - Inaccessible environments, information, communications
 - Lack of awareness by judicial actors
 - Stigma and discrimination (credibility)
 - Not possible to participate on an equal basis with others



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Equal and effective participation

- Right to due process and fair trial in all stages:
 - Investigations and other preliminary stages
 - Legal proceedings
 - Resources
- In each role within the justice system
- Training for those working in the field of the administration of justice



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Due process and fair trial

- Equality of access and equality before the courts
- Equality in the enjoyment of procedural guarantees: presumption of innocence, legal assistance, etc.
- Possibility of seeking and obtaining fair and timely remedies for rights violations (including redress and compensation)



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Legal capacity – legal standing

- Article 12 of the CRPD: universal legal capacity
 - Equal recognition before the law of persons with disabilities
 - People with disabilities enjoy and exercise legal capacity on equal terms with others
- Right to file a complaint, be a party to the process
- Right to participate as a witness



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Accessibility

Removing barriers:

- Physical
- Communications
- Information



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Beyond accessibility: procedural and age-appropriate accommodations

- Modifications and adaptations necessary and adequate to guarantee the effective participation of people with disabilities in all stages of the process
- Non-exhaustive measures:
 - Accessible formats
 - Interpretation in sign language & alternative means of communication
 - Support for decision making
- Flexibility to accommodate specific requirements
- Appropriate for age and gender



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Procedural accommodations

- Not subjected to progressive realisation: its denial results in discrimination
- ≠ reasonable accommodation- not subject to a proportionality test
- States must define obligations and procedures for their request
- Must always be available and free of charge



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Direct and indirect participation

- Equal & effective participation by persons with disabilities in **every role** within justice system: witnesses, lawyers, judges, jurors, experts
- Component of active citizenship and good governance: democracy, rule of law, accountability



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Training

Training of all actors in justice system to address attitudinal barriers & lack of knowledge on:

- CRPD and its human rights based approach
- Provision of procedural accommodations
- Overcoming gender & disability based stereotypes



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Articles 13, 4(3), 29, 33

PARTICIPATION

In all steps and phases of the administration of justice:

- Law/policy reform
- Training
- Awareness-raising
- Research...



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Resources

- Convention on the Rights of Persons with Disabilities
- CRPD Committee General Comment no 1 on equal recognition before the law (2014)
- CRPD Committee General Comment no 6 on equality & non-discrimination (2018)
- CRPD Committee General Comment no 7 on participation (2018)
- OHCHR report on access to justice (2018)
- Special Rapporteur on the rights of persons with disabilities' report on legal capacity (2018)
- Special Rapporteur on the rights of persons with disabilities' report on access to rights-based support (2016)



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Questions / comments?

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www.ohchr.org/en/issues/disability/pages/disabilityindex.aspx





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ERA training
June 2019, Trier

THE RIGHT TO POLITICAL PARTICIPATION OF PERSONS WITH DISABILITIES

Victoria Lee, OHCHR



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Outline

- Article 29 of the CRPD
 - Barriers faced by persons with disabilities in exercising their right to political
 - Developments & case law



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Right to participation in political and public life

- Core human rights principle- HRBA
 - Agency & empowerment
 - inclusion
- Basic condition of democratic societies
 - active citizenship
 - Good governance
 - Accountability



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International & regional human rights treaties

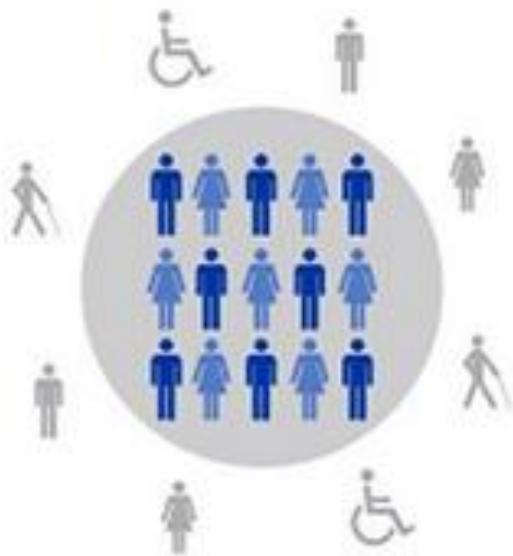
- International Covenant on Civil and Political Rights(art. 25),
- International Convention on the Elimination of All Forms of Racial Discrimination (art.5 (c)),
- Convention on the Elimination of All Forms of Discrimination against Women (art. 7),
- Convention on the Rights of the Child (arts. 12 and 23(1))
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (arts. 41(1) and 42(2)).

Regional instruments

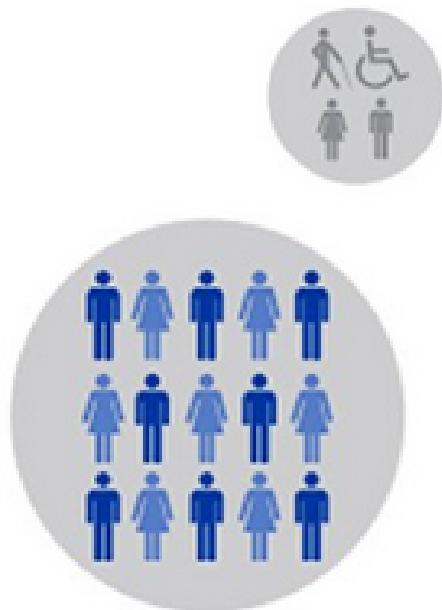
- Charter of Fundamental Rights of the European Union(arts. 39 and 40),
- European Convention on Human Rights (Protocol No. 1, art. 3)
- African Charter on Human and Peoples' Rights (art. 13)
- Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (art 21)
- American Convention on Human Rights (art. 23)
- Inter-American Convention on Protecting the Human Rights of Older Persons (art. 27)



CRPD



or



or



Barriers to political participation of persons with disabilities

- Denial of the right to vote
 - Denial based on actual or perceived disability
 - Denial based on restrictions to exercise legal capacity
 - Blanket restrictions on the exercise of rights including the right to vote
 - Individualised assessment leading to restriction of right to vote (voting tests based on dis/ability, perceived cognitive in/capacity)
- Inaccessible environments, information and procedures
- Lack of support and accommodations including the provision of reasonable accommodation
- Lack of education and awareness raising on voting and standing for election,
- Insufficient allocation of resources for assistance and support in voting and fulfilling elected mandates
- Denial on the basis of institutionalization (placement in a psychiatric or social care)



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CRPD



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Article 29, CRPD -Participation in political & public life

a) Ensure 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**, inter alia, by:

(i) Ensuring that **voting procedures, facilities and materials are appropriate, accessible** and easy to understand and use;

(ii) Protecting the right of persons with disabilities to **vote by secret ballot** in elections and public referendums without intimidation, and to **stand for elections, to effectively hold office and perform all public functions** at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, **allowing assistance in voting** by a person of their own choice;

(b) Promote actively an environment in which persons with disabilities can effectively and fully **participate in the conduct of public affairs**, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) **Participation in non-governmental organizations and associations** concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) **Forming and joining organizations of persons with disabilities** to represent persons with disabilities at international, national, regional and local levels.



Right to vote and to be elected

- No restriction in law or in practice of the enjoyment of political rights on the grounds of disability.
- States must guarantee the right of persons with disabilities to vote and to be elected, including by
 - ensuring that the electoral process, the voting facilities and materials are adequate, accessible and easy to understand and use
 - facilitating the use of assistive and new technologies.
 - Voting by secret ballot, including through the assistance, at the individual' request, of a person of their choice.



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Right to access public service

- Guarantee the right and the opportunity to hold office effectively and perform any public function at any level of government on an equal basis with others
- Persons with disabilities are not excluded from public service positions because of inaccessible recruiting procedures, public buildings or services
- specific measures necessary to accelerate or achieve de facto equality of persons with disabilities in accessing public service positions
- Enact policies and measures to ensure the employment of persons with disabilities in the public sector.



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Right to participate in the conduct of public affairs

Including all aspects of public administration and policymaking concerning.

Direct participation:

- Referendums and other electoral processes
- Participating in popular assemblies and consultative spaces between the State and citizens

Indirect participation

- Electing representatives
- membership in civil society organizations, including representative organizations of persons with disabilities



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Intimately linked with Article 4(3)

Art 4(3)

In the development and implementation of **legislation and policies to implement the present Convention**, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall **closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.**

Nothing about us without us!



CRPD lens applied
to instruments
adopted before
CRPD

Strengthening & evolving interpretations
on the right to **political participation**



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Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, 2002



“...No person with a disability can be excluded from the right to vote or to stand for election on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote and to be elected is imposed by an individual decision of a court of law because of proven mental disability.”



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Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, 2011



“...people with disabilities should therefore be able to exercise their right to vote and participate in political and public life as elected representatives on an equal basis with other citizens.”



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COMMITTEE
OF MINISTERS
COMITÉ
DES MINISTRES



Recommendation to member states on the participation of persons with disabilities in political and public life, 2011

“the general principle of non-discrimination should form the basis of governmental policies geared to ensuring equal rights and opportunities for persons with disabilities through the **removal of restrictions on legal capacity, the abolition of voting tests, the introduction of relevant legal provisions, specific forms of assistance, awareness raising and funding**.”



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CRPD lens
applied to new
HR instruments



Aligning with CRPD:

- OAS (older persons)
- African system
- National level



OAS | More rights
for more people

INTER-AMERICAN CONVENTION ON PROTECTING THE HUMAN RIGHTS OF OLDER PERSONS, 2015

Article 27 (political rights) & Article 30 (Equal
recognition before the law)



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Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities

Article 7- Equal Recognition before the Law

Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;

Article 21- Right to participate in political and public life



Remaining tensions

European Convention on Human Rights as interpreted by the European Court of Human Rights

Article 3 of Protocol No. 1: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.



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Remaining tensions

European Court of Human Rights

Alajos Kiss v Hungary, Application no 38832/06, 20 May 2010

- loss of voting rights on account of placement under partial guardianship
- Denial could pursue a legitimate aim, namely to ensure that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs.
- But automatic blanket restriction regardless of actual faculties = indiscriminate removal of voting rights
- Without an individualized judicial evaluation, loss of right to vote is not proportionate to the aim pursued.



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Remaining tensions

Human Rights Committee, General Comment no 25 (1996) on Article 25 of the ICCPR: “established mental incapacity may be a ground for denying a person the right to vote or to hold office.”

Human Rights Committee’s clarified position, March 2013

Legislation on the right to vote, should not “discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable and objective relation to their ability to vote taking account of article 25 of the Covenant, and article 29 of the CRPD.”



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Developments in caselaw

Zsolt Bujdosó and five others v Hungary, no 4/2011, 2013

CRPD Committee submitted under the Optional Protocol to the CRPD

- six persons with intellectual disabilities whose names had been removed from the electoral register upon being placed under guardianship & denied the right to vote in parliamentary and municipal elections in 2010.
- The CRPD Committee :
 - Article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. An exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment, constitutes discrimination on the basis of disability.
 - Violation of Article 29 of the Convention, read alone and in conjunction with Article 12 of the Convention.



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Developments in caselaw

Germany, Federal Constitutional Court, 2019

Statutory exclusions from voting rights of persons placed under full guardianship and of offenders confined in psychiatric hospital are not in line with the Constitution.

Slovakia, Constitutional Court, 2017

Restriction of the right to vote of those deprived of legal capacity is not consistent with the Constitution nor international human rights including Article 29 of the CRPD in conjunction with Article 5 and Article 12 of the CRPD.



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Developments in caselaw

Japan

The Tokyo District court ruled on 14 March 2013 that it was unconstitutional for the Election Law to deprive persons under guardianship of their right to vote.



Ms Nagoya speaking at the Diet
© 2013 Nagase Osamu

Ms Nagoya, a 50-year-old woman with Down syndrome, voted in almost every election since she turned 20, until her father, Mr Nagoya Seikichi, was appointed by a local family court as her legal guardian. Japanese Election Law deprives people under the specific category of guardianship. Encouraged and represented by her father, Ms Nagoya asked the court to restore her voting right for the coming elections for the House of Representatives, the lower house, and the House of Councillors, the upper house.

Developments in legal reform

- France, March 2019

Act on programming 2018-2022 and reform for justice repealed article 5 of the Electoral Code, which allowed a judge to deprive the person under guardianship of their right to vote.

- Spain, December 2018

Changes to electoral law to permit right to vote of persons under guardianship.

- Croatia, 2012

Register of Voters Act, 2012: guarantees that people under guardianship –previously excluded from the voting register– are fully entitled to exercise their right to vote on a basis of equality with others.

- Denmark 2016, 2018

Grants the right to vote and stand for election to persons under full & partial guardianship

- Germany, 2016, 2018

In Bremen, Hamburg, Brandenburg and North Rhine Westphalia – grants the right to vote and stand in elections to persons under guardianship in all affairs.

Good practices

- Israel
 - Accessible materials and information- booklet in plain language
 - Posted on site of Ministry of Welfare and Central Elections Committee
 - explanation of the election process in Israel, from the act of voting up to the formation of government.
 - easy to read description of the 23 candidates and their platforms

"The brochure has helped me a lot with my daughter Noy, for whom this is the first time to vote. It helped me explain to her what is a parliament, what is the role of the parliament's members, what are the different parties and how does one vote. Noy has fulfilled her right to vote and have an impact, with great emotion – hers and ours!"



Noy casting her vote © 2013 AKIM



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Good practices

■ Lebanon

Role of self advocates

- Awareness raising
- Training

Targeting peers, government (Ministry of Internal Affairs) identifying barriers, proposing solutions

My Right: the Right to Vote by the Lebanese Association for Self Advocacy

The [Lebanese Association for Self Advocacy](#) (LASA) is the first self-advocacy organization of persons with intellectual disabilities in Lebanon and the Arab world.¹ LASA was first established through the media project, "Our Voice", which set up a media resource room run for and by young people in an inclusive setting to provide a platform for children and youth to express their concerns through the media. It was the first project in the Arab world that introduced media as a tool to a group of youth with disabilities and their non-disabled peers. The process focused on promoting self-expression using visual media to showcase their capabilities and expose their voices to the community at large.



Young members of the Lebanese Association for Self Advocacy
© 2009 LASA

In 2005, youth from LASA's "Our Voice" project joined the [Lebanese Physical Handicapped Union \(LPHU\)](#) and other NGOs to start a campaign called "My Rights" aimed at raising awareness about the importance of voting. The campaign covered all regions of Lebanon. They worked on two levels- first on education, with self -advocates and their families. LASA self-advocates started to train their peers on the right to vote. Second, they worked at the political level, before the Ministry of Internal Affairs. LASA was one of four organizations that worked with the Ministry of Internal Affairs, and its role focused on (i) preparing the amendment to the Electoral Law to allow all Lebanese nationals to vote; (ii) identifying barriers that could prevent persons with intellectual disabilities from exercising their right

Good practices- elected officials



Ángela Covadonga Bachiller



Isaac Mwaura



Lenin Moreno



Helene Jarmer



UNITED NATIONS



CRPD heralds a new era, new solutions:

- New research
- New practices
- New laws & policies

Strengthens human rights
Strengthens inclusion of all



UNITED NATIONS



Resources

- Convention on the Rights of Persons with Disabilities
- CRPD Committee General Comment no 1 on equal recognition before the law (2014)
- CRPD Committee General Comment no 6 on equality & non-discrimination (2018)
- CRPD Committee General Comment no 7 on participation (2018)
- OHCHR report on participation in political and public life by persons with disabilities (2011)
- Special Rapporteur on the rights of persons with disabilities' report on legal capacity (2018)
- Special Rapporteur on participation (2016)



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Questions / comments?

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The right to access to justice of persons with disabilities in EU law

EU DISABILITY LAW AND THE UNCRPD - ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES
SEMINAR FOR MEMBERS OF THE JUDICIARY
TRIER, 5 - 7 JUNE 2019

DR. ANGELA VERNIA
EMPLOYMENT JUDGE – TRIBUNAL OF BARI



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1

«People with physical and mental impairments ... are people, but they have not as yet been included, in existing societies, as citizens on a basis of equality with other citizens ... people with physical and mental impairments, temporary or lifelong, ... demand full and equal justice»

M. Nussbaum, *Frontiers of Justice*, 2006

2

Summary

- The right to access to justice in EU Law - Article 47 of the EU Charter of Fundamental Rights
- The role of the UNCRPD in EU Law - Article 13 of the UNCRPD
- A comparative analysis of Article 47 CFR and Article 13 UNCRPD
- Access to justice of persons with disabilities under EU secondary law
- Conclusions

3

The Right to Access to Justice: Definition?

There is **no standardised concept of “access to justice” in EU Law.**

The latter is generally understood as referred to the possibility of access to the legal system.

The access to justice, in other words, enables the 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: it thus cuts across civil, criminal and administrative law.

4

Access to Justice Scholarship - I

The theory and methodology about the access to justice were cleared by Mauro Cappelletti in the 70's - 80's at the European Institute of Fiesole (see, M. Cappelletti and B. Garth, *Access to Justice*, Giuffrè 1978):

"The words 'access to justice' ... serve to focus on two basic purposes of the legal system: the system by which people may vindicate their rights and resolve their disputes... First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just"

5

Access to Justice Scholarship - II

More recently, it is worth mentioning a categorization that identifies three distinct but interlinked components of the access to justice – substantive, procedural and symbolic (see, R. Badhi, *Background Paper on Women's Access to Justice in the MENA Region*, Middle East and North African (MENA) Regional Consultation 2007)

The **substantive component** is concerned with the substance or the content “*of the right claims that are available to those who seek a remedy*”, the **procedural component** must be understood as meaning the types of institutions where one might bring a claim and the rules which govern the complaint, and the **symbolic component** appears to consist in a society in which, due to its laws and justice system, disadvantaged groups (e.g., people with disabilities) are fully included as equal citizens.

6

The Right to Access to Justice under EU Law

In order to identify the meaning and content of the right to access to justice in EU law, we make reference to **Article 47 of the Charter of Fundamental Rights of the EU** (on the grounds of the rights set out in the ECHR – Articles 6 and 13) which provides **the right to a fair trial and an effective remedy**

Article 47: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".

7

The Rights under Article 47 CFR

Art. 47 CFR summarises all the particular rights covered by the concept of access to justice in EU Law:

- 1) the right to a fair and public hearing before an independent and impartial tribunal previously established by the law;
- 2) the right to timely resolution of disputes;
- 3) the right to be advised, defended and represented;
- 4) the right to an effective remedy before a tribunal;
- 5) the right to legal aid (see, FRA, *Handbook on European law relating to access to justice*, 2016).

8

1) The Right to a Fair Trial

This includes:

1) the right to access a court

- Accessibility involves availability of courts, access to information and to court judgements

2) The right to a public hearing

- It requires that an individual has the right to attend and hear evidence

9

1) The Right to a Fair Trial

3) The right to a fair hearing essentially covers:

- the right to equality of arms (each party has a reasonable opportunity to present its case in conditions that do not disadvantage either party);
- the right to adversarial proceedings that encompasses the right to have knowledge of all evidence filed to influence the court's decision, the right to have sufficient time to familiarise oneself with the evidence before the court, the right to produce evidence;
- the right to a reasoned decision (courts are not required to give detailed answers to every argument, but sufficient reasons to allow individuals to make effective applications for appeal).

10

Tribunal

Article 47 uses the term "**tribunal**", which means that a tribunal must possess judicial functions, be capable of issuing binding decisions, be established by law and apply rules of law

- Moreover, a tribunal must be "**independent**" - to act as a third-party decision-maker, independent of the administrative authorities (free from external pressure - external independence) and the parties (internal independence)
- And "**impartial**", which consists of two elements: a subjective element relating to the individual judge's personal (potential) prejudices or bias, and an objective element relating to the appearance of bias

11

2) The Right to Timely Resolution of Disputes

Article 47 also guarantees the right to a trial within a reasonable time.

EU law has not established specific definitions of what a "reasonable time" is, therefore, the reasonableness of the length of proceedings, in both criminal and non-criminal proceedings, according to the ECJ caselaw, ends up depending on the circumstances of the case, on the basis of the following **criteria**:

- the complexity of the case (relates both to the facts and to the law, e.g., high evidence, complex legal issues, the need to hear many witnesses);
- the complainant's conduct;
- the domestic authorities' conduct – states must organise their legal systems to enable their courts to guarantee the right to obtain a final decision within a reasonable time.
- the importance of what is at stake for the complainant (e.g., cases concerning children require a faster resolution).

12

3) The Right to be Advised, Defended and Represented

This right is set out by Article 47 of the CFR, as specifically regards the non-criminal proceedings (while criminal cases are disciplined by Article 48)

It entails the right to **practical and effective legal assistance**

The ECJ establishes that the right to legal representation and the privileged nature of correspondence between lawyers and clients are fundamental part of the EU's legal order

13

4) The Right to an Effective Remedy before a Tribunal

This right allows individuals to seek a **redress** for violations of their rights

Different types of remedies (e.g., compensation, specific performance, injunctions) may redress different types of violation

Under EU law, Member States are legally bound to establish systems of legal remedies and procedures to ensure the effective judicial protection of rights in the fields covered by EU law, on the basis of the principles of **effectiveness** and **equivalence**

Effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU Law

Equivalence requires that the conditions relating to claims arising from EU law are not less favourable than those relating to similar actions of a domestic nature

14

5) The Right to Legal Aid

This right is guaranteed by Article 47 in non-criminal proceedings, and Article 48 in criminal proceedings

As the right to legal assistance, according to article 47, should be effective for all individuals, regardless of their financial means, a further **right to legal aid to those who lack sufficient resources** is provided, as far as this is necessary to ensure effective access to justice (it applies to proceedings relating to all rights and freedoms arising from EU law)

Legal aid is generally subject to **financial means** and **merit tests**: States can decide whether it is in the interest of justice to provide legal aid, taking into account the importance of the case for the individual, the complexity of the case and the individual's capacity to protect himself/herself (e.g., vulnerable persons)

15

TFEU, Article 67(4)

"The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters"

16

UNRPD, Article 13

"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.

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".

17

The Role of the UNCRPD in EU Law

The EU acceded to the Convention with the **Council Decision 2010/48/EC**

The UNCRPD entered into force in the EU area on **22 January 2011**

The UNCRPD is the first human rights treaty that contemplates the possibility that not only the States but the "regional integration organisations" may become parties of the same (CRPD, Article 44)

"The Committee notes with appreciation that the European Union is the first regional organization to ratify a human rights treaty concluded under the auspices of the United Nations, thus setting a positive precedent in public international law" (UNCRPD, Committee Cos, Para. 1)

18

The Status of the UNCRPD

The UNCRPD is a **mixed agreement**: that is, an international agreement that falls partly within the scope of the EU regulatory powers and partly within the scope of those of the Member States

"In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements insofar as the provisions fall within the scope of Community competence"(Case C-239/03, *Etang de Berre*).

"Agreements concluded by the Union are binding upon the institution of the Union and on its Member States" - Article 216 (2) TFEU

19

The UNCRPD and the EU Law Sources

The UNCRPD has become a **part of EU law**.

Under the EU legal order, the fundamental hierarchy of norms is as follows:

- the **Treaties** – the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (including their Protocols) **and the Charter of Fundamental Rights** constitute **EU primary law**
- **directives, regulations and decisions** constitute **EU secondary law**

All the **international law sources** are inferior to the Treaties' provisions but superior to EU secondary law

Therefore the **UNCRPD** – as an international mixed agreement - is **inferior to the Treaties' provisions** but is **superior to secondary EU law** (See, Ferri D., *The conclusion of the Un Convention on the rights of persons with disabilities by the EC/EU: some reflections from a "constitutional prespective"*, I Quaderni Europei, March, 2010, vol. 4)

20

The UNCRPD's Legal Effects

The UNCRPD, in the light of its spirit and objectives, could be *potentially* capable of attributing rights to individuals

However, its provisions are addressed to the Parties and do not seem to be sufficiently clear, precise and unconditional up to the point of having **direct effect** in the EU legal order

The European Court of Justice constantly affirms that the UNCRPD is "**programmatic**" and its provisions are not "**unconditional and sufficiently precise** ... they therefore do **not** have **direct effect** in European Union Law" (Z judgement Case C-363/12 Z v. A Government Department, Case C-356/12 W. Glatzel v. Freistaat Bayern)

21

The Interpretative Effect

Although the UNCRPD is not directly applicable, it may have effect in the EU legal order on the basis of the **principle of consistent interpretation** (CJEU Joined Cases C-335/2011 and C-337/2011, *Ring and Werge*, Case C-312/2011, *Commission v. Italy*, Case C-363/2012, Z. v. *Government Department*), meaning that both EU law and national legislation must be interpreted in a manner consistent with the UNCRPD

This also entails that if the wording of secondary EU Law is open to more than one explanation, the interpretation which could render the provision consistent with the Convention should be preferred as far as possible

However, "Case law leaves the door open to the review of EU measures in the light of the UNCRPD" (see, Ferri D., *The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: some reflections from a "constitutional" perspective*, Online Working Paper 2010, n. 4, March 2010), regardless of whether the Convention has direct effect, in two situations: 1) when an EU act intends to implement a specific obligation arising from the UNCRPD, 2) when an EU act expressly refers to specific provisions of the UNCRPD (for these two famous exceptions, see C-69/89 *Nakajima*, and C-70/87 *Fedioti*; moreover, "The judgment of the Court in *The Netherlands v. EP and Council* provides good grounds to consider that the review of EU measures in the light of the UNCRPD may be possible regardless of whether the Convention has direct effect (ECJ 9 October 2001, C-377/98)", see Ferri, above).

22

The Notion of Disability

The most notable example of the interpretative effect is related to the notion of **disability**

The seminal case: the HK Denmark judgement (decision 11.4.2013), Joined Cases C-335/2011 and C-337/2011

The ECJ preliminarily affirms that the Employment Equality Directive (2000/78/EC) was mentioned in the Declaration of Competences annexed to the Decision 2010/48 and was defined as "one of the European Union acts which refers to matters governed by the UN Convention"

The Court then establishes that the Directive "**must, as far as possible, be interpreted in a manner consistent with that Convention**" and put this in practice regarding the definition of "disability"

According to the social model of disability which underlies the UNCRPD, the Court overrules the definition of disability given by the Chacón Navas judgement (Case C-13/05, based instead on the medical model) and establishes that, in the light of the aforementioned interpretative duty, the concept of **disability** must be understood as "*a [long-term] limitation that results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers*" (see Para. 37)

23

Beyond the Classical Notion of Access to Justice

The statement provided by Article 13, UNRPD, is the first to enshrine an **explicit** right of access to justice in international law

The latter is both a **fundamental right in itself** and an essential **prerequisite** for the protection of all other human rights

Persons with disabilities face significant **obstacles in access to justice** that include denial of their legal standing and due process guarantees and the inaccessibility of the physical and communication environments during proceedings

The UNCRPD calls for the **elimination of obstacles and barriers** faced by persons with disabilities in accessing justice on an equal basis with others, and **innovates on previous standards** developed under international law

The convention not only clarifies **what access to justice means for persons with disabilities**, but also upholds **equal and effective participation at all stages and in every role within the judicial system** as a core element of the right of access to justice

24

Report of the Office of the UN High Commissioner for Human Rights (2018)

***"It underscores the fact that access to justice for persons with disabilities entails not only the removal of barriers to ensure access to legal proceedings to seek and obtain appropriate remedies on an equal basis with others, but also the promotion of the active involvement of persons with disabilities in the administration of justice"* (Par C, 12.)**

25

A Comparative Analysis of Article 47 CFR and Article 13 UNCRPD

The **scope** of the right (art. 13, UNCRPD) is broader compared with the right to a fair trial and an effective remedy under Article 47, CFR, which is only concerned with the right of the main parties of a dispute

Article 13 (1) refers to the right to participate in legal proceedings as a "**direct or indirect**" participant, that is, to take part in the justice process in capacities other than those of claimant or defendant, including crime victims, suspects, witnesses

Art. 29, UNCRPD (promoting the participation in public affairs), supplements Article 13: in combination the two articles suggest that disabled people have the right to participate, on an equal basis with others, in the justice system as a whole

The latter entails the right to **participate in justice system in a broad sense**: access to the profession of lawyer or judge; participation in jury service; procedural accommodations for witnesses

An innovative and explicit requirement of the right to access is that it is specifically extended to non-judicial mechanisms - "all legal proceedings" (equality bodies, Ombudsman etc.); Article 47 is mainly limited to judicial procedures

Article 13 goes beyond the right to a fair hearing and to an effective remedy (Article 47, CFR) by explicitly requiring disability **training** to be provided to the judiciary, police and other staff; the training requirement is expressly extended to prison staff (see, Flynn E. and Lawson A., *European Yearbook of Disability Law*, Vol. 4, 2013, Intersentia)

26

Article 13: to be read in conjunction with...

The **content** of Article 13 goes beyond the right to a fair trial and an effective remedy (article 47, CFR)

Article 13 and **Article 5, UNCRPD ("non discrimination")**

Although the obligation to prohibit discrimination is not explicitly mentioned by article 13, it is clearly implicit in the phrase "**on an equal basis**"

An action which is discriminatory in purpose or effect must be prohibited – AI driven technology applied to justice = increased discrimination risk (COE Recommendation, May 2019)

Failure to provide **procedural accommodations** will also amount to discrimination and therefore falls within the scope of what must be prohibited

27

Procedural/Reasonable Accommodations

Article 13 does not explicitly mention reasonable accommodation, but it refers to "**procedural and age appropriate accommodation**"

Procedural accommodations are not limited by the concept of "disproportionate or undue burden"

These are all the possible accommodations needed to exercise the right to access to justice on an equal basis with others

Adjustments to standard practice or procedure in order to remove a particular disadvantage in access to justice:

- a different timetabling of a case (by avoiding an early morning start for a person taking certain types of medication)
- more frequent breaks for a person with a physical impairment which requires this
- a sign language interpreter or reader to accompany a person with sensory impairments, or communicating with a deaf person in writing rather than orally
- display of text, Braille, tactile communication, large print, audio, plain-language

28

And also with...

Article 21 - accessibility of information and communication

Article 9 - to ensure the physical accessibility of buildings and spaces open to the public; the provision of live assistance and intermediaries such as sign language interpreters; accessible signage, including Braille and easy-to-read formats; accessible information and **communication** technologies

Article 12 - legal capacity - without the recognition of legal personality, there can be no recourse to justice and, without access to justice, the right to be recognised as equal before the law is meaningless since it cannot be asserted, applied to a specific context, or enforced.

Article 8 and 16 - to promote **awareness** amongst disabled people, their families and society of the rights of disabled people and how they might be enforced (see, Flynn E. and Lawson A., *Disability and Access to Justice in the European Union: Implications on the United Nations Convention on the Rights of Persons*, European Yearbook of Disability Law, 2013, Intersentia)

29

EU Secondary Law The Non-Discrimination Context

Directive 2000/78/EC - general framework for equal treatment in employment and occupation - requires Member States to prohibit disability discrimination in employment and occupation

Article 9(1) "*Judicial and/or administrative procedures*" are to be established for the enforcement of the obligation to prohibit disability discrimination (as well as sexual orientation, age, religion or belief)

No explicit requirement for Member States is provided **to prohibit disability discrimination in access to justice** (see, Waddington L. *Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities*, European Yearbook of Disability Law, 2013, Intersentia)

European Commission, **Proposal** for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008)

30

CFR, Article 21

Article 21 (1), CFR: any "discrimination based on any grounds such as ... disability ... shall be prohibited" = to prohibit disability discrimination in connection with entitlements deriving from EU Law

Where **EU Law explicitly** requires the provision of at least **some aspects of access to justice** (e.g. to establish procedures or mechanisms for the enforcement of specific rights), **the requirement that they must be free from discrimination is implicit**

"*Judicial and/or administrative procedures*" are to be established for the enforcement of obligations to prohibit discrimination on the grounds of:

- race - Article 7, Directive 2000/43/EC
- gender - Article 8(1), Directive 2004/113/EC and Article 17(1), Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

31

EU Secondary Law Beyond the Non-Discrimination Context

The **Free Movement Directive** requires **mechanisms for judicial redress** to be available to EU citizens refused entry into another Member State

Article 31 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

"*Procedural safeguards*":

1. The persons concerned shall have access to judicial and, where appropriate, administrative **redress procedures** in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except: (...)
3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 ...

32

Criminal Justice

Criminal justice provides a focus for analysis of the extent to which disability considerations are being factored into emerging EU access to justice standards

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

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

Directive 2013/48/EU on the right to a lawyer in criminal proceedings

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

33

Directive 2010/64/EU 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 (R17)

Suspected or accused persons who are "**unable to speak or understand the language of the proceedings** are provided with **an interpreter and with translation of the essential documents**"

People with disabilities = people who are "**in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively**"

Member States have to **take into account "any potential vulnerability** that affects one's ability to follow the proceedings and to make themselves understood"

34

Some Criticism to Directive 2010/64/EU

People with disabilities are characterised as being made "weak" or "**vulnerable**" by their physical or sensorial impairments; the CRPD, by contrast, stresses the significance of social and external factors in creating barriers for disabled people

These **measures** are **limited** to those who are "**unable to speak or understand the language of the proceedings**": but what about suspected or accused disabled people who are able to understand and follow the proceedings, but who have visual impairments?

NO specific mention is made of **reasonable accommodations**. However, Article 3 (2) states "appropriate assistance for persons with hearing or speech impediments"; recital 27 requires to **take into account** "**any potential vulnerability** that affects one's ability to follow the proceedings and to make themselves understood"

Duties to ensure reasonable accommodations emerge obliquely as duties to make relevant information accessible to disabled people

35

Directive 2012/29/EU: Minimum Standards on the Rights, Support and Protection of Victims of Crime

Recital (9) - **no discrimination** based on disability and **recognition**

-No discrimination of any kind based on any grounds 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

Recital (15) - **accessibility** to premises and access to information

-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 the facilitating of the accessibility to premises where criminal proceedings are conducted and access to information

Recital (21) – the **right to understand and to be understood**, provision of information and advice taking into account a person's intellectual capacity, hearing or speech impediments

-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 (see Chapter 3)

36

Directive 2012/29/EU: Minimum Standards on the Rights, Support and Protection of Victims of Crime

Article 3(2): communications in simple and accessible language

-Member States must ensure that **communications with victims are given in simple and accessible language, orally or in writing**. Such communications should take into account the personal characteristics of the victim, **including any disability** which may affect the ability to understand or to be understood (see Directive, Chapter 3)

Article 22: individual assessment of victims to identify specific protection needs – also victims with disabilities

- 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 crimes, and victims with disabilities, shall be duly considered (see Directive, Chapter 4)

37

Some Criticism to Directive 2012/29/EU

This directive appears to adopt the uncomfortable approach of categorizing people with disabilities as “vulnerable” and in need of protection

38

Directive 2013/48/EU 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

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"

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

39

Directive 2016/1919/EU: 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"

Recital 29

- Non discrimination on grounds of disability

- Respect and implementation in the light of the Charter, including integration of people with disabilities

Recital 18

- practical arrangements: legal aid should be granted following a request by a suspect, an accused person or a requested person.

- such a request should not be a substantive condition for granting legal aid, considering the needs of vulnerable persons

40

The European Disability Strategy 2010 - 2020

Access to justice is not explicitly mentioned in the strategy, nevertheless, it is considered as an important issue

«The area of legal rights and access to justice is therefore of key importance in the new strategy» (European Commission, Commission Staff Working Document to the European Disability Strategy 2010-2020, SEC(2010) 1323 final, section 3.1.2.2.)

Accessibility – Services associated with access to justice (i.e. court proceedings) should be included

Participation – assistance regarding access to legal documents and procedures, improve accessibility of court buildings

Equality - support the enactment of the proposed directive extending the non discrimination prohibition beyond employment and occupation

41

Conclusions

EU secondary law demonstrates the EU's increasing interest in the right to access to justice of persons with disabilities

...but disabled people are often considered as "vulnerable"

'Ensuring equal access to justice is not an issue of protecting people who are inherently "vulnerable"; it is a matter of equality and human rights' (see, Flynn E. and Lawson A., above)

The translation into EU legislation, policies and practices of UNCRPD ideals and the new right to justice designed by Article 13 is still a challenge

42

Thank you for your attention!

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43

Il diritto di accesso alla giustizia delle persone con disabilità nel diritto dell'Unione Europea

IL DIRITTO DELL'UE E CONVENZIONE ONU SUI DIRITTI DELLE PERSONE CON DISABILITÀ (UNCRPD) - ACCESSO ALLA GIUSTIZIA DELLE PERSONE CON DISABILITÀ

SEMINARIO DI FORMAZIONE INTERNAZIONALE DEI MAGISTRATI

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1

“Le persone con handicap fisici e mentali ... non sono state ancora pienamente incluse, nella società attuale, come cittadini sulla base di un parametro di egualianza con gli altri cittadini ... le persone con disabilità ... chiedono giustizia eguale e a pieno titolo”

M. Nussbaum, *Le nuove frontiere della giustizia*, 2006

2

Sommario

- Accesso alla giustizia nel diritto dell'Unione Europea - Articolo 47 della Carta dei diritti fondamentali dell'UE
- Ruolo della UNCRPD nel diritto dell'Unione - Articolo 13 UNCRPD
- Analisi comparativa dell'articolo 47 della Carta e dell'articolo 13 della Convenzione Onu
- Accesso alla giustizia della persone con disabilità nel diritto derivato dell'Unione Europea
- Considerazioni conclusive

3

Diritto di accesso alla giustizia: Definizione?

Nel diritto UE non vi è un concetto codificato di “accesso alla giustizia”

In genere, esso viene riferito alla possibilità di accedere al sistema giudiziario

In altre parole, l'accesso alla giustizia consente agli individui di ottenere tutela contro le violazioni dei loro diritti, di porre rimedio contro gli illeciti civili, di chiamare in causa la responsabilità del potere esecutivo e di difendersi nei processi penali: pertanto è trasversale al diritto civile, al diritto penale e al diritto amministrativo

4

Dottrina - Accesso alla giustizia - I

La teoria e la metodologia relative all'accesso alla giustizia furono elaborate da Mauro Cappelletti negli anni '70 - '80 presso l'Istituto Europeo di Fiesole (v. M. Cappelletti e B. Garth, *Access to Justice*, Giuffrè 1978):

*"Le parole 'accesso alla giustizia' ... servono a individuare le **due finalità basilari del sistema giuridico**: il sistema in base al quale le persone possono difendere i loro diritti e risolvere le loro controversie... Primo, il sistema deve essere equamente accessibile a tutti; secondo, deve produrre risultati che siano individualmente e socialmente giusti"*

5

Dottrina - Accesso alla giustizia - II

E' opportuno menzionare una più recente categorizzazione che identifica tre componenti distinte ma interconnesse del diritto di accesso alla giustizia: sostanziale, procedurale e simbolica (v. R. Badhi, *Background Paper on Women's Access to Justice in the MENA Region*, Middle East and North African (MENA) Regional Consultation 2007)

La **componente sostanziale** riguarda il contenuto "dei diritti disponibili per chi invoca un rimedio"; la **componente procedurale** fa riferimento alla tipologia di istituzioni giudiziarie e alle regole che governano i procedimenti; la **componente simbolica** concerne una società in cui, grazie alle sue leggi e al suo sistema giudiziario, i gruppi più svantaggiati (es. persone con disabilità) sono pienamente inclusi ed integrati come cittadini

6

Il diritto di accesso alla giustizia nel diritto UE

Per individuare il significato e il contenuto del diritto di accesso alla giustizia nel diritto UE, si fa riferimento all'**articolo 47 della Carta dei diritti fondamentali dell'UE** (che si basa sui diritti di cui agli artt. 6 e 13 della CEDU) che consacra il **diritto a un processo equo e a un ricorso effettivo**

Articolo 47: "Ogni persona i cui diritti e le cui libertà garantiti dal diritto dell'Unione siano stati violati ha diritto a un **ricorso effettivo dinanzi a un giudice**, nel rispetto delle condizioni previste nel presente articolo.

*Ogni persona ha diritto a che la sua causa sia esaminata **equamente, pubblicamente ed entro un termine ragionevole da un giudice indipendente e imparziale, precostituito per legge**. Ogni persona ha la facoltà di farsi **consigliare, difendere e rappresentare**.*

*A coloro che non dispongono di mezzi sufficienti è concesso il **patrocinio a spese dello Stato**, qualora ciò sia necessario per assicurare un **accesso effettivo alla giustizia**".*

7

I diritti contenuti nell'articolo 47 CDCEU

L'art. 47 CDCEU sintetizza tutti gli specifici diritti ascrivibili al concetto di accesso alla giustizia nel diritto UE:

- 1) diritto a un processo equo dinanzi a un Tribunale indipendente e imparziale, precostituito per legge;
- 2) diritto a una ragionevole durata del processo;
- 3) diritto di farsi consigliare, difendere e rappresentare;
- 4) diritto a un ricorso effettivo dinanzi a un giudice;
- 5) diritto al patrocinio a spese dello Stato (v. FRA, *Handbook on European law relating to access to justice*, 2016).

8

1) Il diritto a un processo equo

Questo comprende:

1) il diritto di accesso alle corti

- Accessibilità significa accesso alla tutela giurisdizionale dei diritti, ma anche agevole raggiungibilità dei tribunali, accesso alle informazioni e alle sentenze emesse

2) Il diritto a un'udienza pubblica

- Ciò comporta il diritto a presenziare all'udienza, ad essere ascoltati e il diritto ad essere presenti durante l'escussione delle prove

9

1) Il diritto a un processo equo

3) Il diritto in commento abbraccia il diritto ad un'udienza equa che, copre essenzialmente:

- la condizione di reciprocità tra le parti - il diritto alla parità delle armi (tutte le parti debbono poter agire in giudizio in condizioni tali che nessuna ne sia svantaggiata);
- il diritto al contraddittorio che comprende il diritto di avere conoscenza e formulare eccezioni in merito alle prove addotte, il diritto ad aver tempo sufficiente per prendere cognizione delle prove addotte innanzi al tribunale, il diritto di presentare prove;
- il diritto ad ottenere una decisione motivata (le corti non sono tenute a dare una risposta dettagliata ad ogni argomento, ma motivazioni sufficienti per consentire agli interessati di proporre appello – obbligo di motivazione varia in funzione della natura della causa e delle circostanze del caso concreto).

10

Tribunale

L'art. 47 usa il termine "**tribunale**" = organo istituito per esercitare la funzione giurisdizionale e che offre adeguate garanzie: il potere di emanare decisioni vincolanti, essere precostituito per legge e applicare norme di legge

- Inoltre, un tribunale deve essere "**indipendente**" – agire in posizione di terzietà, in modo indipendente dalle autorità amministrative (esente da pressioni esterne, cd. indipendenza esterna) e dalle parti (cd. indipendenza interna)
- E "**imparziale**", fattore costituito da due elementi: un elemento soggettivo, relativo a (potenziali) pregiudizi o preconcetti del singolo giudice, e un elemento oggettivo, relativo al sospetto di parzialità (il tribunale si presume imparziale fino a prova contraria)

11

2) Il diritto a una ragionevole durata del processo

L'art. 47 garantisce altresì il diritto a essere giudicati entro un termine ragionevole.

Nel diritto UE non vi è una definizione specifica di cosa si intenda per "termine ragionevole"; in ossequio alla giurisprudenza della Corte di Giustizia, la ragionevolezza della durata dei procedimenti, tanto civili quanto penali, dipende dalle circostanze del caso concreto, in base ai seguenti **criteri**:

- la complessità della causa (in relazione sia ai fatti sia al diritto – es. volume cospicuo di prove, questioni giuridiche complesse, necessità di sentire numerosi testimoni);
- Il comportamento della parte ricorrente;
- la condotta delle autorità nazionali – gli Stati devono organizzare i loro sistemi giudiziari in modo da consentire ai tribunali di garantire il diritto a ottenere una decisione definitiva entro un termine ragionevole;
- l'importanza della posta in gioco per la parte ricorrente (es. cause relative a minori richiedono una soluzione più rapida).

12

3) Il diritto di farsi consigliare, difendere e rappresentare

Questo diritto è sancito dall'art. 47 della Carta per quanto concerne i procedimenti non penali (analogo diritto è preso in esame dall'art. 48 per i procedimenti penali)

Comporta il diritto a **un'assistenza legale pratica ed efficace**

La CGUE ha stabilito che il diritto alla rappresentanza legale e il rispetto della riservatezza della corrispondenza tra avvocati e clienti sono parte integrante dell'ordinamento giuridico dell'Unione.

13

4) Il diritto a un ricorso effettivo

Permette agli individui di **ottenere un rimedio** contro le violazione dei loro diritti

Diversi tipi di rimedi (es. compensazione, prestazioni specifiche, procedimenti d'ingiunzione) possono riparare diversi tipi di violazione

Ai sensi del diritto dell'Unione, gli Stati membri sono tenuti a stabilire rimedi giurisdizionali per assicurare l'effettiva tutela giuridica dei diritti nei settori disciplinati dal diritto UE, in base ai principi di **effettività** e di **equivalenza**

L'**effettività** richiede che il diritto nazionale non renda impossibile o eccessivamente difficile far valere i diritti garantiti dal diritto UE

L'**equivalenza** esige che le condizioni relative alle pretese derivanti dal diritto UE non siano meno favorevoli di quelle relative ad azioni analoghe derivanti dal diritto nazionale

14

5) Il diritto al patrocinio a spese dello Stato

Questo diritto è garantito dall'art. 47 per i procedimenti non penali, e dall'art. 48 per i procedimenti penali

Il diritto all'assistenza legale deve essere effettivo per ogni persona, a prescindere dai suoi mezzi finanziari, pertanto, l'art. 47 prevede un ulteriore **diritto al patrocinio a spese dello Stato per chi non dispone di risorse sufficienti**, purché questo sia necessario a garantire un effettivo accesso alla giustizia (si applica a procedimenti relativi a tutti i diritti e le libertà contemplati nel diritto dell'Unione)

Il patrocinio a spese dello Stato è in genere soggetto ai **mezzi finanziari e a verifiche di merito**: gli Stati possono decidere se sia nell'interesse della giustizia concedere il patrocinio a spese dello Stato, tenendo conto dell'importanza della causa per l'interessato/a, della complessità della causa stessa e della capacità dell'interessato/a di far valere le proprie ragioni (es. persone vulnerabili).

15

TFUE, Articolo 67(4)

"L'Unione facilita l'accesso alla giustizia, in particolare attraverso il principio di riconoscimento reciproco delle decisioni giudiziarie ed extragiudiziali in materia civile."

16

UNCRPD, Articolo 13

"Gli Stati Parti assicureranno l'accesso effettivo alla giustizia per le persone con disabilità, su base di egualanza con gli altri, anche attraverso la previsione di appropriati accomodamenti procedurali o accomodamenti in funzione dell'età, allo scopo di rendere il loro ruolo effettivo come partecipanti diretti e indiretti, compresa la veste di testimoni, in tutte le fasi del procedimento legale, includendo la fase investigativa e le altre fasi preliminari.

Allo scopo di aiutare ad assicurare l'effettivo accesso alla giustizia da parte delle persone con disabilità, gli Stati Parti promuoveranno una appropriata formazione per coloro che lavorano nel campo dell'amministrazione della giustizia, comprese le forze di polizia e il personale penitenziario".

17

Ruolo della UNCRPD nel diritto UE

L'UE ha aderito alla Convenzione con la **Decisione del Consiglio 2010/48/CE**

L'UNCRPD è entrata in vigore nell'area UE il **22 gennaio 2011**

La Convenzione è il primo trattato sui diritti dell'uomo che contempla la possibilità che possano aderirvi non solo gli Stati ma anche le "organizzazioni regionali d'integrazione" (CRPD, Art. 44)

"Il Comitato nota con piacere che l'Unione europea è la prima organizzazione regionale a ratificare un trattato sui diritti dell'uomo concluso sotto gli auspici delle Nazioni Unite, dando adito a un precedente positivo nel diritto pubblico internazionale" (UNCRPD, Comitato Cos, Par. 1)

18

Lo *status* della UNCRPD

La UNCRPD è un **accordo misto**, ovvero un accordo internazionale che ricade in parte nell'ambito della competenza esclusiva dell'Unione e in parte nell'ambito di quella degli Stati membri

"Orbene, secondo la giurisprudenza, gli accordi misti conclusi dalla Comunità, dai suoi Stati membri e da paesi terzi hanno nell'ordinamento comunitario la stessa disciplina giuridica degli accordi puramente comunitari, trattandosi di disposizioni che rientrano nella competenza della Comunità" (CGUE, Causa C-239/03, *Etang de Berre*).

"Gli accordi conclusi dall'Unione vincolano le istituzioni dell'Unione e gli Stati membri" – Art. 216 (2) TFUE

19

La UNCRPD e le fonti del diritto dell'Unione

La UNCRPD è **parte integrante del diritto dell'Unione**.

Nell'ordinamento giuridico UE, la gerarchia delle fonti è la seguente:

- i **Trattati** – il Trattato dell'Unione europea (TUE) e il Trattato sul funzionamento dell'Unione europea (TFUE) (inclusi i loro protocolli) e la **Carta dei diritti fondamentali** costituiscono la **normativa primaria dell'Unione**
- **direttive, regolamenti e decisioni** costituiscono la **normativa secondaria dell'Unione**

Tutte le **fonti di diritto internazionale** sono collocate al di sotto delle disposizioni dei Trattati, ma al di sopra della legislazione secondaria

Pertanto, la **UNCRPD** – in quanto accordo internazionale misto – è **inferiore alle disposizioni dei Trattati ma superiore alle norme di diritto secondario UE** (v., Ferri D., *The conclusion of the Convention on the rights of persons with disabilities by the EC/EU: some reflections from a "constitutional perspective"*, I Quaderni Europei, Marzo, 2010, vol. 4)

20

Effetti giuridici della UNCRPD

La Convenzione, considerando il suo spirito e i suoi obiettivi, *potenzialmente* potrebbe attribuire diritti direttamente in capo agli individui

Tuttavia, le sue disposizioni sono rivolte agli Stati Parti e non appaiono abbastanza chiare, precise e incondizionate al punto da essere **direttamente applicabili** nell'ordinamento giuridico dell'Unione

La Corte di Giustizia afferma costantemente che la UNCRPD ha natura **"programmatica"** e le sue disposizioni, dal punto di vista contenutistico, **non sono "incondizionate e sufficientemente precise** ... pertanto **non** hanno **effetto diretto** nel diritto dell'Unione" (CGUE, sentenza Z. Causa C-363/12 Z v. A Government Department, Causa C-356/12 W. Glatzel v. Freistaat Bayern)

21

L'effetto interpretativo

Pur non avendo efficacia diretta, la Convenzione ha un importante effetto nell'ordinamento giuridico UE in base al **principio dell'interpretazione conforme** (CGUE, cause congiunte C-335/2011 e C-337/2011, *Ring and Werge*, Causa C-312/2011, *Commissione v. Italia*, Causa C-363/2012, Z. v. *Government Department*); ciò implica che tanto il diritto UE quanto la legislazione nazionale devono essere **interpretati in modo conforme alla UNCRPD**

Se il testo di una norma secondaria di diritto UE è suscettibile di una pluralità di interpretazioni, si dovrà privilegiare, per quanto possibile, l'interpretazione che rende la disposizione maggiormente conforme alla convenzione

Tuttavia, "La giurisprudenza lascia la porta aperta alla revisione delle misure dell'UE alla luce dell'UNCRPD" (v. Ferri D., *The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: some reflections from a "constitutional" perspective*, Online Working Paper 2010, n. 4, March 2010), a prescindere dal fatto che la convenzione sia o meno direttamente applicabile, in due situazioni: 1) allorché una legge dell'UE è intesa attuare un obbligo specifico derivante dall'UNCRPD, 2) allorché una legge dell'UE fa riferimento esplicito alle disposizioni dell'UNCRPD (per queste due famose eccezioni, v. C-69/89 Nakajima, e C-70/87 Fediol; inoltre, "La sentenza della Corte nella causa Paesi Bassi v. PE e Consiglio presenta buoni motivi per considerare che la revisione delle misure dell'UE alla luce dell'UNCRPD può essere possibile a prescindere dal fatto che la convenzione sia o meno direttamente applicabile (CEG 9 ottobre 2001, C-377/98)", v. sopra, Ferri).

22

La nozione di disabilità

L'esempio più rimarchevole dell'effetto interpretativo è relativo alla nozione di **disabilità**

Caso emblematico: sentenza HK Denmark (CGUE, sentenza 11.4.2013), Cause riunite C-335/2011 e C-337/2011

Nella premessa, la Corte afferma che la direttiva 2000/78/CE, relativa alla parità di trattamento sul lavoro, è menzionata nella dichiarazione sulle competenze allegata alla decisione 2010/48/CE ed è definita come "uno degli atti dell'Unione europea che fanno riferimento a questioni governate dalla convenzione ONU"

La Corte stabilisce quindi che la direttiva "**deve essere interpretata, per quanto possibile, in modo conforme alla convenzione**" e applica tale principio alla definizione di "disabilità"

Richiamando espressamente l'art. 1, comma 2, UNCRPD (modello sociale di disabilità), la Corte sovverte la definizione espresa nella sentenza Chacón Navas (Causa C-13/05, basata invece sul modello medico) e stabilisce, che, sulla scorta del dovere di interpretazione conforme, il concetto di **disabilità** deve essere inteso, anche ai fini della Direttiva 2000/78/CE, come "*una limitazione [di lunga durata] derivante in particolare da disabilità fisiche, mentali o psichiche che, in interazione con barriere di diversa natura, può pregiudicare la piena ed effettiva partecipazione della persona interessata alla vita professionale sulla base di egualanza con gli altri lavoratori*" (v. Par. 37)

23

Oltre la nozione classica di accesso alla giustizia

L'art. 13 UNRDP è la prima **esplicita** statuizione di un diritto di accesso alla giustizia in favore dei disabili nel diritto internazionale

Si tratta di un **diritto fondamentale in sé e per sé** e allo stesso tempo di una **precondizione** essenziale per l'esercizio degli altri diritti umani

Le persone con disabilità affrontano notevoli **ostacoli nell'accesso alla giustizia**, tra cui la negazione della capacità giuridica, il diniego delle dovute garanzie processuali, l'inaccessibilità fisica degli ambienti giudiziari e barriere di comunicazione nel corso dei procedimenti

La Convenzione invoca l'**eliminazione degli ostacoli e delle barriere** cui devono far fronte le persone con disabilità per accedere alla giustizia su base di egualanza con gli altri, e **innova le norme preesistenti** di diritto internazionale

L'art. 13 non solo chiarisce **che cosa significa accesso alla giustizia per le persone con disabilità**, ma consacra anche l'**equa ed effettiva partecipazione dei disabili in tutti ruoli e in tutti i gradi del processo** quale elemento fondamentale del diritto di accesso alla giustizia

24

Rapporto dell’Ufficio dell’Alto Commissariato ONU per i diritti umani (2018)

“L’accesso alla giustizia per le persone con disabilità comporta non solo la rimozione delle barriere per garantire l’accesso ai procedimenti legali per chiedere e ottenere appropriati rimedi su una base paritaria, ma anche la promozione della partecipazione attiva delle persone con disabilità all’amministrazione della giustizia” (Par C, 12.)

25

Analisi comparativa dell’articolo 47 CDFEU e dell’articolo 13 UNCRPD

L’ambito di applicazione del diritto (art. 13 UNCRPD) è più ampio rispetto al diritto a un processo equo e a un ricorso effettivo previsto all’art. 47 CDFEU, che riguarda solo il diritto delle parti principali di una controversia

L’art. 13 (1), invece, concerne il diritto di partecipare ai procedimenti giudiziari in qualità di **partecipanti “diretti e indiretti”**, ovvero di prendere parte al processo in vesti diverse da quelle di attore e convenuto, incluse quelle di vittima, indagato, imputato, testimone, consulente tecnico, giurato

L’art. 29 UNCRPD (partecipazione alla vita politica e pubblica) integra l’art. 13: in combinazione, le due norme implicano che le persone disabili hanno il diritto di partecipare, su base paritaria, al sistema giudiziario nel suo complesso

Diritto di **partecipare al sistema giudiziario in senso lato** che comprende anche il diritto di accesso alla professione di avvocato o di giudice; diritto di partecipare alle giurie; diritto agli accomodamenti procedurali per i testimoni

Un requisito innovativo ed esplicito del diritto di accesso è la specifica estensione a meccanismi extra-giudiziari - *“tutti i procedimenti legali”* (organismi di equità, mediatori, ecc.); l’art. 47 è limitato, principalmente, ai procedimenti giudiziari

L’art. 13 va oltre il diritto a un processo equo e a un ricorso effettivo (art. 47 CDFEU) richiedendo esplicitamente l’attuazione di programmi di **formazione** sulla disabilità nei confronti del personale giudiziario, di polizia e altro (incluso il personale penitenziario, v. Flynn E. e Lawson A., *European Yearbook of Disability Law*, Vol. 4, 2013, Intersentia)

26

Articolo 13: da leggere in combinato disposto con...

Il **contenuto** dell'art. 13 va oltre il diritto a un processo equo e a un ricorso effettivo (art. 47 CDFEU)

Art. 13 e art. 5 UNCRPD ("non discriminazione")

Il divieto di discriminazione non è menzionato esplicitamente nell'articolo 13, tuttavia è implicito nella frase «**su base di egualanza con gli altri**»

La Convenzione mira all'eliminazione di ogni forma di discriminazione fondata sulla disabilità

Ogni azione con finalità o effetti discriminatori è vietata – aumento del rischio discriminazione derivante dall'estensione alla giustizia dell'Intelligenza Artificiale (cfr. Raccomandazione Consiglio d'Europa, Maggio 2019)

Il diniego di **accomodamenti procedurali** equivale a discriminazione, pertanto ricade nell'ambito di applicazione di ciò che è vietato

27

Accomodamenti procedurali/ragionevoli

L'art. 13 non fa riferimento ad accomodamenti «ragionevoli» ma ad "**accomodamenti procedurali o accomodamenti in funzione dell'età**"

Gli accomodamenti procedurali non sono limitati dal concetto di "onere sproporzionato o eccessivo"

Sono **tutti i possibili accomodamenti** necessari per esercitare il diritto di accesso alla giustizia su base di egualanza con gli altri

Aggiustamenti di regole procedurali o di prassi necessari per rimuovere un determinato svantaggio nell'accesso alla giustizia:

- modificare l'orario delle udienze (evitare la fissazione in prima mattinata di cause in cui sono coinvolti soggetti con problemi fisici che assumono determinati farmaci)
- concedere interruzioni nel corso della procedura, qualora ciò sia richiesto per la disabilità fisica di una persona
- autorizzare un interprete nella lingua dei segni o un lettore a voce alta per persone con *handicap* sensoriali, o comunicare per iscritto con una persona non udente
- comunicazione tattile, Braille, caratteri ingranditi, ausili auditivi, linguaggio semplice

28

E anche con...

Art. 21 – accesso all’informazione

Art. 9 - assicurare l’accessibilità fisica degli edifici e degli spazi pubblici; mettere a disposizione forme di assistenza ed interpreti quali esperti del linguaggio dei segni; segnaletica accessibile, incluso il Braille e formati di facile lettura; tecnologie dell’informazione e della **comunicazione** accessibili

Art. 12 – uguale riconoscimento di fronte alla legge - senza riconoscimento della personalità giuridica non è possibile ricorrere in giustizia e, senza accesso alla giustizia, il diritto di essere riconosciuti uguali di fronte alla legge perde significato dal momento che non può essere fatto valere o applicato a un contesto specifico.

Arts. 8 e 16 - promuovere tra le persone disabili, le loro famiglie e la società la **consapevolezza** dei diritti delle persone disabili e di come farli valere (v. Flynn E. and Lawson A., *Disability and Access to Justice in the European Union: Implications on the United Nations Convention on the Rights of Persons*, European Yearbook of Disability Law, 2013, Intersentia)

29

Diritto derivato dell’Unione Il diritto antidiscriminatorio UE

- **Direttiva 2000/78/CE** - quadro generale per garantire la parità di trattamento sul lavoro - gli Stati membri sono tenuti a proibire la discriminazione fondata sulla disabilità (nonché orientamento sessuale, età, religione o convinzione) in materia di occupazione e di condizioni di lavoro
- **Art. 9(1)** vanno predisposte "procedure giurisdizionali e/o amministrative" per l’attuazione del divieto di discriminazione basata sulla disabilità
- **Non è previsto** per gli Stati membri un requisito specifico di **proibire la discriminazione sulla base della disabilità nell’accesso alla giustizia in quanto tale** (v. Waddington L. *Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities*, European Yearbook of Disability Law, 2013, Intersentia)
- Proposta di direttiva del Consiglio recante applicazione del principio di parità di trattamento fra le persone indipendentemente dalla religione o le convinzioni personali, la disabilità, l’età o l’orientamento sessuale, COM(2008), oltre le materie dell’occupazione e condizioni di lavoro - oggetto di negoziati in seno al Consiglio

30

CDFEU, Articolo 21

Art. 21 (1) CDFEU: qualsiasi "forma di discriminazione fondata su ... la disabilità ... è vietata" = vietare la discriminazione per motivi di disabilità in connessione con i diritti derivanti dal diritto dell'Unione

Laddove il **diritto dell'Unione richiede esplicitamente** la previsione di taluni **aspetti di accesso alla giustizia** (es. predisporre procedure per l'attuazione di determinati diritti), il **requisito che essi debbano essere esenti da discriminazione è implicito**

Vanno predisposte "*procedure giurisdizionali e/o amministrative*" per l'attuazione del divieto di discriminazione basata su:

- razza – Art.7, direttiva 2000/43/CE
- genere – Art. 8(1), direttiva 2004/113/CE e art. 17(1), direttiva 2006/54/CE - attuazione del principio delle pari opportunità e della parità di trattamento fra uomini e donne in materia di occupazione e lavoro

31

Diritto derivato dell'Unione Oltre il diritto antidiscriminatorio

La **direttiva sulla libera circolazione** delle persone prevede il diritto di **accesso a meccanismi di impugnazione giurisdizionale** per i cittadini dell'UE cui viene negato l'ingresso in un altro Stato membro

Art. 31 direttiva 2004/38/CE del Parlamento europeo e del Consiglio del 29 aprile 2004 relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri

"*Garanzie procedurali*".

1. L'interessato può accedere ai **mezzi di impugnazione** giurisdizionali e, all'occorrenza, amministrativi nello Stato membro ospitante, al fine di presentare ricorso o chiedere la revisione di ogni provvedimento adottato nei suoi confronti per motivi di ordine pubblico, pubblica sicurezza o sanità pubblica.
2. Laddove l'impugnazione o la richiesta di revisione del provvedimento di allontanamento sia accompagnata da una richiesta di ordinanza provvisoria di sospensione dell'esecuzione di detto provvedimento, l'effettivo allontanamento dal territorio non può avere luogo fintantoché non sia stata adottata una decisione sull'ordinanza provvisoria, salvo (...)
3. I mezzi di impugnazione comprendono l'esame della legittimità del provvedimento nonché dei fatti e delle circostanze che ne giustificano l'adozione. Essi garantiscono che il provvedimento non sia sproporzionato, in particolare rispetto ai requisiti posti dall'articolo 28 ...

32

Giustizia penale

L'area in cui la normativa secondaria UE è stata particolarmente attiva nel definire il contenuto del diritto di accesso alla giustizia è la giustizia penale

Direttiva 2010/64/UE sul diritto all'interpretazione e alla traduzione nei procedimenti penali

Direttiva 2012/29/UE che istituisce norme minime in materia di diritti, assistenza e protezione delle vittime di reato

Direttiva 2013/48/UE relativa al diritto di avvalersi di un difensore nel procedimento penale

Direttiva 2016/1919/UE sull'ammissione al patrocinio a spese dello Stato per indagati e imputati nell'ambito di procedimenti penali

33

Direttiva 2010/64/UE sul diritto all'interpretazione e alla traduzione nei procedimenti penali

Questa direttiva mira ad assicurare un'assistenza linguistica gratuita e adeguata per consentire a **persone indagate o imputate che non parlano o non comprendono la lingua del procedimento penale** di esercitare il loro diritto alla difesa, e per salvaguardare l'equità dei procedimenti (considerando 17)

Alle persone indagate o imputate "che non parlano o non comprendono la lingua del procedimento" viene fornita l'assistenza di un interprete e la traduzione dei documenti fondamentali"

Persone con disabilità = persone "in posizione di potenziale debolezza, in particolare a causa di menomazioni fisiche che ne compromettono la capacità di comunicare efficacemente"

Gli Stati membri devono tenere in considerazione "qualsiasi potenziale vulnerabilità che compromette la loro capacità di seguire il procedimento e di farsi capire"

34

Alcune critiche alla direttiva 2010/64/UE

Le **persone con disabilità** sono definite come "deboli" o "vulnerabili" sulla base delle loro limitazioni fisiche o sensoriali; la Convenzione, invece, sottolinea l'importanza dei fattori sociali ed esterni nel creare barriere nei confronti delle persone disabili

Queste **misure** sono **limitate** alle persone "che non parlano o non comprendono la lingua del procedimento": ma che ne è delle persone disabili che possono comprendere e seguire i procedimenti ma che hanno problemi di vista?

NON si fa **menzione** espressa di **accomodamenti ragionevoli**. L'articolo 2 (3) richiede "appropriata assistenza per persone con problemi di udito o difficoltà di linguaggio"; il considerando 27 richiede di **tenere in considerazione** "qualsiasi potenziale vulnerabilità che compromette la loro capacità di seguire il procedimento e di farsi capire"

Il dovere di garantire accomodamenti ragionevoli emerge, quindi, trasversalmente come dovere di rendere accessibili alle persone disabili le informazioni pertinenti

35

Direttiva 2012/29/UE: norme minime in materia di diritti, assistenza e protezione delle vittime di reato

Considerando (9) - **non discriminazione** basata sulla disabilità e **riconoscimento**

-senza discriminazioni di sorta fondate su motivi quali ..., disabilità,

-In tutti i contatti con un'autorità competente ... tenere conto della situazione personale delle vittime e delle loro necessità immediate, ..disabilità .. rispettandone pienamente l'integrità fisica, psichica e morale

Considerando (15) - **accessibilità** ai luoghi e accesso alle informazioni

-Nell'applicare la presente direttiva, gli Stati membri dovrebbero garantire che le vittime con disabilità siano in grado di beneficiare pienamente dei diritti da essa previsti su una base di parità con gli altri, tra l'altro agevolando l'accessibilità ai luoghi in cui si svolge il procedimento penale e l'accesso alle informazioni

Considerando (21) – **diritto di comprendere e di essere compresi**, fornitura di informazioni e consigli tenendo conto della capacità intellettuale di una persona, problemi di udito o difficoltà di linguaggio

È inoltre opportuno garantire che, nel corso del procedimento, la vittima sia a sua volta compresa, tenendo pertanto conto della sua conoscenza della lingua usata per dare le informazioni, dell'età, della maturità, della capacità intellettuiva ed emotiva, del grado di alfabetizzazione e di eventuali menomazioni psichiche o fisiche. Si dovrebbe tenere conto in modo particolare dei problemi di comprensione o di comunicazione che possono insorgere a causa di eventuali disabilità, come problemi di udito o difficoltà di linguaggio. Nel corso del procedimento penale si dovrebbe anche tenere conto di eventuali limitazioni della capacità della vittima di comunicare informazioni.

36

Direttiva 2012/29/UE: norme minime in materia di diritti, assistenza e protezione delle vittime di reato

Art. 3(2): comunicazioni in un linguaggio semplice e accessibile

-Gli Stati membri provvedono a che le **comunicazioni fornite alla vittima siano offerte oralmente o per iscritto in un linguaggio semplice e accessibile**. Tali comunicazioni tengono conto delle personali caratteristiche della vittima, **comprese eventuali disabilità** che possano pregiudicare la sua facoltà di comprendere o di essere compreso (v. dir., capo 3).

Art. 22: Valutazione individuale delle vittime per individuarne le specifiche esigenze di protezione – incluse le vittime con disabilità

- Nell'ambito della valutazione individuale, è rivolta particolare attenzione alle vittime che hanno subito un notevole danno a motivo della gravità del reato, alle vittime di reati motivati da pregiudizio o discriminazione che potrebbero essere correlati in particolare alle loro caratteristiche personali, alle vittime che si trovano particolarmente esposte per la loro relazione e dipendenza nei confronti dell'autore del reato. In tal senso, sono oggetto di debita considerazione le vittime del terrorismo, della criminalità organizzata, della tratta di esseri umani, della violenza di genere, della violenza nelle relazioni strette, della violenza o dello sfruttamento sessuale o dei reati basati sull'odio e le vittime con disabilità (v. dir., capo 4).

37

Alcune critiche alla direttiva 2012/29/UE

Anche questa direttiva sembra adottare il discutibile approccio che definisce le persone con disabilità come “vulnerabili” e bisognose di protezione

38

Direttiva 2013/48/UE relativa al diritto di avvalersi di un difensore nel procedimento penale

...e nel procedimento di esecuzione del mandato d'arresto europeo, al diritto di informare un terzo al momento della privazione della libertà personale e al diritto delle persone private della libertà personale di comunicare con terzi e con le autorità consolari

Art. 13 **Persone vulnerabili:** "Gli Stati membri garantiscono che, nell'applicazione della presente direttiva, si tenga conto delle particolare esigenze di indagati e imputati vulnerabili"

- Diritto di avvalersi di un difensore/riservezza
- Diritto di informare un terzo della privazione della libertà personale
- Diritto di comunicare con terzi durante lo stato di privazione della libertà personale
- Diritto di comunicare con le autorità consolari
- Rinuncia-limitazioni

39

Direttiva 2016/1919/UE: ammissione al patrocinio a spese dello Stato per indagati e imputati nell'ambito di procedimenti penali

Art. 9 **Persone vulnerabili:** "Gli Stati membri garantiscono che, nell'attuazione della presente direttiva, si tenga conto delle particolari esigenze di indagati, imputati e persone ricercate vulnerabili"

Considerando 29

- Non discriminazione a motivo della disabilità
- Rispetto e integrazione ai sensi della Carta, inclusa l'integrazione delle persone con disabilità

Considerando 18

- modalità pratiche: prevedere che l'ammissione al patrocinio a spese dello Stato sia concessa a seguito di una richiesta da parte di un indagato, un imputato o una persona ricercata.
- alla luce delle esigenze delle persone vulnerabili, una tale richiesta non dovrebbe tuttavia costituire una condizione essenziale per la concessione del patrocinio a spese dello Stato

40

La strategia europea sulla disabilità 2010 - 2020

L'accesso alla giustizia non è esplicitamente menzionato nella strategia, tuttavia è considerato una problematica di primario rilievo

"L'area dei diritti e dell'accesso alla giustizia è pertanto di importanza fondamentale nella nuova strategia" (Commissione europea, documento di lavoro dei servizi della Commissione per la strategia europea sulla disabilità 2010-2020, SEC(2010) 1323 final, sezione 3.1.2.2.). Ciò comporta che l'accesso alla giustizia è strettamente legato ad alcune specifiche aree individuate dalla strategia:

Accessibilità – inclusi i servizi associati con l'accesso alla giustizia (es. procedimenti giudiziari)

Partecipazione – assistenza all'accesso ai documenti e ai procedimenti giudiziari; migliorare l'accessibilità degli edifici giudiziari

Uguaglianza – supportare l'attuazione della proposta di direttiva che estende il divieto di discriminazione al di là dell'ambito dell'occupazione e condizioni di lavoro

41

Considerazioni conclusive

La legislazione secondaria dell'Unione dimostra il crescente interesse dell'UE per il diritto di accesso alla giustizia delle persone disabili

...ma i soggetti con disabilità sono spesso considerati "vulnerabili"

"Assicurare un pari accesso alla giustizia non è un problema di protezione di persone che sono intrinsecamente "vulnerabili"; è questione di uguaglianza e di diritti umani" (v. sopra, Flynn E. e Lawson A.)

L'art. 13 UNCRPD costituisce un'importante espansione del tradizionale concetto di accesso alla giustizia, tuttavia, la traduzione in atti normativi, politiche e prassi UE, degli ideali e delle ambizioni della Convenzione rimane ancora una sfida aperta

42

Grazie per la vostra attenzione!

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CASE STUDY 1

Ms. Anna, suffering from systemic sclerosis, was employed by the company B from 2007 until 3 November 2016, the date on which she was dismissed for objective justifiable reasons due to having become permanently unfit for the duties as warehouse operator, and given the unavailability of other tasks to be entrusted to her, even of a lower level (also on account of the fact that the company doctor had forbidden the assignment of tasks to Ms A involving the manual handling of loads, night shifts, vibrations).

The claimant, already acknowledged as a disabled person by the territorially competent medical commission, objected to the discriminatory nature of the dismissal on the basis of her disability. In particular, she argued that pursuant to art. 5 Directive 2000/78/EC, as interpreted in the light of the UNCRPD, and the national transposition legislation, art. 3, subsection 3 bis, of Legislative Decree no. 216/2003, the employer should have adopted more appropriate organisational measures in order to allow the worker to carry out her tasks without risks.

She claimed in any case the possibility of carrying out her employment duties as a warehouse operator, albeit with certain prescriptions.

The company argues that there had not been any form of discrimination based on disability as there were no equivalent or lesser tasks in the company than those assigned to Mrs A, and also because there were no operating positions in the company that did not involve the manual handling of loads or exposure to vibrations.

Witnesses have shown, however, that:

- the operating structure of the company consisted of sales outlets, warehouses and offices;
- in the warehouse - where the appellant worked - the activity was divided into three phases: incoming, outgoing and preparation.

At the incoming counter the goods loaded by the carriers are accepted by the employees where they are unloaded, checked and their transport bill data entered in the terminal;

At the outgoing counter, the employees load the goods and take care of the "preparation", that is, the preparation of the loads (also via



handling), in order to plan the journeys of the company vehicles to the various branches for being delivered.

Operating in all three different areas are employees with the same qualifications as the appellant (4th level of the CCNL – *National Labour Contract* in this sector)

- At the incoming counter the employees carried out activities that did not involve the manual handling of the loads or exposure to vibrations, except in very rare cases in which the operators in charge of controlling the goods or the carriers always intervened.

1. Is Ms. Anna a person with disabilities according to the Directive 2000/78/EC and the UNCRPD?

- In the affirmative, why?
- In the negative, why not?

2. What rights are guaranteed by the UNCRPD in the case described above?

It must also be borne in mind that Anna did not show any evident manifestations deriving from her condition.

3. In your opinion, is Anna's complaint founded?

4. What would your decision be in this case, by interpreting the national and EU regulations in compliance with the UNCRPD?



CASE STUDY 1

La signora Anna, affetta da sclerosi sistemica, era stata dipendente della azienda B dal 2007 al 3.11.2016, data in cui era stata licenziata per giustificato motivo oggettivo consistente nell'essere divenuta permanentemente inidonea alle mansioni di preparatrice di magazzino, stante l'indisponibilità di altre mansioni a cui adibirla, anche inferiori (considerato che il medico competente aveva vietato l'assegnazione della sig.ra A a mansioni comportanti la movimentazione manuale dei carichi, turni notturni, vibrazioni).

La ricorrente, già riconosciuta dalla commissione medica territorialmente competente soggetto portatore di handicap, deduceva il carattere discriminatorio del licenziamento sulla base della disabilità. Sosteneva, in particolare, che, ai sensi dell'art. 5 Direttiva 2000/78/CE, come interpretata alla luce della UNCRPD, e della normativa nazionale di recepimento - art. 3, comma 3 bis, D. Lgs. n. 216/2003 – il datore di lavoro avrebbe dovuto adottare le misure organizzative più idonee a consentire alla lavoratrice di svolgere la sua attività lavorativa senza rischi.

Sosteneva, in ogni caso, la possibilità di svolgere le mansioni di assunzione, ossia quelle di preparatrice di magazzino, seppure con prescrizioni.

La società deduceva che non poteva riscontrarsi alcuna forma di discriminazione fondata sulla disabilità in quanto non vi erano in azienda di mansioni equivalenti o inferiori a quelle assegnate alla signora A, perché nella società non vi erano posizioni operative che non comportassero movimentazione manuale dei carichi e l'esposizione a vibrazioni.

Le testimonianze hanno dimostrato:

- La struttura operativa della società si articolava in punti vendita, magazzini ed uffici;



- Nel magazzino – ove prestava servizio la ricorrente - l'attività era divisa in tre fasi: entrata, uscita e preparazione.
In entrata, presso un bancone, gli addetti ricevono la merce, caricata dai vettori, controllano la merce scaricata, inseriscono i dati delle bolle di consegna nel terminale;
in uscita, i dipendenti caricano le merci e, al bancone d'uscita, provvedono alla “preparazione”, ossia alla preparazione dei carichi (anche movimentandoli), pianificazione dei viaggi dei mezzi aziendali verso le varie filiali per le consegne.
Nei tre blocchi operavano, grossomodo, addetti con pari qualifica rispetto alla ricorrente (4° liv. CCNL di categoria)
- Al banco di entrata gli addetti svolgevano attività che non comportavano la movimentazione manuale dei carichi, né l'uso di vibrazioni, salvo casi eccezionali in cui intervenivano anche gli addetti al controllo merci o i vettori.

1. La signora Anna è una persona con disabilità ai sensi della Direttiva 2000/78/CE e della UNCRPD?

- . se si perché?
- . se no perché?

2. Quali diritti garantiti dalla UNCRPD vengono in rilievo nel caso descritto sopra?

Si tenga anche presente che Anna non presentava manifestazioni evidenti derivanti dalla sua condizione

3. Secondo la tua opinione, il ricorso di Anna è fondato?

4. Quale sarebbe la tua decisione in questo caso, interpretando la normativa nazionale e quella UE in maniera conforme alla Convenzione ONU?



CASE STUDY 2

Steven was hired to work for Getrag Ltd., a company that produces bolts, in 1998.

He was initially employed as an “incoming inspector” and worked inside the main Getrag manufacturing site.

During the employment relationship he contracted multiple sclerosis, but his condition was well controlled by medication, and he has not had a seizure in over eight years.

In 2006, his condition deteriorated and his employer decided to assign him to administrative work (invoice control).

In 2016, his employer repeatedly required that he undergo medical examinations with a doctor appointed by Getrag to evaluate his fitness for work. Steven attended all the medical examinations.

Finally, the employer asked the Local Medical Commission to evaluate Steven’s health condition. The Commission wrote a report according to which Steven was considered permanently unsuited to the job of “incoming inspector”, and in fact was not fit to operate heavy machinery.

Nevertheless the Commission evaluated Steven as suited to “sedentary activities”.

His employer immediately put him on paid leave.

Steven decided to sue Getrag Ltd. claiming that he had been discriminated against on the grounds of a disability.

He contested the medical examinations and also claiming that even if he was declared unfit to operate machinery, Getrag Ltd. should have offered him a different position in the company, such as administrative control, and he requested this measure from the Employment Tribunal.

In his complaint he referred to the national anti-discrimination law, but also claimed there was a general violation of the UNCRPD.

The defendant claims that Steven is not a person with a disability, and as a result, no discrimination on the grounds of disability was committed, stating that the UNCRPD is immaterial in the case at stake.



In addition, Getrag Ltd. claims that even if Steven were to be considered a person with a disability, still no discrimination occurred and the paid leave was justified as a result of observing the minimum safety standards.

1. Is Steven a person with disabilities according to the Directive 2000/78/CE and UNCRPD?

- In the affirmative, why?
- In the negative, why not?

2. What rights guaranteed by the UNCRPD are affected in the circumstances described above?

Bear in mind that Steven uses a wheelchair.

3. Is Stevens' complaint well founded in your opinion?

4. What would your decision be in this case if you interpreted the national and EU regulations in compliance with the UNCRPD?



CASE STUDY 2

Stefano era stato assunto dalla Getrag S.r.l., una società che produce bulloni, nel 1998.

Fu inizialmente addetto alle mansioni di “incoming inspector” (controllo di qualità), espletando la sua attività di lavoro presso il principale centro produttivo della Getrag S.r.l..

Nel corso del suo rapporto di lavoro aveva contratto la sclerosi multipla; tuttavia, le sue condizioni di salute erano state sotto controllo, attraverso terapie farmacologiche, sicchè non aveva avuto problemi per oltre otto anni.

Nel 2006, le sue condizioni peggiorarono, tant’è che il datore di lavoro decise di assegnarlo a mansioni di controllo ed emissione di fatture svolte al *computer* nell’edificio in cui erano collocati gli uffici.

Nel corso del 2016 l’istante veniva sottoposto dal datore di lavoro ad una pluralità di visite mediche volte ad accertarne la idoneità al lavoro.

L’azienda, infine, richiedeva alla Commissione Medico Collegiale competente di pronunciarsi sull’idoneità al lavoro di Stefano. La Commissione valutava Stefano *“permanentemente non idoneo alla mansione di “incoming inspector””*, giudicandolo abile a svolgere *“attività di tipo sedentario che non prevedono movimentazioni manuali del carico da svolgere lontano da macchine semimuoventi”*.

L’azienda, subito dopo, collocava il ricorrente in aspettativa retribuita.

Stefano, quindi, Steven decideva di adire l’autorità giudiziaria deducendo di essere stato discriminato sulla base della disabilità.

In particolare, assumeva di essere un soggetto disabile, contestava gli accertamenti medici ed allegava, comunque, di poter svolgere qualunque attività che non comportasse movimentazioni manuali del carico.

Sosteneva, in particolare, che, ai sensi dell’art. 5 Direttiva 2000/78/CE, come interpretata alla luce della UNCRPD, e della normativa nazionale di recepimento - art. 3, comma 3 bis, D. Lgs. n. 216/2003 – il datore di lavoro avrebbe dovuto adottare le misure organizzative più idonee a consentirgli



svolgere la sua attività lavorativa senza rischi, ad esempio destinandolo a mansioni amministrative, quali quelle relative all’emissione delle fatture che aveva svolto fino ad allora.

La società contestava la qualifica di “disabile” di Stefano, ditalchè assumeva che non poteva applicarsi al caso di specie l’invocata normativa antidiscriminatoria; deduceva altresì che la Convenzione ONU non poteva essere direttamente applicata al caso di specie.

Infine, la Getrag S.r.l. sosteneva che, anche a voler considerare Stefano come soggetto disabile, non sarebbe stata ravvisabile alcuna discriminazione perchè l’aspettativa retribuita si giustificava con la necessità di tutelare la salute del ricorrente e di prevenire infortuni sul lavoro.

1. Stefano è una persona con disabilità ai sensi della Direttiva 2000/78/CE e della UNCRPD?

- . se sì perché?
- . se no perché?

2. Quali diritti garantiti dalla UNCRPD vengono in rilievo nel caso descritto sopra?

Si tenga presente anche che Stefano utilizzava una sedia a rotelle

3. Secondo la tua opinione, il ricorso di Stefano è fondato?

4. Quale sarebbe la tua decisione in questo caso, interpretando la normativa nazionale e quella UE in maniera conforme alla Convenzione ONU?

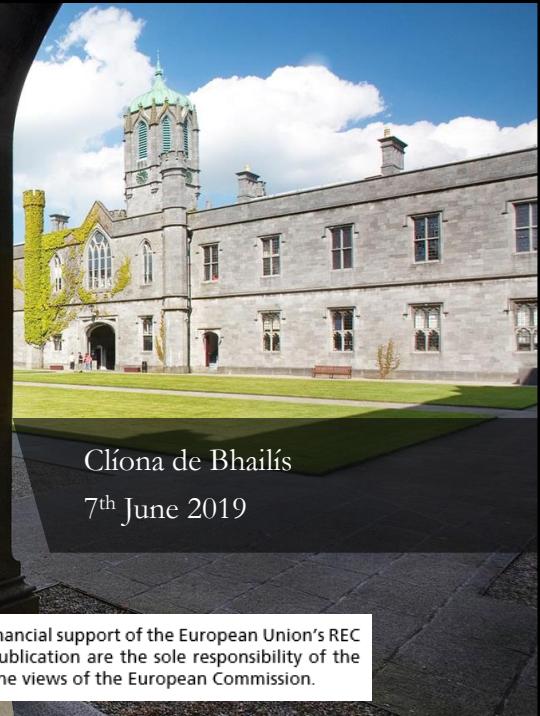




NUI Galway
OÉ Gaillimh

Article 12 UNCRPD

Equal recognition before the law



Clíona de Bhailís

7th June 2019



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Overview

- Equal recognition before the law – Article 12 CRPD
- General Comment No. 1
- Supported Decision Making
- Safeguards under Article 12 CRPD
- Hard Cases



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Centre for Disability Law and Policy

Equal recognition before the law

- Recognition as a person before the law
- People with disabilities have both **capacity to hold rights** and the **capacity to be an actor in law** on an equal basis with others
- Paradigm shift – from ‘objects’ to ‘subjects’

Tests of Competency

Status

- Based on the individual's status as a person with a disability, or due to having a diagnosis or impairment

Outcome

- Judgement on the decision made by a person
- 'Unwise' decision or choice viewed as not in their 'best interests'

Functional

- To have capacity an individual must be able to:
 - ⑩ Understand the information relevant to the decision
 - ⑩ Use, weigh and retain the information to make the decision
 - ⑩ Communicate their decision

Substituted vs. Supported Decision Making

Substituted decision making

- Capacity to act restricted/denied
- Decision made by third party
- Based on best interests
- Example: Guardianship

Supported Decision Making

- Individual makes the decision
- Based on their will and preferences
- Example: Support agreement



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Best interests vs will and preferences

Best Interests

Judgement by third party about what is best for an adult in a particular circumstance. Objective standard.

Will and Preferences (Article 12)

Will

Vision of the good life
Overall plan for our lives

Preferences

Likes and dislikes
Priorities we give to things



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Support

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



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Common Misconceptions

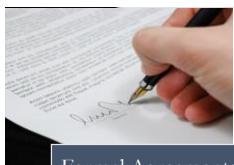
- General Comment only places an obligation on States to provide support to exercise legal capacity
- Not everyone will wish to exercise their right to support and support cannot be imposed
- Support should be open to everyone – including people with complex or high support needs or who communicate differently



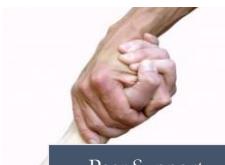
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Supported Decision Making



Formal Agreements



Peer Support



Self Advocacy



Circles of Support



Advance Planning



Assistive Technology

Support & Informal Communication

- Dr. Jo Watson, Deakin University
- 5 individuals with complex/high support needs using unintentional/informal communication & their circles of support
- Examined the forms of communication people were using and identified key decisions in the person's life to support them to make using this information
- Included decisions on daily routine, finances, health care

Safeguards

- Article 12, paragraph 4
- Must respect rights, will and preferences
- For example:
 - Mechanism to verify identity of support people
 - Mechanism for third parties to challenge support person's actions
 - Withdraw from support arrangement

Hard Cases

Will and preferences are unknown

For example: Coma patient

Article 12 Approach: Best interpretation
of will and preferences



Hard Cases



Expression of will and preferences is clear but respecting them entails a risk of harm to the person or others

For example: Individual wishes to remain at home but is at risk of falls/injury

Article 12 Approach: Dignity of risk

Hard Cases

Will and preferences in conflict

For example: Person with a toothache who refuses to go to the dentist but wants the pain to stop

Article 12 Approach: Work to resolve the conflict





Questions & Further Discussion

Links & Resources

- Committee on the Rights of Persons with Disabilities, General Comment No. 1 - <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>
- Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar of the Future?' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 429-462.
- Kristin Booth Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond.' (2012) 44 *Colum. Hum. Rts. L. Rev.* 93.
- Supported Decision Making
 - Choices, Supported Decision Making Platform - <http://www.right-to-decide.eu/support-types/>
 - ACLU, Supported Decision Making and the Problems of Guardianship - <https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/supported-decision-making>
- Dr Jo Watson
 - 'The right to supported decision-making for people rarely heard' (2016) PhD thesis submitted to Deakin University <http://dro.deakin.edu.au/eserv/DU:30083812/watson-theright-2016A.pdf>
 - Tom's Story, available at <<https://vimeo.com/170785584>>

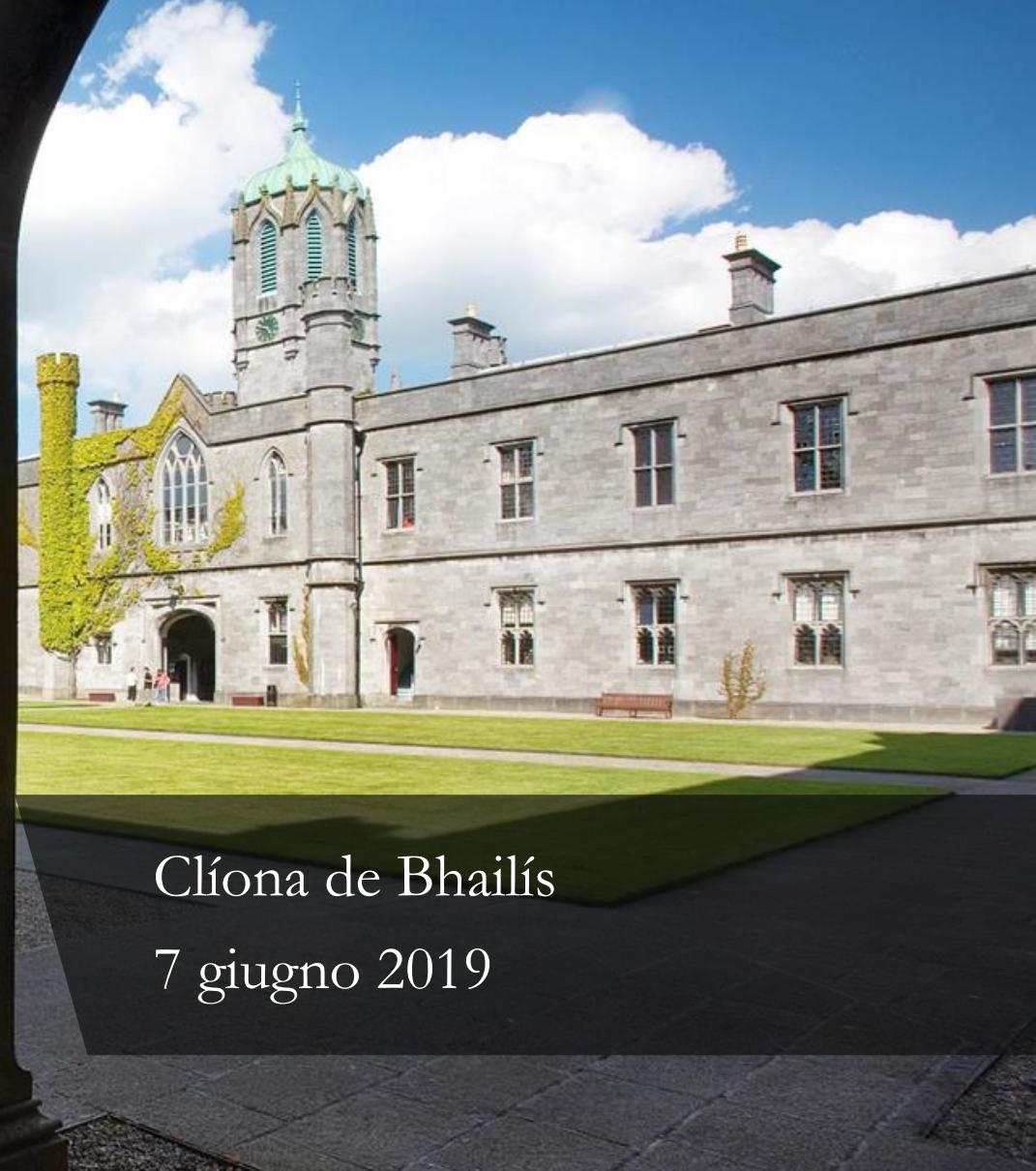


NUI Galway
OÉ Gaillimh

Articolo 12 UNCRPD Eguale riconoscimento di fronte alla legge



Questa pubblicazione è stata realizzata con il sostegno finanziario del programma dell'Unione Europea «Diritti, uguaglianza e cittadinanza» (2014-2020). I pareri espressi nella presente pubblicazione non impegnano che il loro autore e non riflettono necessariamente il punto di vista della Commissione europea.



Clíona de Bhailís
7 giugno 2019

Sintesi

- Eguale riconoscimento di fronte alla legge – Articolo 12 CRPD
- Commentario generale n. 1
- Affiancarsi nel processo decisionale
- Salvaguardie previste all'articolo 12 CRPD
- Casi difficili



Eguale riconoscimento di fronte alla legge

- Riconoscimento di una persona dinanzi alla legge
- Le persone con disabilità godono sia della **capacità di far valere i diritti** sia della **capacità legale** su base di egualanza rispetto agli altri
- Cambiamento di paradigma – da ‘oggetti’ a ‘soggetti’

Test di competenza

Situazione

- Basato sulla situazione specifica di una persona con disabilità, o in seguito a una diagnosi o menomazione

Esito

- Giudizio sulla decisione presa da una persona
- Decisione o scelta “poco saggia” considerata non nel loro “migliore interesse”

Funzionale

- Per avere la capacità una persona deve essere in condizione di:
 - ⑩ Comprendere le informazioni pertinenti alla decisione
 - ⑩ Utilizzare, soppesare e assimilare le informazioni per prendere una decisione
 - ⑩ Comunicare la loro decisione

Sostituirsi o affiancarsi nel processo decisionale

Sostituirsi nel processo decisionale

- Capacità di agire limitata/negata
- Decisione presa da terzi
- Basata sui migliori interessi
- Esempio: tutela

Affiancarsi nel processo decisionale

- L'interessato(a) prende la decisione
- Basata sulla sua volontà e le sue preferenze
- Esempio: contratto di assistenza

Migliore interesse vs volontà e preferenze

Migliore interesse

Giudizio da parte di terzi su ciò che è “meglio” per un adulto in una determinata circostanza. Norma “oggettiva”.

Volontà e preferenze (articolo 12)

Volontà

Visione di quello che dovrebbe essere la vita
Pianificazione generale della vita

Preferenze

Simpatie e antipatie
Le priorità che si attribuiscono alle cose



Assistenza

- Termine generico trasversale ad accordi formali e informali
- Varia per tipo e intensità secondo la persona e le sue esigenze
- Il commentario generale riconosce la natura mutevole di questo aspetto e le molteplici e varie esigenze individuali di assistenza
- Assistenza nell'esercizio della capacità legale vs affiancamento nel processo decisionale

Pregiudizi diffusi

- Il commentario generale prevede solo l'obbligo per gli Stati membri di fornire assistenza per l'esercizio della capacità legale
- Non tutti vorranno esercitare il loro diritto all'assistenza e l'assistenza non può essere imposta
- L'assistenza dovrebbe essere aperta a tutti, anche a persone con elevate o complesse necessità di assistenza o che comunicano in modo diverso

Affiancarsi nel processo decisionale



Accordi formali



Sostegno tra pari



Auto promozione



Circoli di supporto



Pianificazione
preliminare



Tecnologia di sostegno

Assistenza e comunicazione informale

- Dr. Jo Watson, Deakin University
- 5 persone con elevate o complesse necessità di assistenza che utilizzano forme di comunicazione non intenzionali/informali e i loro circoli di supporto
- Ha preso in esame le forme di comunicazione utilizzate e identificato le decisioni chiave nella vita degli interessati per assisterle a fare uso di tale informazioni
- Include decisioni sulla vita quotidiana, le finanze, la sanità

Salvaguardie

- Articolo 12, paragrafo 4
- Rispettare i diritti, volontà e preferenze
- Per esempio:
 - Meccanismo per verificare l'identità del personale di assistenza
 - Meccanismo che permetta a terzi di mettere in questione le azioni del personale di assistenza
 - Rescissione del contratto di assistenza

Casi difficili

Volontà e preferenze non conosciute

Per esempio: paziente in coma

Approccio dell'articolo 12: migliore interpretazione delle volontà e preferenze



Casi difficili



L'espressione di volontà e preferenze è chiara ma comporta un rischio di recare danno all'interessato(a) o ad altri

Per esempio: l'interessato(a) preferisce rimanere a casa sua ma è a rischio di cadute/lesioni

Approccio dell'articolo 12: dignità del rischio

Casi difficili

Volontà e preferenze conflittuali

Per esempio: una persona ha mal di denti, rifiuta di andare dal dentista ma vuole far cessare il dolore

Approccio dell'articolo 12: adoperarsi per risolvere il conflitto





NUI Galway
OÉ Gaillimh



Domande e
ulteriore dibattito

Link e risorse

- Comitato sui diritti delle persone con disabilità, Commentario generale n. 1 - <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>
- Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar of the Future?' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 429-462.
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 - Tom's Story, disponibile su <<https://vimeo.com/170785584>>

EU Disability Law and the UN CRPD Seminar

Case Study on Article 12 CRPD

Emer is 28 years old and has been diagnosed with an eating disorder, severe anorexia nervosa. She has been hospitalised several times in the last 10 years as a result of her condition. She is now severely malnourished, refusing to eat, although she will take a small amount of water, and has developed several other chronic health conditions. In the past, she has been force fed, which has never been successful in the long term. In discussions with her medical team and family she has clearly stated that while she does not want to die yet she also is very clear that she does not want to be force fed.

She has explored palliative care options in her area however, they are not typically available to people with an eating disorder. Her partner, who does not want her to die, tells the doctors that he also does not want them to force feed her as this experience has been very traumatic for her in the past.

Her medical team have applied to court for an order permitting the introduction of artificial nutrition (force feeding) and hydration.

Discuss how you could decide the case in line with Article 12 CRPD.



This seminar series has received financial support from the European Union's REC Programme (2014-2020).



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**Diritto dell'UE e Convenzione dell'ONU sui diritti delle persone con
disabilità**

Caso di studio sull'articolo 12 della Convenzione

Emer ha 28 anni ed è stata diagnosticata un disturbo alimentare, anoressia nervosa grave. Negli ultimi 10 anni è stata ricoverata più volte a causa delle sue condizioni di salute. Ora è gravemente malnutrita, rifiuta di mangiare, anche se prende piccole quantità di acqua, e ha sviluppato diverse altre condizioni di salute croniche. In passato è stata alimentata con la forza, che non ha mai avuto successo a lungo termine. Nelle discussioni con l'equipe medica e la sua famiglia ha affermato chiaramente che, pur non volendo morire, è anche molto chiara sul fatto che non vuole essere nutrita con la forza.

Nella sua zona ha esplorato le opzioni di cure palliative che in genere non sono disponibili per le persone con disturbi alimentari. Anche il suo partner, pur non volendo che lei muoia, dice ai medici che non vuole che la costringano a mangiare perché in passato questa esperienza è stata molto traumatica per lei.

La sua equipe medica ha chiesto al tribunale di emettere un'ordinanza che consenta l'introduzione della nutrizione artificiale (alimentazione forzata) e dell'idratazione.

Discutete su come potreste decidere il caso ai sensi dell'articolo 12 della Convenzione.



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EU public procurement law and accessibility standards

ERA seminar on EU disability law and the UNCRPD
06 June 2019, Trier

Chiara Giovannini
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Content

- ★ About ANEC in a nutshell
- ★ EU Single Market legislation and Public Procurement Directives
- ★ Standards as a tool to foster accessibility
- ★ Discussion and exchange of national experiences

Part 1



About ANEC

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Raising Standards for Consumers

3



THE SINGLE MARKET



The New Approach



The Legislative Environment



- The European legislator sets essential safety requirements through horizontal and sectoral European laws ('directives')
- The European Standards Organisations (CEN, CENELEC, ETSI) are invited (through a 'mandate/request') to develop the European Standards (ENs) that can provide the technical detail to support implementation of the directives
- These 'mandated/requested' ENs are called 'harmonized standards' when their references are published in the Official Journal of the European Union
- Although the use of harmonized standards remains voluntary, a manufacturer can presume that his product complies with the law if he complies with the harmonized standard(s)
- A product in compliance with the law is free to circulate throughout the European Economic Area (or 'Single Market')

The Problem

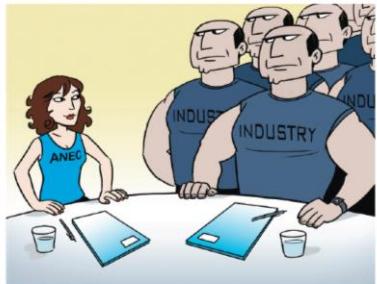


- The New Approach is a model of 'co-regulation' (a private/public partnership). So too is the New Legislative Framework that incorporated the New Approach from 1 January 2010.
- European standardisation is a private activity and is based on national delegations (as in ISO & IEC)
- Yes, participation of all national stakeholders is encouraged in the development of European Standards . . . but (bigger) business has most to gain from influencing the content of standards and has the knowledge and resources to participate
- Moreover, national consumer expertise in standardisation is fragmented in many countries or simply does not exist

So consumer participation...



has been centralised at the European level since 1995:



'The European Association for the Co-ordination of Consumer Representation in Standardisation'

(or 'The European consumer voice in standardisation')

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7

Part 2



EU Single Market and Public Procurement Law

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8



Area without internal frontiers in which free movement of **goods, services**, persons and capital is ensured (art.26.2 TFEU)

In defining and implementing its policies and activities, the Union shall aim to **combat discrimination based** on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation (art.10 TFEU)



Done with measures for the **approximation** of the provisions laid down by law in Member States which have as their object the establishment and functioning of the internal market (art. 114 TFEU)

Legislative technique of '**New Approach to technical harmonization and standardization**' (Lord Cockfield, 1985)

New Legislative Framework (Regulation (EC) 765/2008):

- common legal framework for industrial products
- market surveillance rules
- CE marking
- accreditation and conformity assessment.

Non-harmonised sectors are not subject to common EU rules and may come under the national rules but still benefit from Treaty provisions governing free movement of goods according 'mutual recognition' (ECJ *Cassis de Dijon* jurisprudence 1979)

Public procurement



Public procurement – 15-20% of EU GDP

Purchasing best value for tax-payers money

Snow-ball effect as public authorities are the biggest consumers

Public procurement commitments under the World Trade Organization's Agreement on Public Procurement (GPA) have been estimated at around EUR 1.3 trillion.

It is regulated by the EU Public Procurement law to make sure the public sector gets the best value for money

55% of EU procurement procedures use lowest price as the only award criterion for public contracts. This indicates that public authorities do not pay enough attention to social, sustainability and innovation criteria.

Public Procurement Directive



Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement
Applicable as of 18 April 2016

Scope: establishes rules on the procedures for procurement by contracting authorities with respect to **public contracts** as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

Recital 3: When implementing this Directive, the **United Nations Convention on the Rights of Persons with Disabilities** should be taken into account, in particular in connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions.

Public Procurement Directive



Article 42: Technical specifications

1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply.

For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications **shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.**

Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

Public Procurement Directive



Article 42: Technical specifications

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

b) by reference to technical specifications and, in order of preference, **to national standards transposing European standards**, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when any of those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent'.

Public Procurement Directive



Article 62 Quality assurance standards and environmental management standards

1. Contracting authorities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on **accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies**. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

Public Procurement Directive



Article 67: Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions (...), contracting authorities shall base the award of public contracts on the most economically advantageous tender.
2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and **may include the best price-quality ratio, which shall be assessed on the basis of criteria**, including qualitative, environmental and/or **social aspects**, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:
 - (a) quality, including technical merit, aesthetic and functional characteristics, **accessibility**, design for all users, social, environmental and innovative characteristics and trading and its conditions;

Public procurement databases



TED is a website managed by the Publications Office of the European Union which allows companies to find out about public procurement opportunities from the EU, the European Economic Area and beyond through one single point of access.

The screenshot shows the TED website interface. At the top, there are tabs for 'TED', 'TED SMAP', 'TED eServices', and 'TED eFendering'. A sidebar on the left provides links to 'RSS feeds', 'What is RSS?', 'My TED' (with 'Log in' or 'Register here'), 'Preferences', 'Link to TED subsets in CSV formats', 'Link to Public Procurement Scoreboard', 'Site news', and 'Video tutorials'. The main content area displays a 'Supplies - 232990-2019' page for a contract notice. The notice is for 'Lithuania-Vilnius: Devices for the disabled' (2019/5 096-232990), categorized under 'Contract notice - utilities' and 'Supplies'. It specifies the legal basis as Directive 2014/25/EU and details the contracting entity as 'Vilniaus miesto Lietuvos oro uostai' (LT-02189, Lithuania). The notice is dated 20/05/2019 and is a 'Negotiated procedure'.

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17

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Standardisation Regulation



- **Regulation (EU) 1025/2012**
- Entered into force in **1 January 2013**
- Scope: rules with regard to the cooperation between European standardisation organisations, national standardisation bodies, Member States and the Commission, the establishment of European standards and European standardisation deliverables for products and for services **in support of Union legislation and policies** (...) and stakeholder participation in European standardisation.
- Recital 24: 'The European standardisation system should also fully take into account the **United Nations Convention on the Rights of Persons with Disabilities** (...)'.

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15

Rules on EC standardisation requests



Articles of Reg.(EU) No 1025/2012 on mandating process

Art. 8(2): Planning (annual Union Work programme)

Art 10(2): Consultation of the **opinion of the Member States** and required **informal consultations**

Art 12: Notification (of the texts) of draft mandates **to all stakeholders** before adoption

Art 22(3): Application of the **examination procedure** during formal consultation (**Reg (EU) No 182/2011** "Comitology Regulation")

Function/aim of standardisation requests



An invitation to the ESOs to develop standards

A tool to get standards in support of EU legislation or policies

A way for Member States to give political and technical support for standardisation activities

Not legally binding -ESOs are free to respond (but if they accept, they commit).

Standardization Request a precondition for citation of hENs in OJEU.



Thank you for your attention!

Please ask your questions!



Accessibility standards

Role of standards



Many goods and services in Europe fall under Single Market regulations

Example: Legislator defines basic safety requirements in directives

Technical solutions are left to the European standards bodies

Voluntary standards complement European legislation

Standard

-document

-voluntary agreement based on consensus amongst economic actors

-approved by recognised body (CEN-CENELEC-ETSI)

-establishes important criteria for products, services and processes



Standardisation process



- Formal request
- Technical Committee
- Draft standard
- Public enquiry & Voting (national representation)
- Publication



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25

Raising Standards for Consumers

Accessibility



"extent to which products, systems, services, environments and facilities can be used by people from a **population with the widest range of characteristics and capabilities** to achieve a specified goal in a specified context of use".

Accessibility is about avoiding and removing obstacles that prevent people with disabilities from participating fully and on equal terms in society.

Accessibility rests on the adoption of Design for All principles for the design of products, services and built environment and the use of specific assistive solutions/technologies.

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26

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Barrier-free design

Inclusive design

Trans-generational design

Universal design

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27



Designing products, services and environments that are readily **usable by most users without any modification.**



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28

Assistive Products



Piece of equipment

Product system

Hardware or software

used by or for persons with disability for participation, to protect, support, train, measure or substitute for body functions/structures and activities, or to prevent impairments, activity limitations or participation restrictions

Social model of disability



Disability is an evolving concept

and

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

Different from medical concept of disability!

Examples accessibility standards



EN 301549 'Accessibility requirements suitable for public procurement of ICT products and services in Europe'.

EN 17161 'Design for All - Accessibility following a Design for All approach in products, goods and services - Extending the range of users'.

CEN-CENELEC Guide 6: 'Guide for addressing accessibility in standards.'

ETSI EG 202 116 V1.2.2: 'Human Factors (HF); Guidelines for ICT products and services; "Design for All"'.

ISO 21542 'Building construction – Accessibility and usability of the built environment.'

EN 81-70 'Safety rules for the construction and installation of lifts – Basics and interpretations'.

Accessibility and Innovation



Innovation is seen as one of the main drivers of the EU economy recovery

Innovation means competitiveness

Innovative ideas can be turned into new products and services that create growth, quality jobs and help address European and global societal challenges

Innovative products and services can have a different design and can be disruptive

Accessible products and services can have a different design and can be disruptive!

Standardisation Mandate 420



Accessibility requirements for public procurement in the Built Environment

Scope: European Accessibility requirements for public procurement in the built environment

Phase I: inventory of existing accessibility standards, codes, regulations and guidance documents for the built environment (buildings, public places and transport related facilities) used in EU MS and internationally; information on their use in public procurement

Standardisation Mandate 420



Phase 2

1 European Standard at the level of common functional requirements that contains a set of functional European accessibility requirements of the built environment to be used as either technical specifications or as criteria for awarding public contracts (in the sense of the Public Procurement Directives)

1 Technical Report describing **technical performance criteria** to be able to fulfil the above mentioned functional accessibility requirements

1 Technical Report containing reference documents needed to **assess conformity**

Additional guidance and support material for use by a procurer whishing to buy accessible built environment elements

An **online toolkit** which assists public procurers, public authorities, industry, public authorities and experts in accessibility



- EN 301549 – Accessibility and usability of the built environment –Functional requirements

Scope: functional accessibility requirements, not technical performance criteria and so not conflicting with national standards.

Another standard (CEN-CENELEC Technical Report "Accessibility and usability of the built environment -Technical performance criteria and specifications) containing technical performance criteria to fulfil the functional requirements will be developed.

As a Technical Report, it will not take precedence on national standards, which could continued to be used.

To help public procurers to identify the requirements for their purchases, and manufacturers to design products



Thank you for your attention!

Please ask your questions!

Key learning points



Public procurement = Purchasing **best value for tax-payers money**

It is regulated by the EU Public Procurement Directives to make sure the public sector gets the best value for money

For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account **accessibility criteria for persons with disabilities or design for all users** (art.42).

The technical specifications shall be formulated by reference to technical specifications and, in order of preference, **to national standards transposing European standards** (art.43).

Standards need to be developed in an **inclusive manner**, to realise the full potential of the legislative instruments which encourage accessibility, such as Public Procurement legislation.



Thank you for your attention!

Please ask your questions!





Discussion and exchange of national experiences

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39



Thank you !

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Accessibility in the UN CRPD and in EU law

Alejandro Moledo, EDF Policy Coordinator

EU Disability Law and the UNCRPD, Trier, 6 June 2019



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About the European Disability Forum

- Umbrella organisation
- 80 million Europeans with disabilities in Europe (15% EU population)
- Organisation **of** persons with disabilities, **run by** persons with disabilities
- Fight against discrimination and promote the Human Rights of persons with disabilities
- Full implementation of the UN Convention on the Rights of Persons with disabilities
- Advocacy organisation at European level
- Closely work with the European Union, the Council of Europe and the United Nations

ICT as key enabler for persons with disabilities (1/2)

- Gateway to social participation and independent living
 - Overcome existing barriers
 - More easily adaptable
 - Mainstream and assistive technologies / solutions
- Triple A conditions:
- available,
 - affordable
 - accessible

ICT as key enabler for persons with disabilities (2/2)

ITU – “[The ICT opportunity for a disability-inclusive development framework](#)”. The most valuable areas:

- Web
- Mobile
- Audiovisual media

Now everything converges!

Barriers:

- Cost of assistive technologies
- Lack of **accessible** ICT goods and services

Accessibility

- Non-discrimination
- Beneficial to all
- Is not black or white (nor a backyard entrance!)
- Soft approach to accessibility failed
- Accessibility is not sufficiently addressed in national legislations in many EU countries
- Legislation is essential and standards are needed, including on quality aspects
- Labels and raising awareness help
- Enforcement, monitoring and redress mechanism are essential
- Cost-effective when incorporated from the outset

EDF twin track approach to EU policy

1. Disability specific (empowerment):
 - Web Accessibility Directive
 - European Accessibility Act
2. Societal (mainstreaming disability)
 - Audiovisual Media Services Directive
 - European Electronic Communication Code (Directive)

Accessibility should be a core aspect of the ICT like privacy, data protection or security

UN CRPD & ICT

- 1st International Human Rights Treaty addressing ICT
- Ratified by the EU in 2010, and 27 Member States
- Article 3: Accessibility as a General Principle
- Article 9 on Accessibility “on an equal basis with others”, including to ICT
- Article 21 on Freedom of expression
- Article 30 on Participation on cultural life

See: [CRPD Committee General Comment n° 2](#)

In this presentation...

1. Web Accessibility Directive
2. European Accessibility Act
3. Audiovisual Media Services Directive
4. European Electronic Communication Code

Web Accessibility Directive

UN CRPD Article 21 on Freedom of expression:
“Urging private entities that provide services to the general public, **including through the Internet**, to provide information and services in accessible and usable formats for persons with disabilities”

What do we mean by web accessibility? 1/2

“Web accessibility means that people with disabilities can **use** the Web. More specifically, Web accessibility means that people with disabilities can perceive, understand, navigate, and interact with the Web, and that they can **contribute** to the Web. Web accessibility also benefits others, including older people with changing abilities due to aging” (World Wide Web Consortium, W3C)

4 Principles:

perceivable, understandable, operable and robust.

What do we mean by web accessibility? 2/2

1. Provide text equivalents
2. Organise and structure content
3. Do not depend on single sense
4. Ensure keyboard access
5. Give users enough time
6. Avoid interferences
7. Identify hyperlinks and contents
8. Use consistent navigation interfaces
9. Help users avoid mistakes
10. Ensure compatibility

[EDF e-resource on web accessibility](#)

Guidelines: [W3C Web Content Accessibility Guidelines 2.0](#)
Included in the [European Standard EN 301 549](#)

Benefits of web accessibility

- Equal opportunities for persons with and without disabilities
- Faster loading time
- Increased usability
- Reduced site development and maintenance time
- Better search engine indexation
- Wider compatibility
- Inclusive digitalisation
- Legal compliance

Require [W3C Web Content Accessibility Guidelines \(WCAG\) 2.0 level AA](#)

Strive for level AAA (or beyond)

Directive on the accessibility of website and mobile applications of the public sector bodies (Web Accessibility Directive) (1/3)

- All public sector bodies websites and mobile apps
- Digital documents and online services
- Exceptions:
 - Public broadcasters websites
 - live audiovisual – to be made accessible in 14 days
 - Third party content
 - **May exclude non-essential functions of schools, kindergartens and nurseries' websites and apps**

Web Accessibility Directive (2/3)

- Disproportionate burden
- Accessibility statement, including feedback mechanism with an on-demand service for inaccessible content
- Use of harmonised standard (web and mobile) – in absence of it: Common Technical Specifications for mobile apps – the EN 301 549 v.2.1.2 (2018)
- Enforcement mechanism:
 - National authority with a complaint mechanism
 - Focal point for web accessibility (trainings, materials, contact with users' organisations, etc.)

Web Accessibility Directive (3/3)

- Regular [monitoring and reporting](#) to the Commission
- Transposition by 23 September 2018 (T-day):
 - Webs published after T-day will be accessible from 23 September 2019
 - Webs published before the T-day will be accessible from 23 September 2020
 - Apps will be accessible from 23 June 2021

European Accessibility Act

UN CRPD Article 9 Accessibility:

“State Parties shall also take appropriate measures (...) to ensure that **private entities** that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities”

European Accessibility Act (pending publication)

- Directive about the EU Internal Market
- Mainstream products and services
- Common accessibility requirements for public procurement & private sector
- Exemption of microenterprises for services
- Disproportionate burden and fundamental alteration
- Use of harmonised standards and common technical specifications
- Enforcement mechanisms by market surveillance authorities – use of CE marking
- Organisations action before the Court
- Penalties

European Accessibility Act scope

- Computers and operating systems
- ATMs, ticketing and check-in machines for the provision of the services
- All payment terminals
- Telephony services and smartphones
- Emergency calls to 112
- TVs and access to the audiovisual media services
- Consumer Banking services
- e-books and e-readers
- e-commerce
- Certain elements of transport services

Complementing other EU legislations:

- Public Procurement Directive (mandatory for the above)
- Other EU acts (e.g. structural Funds) – present or future

Missed opportunity on:

- Built environment
- Transport services
- Urban modes of transport
- Publicly procured works (buildings, infrastructure)
- Accessibility requirements for audiovisual content
- Other products (e.g. household appliances)

Accessibility Act Annexes

- Annex I: Accessibility requirements.
- Annex II: Non-obligatory examples for Annex I.
- Annex III: Non-obligatory requirements for the built environment.
- Annex IV: Procedure for product manufacturers to assess and declare compliance.
- Annex V: Information service providers must gather to prove compliance.
- Annex VI: Criteria to assess the exemption based on disproportionate burden.

Examples Accessibility Requirements

General requirements for products (information on the product itself):

“made available by more than one sensory channel”
“presented to users in ways they can perceive”

Specific requirements, e.g. E-books

“Ensuring access to the content, the navigation of the file content and layout including dynamic layout, the provision of the structure, flexibility and choice in the presentation of the content;”

**TO DEMONSTRATE COMPLIANCE:
HARMONISED EUROPEAN STANDARDS
OR TECHNICAL SPECIFICATIONS**

Examples of Functional Performance Criteria

Usage without vision

Where the product provides visual modes of operation, it shall provide at least one mode of operation that does not require vision.

Usage with limited cognition

The product shall provide at least one mode of operation incorporating features that make it simpler and easier to use.

Audiovisual Media Services Directive

UN CRPD Article 30 Participation in cultural life, recreation, leisure and sport:

“States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (...) enjoy access to **television programmes**, films, theatre and other cultural activities, in accessible formats”.

Audiovisual Media Services Directive

- Adopted in 2007 – adopted revision in 2018
- TV broadcasting + on demand services (VOD)
- Operators established in the EU
- Commercial communications
- User protection and prohibition of hate speech and discrimination
- Protection of minors
- Promote EU audiovisual content
- Coordination of regulators
- (New) Video sharing platforms

Audiovisual Media Services Directive

Recital 23: “The means to achieve the accessibility of audiovisual media services should include, but need not be limited to, **sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description.** However, that Directive does not cover features or services providing access to audiovisual media services, nor does it cover accessibility features of electronic programme guides (EPGs). Therefore, that Directive is without prejudice to” … the European Accessibility Act.

Audiovisual Media Services Directive

Article 7:

1. Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures.
2. Member States shall ensure that media service providers report on a regular basis to the national regulatory authorities or bodies... (+ Member States to the Commission from 2019 every 3 years)

Audiovisual Media Services Directive

Article 7:

3. Member States shall encourage media service providers to develop accessibility action plans ...
4. Each Member State shall designate a single, easily accessible, including by persons with disabilities, and publicly available online point of contact for providing information and receiving complaints regarding any accessibility issues referred to in this Article.

Audiovisual Media Services Directive

Article 7:

5. Member States shall ensure that emergency information, including public communications and announcements in natural disaster situations, which is made available to the public through audiovisual media services, is provided in a manner which is accessible to persons with disabilities.

Article 9: no discriminatory commercial communication on the grounds of disability

Electronic Communications

UN CRPD Article 9 on Accessibility:
“Information, communications and other services,
including **electronic services and emergency services**”

The previous EU telecoms framework

2009 revision – Universal Service Directive:

- Good example of mainstreaming disability in EU legislation
- Follows the UN CRPD

Article 23a of the Universal Service Directive

Equal access and choice to, and affordability of:

- Electronic communication services “equivalent to that enjoyed by the majority of end-users”
- Terminal equipment

European Electronic Communication Code (EECC) 2018 Recast

- Amends and merges in one single Directive the 2009 Telecoms Package
- Removes legacy universal services (e.g. public payphones, telephony directories) and focus on:
 - Voice communication
 - Functional internet connection (list of online services)
- Keeps obligations in regards to affordability
- Advances on emergency communications

EECC for end-users with disabilities

Universal Services:

Affordable adequate broadband internet access and voice communications to all consumers (**Art 84**).

- **Art 85:** Affordability measures for low-income or special social needs consumers: if retail prices are not affordable: support or tariff options.
- **Art 85:** availability and affordability of related terminal equipment, specific equipment and specific services for consumers with disabilities, including where necessary total conversation and relay services.

EECC for end-users with disabilities

End users protection:

- **Art 102** Information requirements for contracts: in an accessible format for end-users with disabilities; to include information on the extent to which the products and services are designed for end-users with disabilities.
- **Art 103** Transparency: information to be published in an accessible format for end-users with disabilities.
- **Art 104** Quality of service: information on the quality, including on measures taken to ensure equivalence in access; BEREC (Body of European Regulators for Electronic Communication) guidelines to include parameters for end-users with disabilities

EECC for end-users with disabilities

End users protection:

- **Art 109:** Emergency communications: access for end-users with disabilities to emergency services through emergency communications available and equivalent in accordance with ... the Accessibility Act.
- **Art 111:** Equivalent access and choice for end-users with disabilities: requirements to be met by providers of electronic communications services
- **Art 114:** Must carry obligations: may be imposed by MSs (requirements) on providers of ECN or ECS used for the transmission of radio and TV broadcast ... in particular services to enable appropriate access for end-users with disabilities

EECC vs EAA:

EECC	EAA
Availability & affordability of <u>special equipment</u> and <u>mainstream equipment</u>	Accessibility requirements for <u>mainstream products</u> (smartphones). E.g. able to support Total Conversation
Availability & affordability of <u>Universal Services obligations</u> + Total Conversation + TRS and VRS Accessible 112 services across EU	<u>Harmonised functional accessibility</u> requirements for those
Interoperability for RTT and video call through NRA joint action	Interoperability for RTT through <u>Harmonised Standards (preferred)</u>
NRA's tasks regarding equal access and choice for end-users with disabilities	Accessible Information, websites and mobile apps of electronic communication providers



THANK YOU

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The Right to Personal Mobility

Ann Frye

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"When I book a plane, even months in advance, I am still not sure I am going to reach my final destination. I don't even know if I am going to board. For persons with disabilities, travelling in Europe is still a challenge."

Stig Langvad, Executive Member, European Disability Forum

What are the issues?

- The ability to travel is fundamental to the ability of disabled people to live independent lives;
- Public transport has presented accessibility challenges for many years:
 - High steps;
 - Narrow doorways;
 - Poor information;
 - Limited assistance.



28/05/2019

• UNCRPD

28/05/2019

What do the terms mean?

- **Accessibility:**

- “Independent living and participation in society”;
- Not defined – too vague

- **Reasonable accommodation:**

- “Necessary and appropriate accommodation and adjustments, not imposing a disproportionate or undue burden”;
- But easy to say cost is too high!

- **Universal Design:**

- “The design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”;
- Best practice in terms of cost and outcome.

28/05/2019

Accessibility

Access must be ensured to:

- Living independently and being included in the community (article 19)
- Information and communication services (article 21)
- Education (article 24)
- Health (article 25)
- Work and employment (article 27) –
- Participation in political and social life (article 29)
- Participation in cultural life, recreation, leisure and sport (article 30).

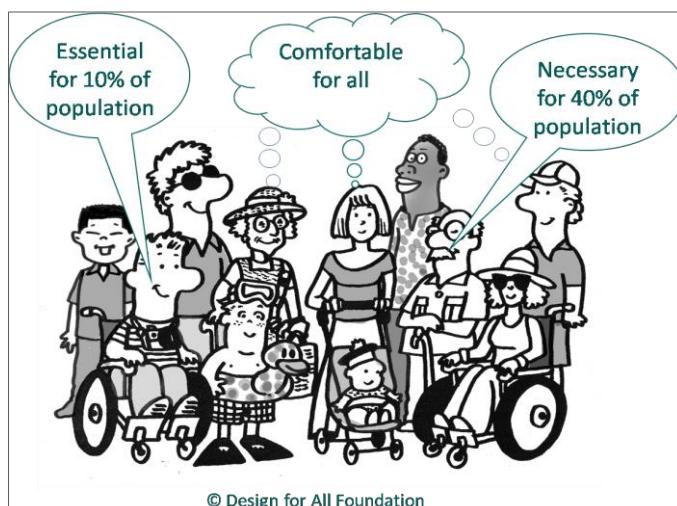
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Reasonable accommodation

- **Reasonable accommodation** must be made for people with disabilities ;
- ‘Necessary and appropriate modification and adjustments to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

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Universal Design



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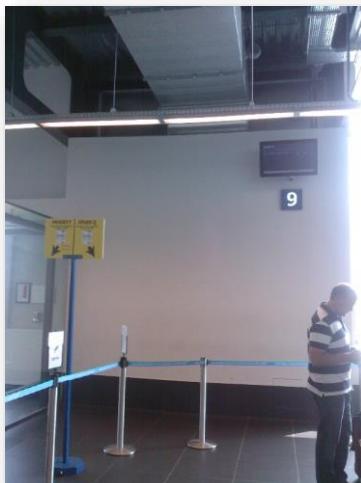
Equal Access/Eliminating Barriers

Article 9 –

Equal access to information and communications technologies and an obligation to identify and eliminate barriers.

28/05/2019

Getting it wrong



28/05/2019

Getting it right



28/05/2019

Access to Transport

Article 9 –

To enable persons with disabilities to live independently and participate fully in all aspects of life, ..., [with access] on an equal basis with others, to the physical environment, to **transportation** ...

28/05/2019

Getting it wrong



28/05/2019

Getting it right



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- Article 20 - Personal mobility

“States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities”.

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Getting it Wrong



28/05/2019

Getting it right



28/05/2019

- Is Europe getting it right?

28/05/2019

Progress?

- In the past 40 years, many countries have taken steps to tackle transport accessibility;
- Sometimes in response to direct action by disabled people;
- Measures include:
 - Civil rights legislation;
 - Technical regulations;
 - Design standards;
 - Best practice guidelines.



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Progress?

- There has also been legislation at European level to introduce common technical standards for accessibility.
- Notably:
 - Directive 2001/85/EC which defines access standards for buses and coaches (now replaced by UNECE Regulation 107);
 - Applicable standards in TSI relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system (2008/164/EC).
- And now the European Accessibility Act will improve functioning of the internal market....

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European Accessibility Act

- Will complement existing EU legislation on passenger rights for disabled people as well as standards on accessibility of vehicles in different transport modes;
- Will allow disabled passengers to book tickets on transport companies' websites or directly via accessible ticket machines.
- For example, a blind person will be able to use voice or tactile interfaces to interact with the ticket machines and to get information about the schedule of his/her journey.

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Why is Rights legislation important?

- For many disabled people, the awareness, understanding and support of transport staff is as important as the design of the vehicle or infrastructure;
- Disabled people cannot travel with confidence if they do not know that their needs will be met in a consistent and appropriate way;
- For this reason the concept of “rights” legislation is a vital element of barrier free mobility.

28/05/2019

- European Passenger Rights Regulations

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Passenger Rights Regulations

Regulation 1107/2006 “Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when travelling by air;”

- Since July 2008

Regulation 1371/2007 on Rail Passengers Rights and Obligations;

- Since December 2009

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Passenger Rights Regulations

Regulation 1177/2010

“Concerning the Rights of passengers when travelling by sea and inland waterway”;

- Since December 2012

Regulation 181/2011

“Concerning the rights of passengers in bus and coach transport;”

- Since March 2013

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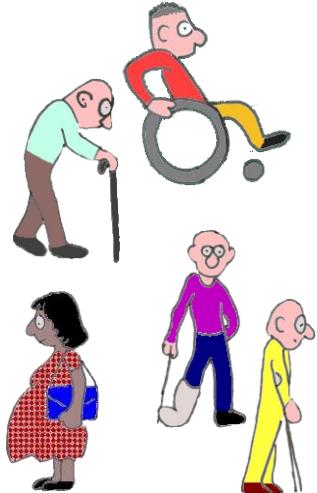
Scope

- Only the air travel Regulation (1107/2006) is exclusive to disabled passengers and PRMs;
- The other three Rights Regulations cover passenger rights generally but include specific requirements related to disabled passengers and PRMs;
- The articles on disability rights all use essentially the same text as Regulation 1107/2006.

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Definition

- “Disabled Person” or “Person with Reduced Mobility” (prm) includes anyone whose mobility when using transport is reduced due to:
 - Any physical disability (permanent or temporary);
 - Any intellectual impairment;
 - Any other problem caused by age or disability.



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Basic requirements

- Non discrimination/equal treatment
- Provision of assistance
- Quality standards
- Training (all staff dealing with travelling public)
- Enforcement (by Member States)
- Penalties (effective, proportionate, dissuasive)
- Complaints mechanism

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Is it working?

A (pre-notified) wheelchair user left waiting over an hour for assistance;

A disabled passenger left to wait in a small windowless room with no information;

No personalised assistance: staff helping several passengers at once and making everyone wait until all flights have arrived

A wheelchair user dropped by assistance providers whilst boarding a flight;

Blind passengers being asked to sit in wheelchairs to make it easier to move them through the airport..

All of these examples happened in Europe since the Regulation came into effect

28/05/2019

Is it working?

- Monitoring and enforcement (in the hands of Member States) is patchy and sometimes non-existent;
- Penalties vary widely (some criminal some civil) and are rarely imposed;
- Quality standards vary widely within and between countries;
- Training requirements are often ignored;
- Access standards for buildings and infrastructure are left to Member States.



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Conclusions

Passenger Rights Regulations have been widely welcomed by disabled people; but



They have not yet made the difference that was hoped for by the legislation;



We need greater clarity in the drafting of Regulations and:

28/05/2019

Conclusions

UNCRPD is a valuable tool in the fight against discrimination in the transport field as elsewhere; But



It is not specific enough in isolation to empower disabled people easily;



Combined with both technical and rights based legislation in Europe, it should strengthen the case for accessible transport in a barrier free environment;



But, it needs to be tested in the courts on a more regular basis so that disabled people – and transport providers – understand the power of the law!

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"Passengers' rights have been in many ways one of the success stories in EU policy- facilitating freedom of movement of persons with disabilities.

However, lack of accessibility is often still a barrier. There are many issues still to be tackled to make independent, spontaneous and seamless travel a reality for everyone in the EU."

Gunta Anca, Vice-President European Disability Forum

Case Study

Passenger Rights: Making enforcement work

The Issue

- Regulation 1107/2006 requires Member States to establish penalties that are:
 - “effective, proportionate and dissuasive”.
- Some Members States have imposed criminal penalties , others have impose civil penalties;
- The maximum level of financial sanction also varies widely between countries from €563 to €24 000 000!
- In some countries there is no limit set.

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Country	Type and Level (in case of pecuniary sanctions)
AT	EUR 22 000
BE	- Criminal penalties: imprisonment of 1 year and a fine of EUR 24 000 000 (year 2012) - Administrative penalties: EUR 24 000 000 (year 2012) - Civil penalties: the principle for the sanction under civil procedures is integral reparation
BG ⁷⁹	EUR 5 000
CH	CHF 20 000 (~EUR 16 189)
CY	~ EUR 8 500 administrative fine or 10% of an air carrier's annual turnover
CZ	CZK 5 000 000 (~EUR 194 090)
DE	EUR 25 000
DK ⁸⁰	Unlimited
EE	EUR 3 200
ES	- Minor infringements: warning or fine of EUR 4 500 to EUR 70 000 - Serious infringements: fine of EUR 70 001 to EUR 250 000 - Very serious infringements: fine of EUR 250 001 to EUR 4 500 000
FI	No maximum amount of sanction, depends i.a. on the size of the company
FR	EUR 7 500 per infringement (doubling is possible for a subsequent offense within one year); no ceiling per airline
GR	EUR 3 000 per passenger complaint
HR ⁸¹	- HRK 50 000 (~EUR 6 560) for air carrier or airport operator - HRK 15 000 (~EUR 1 970) accountable manager in the air carrier/airport operator - HRK 15 000 (~EUR 1 970) any other person
HU	HUF 2 000 000 (~EUR 6 823)
IE	- On summary conviction: EUR 5 000 - On conviction on indictment: EUR 150 000
IS	ISK 10 000 000 (~EUR 60 000)
IT	EUR 50 000
LT	LTL 3 000 (~EUR 869)
LU	EUR 50 000
LV	- For failure to provide air passengers with information: up to LVL 100 (~EUR 143) - For failure to respect passengers' rights (including all air passenger laws relating to denied boarding, cancellation or long delay): up to 700 LVL (~EUR 1 000) - For failure to comply with request for information made in the course of investigating a complaint: up to LVL 10 000 (~EUR 14 300)
MT	EUR 5 000 plus EUR 120-230 fine for every day of continuous non-compliance

Your task

- Imagine that you are asked by the European Commission to advise them on the most effective way to impose sanctions that will really tackle failings in the delivery of services to people with disabilities;
- Please consider:
 - Which is more effective – and why – criminal or civil sanctions?
 - What steps would you advise on the level and form of penalties ?
 - Should there be a means of compensating passengers with disabilities who are treated inappropriately by an airline or airport?
 - Are there other steps you would recommend to ensure that the regulations on passenger rights are effective in protecting and promoting the interests of people with disabilities?

28/05/2019

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Case Study: Passenger Rights: Making Enforcement Work

The Issue

Regulation 1107/2006 (concerning the Rights of Disabled Persons and Persons with Reduced Mobility when travelling by Air) has been in effect since 2008.

The basic requirements of the Regulation are:

- Non-discrimination/equal treatment
- Provision of assistance
- Quality standards
- Training (all staff dealing with travelling public)
- Enforcement (by Member States)
- Penalties (effective, proportionate, dissuasive)
- Complaints mechanism.

After more than 10 years since the Regulation came into force, we find that there is a huge variation between the way that Member States have set up systems of penalties and enforcement and that, in fact, very few penalties have been imposed.

Regulation 1107/2006 requires Member States to establish penalties that are:

- “effective, proportionate and dissuasive”.

Penalties can be imposed on either airports or airlines for breach of the Regulations.

Some Members States have introduced a system of criminal penalties, others have civil penalties.

The maximum level of financial sanction also varies widely between countries from €563 to €24 000 000! In some countries there is no limit set.

There are quite low numbers of complaints from people with disabilities – in part because there is still limited knowledge that the Regulation exists and that they have rights.

There is also no provision for compensation for the person who receives bad treatment.



Your Task

Imagine that you are asked by the European Commission to advise them on the most effective way to impose sanctions that will really tackle failings in the delivery of services to people with disabilities;

Please consider:

- Which is more effective – and why – criminal or civil sanctions?
- What steps would you advise on the level and form of penalties?
- Should there be a means of compensating passengers with disabilities who are treated inappropriately by an airline or airport? Would this lead to higher standards or just encourage more complaints?
- Are there other steps you would recommend to ensure that the regulations on passenger rights are effective in protecting and promoting the interests of people with disabilities?



Caso di studio: Diritti dei passeggeri: Fare in modo che l'applicazione funzioni

Il problema

Il regolamento 1107/2006 (relativo ai diritti delle persone con disabilità e delle persone a mobilità ridotta nel trasporto aereo) è in vigore dal 2008.

I requisiti di base del regolamento sono:

- Non discriminazione/parità di trattamento
- Fornitura di assistenza
- Norme di qualità
- Formazione (tutto il personale che si occupa di viaggiatori)
- Applicazione (da parte degli Stati membri)
- Sanzioni (efficaci, proporzionate, dissuasive)
- Meccanismo di reclamo.

Dopo più di dieci anni dall'entrata in vigore del regolamento, ci rendiamo conto che vi è un'enorme differenza tra il modo in cui gli Stati membri hanno istituito sistemi di sanzioni e di applicazione e che, di fatto, sono state imposte pochissime sanzioni.

Il regolamento n. 1107/2006 impone agli Stati membri di stabilire sanzioni:

- "efficaci, proporzionate e dissuasive".

Le sanzioni possono essere inflitte agli aeroporti o alle compagnie aeree in caso di violazione dei regolamenti.

Alcuni Stati membri hanno introdotto un sistema di sanzioni penali, altri hanno sanzioni civili.

Anche il livello massimo della sanzione finanziaria varia notevolmente da un paese all'altro, da 563 a 24 milioni di euro! In alcuni paesi non sono stati fissati limiti.

Il numero di denunce da parte di persone con disabilità è piuttosto basso, in parte perché si sa ancora poco dell'esistenza del regolamento e dei loro diritti.

Inoltre, non è previsto alcun risarcimento per la persona che subisce maltrattamenti.



Il suo compito

Immaginate di essere invitati dalla Commissione europea a consigliarle il modo più efficace per imporre sanzioni che affrontino realmente le carenze nella fornitura di servizi alle persone con disabilità;

La prego di considerare:

- Quale è più efficace - e perché - sanzioni penali o civili?
- Quali misure consiglierebbe sul livello e sulla forma delle sanzioni?
- Dovrebbe esserci un mezzo per indennizzare i passeggeri disabili che vengono trattati in modo inappropriato da una compagnia aerea o da un aeroporto? Ciò porterebbe a standard più elevati o incoraggerebbe semplicemente un maggior numero di reclami?
- Ci sono altre misure che consiglierebbe per garantire che le norme sui diritti dei passeggeri siano efficaci nel proteggere e promuovere gli interessi delle persone con disabilità?



Questa pubblicazione è stata realizzata con il sostegno finanziario del Programma REC 2014-2020 dell'Unione Europea. I contenuti di questa pubblicazione sono di esclusiva responsabilità dell'autore e non possono in alcun modo essere interpretati in modo da riflettere il punto di vista della Commissione Europea.

Disability in employment under EU law

Julie Brohée,
Legal Secretary
Judge A.Arabadjieva, President of the Second Chamber
CJEU



Legal framework

Amsterdam Treaty

1st explicit mention
general non-
discrimination article
19 TFEU

Charter of Fundamental Rights

Art. 21 : discrimination
on disability shall be
prohibited
Art. 26 : Integration of
persons with disabilities

EU's conclusion of the CRPD

European Disability Strategy 2010-2020

A Renewed
Commitment to a
Barrier-Free Europe

Employment Equality Directive 2000/78

A general framework to ensure equal treatment of individuals

prohibits employment discrimination on the grounds of :

religion or belief

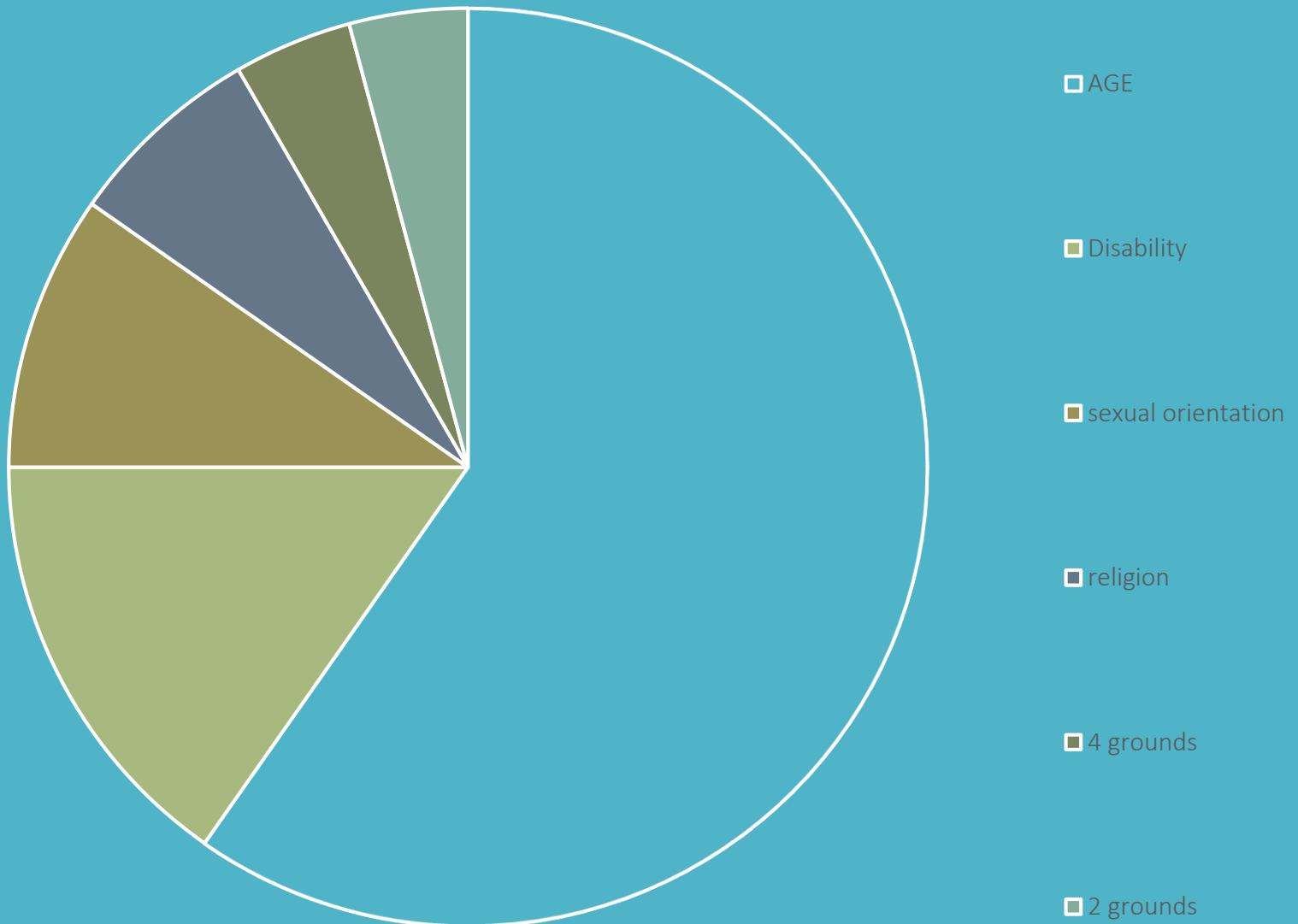
disability



age

sexual orientation

Case law per criteria



Recital 13

definition of income
“pay”

Article 3

1. Within the limits of the areas of competence conferred on the Community,
this Directive shall apply to **all persons**,
as regards both the **public and private** sectors,
including public bodies,
in relation to:

Material scope

conditions for access to employment, to self-employment or to occupation, including **selection** criteria and **recruitment** conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion

(c) employment and **working conditions**, including **dismissals and pay**;

(d) membership of, and involvement in, an organisation of workers or employers

Article 3

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

3. This Directive **does not apply** to payments of any kind made by state schemes or similar, including state **social security** or social protection schemes.

education, healthcare
access to goods and services

Personal scope

“it suffices to note that Article 3(1)(c) of that directive expressly states that it applies, *inter alia*, to all persons in the public sector, including public bodies.

Moreover, it is not disputed that
the position of judge falls within the public sector.

Article 3(1)(c) of Directive 2000/78 must be interpreted as meaning that pay conditions for judges fall within the scope of that directive”

(Unland, 9 sept. 2015, C-20/13)



Case law on disability

- judgment of 11 July 2006, [Chacón Navas](#), C-13/05, EU:C:2006:456
judgment of 17 July 2008, [Coleman](#), C-303/06, EU:C:2008:415
judgment of 5 May 2011, [Commission v Germany](#), C-206/10, EU:C:2011:283
judgment of 6 December 2012, [Odar](#), C-152/11, EU:C:2012:772
judgment of 11 April 2013, [HK Danmark](#), C-335/11 and C-337/11, EU:C:2013:222
judgment of 4 July 2013, [Commission v Italy](#), C-312/11, not published, EU:C:2013:446
judgment of 18 March 2014, [Z.](#), C-363/12, EU:C:2014:159
judgment of 22 May 2014, [Glatzel](#), C-356/12, EU:C:2014:350
judgment of 18 December 2014, [FOA](#), C-354/13, EU:C:2014:2463
judgment of 26 March 2015, [Fenoll](#), C-316/13, EU:C:2015:200
judgment of 23 April 2015, [Van Hove](#), C-96/14, EU:C:2015:262
judgment of 16 July 2015, [Maïstrellis](#), C-222/14, EU:C:2015:473
judgment of 26 May 2016, [Invamed Group and Others](#), C-198/15, EU:C:2016:362
judgment of 1 December 2016, [Daouidi](#), C-395/15, EU:C:2016:917
judgment of 9 March 2017, [Milkova](#), C-406/15, EU:C:2017:198
judgment of 18 January 2018, [Ruiz Conejero](#), C-270/16, EU:C:2018:17
judgment of 19 September 2018, [Bedi](#), C-312/17, EU:C:2018:734
judgment of 14 March 2019, [Dreyer](#), C-372/18, EU:C:2019:206

« disability » - defining the outlines of the concept

“The concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”

‘it must be probable that it will last for a long time’

‘disability’ is different from ‘sickness’

Chacón Navas (2006) C-13/05, par.43,
45, 44

Individual or medical model

Not in line with the CRPD

« disability »

- judgment [HK Danmark \(2013\) C-335/11 & C-337/11](#)
- “both workers are not disable, since ‘the only incapacity that affects them is that they are not able to work full-time’”
- Ratification by the EU of the CRPD → “The concept of ‘handicap’ must be understood as referring to :

a limitation which results in particular from [long-term] physical, mental or psychological impairments **which in interaction with various barriers** may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers



« disability », a social-contextual approach

- recognises that disability results from an interaction between an impairment and the environment
- relevance of social and environmental factors in limiting



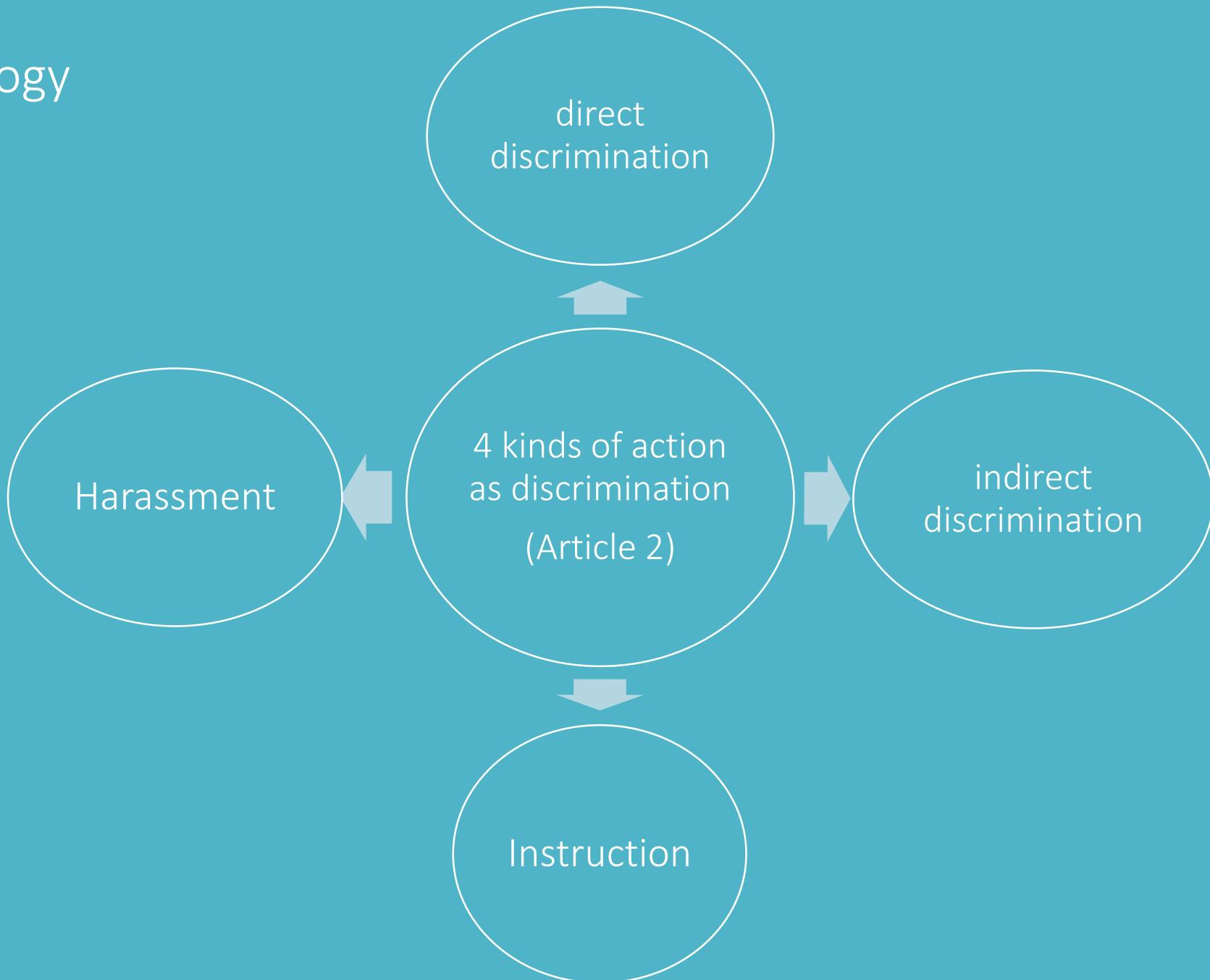
- CRPD interaction between ‘impairments’ and ‘various barriers’
- CJEU interaction between ‘limitations’ resulting from impairments and ‘various barriers’.



- Mr Kaltoft ([FOA](#), C-354/13) and the difficulty to apprehend a prejudice

- a “hindrance” to the exercise of professional life : Z., C-363/12
- a long-term impairments : Daouidi, C-395/15
- Different from a illness? HK Danmark, C-335/11 and C-337/11
FOA, C-354/13 (Kaltoft)

typology



Typology – Direct Discrimination

Article 2(2)(a)

- A difference of treatment based on the disability of the person
- Measures that explicitly refer to or target disability
- Drawing a parallel between the treatment of the person bringing the claim and someone in a ‘comparable situation’. Such comparator may be present, past or hypothetical.
- Strictly prohibited, with little possibility of escaping the prohibition



Article 2(2)(b)

- ‘an apparently neutral provision, criterion or practice’ would put persons having a disability at a **particular disadvantage** compared with other persons.
- Justification possible : Objectively justified by a **legitimate aim** and the **means** of achieving that aim are appropriate and necessary does not explicitly refer to or target disability but is more likely to disadvantage (or does in fact disadvantage) persons with a disability
 - + not to go beyond what is necessary to achieve the aim pursued
- second justification: reasonable accommodation or adjustment for a specific individual with a disability to eliminate the disadvantages

■ Typology – Harassment & Instruction to discriminate

- Harassment (Article 2(3))
- Instruction to discriminate (Article 2(4))
- By association : Coleman, C-303/06

Multiple and intersectional discrimination

Parris and Z : no new category of discrimination resulting from the combination of more than one ground

Odar : no difference of treatment based on age but on disability

In order to examine whether the national rule goes beyond what is necessary to achieve the aims pursued, that provision must be placed in its context and **the adverse effects it is liable to cause for the persons concerned** must be considered (Odar, Par. 65).

In this respect, it is for the referring court to examine whether the national legislature, in pursuing the legitimate aims of, first, promoting the recruitment of persons with illnesses and, secondly, striking a reasonable balance between the opposing interests of employees and employers with respect to absences because of illness, omitted to take account of relevant factors relating in particular to workers with disabilities.

In this respect, the risks run by disabled persons, **who generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires**, should not be overlooked (Odar, par. 68 and 69).

Reasonable accommodation

Art. 5: reasonable accommodation shall be provided. Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Recital 20 Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example, adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training and integration resources

Recital 21 disproportionate burden : financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance

conclusion

- A recent and dynamic case law
- “more subtle and less obvious” difference of treatment
- A robust conception of equality
- Limits of the protection
- Balancing of the interests BUT regards to the directive’s objectives & intented effect

The end

Thank you for your attention!



REFERENCE FOR A PRELIMINARY RULING – MS ROMOLO Vs REMO SCHOOL

Case study 2019 - Julie BROHÉE

Ms Romolo always loved kids and wanted to become a kindergarten or elementary school teacher since her young age. After obtaining her bachelor's degree in elementary education and completing a teacher preparatory program, she got her certification. In 1990, she started teaching in a small local school of Trier, the Remo School, and was a successful and happy educator in that school since then.

In 2013 she began to feel discomfort in her right arm, which spread after a few weeks to her right leg. She consulted several physicians who concluded that she has "Muscular dystrophy (MD)", which is a group of muscle diseases that results in increasing weakening and breakdown of skeletal muscles over time. The disorders differ in which muscles are primarily affected, the degree of weakness, how fast they worsen, and when symptoms begin. Many people will eventually become unable to walk.

The medical records from the hospital of Trier, dated 3 June 2015, include the following: "There is an inability to relax muscles at will following contractions and shoulder blades stick out like wings when Ms Romolo raises her arms. She has also difficulty lifting the front part of the foot and as a result may trip frequently. There is nothing useful we can offer."

A 'status report' dated 19 October 2015 from 1st assistant doctor, includes the following: 'Her prognosis for a full-time return to the employment market, if there is a permanent reduction in her capacity for work in all jobs, cannot be assessed in a status report. As of now, we have no further treatment to offer to the patient.'

At a staff meeting at the school on 25 November 2015, Ms Romolo asked whether it was possible to have a wheel-chair, to move her classroom to the ground floor. She also requested an adaptation of the school accesses and of her working space. None was given by the Remo school.

Her condition deteriorated and she was absent for several periods. Her absence is documented by doctors' certificates. She then asked to get back to work with significantly reduced working hours. The Remo School replied that, for management reasons in such a small school, that accommodation could not be offered.

The employment relationship was covered by the Law on salaried employees. According to Article 3(5), under certain more closely defined conditions, an employer may dismiss an employee by giving a shorter period of notice – equivalent to one month's notice of termination of the employment relationship from the end of a month – if the employee has received his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months.

Ms Romolo was dismissed by a letter from the Remo school dated 24 April 2016 citing the fact that 'you have received your salary during periods of illness for a total of 120 days within 12 months.' The parties agree that Ms Romolo's periods of absence were such that the conditions for applying Article 3(5) of the Law on salaried employees, were satisfied.

On 1 September 2016 Ms Romolo herself took up a new position as elementary teacher in a nearby school with ‘established full-time employment under the flexijob scheme – approved for a 75% rebate. Photographs of Ms Romolo’s classroom have been submitted, which the parties agree may be described as a desk with computer and extra space for the wheelchair. The access to the school and classroom has been adapted prior to Ms Romolo’s arrival.

The Remo School submitted a budget estimate of 3 September 2018 for a change to the building and classroom to include changes to a classroom environment or task that permit the teacher with a disability to perform her duties, removal of architectural barriers, modifications to policies, practices or procedures, provision of auxiliary aids and services, and other adaptations or modifications. The total costs were put at ‘approx. EUR 105 000.’

The case was brought on 17 May 2019. Ms Romolo filed a claim inter alia for compensation in accordance with the Law on the prohibition of discrimination. The Remo School contested the claim.

Answer the following questions:

- Does Ms Romolo suffer from an “illness” or “disability” within the meaning of European law? Does the CJEU have jurisdiction to provide a definitive assessment in this respect?
- Are we potentially dealing with a direct or indirect difference of treatment?
- Does a reduction in working hours may constitute one of the accommodation measures referred to in EU law. What about the material accomodations requested by Ms Romolo?
- Who has jurisdiction to assess whether, in the circumstances of the main proceedings, the requested material accommodation and management measure represent a disproportionate burden for the employer? What are the criteria to decide so ?
- Does EU law preclude, in the circumstances of the main proceedings, a national provision such as Article 3(5) of the Law on salaried employees?

DOMANDA DI PRONUNCIA PREGIUDIZIALE- SIG.RA. ROMOLO CONTRO REMO SCHOOL

Caso di studio 2019 - Julie BROHÉE

La signora Romolo ha sempre amato i bambini e sin da giovane età ha voluto diventare un insegnante di scuola materna o elementare. Dopo aver ottenuto una laurea in educazione elementare e completato un programma preparatorio per insegnanti, ha ottenuto la sua certificazione. Nel 1990, ha iniziato a insegnare in una piccola scuola locale di Treviri, la Remo School, e da allora in questa scuola è stata un'educatrice felice e di successo.

Nel 2013 ha iniziato a sentire disagio al braccio destro che dopo poche settimane si è diffuso per gamba destra. Ha consultato diversi medici che hanno concluso che ha una «distrofia muscolare (DM)», che è un gruppo di malattie muscolari che risultano in un crescente indebolimento e rottura dei muscoli scheletrici nel tempo. I disturbi si differenziano per i muscoli principalmente colpiti, il grado di debolezza, quanto velocemente peggiorano, e quando iniziano i sintomi. Alla fine molte persone diventano incapaci di camminare.

La cartella clinica dell'ospedale di Treviri, datata 3 giugno 2015, include quanto segue: «C'è un'incapacità di rilassare i muscoli a piacimento dopo contrazioni e quando la sig.ra. Romolo alza le braccia, le scapole sporgono come ali. Ha anche difficoltà a sollevare la parte anteriore del piede e, di conseguenza, può inciampare frequentemente. Non c'è niente di utile che possiamo offrire.»

Un «rapporto sul suo stato» datato 19 ottobre 2015 del 1° assistente medico include quanto segue: «La sua prognosi di un ritorno a tempo pieno sul mercato del lavoro, se vi è una riduzione permanente della sua capacità lavorativa in tutti i posti di lavoro, non può essere valutata in un rapporto sul suo stato. In questo momento non abbiamo altre cure da offrire alla paziente.»

Nel corso di una riunione del personale della scuola del 25 novembre 2015, la sig.ra. Romolo ha chiesto se era possibile avere una sedia a rotelle, spostare la sua classe al piano terra. Inoltre ha richiesto l'adattamento degli accessi alla scuola e del suo spazio di lavoro. Niente di tutto ciò è stato fornito dalla scuola Remo.

Le sue condizioni peggiorarono e fu assente per diversi periodi. La sua assenza è documentata da certificati medici. Ha poi chiesto di tornare a lavorare con orario di lavoro significativamente ridotto. La Scuola Remo ha risposto che, per motivi di gestione in tale piccola scuola, l'accomodamento non poteva essere offerto.

Il rapporto di lavoro era disciplinato dalla legge sui lavoratori dipendenti. Secondo l'articolo 3, paragrafo 5, a determinate condizioni strettamente definite, il datore di lavoro può licenziare un dipendente con un periodo di preavviso più breve – equivalente a un mese di preavviso di cessazione del rapporto di lavoro a partire dalla fine del mese – se il dipendente ha percepito lo stipendio durante i periodi di malattia per un periodo totale di 120 giorni nel corso di un qualsiasi periodo di malattia di 12 mesi consecutivi.

La sig.ra. Romolo è stata licenziata con lettera della scuola Remo in data 24 aprile 2016, citando il fatto che «ha ricevuto il suo stipendio durante i periodi di malattia per un totale di 120 giorni entro 12 mesi.» Le parti convengono che i periodi di assenza della sig.ra. Romolo erano tali che le condizioni per l'applicazione dell'articolo 3, paragrafo 5, della legge sui lavoratori dipendenti erano soddisfatte.

Il 1° settembre 2016 la sig.ra. Romolo ha assunto un nuovo incarico di insegnante elementare in una scuola vicina con «un'occupazione a tempo pieno stabilita nell'ambito del programma flexijob –

approvato per il 75% di rimborso dei costi salariali. Sono state presentate le foto della classe della sig.ra. Romolo, che, di comune accordo delle parti, mostrano una scrivania con computer e spazio extra per la sedia a rotelle. L'accesso alla scuola e alla classe è stato adattato prima dell'arrivo della sig.ra. Romolo.

La Scuola Remo ha presentato un bilancio preventivo del 3 settembre 2018 per una modifica dell'edificio e della classe che include modifiche all'ambiente scolastico o a un compito che permettono all'insegnante con disabilità di esercitare le sue funzioni, rimozione delle barriere architettoniche, modifiche a politiche, pratiche o procedure, fornitura di servizi ausiliari e altri adattamenti o modifiche. I costi totali sono stati stimati a circa 105 000 euro.»

La causa è stata avviata il 17 maggio 2019. La sig.ra. Romolo ha presentato una richiesta, tra l'altro, di risarcimento in conformità con la legge sul divieto di discriminazione. La scuola Remo ha contestato la richiesta.

Risponda alle seguenti domande:

- Se la sig.ra. Romolo soffre di una «malattia» o ha una «disabilità» ai sensi del diritto europeo. Se la Corte di giustizia dell'Unione europea è competente a pronunciarsi in via definitiva a questo proposito.
- Se si tratta potenzialmente di una differenza di trattamento diretta o indiretta.
- Se la riduzione delle ore di lavoro può costituire una misura di accomodamento di cui al diritto dell'UE. E per quanto riguarda gli accomodamenti in questione richiesti dalla signora Romolo?
- Chi è competente a valutare se, nelle circostanze della causa principale, l'accomodamento richiesto e le misure di gestione rappresentano un onere sproporzionato per il datore di lavoro? Quali sono i criteri per una tale decisione?
- Se sia contraria al diritto dell'UE, nelle circostanze della causa principale, una norma nazionale come l'art. 3, paragrafo 5, della legge sui lavoratori dipendenti.



Funded by the European Union's REC Programme (2014-2020)



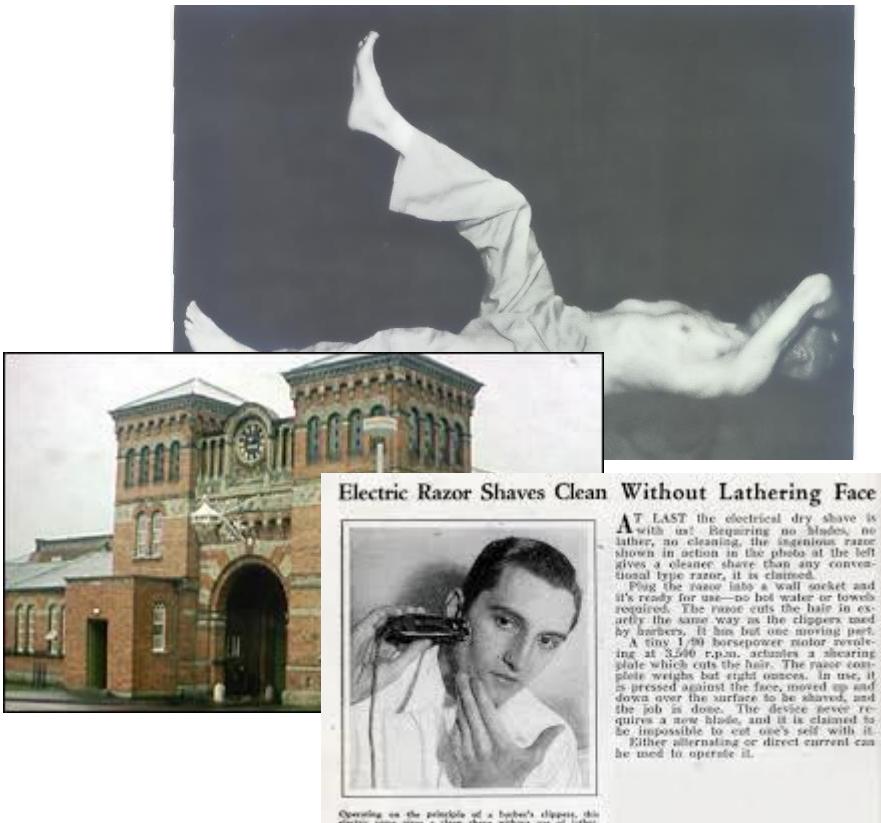
ECHR and Mental Health

Professor Anselm Eldergill, Judge in the Court of Protection, London
medicolegal@email.com

Trier, Germany, 7 June 2019

How it was

Remember how it was



Progress is always slow

- *ECHR*
- *EU recommendations and directives*
- *International commitment to the rights of people with disabilities through the CRPD*



§1 — Introduction

Relevant Articles

5

Deprivation of Liberty: Right to liberty and security of person

Provides that **no one may be detained on the ground of unsoundness of mind unless it is lawful and in accordance with a procedure prescribed by law.**

In relation to crime, also permits lawful arrest and detention following conviction.

2

Everyone's right to life shall be protected by law

Much of the case law concerns incidents of **suicide in prisons**. However, Article 2 also covers **grossly inadequate hospital conditions** and requires an effective independent investigation of alleged breaches of the state's duty to protect life.

3

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

This article is relevant to the conditions of detention in prisons, police stations, hospitals and social care homes.

6

Determination of civil rights and criminal charges

All are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal

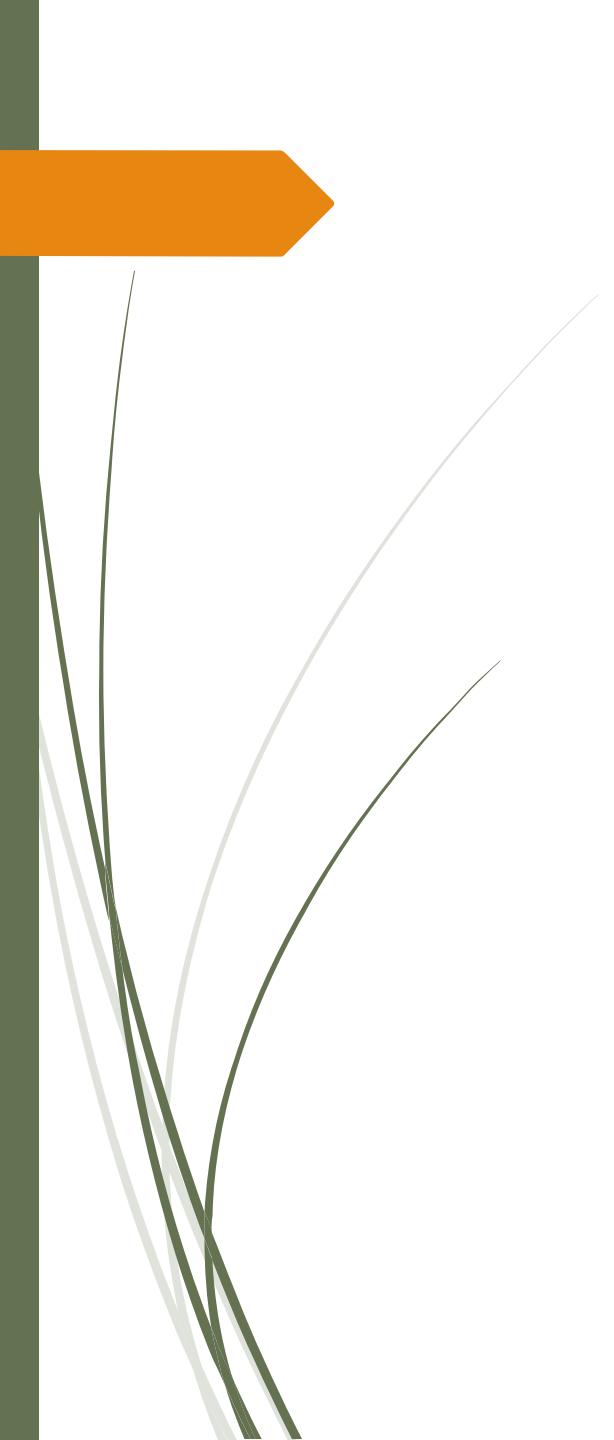
Includes proceedings to divest individuals of their legal capacity.

8

Respect for private and family life, home and correspondence

The aim is to protect the citizen against arbitrary interference.

Concerns matters such as **free and informed consent to medical treatment, correspondence of patients, patient confidentiality, guardianship, care proceedings, family contact.**



§2 — Article 5

**Deprivation of Liberty:
Right to liberty and security of person**

Article 5(1)

§5–(1) ‘No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(e) the lawful detention of ... persons of unsound mind’



Provided the person is detained in a hospital or facility appropriate for persons of unsound mind, Article 5 is not concerned with the conditions of detention or the level of detention/security: *Ashingdane v United Kingdom (1985)*.



Article 5 concerned only with deprivations of liberty



Note also that Article 5(1) is concerned only with deprivations of liberty and not with restrictions of liberty or movement which do not amount to a deprivation of liberty.

One must therefore ask two questions:

- ▶ 1 **Is this person deprived of their liberty?** If not, Article 5 and its safeguards do not apply.
- ▶ 2 **If s/he is, is the deprivation of liberty both lawful and in accordance with a procedure prescribed by law?** In other words, does it comply with the requirements of Article 5.

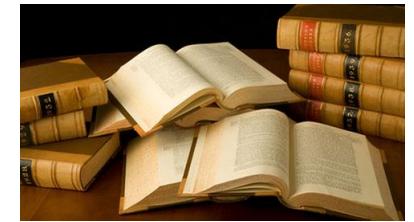


Question 1: Is there a deprivation of liberty?

1. Deprivation of liberty requires that the person has been confined in a particular restricted space 'for a not negligible length of time. This is the 'objective condition'.
2. Of considerable importance is whether the professionals exercise 'complete and effective control' over the person's his care and movements, so that the individual is 'under continuous supervision and control and is not free to leave.'
3. In addition, a 'subjective condition' must be met. This is that the person has not validly consented to their confinement.



Case law examples:



HM v Switzerland (2002)	<p>HM suffered from 'senile dementia' She was placed in a nursing home on account of neglect.</p> <p>Held that HM was not deprived of her liberty. She was not placed in the secure ward of the nursing home. She enjoyed freedom of movement and was able to maintain social contact with the outside world. She had been undecided about where she wanted to live. She 'was hardly aware of the effects of her stay' and had stated that she had no reason to be unhappy with the nursing home. After moving there, she agreed to stay.</p>
Stanev v Bulgaria (2012)	<p>Without consulting or informing him, Mr Stanev's guardian had him placed in a social care home for men with psychiatric disorders, in a remote mountain location. Held to be a deprivation of liberty. He was under constant supervision and was not free to leave the home without permission. The time he spent away and the places he could go were always subject to controls and restrictions. When he did not return from leave in 2006, the home's management asked the police to return him. In terms of the subjective condition, the court 'was not convinced that he ever consented to the placement, even tacitly'.</p>



Question 2: Is the deprivation of liberty lawful and in accordance with a procedure prescribed by law?

The leading case is ***Winterwerp v Netherlands* (1979)**.

In that case, the court set down four conditions that must be satisfied for a person's detention on the basis of unsoundness of mind to be lawful under Article 5§1(e):

- A. The deprivation of liberty must be lawful, i.e. in conformity with domestic law and the Convention.
- B. Except in emergency cases, the individual concerned must be reliably shown to be of 'unsound mind', that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.
- C. The mental disorder must be of a kind or degree warranting compulsory confinement.
- D. The validity of continued confinement depends upon the persistence of such a disorder.

CRPD, Article 14

Article 14

Liberty and security of person

1. **States Parties shall ensure that** persons with disabilities, on an equal basis with others:
 - (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that **the existence of a disability shall in no case justify a deprivation of liberty.**

Committee on the Rights of Persons with Disabilities

- ‘The Committee has established that Article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment.’
- ‘Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments and the principle of free and informed consent of the person concerned for health care.’

Access to Justice: Article 5(4)

Article 5(4) provides that, 'Everyone who is **deprived of his liberty** by arrest or detention shall be entitled to take **proceedings** by which the **lawfulness of his detention** shall be **decided speedily** by a **court** and his **release ordered / if the detention is not lawful.**'

- Article 5§4 is the *habeas corpus* provision of the Convention. It provides detained persons with the right to a judicial review of their detention. This extends to **both the procedural and substantive justifications of the deprivation of liberty** (*Idalov v Russia*, 2012).

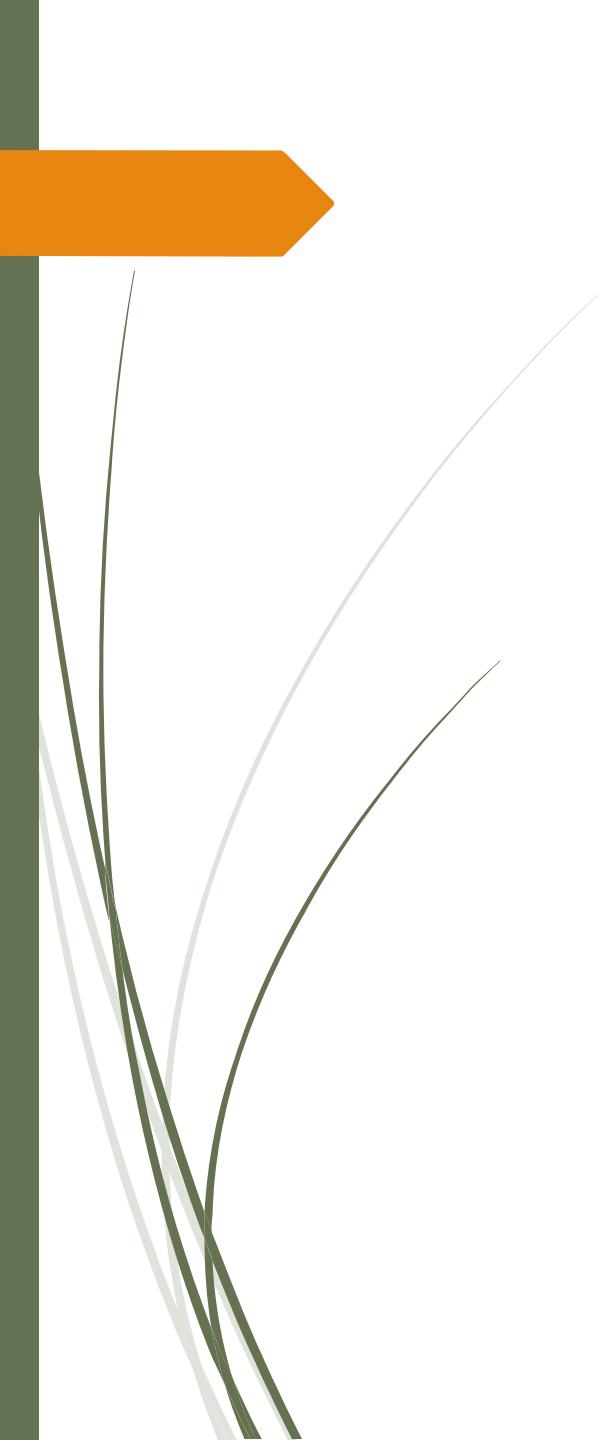
KEY POINT

Some Article 5(4) principles

1. The review should consider a mental health patient's contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments (*X v United Kingdom*, 1981).
2. A person compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings 'at reasonable intervals' to put in issue the lawfulness of their detention (*Ruiz Rivera v Switzerland*, 2014).
3. A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own (*X v Finland*, 2012).
4. The 'court' to which the detained person has access does not have to be a court of law of the classical kind. However, the

Some Article 5(4) principles

5. The 'court' must be independent of the executive and the parties, and have the power to order release if detention is unlawful. A mere power of recommendation is insufficient (*Benjamin and Wilson v United Kingdom*, 2002).
7. It is essential that the person concerned has the opportunity to be heard either in person or, where necessary, through some form of representation.
8. Special procedural safeguards (e.g. legal aid and/or representation) may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (*Megyeri v Germany*, 1992).
9. The individual has the right to a speedy judicial decision. Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities (*E v Norway*, 1990).



§3 — The Other Articles

The Other Articles

- ▶ Article 2 (Right to Life)
- ▶ Article 3 (Inhuman or degrading treatment)
- ▶ Article 6 (Determination of civil rights)
- ▶ Article 8 (Respect for private and family life)



Article 2 (Right to Life)

- ▶ 'Everyone's right to life shall be protected by law.'

The negative obligation

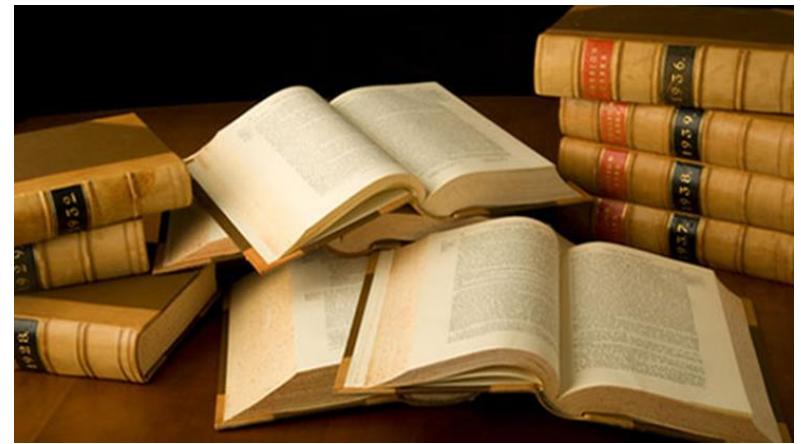
- ▶ State agents must refrain from acts of a life-threatening nature and acts which place the health of individuals at grave risk.

The positive obligation

- ▶ States also have positive obligations under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction.
- ▶ Mental health patients and persons in custody are in a vulnerable position and the authorities are under a duty to protect them. This duty includes making regulations which compel hospitals to adopt appropriate measures for the protection of patients' lives and appropriate investigation of patient deaths.
- ▶ This positive obligation must not be interpreted in a disproportionate way given the unpredictability of human behaviour and the operational choices faced by states in terms of priorities and resources (*Keenan v United Kingdom*, 2001).

Dodov v Bulgaria (2008)

- ▶ This case concerned the disappearance from a state-run nursing home for the elderly of a patient called Mrs Stoyanova who was suffering from Alzheimer's disease.
 - ▶ Nursing home staff had been instructed not to leave her unattended. However, a nursing orderly left her alone in the home's courtyard and, on returning to fetch her a few minutes later, found that she was no longer there. Mrs Stoyanova has never been seen since.
 - ▶ The court found a violation of Article 2. Given the instructions never to leave her unattended, there was a direct link between the failure to supervise her and her disappearance. Furthermore, the legal system had not provided her son with the means to establish the facts surrounding his mother's disappearance and to bring to account those responsible, as required by Article 2.



Article 3 (Inhuman/Degrading Treatment)

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

Article 3 is cast in absolute terms, without exception, proviso or possibility of derogation. It is one of the most fundamental Convention provisions and enshrines the core values of the democratic societies making up the Council of Europe. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative.

The negative obligation

- State agents must refrain from acts which subject the citizen to inhuman or degrading treatment.

The positive obligation

- The state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility. There is a particular need for states to take such measures in the context of psychiatric hospitals, where patients are typically in a position of inferiority and helplessness (*Herczegfalvy v Austria*, 1992).
- The Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population. However, the court will have regard for healthcare standards set down within the framework of the Council of Europe. In effect, there is no guarantee to high quality healthcare or a particular treatment (*Wasilewski v Poland*, 1999) but a minimum standard of healthcare is guaranteed to vulnerable detainees, in particular those suffering from mental disorder.

Medical treatment

As a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading

Herczegfalvy v Austria
(1992)



Conditions of detention

The court has reiterated on many occasions that the state is required to ensure that all persons deprived of their liberty are detained in conditions which are compatible with respect for their human dignity;



PSYCHIATRIC HOSPITAL CONDITIONS

Patients were likely to catch scabies or become infested with lice, sometimes two patients had to share a bed, two showers for 70–100 patients, poor food (*Parascineti v Romania*, 2012).

SECLUSION IN A PSYCHIATRIC HOSPITAL

Patient deprived of adequate furnishing and clothing, cell insanitary and inadequately lit and ventilated. Friendly settlement (*A v United Kingdom*, 1980).

Seclusion cell contained only a bed and a flush toilet and no table or chair. It had only one small window which was situated above eye-level. Detainee had his daily exercise in a courtyard separate from other inmates. Meals were served in his cell (*Dhoest v Belgium*, 1997).

SOCIAL CARE HOMES

- Residents' diet contained no milk or eggs and only rarely fruit and vegetables; building inadequately heated and in winter Mr Stanev had to sleep in his coat; could shower only once a week in an unhygienic and dilapidated bathroom; toilets in an execrable state; residents led passive, monotonous lives.

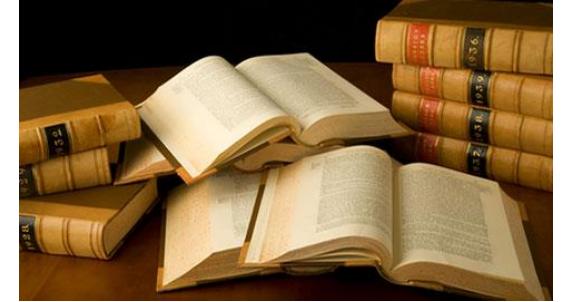
Article 6

Article 6(1) provides that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

- Article 6 is an important protection for citizens in relation to legal proceedings which do not involve challenging a deprivation of liberty.



Case law on Article 6



- In **Shtukaturov v Russia (2008)**, the applicant had a history of mental illness. Following a request filed by his mother, the Russian courts declared him legally incapable. The court found that the procedures breached Article 6. He had not been given any opportunity to participate in the proceedings. His attendance had been indispensable not only to give him the opportunity to present his case, but also to allow the judge to form an opinion on his mental capacity.

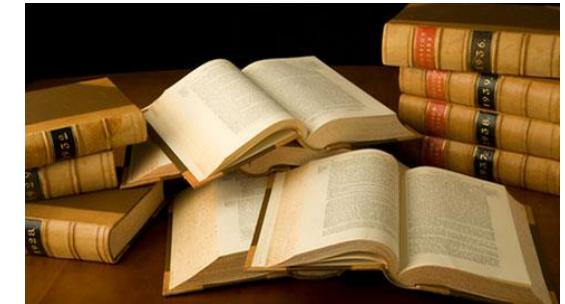
Article 8

Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence.

There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article 8

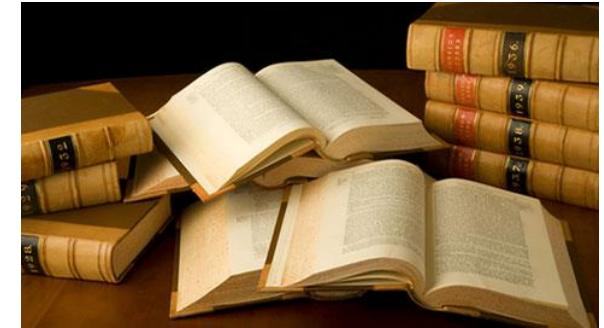
- ▶ The right to respect for one's private life includes the right to refuse medical treatment or to request a particular form of medical treatment (*Glass v United Kingdom*, 2004)
- ▶ When considering whether an interference is proportionate, the burden lies on the state to justify its action.
- ▶ The 'proportionality' test entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of an individual suffering mental ill-health with those of the whole community.

Article 8 examples



- In ***Grare v France (1983)***, a voluntary in-patient complained that his treatment with antipsychotic drugs resulted in unpleasant side-effects which violated Article 8. It was held that, even if the treatment regime constituted an invasion of his private life, it was justified in the interests of his health and public order.
- In ***Acmanne v Belgium (1983)***, compulsory tuberculosis screening was held not to breach Article 8 although it interfered with the individual's private life.
- In ***TV v Finland (1994)***, it was held that access by prison and medical staff to information regarding the applicant's HIV status could be justified under Article 8(2). Such access was lawful, necessary to protect the rights and freedoms of others and proportionate.
- In ***Szuluk v United Kingdom (2009)***, a prisoner who had undergone brain surgery discovered that his correspondence with the specialist supervising his hospital treatment had been monitored by a prison medical officer. The court found a violation of his right to respect for his correspondence under Article 8.

Shtukaturov v Russia (2008)



The applicant had a history of mental illness. A Russian court declared him legally incapable on 28 December 2004. This decision deprived him of his capacity to act independently in almost all areas of life: he was no longer able to buy or sell any property on his own, to work, to travel, to choose his place of residence, to join associations or to marry. Even his liberty could be limited without his consent and without any judicial supervision.

The court found a violation of Article 8 as a result of the applicant being fully deprived of his legal capacity.

Equal recognition before the law (Article 12)

- ▶ States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- ▶ States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. **Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person**, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.



ECHR interpretation of Article 12



► In the ECHR case of **A-MV v Finland (2017)**, the court rejected a central tenet of the interpretation of Article 12 of the UNCRPR, namely that the will and preferences of an individual should always be determinative of any decision taken in their name.

A-MV v Finland, no. 53251/13, 23 March 2017

► The Court considered that a proper balance was struck in the AM-V's case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law which ensured that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to his circumstances and was subject to review by competent, independent and impartial domestic courts.

Academy of European Law



THE EUROPEAN CONVENTION ON HUMAN RIGHTS THE UNCRPD & THE LEGAL RIGHTS OF CITIZENS SUFFERING MENTAL ILL-HEALTH

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Trier, June 2019



TABLE OF CONTENTS

• A	<i>European Convention on Human Rights and Mental Health</i>	<i>Page 3</i>
• B	<i>UNCRPD</i>	<i>Page 83</i>
• C	<i>Judicial Decision-Making</i>	<i>Page 105</i>
• D	<i>Principles of Mental Health Laws</i>	<i>Page 114</i>
• E	<i>About the Author/Resume</i>	<i>Page 117</i>

Brief

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

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A – THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND MENTAL HEALTH

INTRODUCTION

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

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

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

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

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

Sources and acknowledgments

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

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

Note on the citation of cases

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

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

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

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

§2 — ARTICLE 2

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

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

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

The positive obligation

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

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

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

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

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

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

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

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

Hospitals and (social) care homes

Article 2 requires states ‘to make regulations compelling hospitals ... to adopt appropriate measures for the protection of their patients’ lives’ and to set up an effective independent judicial system ‘so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable ...’⁸

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

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

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

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

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

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

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

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

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

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

Prisons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§3 — ARTICLE 3

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

ARTICLE 3

Prohibition of torture

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

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

The positive obligation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III-treatment

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

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

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

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

37 Peers, *supra*, §74.

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

Use of seclusion on psychiatric wards/units

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

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

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

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

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

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

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

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

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

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

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

General conditions on psychiatric wards/units

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

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

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

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

Conditions in (social) care homes

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

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

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

The treatment of persons suffering from mental disorder

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

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

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

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

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

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

According to the court (at §§82–83):

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

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

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

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

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

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

45 See Buckley, *infra*.

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

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

Adopting the same numbering, the Commission held that:

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

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

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

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

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

The sentencing of persons with mental ill-health

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

Prisons, prison conditions and medical treatment

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

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

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

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

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

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

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

Detainees with physical disabilities

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

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

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

Medical care in prison for persons suffering from mentally illness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prisoners with suicidal tendencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Detention in police stations

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

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

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

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

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

Immigration, deportation and extradition cases

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

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

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

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

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

ARTICLE 5(1)

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

ARTICLE 5

Right to liberty and security

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

...

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

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

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

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

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

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

Ten commandments

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

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

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

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

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

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

The positive obligation

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

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

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

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

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

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

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

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

92 Guzzardi v Italy, *supra*, §95.

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

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

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

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

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

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

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

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

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

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

Deprivation of liberty and restriction of liberty

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

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

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

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

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

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

101 Storck v Germany, *supra*, §102.

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

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

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

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

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

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

What is a deprivation of liberty?

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

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

The starting point must be the individual's concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.¹⁰⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case law on whether a deprivation of liberty exists

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

75 ... the Court observes that the applicant had attained majority at the time of her admission to the clinic and had not been placed under guardianship. Therefore, she had been considered to have the capacity to consent or object to her admission and treatment in hospital. It is undisputed that she had not signed the clinic's admission form prepared on the day of her arrival. It is true that she had presented herself to the clinic, accompanied by her father. However, the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention (see *De Wilde, Ooms and Versyp v Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, §65; *H.L. v the United Kingdom*, cited above, §90).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The issue of deprivations of liberty in supported living placements and a person's own home was considered by the UK Supreme Court in what is known as the ***Cheshire West Case (2014)***.¹²⁸ The court reiterated the standard test set out in cases such as *HL*, *Storck* and *Stanev* and also that a deprivation of liberty imputable to the state may occur in a setting such as one's own home or a supported living environment. The judgment lacked intellectual rigour, however, and did little to clarify the grey areas. Consequently, its implementation nationally has been fairly subjective.

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

If an individual is deprived of his liberty on the ground of unsoundness of mind, the next question is whether their deprivation of liberty is lawful? Does it comply with or contravene the Article 5 requirements? The leading case is ***Winterwerp v The Netherlands***.¹²⁹ In that case, the court set down four conditions that must be satisfied for a person's detention on the basis of unsoundness of mind to be lawful under Article 5§1(e):¹³⁰

1. The deprivation of liberty must be lawful.

Lawfulness presupposes conformity with domestic law and the Convention.

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

Domestic law must be in conformity with the Convention, including the general principles expressed or implied by it.¹³¹ The general implied principles to which the Article 5§1 case law refers are the principle of the rule of law and, connected to this, the principles of legal certainty, proportionality and protection from arbitrariness, which is the very aim of Article 5.¹³² A deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention.¹³³

As concerns the principle of legal certainty, the Convention requires that the law is sufficiently clear and precise. It is essential that the conditions for a deprivation of liberty under domestic law are clearly defined and that the law foreseeable in its application, so that so that a person may know to a degree that is reasonable in the circumstances the consequences which a given action may entail, if need be by taking appropriate advice.¹³⁴

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

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

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

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

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

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

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

The essential objective of Article 5 is to prevent citizens from being deprived of their liberty arbitrarily.¹³⁵ No detention that is arbitrary can ever be regarded as ‘lawful’. If there are no procedural rules, no criteria, no statement of purpose, no time limits or treatment, and no requirement for continuing clinical assessment, then there is nothing in the law to protect the individual against the arbitrary deprivation of liberty.

Arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the detention do not genuinely conform to the purpose of the restrictions permitted by the relevant subparagraph of Article 5§1; where there is no connection between the ground relied on and the place and conditions of detention; and where there is no proportionality between the ground of detention relied on and the detention in question.¹³⁶ The speed with which the domestic courts replace a detention order which has expired or has been found to be defective is a further relevant element in assessing whether a person’s detention must be considered arbitrary.¹³⁷ The absence or lack of reasoning in detention orders is another element taken into account by the court when assessing lawfulness under Article 5§1.¹³⁸

In terms of the principle of proportionality, the authorities should consider less intrusive measures than detention.¹³⁹

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

¹³⁵ See e.g. *Witold Litwa v Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, §78.

¹³⁶ See *James, Wells and Lee v the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012, §§191-95; *Saadi v the United Kingdom* [GC], no. 13229/03, 29 January 2008, §§68-74.

¹³⁷ *Mooren v Germany* [GC], no. 11364/03, 9 July 2009, §80. Thus, in the context of sub-paragraph (c), the court considered that a period of less than one month between the expiry of the initial detention order and the issue of a fresh, reasoned detention order following a remittal of the case from the appeal court to a lower court did not render the applicant’s detention arbitrary: *Minjat v Switzerland*, no. 38223/97, 28 October 2003, §§46 and 48. In contrast, a period of more than a year following a remittal from a court of appeal to a court of lower instance, in which the applicant remained in a state of uncertainty as to the grounds for his detention on remand, combined with the lack of a time-limit for the lower court to re-examine his detention, was found to render the applicant’s detention arbitrary: *Khudoyorov v Russia*, no. 6847/02, 8 November 2005, ECHR 2005-X (extracts), §§ 136-37.

¹³⁸ The absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5§1: *Stašaitis v Lithuania*, no. 47679/99, 21 March 2002, §§66-67. Likewise, a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness: *Khudoyorov v Russia*, *supra*, §157. What is required is a detention order based on concrete grounds and setting a specific time-limit: *Meloni v Switzerland*, no. 61697/00, 10 April 2008, §53.

¹³⁹ *Amruszkiewicz v Poland*, no. 38797/03, 4 May 2006, §32.

¹⁴⁰ *LB v Belgium*, no. 22831/08, 2 October 2012, §93; *Ashingdane v United Kingdom*, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8, §44; *OH v Germany*, no. 4646/08, 24 November 2011, §79.

health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.¹⁴¹

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

The very nature of what has to be established before the competent national authority — a true mental disorder — calls for objective medical expertise. Except in an emergency, no deprivation of liberty of a citizen considered to be of unsound mind is in conformity with Article 5§1 (e) if it has been ordered without seeking the opinion of a medical expert.¹⁴² A mental condition must be of a certain gravity in order to be considered as a ‘true’ mental disorder.¹⁴³ The relevant time at which a person must be reliably established to be of unsound mind is the date of adoption of the measure depriving that person of their liberty as a result of that condition.¹⁴⁴

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

In deciding whether an individual should be detained as a person ‘of unsound mind’, the national authorities have a certain discretion because it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case.¹⁴⁵ The detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate their condition, but also where the person needs control and supervision to prevent them from, for example, causing harm to themselves or others.¹⁴⁶

141 Pankiewicz v Poland, no. 34151/04, 12 February 2008, §§44-45; Morsink v Netherlands, no. 48865/99, 11 May 2004, §§67-69; Brand v Netherlands, no. 49902/99, 11 May 2004, §§64-66. With regard to Article 5§1(e), the case law provides that it should not be interpreted as only allowing the detention of ‘alcoholics’ in the limited sense of persons in a clinical state of ‘alcoholism’, because nothing in the text of this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking: Kharin v Russia, no. 37345/03, 3 February 2011, §34. Therefore, persons whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves can be taken into custody for the protection of the public or their own interests, such as their health or personal safety: Hilda Hafsteinsdóttir v Iceland, no. 40905/98, 8 June 2004, Witold Litwa v Poland, no. 26629/95, 4 April 2000, ECHR 2000-III, §42. However, this does not mean however that Article 5§1(e) permits the detention of an individual merely because of his alcohol intake: Witold Litwa v Poland, *supra*, §§ 61-62.

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

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

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

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

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

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

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant's confinement.¹⁴⁷ However, the continuation of a deprivation of liberty for purely administrative reasons is not justified.¹⁴⁸

In *X v United Kingdom (1981)*,¹⁴⁹ a patient who was subject to special restrictions because of a risk of serious harm to others complained that it had been unlawful for the Home Secretary to recall him to Broadmoor (high-secure) Hospital without any doctor having certified first that he was of unsound mind. This argument was rejected by the court. The court noted that the Home Secretary's power of recall was concerned,

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

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

In the *Luberti Case (1984)*,¹⁵⁰ the court accepted that terminating the confinement of an individual whom a court has previously found to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to that fact, and the very serious nature of the offence committed by the applicant when mentally ill, the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.

¹⁴⁷ Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

¹⁴⁸ RL and M-JD v France, no. 44568/98, 19 May 2004, §129.

¹⁴⁹ X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

¹⁵⁰ Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

As with *X v United Kingdom (1981)*, the applicant in *Kay v United Kingdom (1994)*¹⁵¹ complained about his recall to Broadmoor Hospital without a prior medical assessment, in his case on the expiration of a lengthy prison sentence. The Commission noted that his recall was in accordance with the procedures prescribed by domestic law. Furthermore, the Home Secretary was entitled to be concerned about the protection of the public in the light of the applicant's history of psychopathy, and his serious criminal record involving extreme violence towards girls and women. However, this historical background did not mean that one could dispense with the need to obtain up-to-date medical evidence about the applicant's mental health before ordering his recall. The most recent tribunal decision in 1986 had found that there was no evidence the applicant was then suffering from a psychopathic disorder and the weight of medical evidence at the time of recall was in his favour. It had not been impossible to have him assessed in prison, and the existence of a dissenting report from a Broadmoor doctor who had not interviewed him could not outweigh the tribunal's finding, nor provide a sufficient scientific basis for his continued compulsory confinement in hospital nearly three years later. Consequently, when the Home Secretary decided to recall the applicant to Broadmoor certain minimum conditions of lawfulness were not respected. In particular, there was no up-to-date objective medical expertise showing that the applicant suffered from a true mental disorder, or that his previous psychopathic disorder persisted. In the absence of any emergency, there were no particular circumstances to justify the omission. Accordingly, the applicant's recall and return to Broadmoor could not be qualified as the lawful detention of a person of unsound mind for the purposes of Article 5(1)(e).

In *Johnson v United Kingdom (1997)*,¹⁵² the applicant's detention in Rampton [high secure] Hospital was reviewed by a tribunal on 15 June 1989. The tribunal accepted the medical evidence that he was not then suffering from mental illness, stating that the episode of mental illness from which he formerly suffered has come to an end. It ordered his conditional rather than absolute discharge, because he required rehabilitation under medical supervision in a hostel environment, and a recurrence of his mental illness requiring recall to hospital could not be excluded. This discharge was deferred until arrangements could be made for his suitable accommodation. Considerable efforts to secure a hostel were unsuccessful. Eventually, on 12 January 1993, a tribunal ordered his absolute discharge. The applicant complained that his detention between 15 June 1989 and 12 January 1993 violated Article 5(1). More particularly, the tribunal in 1989 should have ordered his immediate and unconditional discharge, since he had made a full recovery from the episode of mental illness specified in the hospital order imposed by the court.

The court observed that it does not automatically follow from a finding by an expert authority that the mental disorder which justified confinement no longer persists that therefore the patient must be immediately and unconditionally released into the community. Such a rigid approach would place an unacceptable degree of constraint on the responsible authority's exercise of judgment when determining whether the interests of the patient and the community will be best served by such a course of action. In the field of mental illness, the assessment as to whether the disappearance of symptoms is confirmation of complete recovery is not an exact science. Whether or not recovery from the episode of illness which justified the confinement is complete and definitive, or merely apparent, cannot always be

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

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

measured with absolute certainty. It is the patient's behaviour outside the confines of the psychiatric institution which will be conclusive of this. Therefore, a responsible authority is entitled to exercise a measure of discretion in deciding whether it is appropriate to order immediate and absolute discharge in a case as this. It is, however, of paramount importance that appropriate safeguards are in place which ensure that any deferral of discharge is consonant with the purpose of Article 5(1)(e) and, in particular, that discharge is not unreasonably delayed.

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

In *Roux v United Kingdom (1996)*,¹⁵³ the applicant was subject to special restrictions because of a risk of serious harm to others. He complained that it had been unlawful for the Home Secretary to recall him to Broadmoor [high-secure] Hospital because of a concern that he was beginning to repeat the pattern of behaviour evident before the commission of his two offences against prostitutes. Mr Roux complained that his recall contravened Article 5 because he had not failed to comply with or breached any condition of the tribunal order discharging him and no breach of an obligation prescribed by law. Furthermore, no court had determined the state of his mental health at the time of his recall. The Government submitted that the Home Secretary's power of recall was not limited by the conditions attached to release and there could be occasions where recall was appropriate even though no conditions had been breached. Conversely, some breaches of the conditions of discharge from hospital would not warrant recall to hospital. In the event, a friendly settlement was reached, whereby the Government agreed to pay £2,000 to the applicant together with the agreed costs.

In *Aerts v Belgium (1998)*,¹⁵⁴ national legislation provided only for the detention of a mentally ill person in a prison as a provisional measure, pending a designation by the relevant mental health board as to the institution where the person was to be detained. The applicant maintained that his detention for seven months in the psychiatric wing of Lantin Prison, pending transfer to the Paifve Social Protection Centre (his designated place of detention), breached Article 5. The prison psychiatric wing was not an appropriate institution for the treatment of the mentally ill and the treatment he received there had done him harm. The court reiterated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the detention of a person as a mental health patient will only be lawful for the purposes of Article

¹⁵³ Roux v United Kingdom, no. 25601/94, 4 September 1996.

¹⁵⁴ Aerts v Belgium, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.

5(1)(e) if effected in a hospital, clinic or other appropriate institution. Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind. Indeed, on 2 August 1993, the Mental Health Board had expressed the view that the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. The proper relationship between the aim of the detention and the location and conditions in which it took place was therefore deficient, and there had been a breach of Article 5.

In *Halilovic v Bosnia and Herzegovina (2009)*,¹⁵⁵ the appellant's detention for four years and five months was pursuant to an administrative decision, as opposed to a decision of the competent civil court, as required by the amended domestic legislation and so breached Article 5(1). Compensation of €22,500 was awarded.

In *X v Finland (2012)*,¹⁵⁶ the court found that while there had been no problem with the applicant's initial involuntary confinement in a mental institution, the safeguards against arbitrariness as regards the need for her continued confinement had been inadequate. In particular, there had been no independent psychiatric opinion, as the two doctors who had decided to prolong her stay were from the hospital where she was confined. In addition, the applicant had no standing under domestic law to seek a review of the need for her continued confinement, as a review could only take place at the initiative of the domestic authorities. In addition to the breach of Article 5, the court also found a violation of the applicant's right to respect for her private life under Article 8 because of the forced administration of medication during her confinement.

ARTICLE 5(2)

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

ARTICLE 5

Right to liberty and security

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

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

The underlying purpose of Article 5§2 is that a person who is arrested must be told why they are being deprived of their liberty. This is an integral part of the scheme of protection afforded by Article 5. It enables the person, if they wish, to apply to a court to challenge the grounds and reasons given and the lawfulness of their detention. This is the right conferred by Article

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

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

5§4,¹⁵⁷ and a person in such a situation cannot make effective use of it unless they are promptly and adequately informed of the reasons for the deprivation of liberty.¹⁵⁸

The words in Article 5§2 must be interpreted ‘autonomously’, that is in accordance with the aim and purpose of Article 5 which is to protect everyone from arbitrary deprivations of liberty. The term ‘arrest’ extends beyond the realm of the criminal law to persons deprived of their liberty in other situations, for example on the ground of unsoundness of mind, and the words ‘any charge’ must be interpreted accordingly.¹⁵⁹

The wording clearly indicates that the duty on states is to furnish specific information to the individual or their representative.¹⁶⁰ The detained person must be told the essential legal and factual grounds for their detention in simple non-technical language that they can understand.¹⁶¹

The reasons do not have to be set out in the text of the decision which authorises the person’s detention; nor do they have to be in writing or in any special form.¹⁶² Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features.¹⁶³ However, a bare indication of the legal basis for the arrest or detention, taken on its own, is insufficient for the purposes of Article 5§2.¹⁶⁴

If the relevant person is incapable of receiving the information, the relevant details must be given to the individuals who represent their interests, such as their lawyer or guardian.¹⁶⁵ More particularly, if the mental condition of a person with an intellectual disability is not given due consideration in the process, it cannot be said that they were provided with the requisite information enabling them to make effective and intelligent use of the right ensured by Article 5§4, unless a lawyer or another authorised person was informed in their stead.¹⁶⁶

In *X v the United Kingdom (1981)*,¹⁶⁷ the court emphasised that the need for the applicant to be apprised of the reasons for his recall followed from Article 5§4; a person entitled to take proceedings to have the lawfulness of their detention speedily decided cannot make effective

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

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

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

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

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

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

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

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

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

166 ZH v Hungary, *supra*, §41.

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

use of that right unless they are promptly and adequately informed of the facts, and the legal authority relied on, to deprive them of their liberty.'

In *Van der Leer v The Netherlands (1990)*,¹⁶⁸ the court held that the word 'arrest' in Article 5(2) embraces deprivation of liberty on the ground of unsoundness of mind:

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

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

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

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

ARTICLE 5(4)

*Article 5§4 provides that everyone who is deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful.'*¹⁶⁹

ARTICLE 5

Right to liberty and security

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

¹⁶⁸ Van der Leer v the Netherlands, no. 11509/85, 21 February 1990, Series A no. 170-A, [1990] ECHR 3, 12 EHRR 567.

¹⁶⁹ As concerns access to justice, see also Article 13 of the UNCRPD. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

Article 5§4 is the *habeas corpus* provision of the Convention. It provides detained persons with the right to seek a judicial review of their detention¹⁷⁰ and this extends to both the procedural and substantive justifications of the deprivation of liberty.¹⁷¹

Furthermore, the notion of ‘lawfulness’ in Article 5§4 has the same meaning as in Article 5§1. Consequently, the detained person is entitled to a review of the ‘lawfulness’ of their detention not just in terms of the requirements of domestic law but also the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1.¹⁷²

The remedy of *habeas corpus* does not enable a judicial determination as wide as this because where the terms of a statute afford the executive a discretion, whether wide or narrow, the review exercisable by the courts in *habeas corpus* proceedings bears solely on the conformity of the exercise of that discretion with the empowering statute.¹⁷³

The Article 5§1(e) criteria for ‘lawful detention’ necessitates that the review guaranteed by Article 5§4 in relation to the continuing detention of a mental health patient should be made by reference to their contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the time of the initial decision to detain.¹⁷⁴

A person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings ‘at reasonable intervals’ to put in issue the lawfulness of their detention.¹⁷⁵ A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own.¹⁷⁶

The forms of judicial review which satisfy the requirements of Article 5§4 may vary from one domain to another and will depend on the type of deprivation of liberty in issue.¹⁷⁷

Where the European Court of Human Rights court has found no breach of the requirements of Article 5§1, this does not release the court from carrying out a review of compliance with Article 5§4. The two paragraphs are separate provisions. Observance of the former does not necessarily entail observance of the latter.¹⁷⁸

¹⁷⁰ Mooren v Germany [GC], no. 11364/03, 9 July 2009, §106; Rakevich v Russia, no. 58973/00, 28 October 2003, §43.

¹⁷¹ Idalov v Russia [GC], no. 5826/03, 22 May 2012, §161; Reinprecht v Austria, no. 67175/01, 12 April 2006, ECHR 2005-XII, (2007) 44 EHRR 39, IHRL 3254, §31.

¹⁷² Suso Musa v Malta, no. 42337/12, 23 July 2013, §50.

¹⁷³ See X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

¹⁷⁴ See X v United Kingdom, *supra*.

¹⁷⁴ Juncal v United Kingdom (dec), no. 32357/09, 17 September 2013, §30; Ruiz Rivera v Switzerland, no. 8300/06, 18 February 2014, §60.

¹⁷⁵ *Ibid.*, §77.

¹⁷⁶ X v Finland, no. 34806/04, 3 July 2012, §170; no. 24086/03, 17 December 2013, §82.

¹⁷⁷ MH v United Kingdom, no. 11577/06, 22 October 2013, §75.

¹⁷⁸ Douiyeb v Netherlands [GC], no. 31464/96, 4 August 1999, §57; Kolompar v Belgium, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §45.

It is not always necessary that an Article 5§4 procedure is attended by the same guarantees as are required under Article 6 for criminal or civil litigation but it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty.¹⁷⁹

The ‘court’ to which the detained person has access does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country.¹⁸⁰ However, it must be a body of ‘judicial character’ offering certain procedural guarantees appropriate to the kind of deprivation of liberty in question.¹⁸¹ To satisfy the requirements of the Convention the review must comply with both the substantial and procedural rules of national legislation and be conducted in conformity with the aim of Article 5, which is to protect the individual against arbitrariness.¹⁸² The ‘court’ must be independent both of the executive and of the parties to the case,¹⁸³ and have the power to order release if it finds that the detention is unlawful. A mere power of recommendation is insufficient.¹⁸⁴

A ‘speedy’ decision

Article 5§4 also proclaims the right to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it is unlawful.¹⁸⁵

The term ‘speedily’ cannot be defined in the abstract. As with the ‘reasonable time’ requirements of Article 5§3 and Article 6§1, whether the decision has been made ‘speedily’ must be determined in the light of the circumstances of the particular case.¹⁸⁶

The notion of ‘speedily’ (*à bref délai*) indicates a lesser urgency than that of ‘promptly’ (*aussitôt*) in Article 5§3.¹⁸⁷ However, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of ‘speediness’ of judicial review under Article 5§4 comes closer to the standard of ‘promptness’ under Article 5§3.¹⁸⁸ The relevant starting point is the date when the application for release was made/the proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant’s detention, including any appeal.¹⁸⁹

¹⁷⁹ A and Others v United Kingdom [GC], no. 3455/05, 19 February 2009, §203; Idalov v Russia [GC], no. 5826/03, 22 May 2012, §161.

¹⁸⁰ Weeks v United Kingdom, no. 9787/82, 2 March 1987, Series A no. 114, (1988) 10 EHRR 293, §61.

¹⁸¹ See e.g. De Wilde, Ooms and Versyp v Belgium, nos. 2832/66; 2835/66; 2899/66, 18 June 1971, Series A no. 12, §§76 and 78.

¹⁸² Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §27.

¹⁸³ Stephens v Malta (no. 1), no. 11956/07, 21 April 2009, §95.

¹⁸⁴ Benjamin and Wilson v United Kingdom, no. 28212/95, 26 September 2002, §§33-34.

¹⁸⁵ Ibid, §154; Baranowski v Poland, no. 28358/95, 28 March 2000 ECHR 2000-III, §68.

¹⁸⁶ RMD v Switzerland, no. 19800/92, 26 September 1997, §42; Rehbock v Slovenia, no. 29462/95, 28 November 2000, ECHR 2000-XII, §84.

¹⁸⁷ E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; Brogan and Others v United Kingdom, nos. 11234/84 and 11209/84, 29 November 1988, Series A no. 145-B, (1988) 11 EHRR 117, §59.

¹⁸⁸ Shcherbina v Russia, no. 41970/11, 26 June 2014, §§65-70, where a delay of sixteen days in the judicial review of the applicant’s detention order issued by the prosecutor was found to be excessive.

¹⁸⁹ Sanchez-Reisse v Switzerland, no. 9862/82, 21 October 1986, Series A no. 107, [1986] ECHR 12, (1986) 9 EHRR 71, §54; E. v Norway, §64.

Where the judicial determination involves complicated issues — such as the detained person's medical condition — this may be taken into account when considering how long is 'reasonable' under Article 5§4. However, even in complicated cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention.¹⁹⁰

If the length of time before a decision is taken is *prima facie* incompatible with the notion of speediness, the court will look to the state to explain the reason for the delay.¹⁹¹

In assessing the speedy character required by Article 5§4, factors such as the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state's responsibility may be taken into consideration.¹⁹²

Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.¹⁹³

In the case of ***Barclay-Maguire v United Kingdom (1983)***,¹⁹⁴ the Commission declared admissible an application which alleged that a delay of 18 weeks between the making of a tribunal application and its determination contravened Article 5(4). The government, seeking a settlement from the Commission, suggested 13 weeks as a reasonable target time. It subsequently failed to meet this target. A number of patients subsequently sought judicial review in relation to delayed hearings but judgment was avoided by offering them an earlier date, necessarily at the expense of other patients.¹⁹⁵

In ***Koendjbiharie v Netherlands (1990)***,¹⁹⁶ the relevant period was held to have began on 17 May 1984 when the application to extend the patient's confinement was filed with the Court of Appeal. The decision was received more than four months later. Such a lapse of time was not compatible with the notion of speediness. The court, accordingly, found a failure to comply with the requirement of 'speediness' laid down in Article 5(4).

In ***Kay v United Kingdom (1994)***,¹⁹⁷ the Commission referred to the court's case law that periods of eight weeks to five months in mental health determinations were difficult to reconcile with the notion of 'speedily' in Article 5(4) of the Convention.¹⁹⁸

190 Frasik v Poland, no. 22933/02, 5 January 2010, §63; Jablonski v Poland, no. 33492/96, 21 December 2000, §§91-93.

191 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §29.

192 Mooren v Germany [GC], no. 11364/03, 9 July 2009, §106; Kolompar v Belgium, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §42.

193 E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §66; Bezicheri v Italy, no. 11400/85, 25 October 1989, Series A no. 164, (1990) 12 EHRR 210, [1989] ECHR 19, §25.

194 Barclay-Maguire v United Kingdom (dec), no. 9117/80, 9 December 1983.

195 See e.g. the judicial review applications in R. v Mental Health Review Tribunal, ex p. Hudson (unreported, 1986) and R. v Mental Health Review Tribunal, ex p. Mitchell (unreported, 1985).

196 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820.

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

198 E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; Van der Leer v the Netherlands, *supra*, §§ 27-28; X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §§32-36.

It was not contested by the government that mental health review tribunals frequently took up to six months to determine cases like the applicant's. In Kay's case, the determination took just over two years and the first hearing date proposed by the tribunal was nearly five months after referral. In the Commission's view, the system itself was inherently too slow. The tribunal proceedings were not conducted 'speedily' within the meaning of Article 5(4).

In ***Pauline Lines v United Kingdom (1997)***,¹⁹⁹ the applicant was subject to special restrictions because of a risk of serious harm to others. She was readmitted to hospital on 27 July 1993. On 7 December 1993, the Home Secretary referred her case to a tribunal which then heard the matter on 23 February 1994. The patient complained about the length of time it took for her to have a review following admission, contrary to Article 5(4). The Commission unanimously declared her complaint to be admissible. In the event, a friendly settlement was reached, whereby the government paid the applicant's representatives £3591.75, of which £2000 represented compensation and the remainder costs.

In ***RSC v United Kingdom (1997)***,²⁰⁰ the applicant was subject to special restrictions because of a risk of serious harm to others. He was recalled to Broadmoor [high-secure] Hospital on 16 November 1994. On 22 November 1994, the Home Secretary referred his case to a tribunal, which adjourned the initial hearing on 20 September 1995 and did not determine his detention until 25 March 1996. The applicant alleged a violation of Article 5(4), *inter alia* on the ground that the tribunal did not decide the matter 'speedily'. A friendly settlement was reached. The government agreed to pay the applicant £2,000 compensation, together with £2,800 costs. It also undertook to amend the tribunal rules, so that when a conditionally discharged patient was recalled there must be a tribunal hearing within two months from the date on which the case was referred to the tribunal (which must be within a month of recall).

Periodic reviews

The detention of persons on the ground of unsoundness of mind constitutes a special category with its own specific problems. In particular, the reasons initially warranting confinement may cease to exist. The very nature of the deprivation of liberty 'would appear to require a review of lawfulness to be available at reasonable intervals. By virtue of Article 5(4), a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is thus in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the lawfulness ... of his detention, whether that detention was ordered by a civil or criminal court or by some other authority.'²⁰¹

Whereas one year per instance may be a rough rule of thumb in Article 6§1 cases, Article 5§4 concerns issues of liberty which require particular expedition.²⁰² Where an individual's personal liberty is at stake, the court has very strict standards concerning the state's compliance with the requirement of speedy review of the lawfulness of detention.

199 Pauline Lines v United Kingdom, European Commission, no. 2451/94, 17 January 1997.

200 RSC v United Kingdom, European Commission, no. 27560/95, 28 May 1997.

201 X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52, referring to Winterwerp v Netherlands, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR, §§ 57 and 60.

202 Panchenko v Russia, §117.

The applicant in *Turnbridge v United Kingdom (1990)*²⁰³ was detained in Broadmoor [high-secure] Hospital. He complained that an annual review of the lawfulness of his detention by a tribunal was insufficient. The Commission found nothing to suggest that the period of a year which the applicant must respect before reapplying to a tribunal for his discharge was an unreasonable interval in the circumstances. Inadmissible.

Legal assistance

In the *Megyeri Case (1992)*,²⁰⁴ the applicant's confinement was grounded on a finding in criminal proceedings that he was not responsible for his acts because he was suffering from a schizophrenic psychosis with signs of paranoia. Sometime later, in July 1986, the Aachen Regional Court had before it expert evidence stating that his condition had deteriorated, he was unwilling to undergo treatment and he had shown a distinct propensity towards aggressive behaviour and violence. Before the Commission, Mr Megyeri submitted that the failure to appoint a lawyer to assist him in the 1986 regional court proceedings concerning his possible release violated Article 5(4). The court found it was doubtful 'to say the least' whether, acting on his own, he was able to marshal and present adequately points in his favour on the relevant issues, involving as they did matters of medical knowledge and expertise. It was even more doubtful whether, on his own, he was in a position to address adequately the legal issue arising: would his continued confinement be proportionate to the aim pursued (the protection of the public). There had been a breach of Article 5(4).

The court stated that the principles enshrined within Article 5(4) included the following:

1. A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings 'at reasonable intervals' before a court to put in issue the 'lawfulness' of their detention (see, *inter alia*, *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52).
2. Article 5(4) requires that the procedure followed must have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place (see *Wassink v Netherlands*, no. 12535/86, 27 September 1990, Series A no. 185-A, [1990] ECHR 22, [1990] ECHR 22, §30).
3. The judicial proceedings referred to in Article 5(4) need not always be attended by the same guarantees as those required by Article 6(1) for civil or criminal litigation. None the less, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards

203 Turnbridge v United Kingdom (dec), European Commission, no. 16397/90, 17 May 1990.

204 Megyeri v Germany, no. 13770/88, 12 May 1992, (1993) 15 EHRR 584, [1992] ECHR 49.

may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v Netherlands*, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR 387, §60).

4. Article 5(4) does not require that persons committed to care under the head of ‘unsound mind’ should themselves take the initiative in obtaining legal representation before having recourse to a court (see *Winterwerp v Netherlands*, *supra*, §66).
5. It follows from the foregoing that where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences, but in respect of which he could not be held responsible on account of mental illness, he should (unless there were special circumstances) receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what was at stake for him (personal liberty) taken together with the very nature of his affliction (diminished mental capacity) compelled this conclusion.

Case law

The applicant in *R v United Kingdom (1986)*²⁰⁵ was detained in Broadmoor [high-secure] Hospital, subject to special restrictions because of a risk of serious harm to others. On 23 March 1984, he appeared before a mental health review tribunal. The tribunal found that it could not evaluate the degree to which he presented a risk to the public without evidence of unescorted leave and accordingly he was not discharged. The applicant complained of a violation of Article 5(4), in that the Mental Health Act 1983 failed to give the tribunal sufficient power to meet the reasonable needs of a ‘court’ within the meaning of Article 5(4). It was not sufficient that the tribunal be able to discharge, conditionally or unconditionally; it must also have ancillary powers, such as the ability to grant brief trial leave of absence. Furthermore, it was difficult to reconcile the exclusive power of the Home Secretary to authorise even one day’s escorted leave with the tribunal’s power to give an absolute discharge, because the power to grant brief trial leave was clearly less drastic than a power to order an absolute discharge.

According to the Commission, ‘In the present case the Mental Health Review Tribunal had jurisdiction to decide on the substantive lawfulness of the applicant’s detention and it had the power (indeed the duty) to release the applicant if the conditions for continued detention were not satisfied. In this respect the present Mental Health Review Tribunal is different from that considered by the Court in the case of *X v United Kingdom*’ (§1). Article 5(4) ‘does not require any control of detention beyond that of “the lawfulness of his detention” and in the present case the Mental Health Review Tribunal was able to make such a review. It follows that this part of the application is manifestly ill-founded’ (§1).

205 R v United Kingdom (dec), European Commission, no. 12039/86, 18 July 1986.

In *Stanev v Bulgaria (2012)*,²⁰⁶ the court found that Mr Stanev was deprived of his liberty (see above). The court then considered his complaint under Article 5§4. The court observed that the Bulgarian Government had not provided any domestic remedy capable of giving him a direct opportunity to challenge the lawfulness of his placement in the institution and the continued implementation of that measure. The validity of the placement agreement could only have been challenged on the ground of lack of consent on his guardian's initiative. The Bulgarian courts were not involved at any time or in any way in the placement and the domestic legislation did not provide for automatic periodic judicial review of placements in homes for people with mental disorders. Because his placement in the institution was not recognised as a deprivation of liberty in Bulgarian law, there were no national legal remedies available to challenge its lawfulness. Therefore, there had been a violation of Article 5§4.

In *DD v Lithuania (2012)*,²⁰⁷ the court found that DD was deprived of her liberty in the social care home where she was confined (see above). The court then considered her right to a review of her deprivation of liberty. The court noted that Article 5§4 requires that the procedure followed has a judicial character and gives to the individual guarantees appropriate to the kind of deprivation of liberty in question. It is essential that the person has access to a court and the opportunity to be heard in person or, where necessary, through some form of representation. Special procedural safeguards may be called for to protect the interests of those who, because of their mental disabilities, are not fully capable of acting for themselves. That last principle was all the truer when, as here, the placement was carried out without any involvement on the part of the courts. The form of judicial review may vary from one domain to another and depend on the type of the deprivation liberty at issue. However:

'165... It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kedainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.

166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kedainiai Home in the first place. The court also observes that the applicant's current legal guardian is the Kedainiai Home – the same social care institution which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the court considers that where a person capable of expressing a view, despite having been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation...

²⁰⁶ Stanev v Bulgaria [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46.

²⁰⁷ DD v Lithuania, no. 13469/06, 14 February 2012, [2012] ECHR 254.

167. In the light of the above, the court ... holds that there has also been a violation of Article 5§4 of the Convention.'

ARTICLE 6

Article 6(1) provides that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁰⁸

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Proceedings to divest individuals of their legal capacity

In **Shtukaturov v Russia (2008)**,²⁰⁹ the applicant had a history of mental illness and was officially declared disabled in 2003. Following a request filed by his mother, the Russian courts declared him legally incapable in December 2004. His mother was subsequently appointed as his guardian and, in November 2005, she admitted him to a psychiatric hospital. The applicant alleged that he had been deprived of his legal capacity without his knowledge.

The court held that there had been a violation of Article 6 in relation to the proceedings depriving the applicant of his legal capacity. The applicant, who appeared to have been a relatively autonomous person despite his illness, had not been given any opportunity to participate in the proceedings concerning his legal capacity. Given the consequences of those proceedings for his personal autonomy and indeed liberty, his attendance had been indispensable not only to give him the opportunity to present his case, but also to allow the judge to form an opinion on his mental capacity. Therefore, the decision in December 2004, based as it was purely on documentary evidence, had been unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6§1.

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

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

The case of *X and Y v Croatia (2011)*²¹⁰ concerned proceedings brought by social services to divest a mother and daughter of their legal capacity. The first applicant, who was born in 1923, was bedridden and suspected to be suffering from dementia. She was divested of her legal capacity in August 2008. She alleged that the proceedings had been unfair because she had not been notified of them and thus had not been heard by a judge or been able to give evidence. The court held that there had been a violation of Article 6§1, finding that the first applicant had been deprived of adequate procedural safeguards in proceedings which resulted in a decision adversely affecting her private life. As regards the reasons adduced by the domestic court for its decision, the court observed that in order to ensure proper care for the ill and elderly the state authorities had at their disposal much less intrusive measures than divesting them of legal capacity.

In *Stanev v Bulgaria (2012)*,²¹¹ the court found that Mr Stanev was deprived of his liberty and that there had been a violation of his rights under Article 5§4 (see above). The court then proceeded to consider whether Article 6 had also been breached. The court noted that, under Bulgarian law, no legal distinction was made between those partially and fully deprived of legal capacity. The measure in question was indefinite and Mr Stanev was unable to apply for the restoration of his legal capacity other than through his guardian or one of the people listed in legislation. Nor was there any automatic periodic review of whether the grounds for placing a person under guardianship remained valid. Although the right of access to the courts was not absolute and restrictions on a person's procedural rights might be justified, even in cases where the person had been only partially deprived of legal capacity, the right to ask a court to review a declaration of incapacity was a fundamental procedural right for the protection of those who had been partially deprived of legal capacity. It followed that in principle such people should have direct access to the courts.

The court observed that, according to a recent study, 18 out of 20 national European legal systems allowed direct access to the courts for any partially incapacitated person who wished to have their status reviewed. In 17 countries such access was even open to those declared fully incapable. There was therefore a European trend towards granting legally incapacitated people direct access to the courts to seek a restoration of their legal capacity. The court stressed the growing importance which international instruments for the protection of people with mental disorders attached to granting them as much legal autonomy as possible. Article 6§1 should be interpreted therefore as guaranteeing in principle that anyone in Mr Stanev's position must have direct access to a court to seek restoration of their legal capacity. As direct access of this kind was not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation, there had been a violation of Article 6§1.

The case of *Nataliya Mikhaylenko v Ukraine (2013)*²¹² concerned the applicant's lack of access to court for the purpose of seeking a restoration of her legal capacity. In 2007, the applicant was deprived of her legal capacity on the ground that she was suffering from a serious mental illness. Gradually, her mental health improved. In 2009, her guardian applied for her legal capacity to be restored but the application was dismissed without being considered on its merits owing to the guardian's repeated failure to appear in court. In 2010

210 X and Y v Croatia, no. 5193/09, 3 November 2011.

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

212 Nataliya Mikhaylenko v Ukraine, no. 49069/11, 30 May 2013, [2013] ECHR 484.

the applicant herself lodged an application for her legal capacity to be restored. However, both it and her subsequent appeals were dismissed on the ground that the Code of Civil Procedure did not provide her with a right to lodge such an application. Under domestic legislation it was for the applicant's guardian or the guardianship authority to raise the issue of the restoration of her legal capacity before a court.

The court observed that the applicant had had no procedural status in capacity proceedings and could not influence them. By virtue of clear and foreseeable rules of domestic law, she could not personally apply to a court for restoration of her legal capacity. Furthermore, the Code did not provide that a declaration of legal incapacity was subject to automatic judicial review even though the duration of the measure in her case was not limited in time. Lastly, it had not been shown that the domestic authorities had effectively supervised the applicant's situation, including the performance of the guardian's duties, or taken the requisite steps to protect her interests. Restrictions on the procedural rights of persons deprived of their legal capacity could be justified to protect their own or others' interests or for the proper administration of justice. However, the approach pursued by the domestic law in this case was not in line with the general trend at European level. The absence of any judicial review, which had seriously affected many aspects of the applicant's life, could not be justified by the legitimate aims underpinning the limitations on access to a court by incapacitated persons. The situation in which she had been placed amounted to a denial of justice as regards the possibility of securing a review of her legal capacity. Article 6(1) had been violated.

Other case law

In ***Mocie v France (2003)***,²¹³ the applicant had applied to the competent national courts, seeking mainly an increase in his military invalidity pension. The first set of proceedings, which commenced in 1988, was still pending when the European Court of Human Rights delivered its judgment almost 15 years later; a second set of proceedings had lasted for almost eight years.

The court held that there had been a violation of Article 6§1 on account of the length of the proceedings in question. It noted that the invalidity pension had made up the bulk of the applicant's income. The proceedings had in substance been aimed at boosting the applicant's pension in the light of his deteriorating health. They were therefore of particular importance to him and called for particular diligence on the part of the authorities.

The case of ***Farcaş v Romania (2010)***²¹⁴ involved applicant who had suffered from progressive muscular dystrophy since the age of 10. He complained that one effect of his physical disability was that it was impossible for him to access certain buildings, in particular those of the courts that had jurisdiction over disputes concerning his civil rights. Because the entrance to the local court building was not specially adapted, he could not enter the court or seek assistance from the bar association, and had been unable to challenge the termination of his contract.

213 Mocie v France, no. 46096/99, 8 April 2003.

214 Farcaş v Romania (dec), no. 32596/04, 14 September 2010.

The court declared the application to be manifestly ill-founded and inadmissible, even when viewed in conjunction with Article 14 (prohibition of discrimination). On the facts, it found that neither Mr Farcas's right of access to a court nor his right of individual petition had been hindered by insurmountable obstacles which prevented him from bringing proceedings, lodging an application or communicating with the court. He could have brought proceedings before the courts or administrative authorities by post, if necessary through an intermediary. The local post-office was accessible and, in any event, access to it was not indispensable for posting letters. The assistance of a lawyer was not necessary to bring the proceedings in question, and the applicant could always have contacted the bar association by letter or fax, or made a request to the court for free legal assistance. No appearance of discriminatory treatment against the applicant had been noted.

The case of **Blokhin v Russia (2016)** concerned the detention for 30 days in a temporary detention centre for juvenile offenders of a 12-year old boy suffering from a mental and neuro-behavioural disorder. The applicant maintained that the proceedings against him had been unfair for two reasons. He had been questioned by the police in the absence of his guardian, a legal counsel or a teacher and he had not been given the opportunity to cross-examine the two witnesses against him. The Grand Chamber held that there had been a violation of Article 6 §§1 and 3. The applicant's defence rights had been violated because he had been questioned by the police without legal assistance. Furthermore, the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention. When their liberty was at stake, it was essential that adequate procedural safeguards were in place to protect the best interests and well-being of a child. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected. There had also been violations of Article 3 (inhuman or degrading treatment) and Article 5 §1 (right to liberty and security).

ARTICLE 8

Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence. There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article 8.²¹⁵

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

215 See also Article 22 (Respect for privacy) of the UNCRPD: '1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court has on a number of occasions ruled that ‘private life’ is a broad term not susceptible to exhaustive definition.²¹⁶ However, Article 8 ‘secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality’.²¹⁷ It protects the moral and physical integrity of the individual, including the right to live privately away from unwanted attention.²¹⁸

The right to respect for one’s private life guaranteed by Article 8 has been prominent in relation to issues of health, treatment and care. The court has interpreted the right to such respect as including the right to protection of one’s physical, moral and psychological integrity, as well as the right to choose and exercise one’s personal autonomy; for example, to refuse medical treatment or to request a particular form of medical treatment.²¹⁹ The imposition of treatment against a person’s will gives rise to an interference with their right to respect for their private life and their right to physical integrity.

While Article 8 contains no explicit procedural requirements, ‘the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8’.²²⁰ The extent of the state’s margin of appreciation turns partly on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism.²²¹

The issue of proportionality (the interference must be ‘necessary in a democratic society’) is a consistent theme the case law. When considering whether an interference is proportionate, the burden lies on the state to justify its action. The ‘proportionality’ test entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of the individual with those of the whole community.

More particularly, under Article 8 the authorities must strike a fair balance between the interests of a person of unsound mind and the other legitimate interests concerned. As a rule, in complicated matters such as issues concerning mental capacity the authorities enjoy a wide margin of appreciation. National authorities have the benefit of direct contact with the persons concerned and therefore are particularly well placed to determine such issues. The court’s task is rather to review under the Convention the decisions taken by the national authorities in the exercise of their powers.²²²

216 Peck v United Kingdom, no. 44647/98, 28 January 2003, (2003) 36 EHRR 41, [2003] ECHR 44, §57.

217 Sidabras v Lithuania, nos. 55480/00 and 59330/00, 27 July 2004, (2006) 42 EHRR 6, §43; Brüggeman v Germany, no. 6959/75, 12 July 1977, (1981) 3 EHRR 244, §55.

218 X and Y v Netherlands, no. 8978/80, 26 March 1985, (1985) 8 EHRR 235, [1985] ECHR 4, §§22–27.

219 Glass v United Kingdom, no. 61827/00, 9 March 2004, [2004] ECHR 102, (2004) 39 EHRR 15, §§74–83; Tysiąc v Poland, no. 5410/03, 20 March 2007, [2007] ECHR 219, (2007) 45 EHRR 42.

220 Shtukaturov v Russia, *supra*, §89; Görgülü v Germany, no. 74969/01, 26 February 2004, §52.

221 Shtukaturov v Russia, *supra*, §89; Sahin v Germany, no. 30943/96, 11 October 2001, §§46 et seq.

222 Shtukaturov v Russia, *supra*, §87; *mutatis mutandis*, Bronda v Italy, no. 22430/93, 9 June 1998, Reports 1998-IV, §59.

Notwithstanding this observation, the margin of appreciation varies in accordance with the nature of the issues and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life.²²³

The positive obligation

Article 8 gives rise to both negative and positive obligations. States are under a positive obligation to secure the right to effective respect for physical and psychological integrity.²²⁴ This obligation may require the state to take measures to provide effective and accessible protection of the right to respect for private life,²²⁵ through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures.²²⁶

Medical treatment

The issue of free and informed consent to medical treatment has been a feature of the case law under Article 8.

In *Grare v France (1983)*,²²⁷ a voluntary in-patient complained his treatment with antipsychotic drugs resulted in unpleasant side-effects that violated Article 8. It was held that, even if the treatment regime constituted an invasion of his private life, it justified in the interests of his health and public order.

In *Acmanne v Belgium (1983)*,²²⁸ compulsory tuberculosis screening was held not to breach Article 8 although it interfered with the individual's private life.

In *TV v Finland (1994)*,²²⁹ the court ruled inadmissible a claim by an HIV-positive prisoner that his Article 8 rights were breached because guards were present during his medical review at an outside clinic and because staff involved in his treatment had allegedly disclosed his HIV status to others.

It was held that although access by prison and medical staff to information regarding the applicant's HIV status constituted an interference with his Article 8(1) rights, this could be justified under Article 8(2). His medical notes were marked to alert staff to his blood-borne disease and the access to this information was lawful, necessary to protect the rights and freedoms of others and proportionate.

223 Shtukaturov v Russia, *supra*, §88; Elsholz v Germany [GC], no. 25735/94, ECHR 2000-VIII, §49.

224 Sentges v Netherlands (dec), no. 27677/02, 8 July 2003; Pentiacova and Others v Moldova (dec) no. 14462/03, 4 January 2005; Nitecki v Poland (dec), no. 65653/01, 21 March 2002.

225 Airey v Ireland, no. 6289/73, 11 September 1979, (1979) 2 EHRR 305, [1979] ECHR 3, §33; McGinley and Egan v United Kingdom, nos. 10/1997/794/995-996, 9 June 1998, [1998] ECHR 51, §101; Roche v United Kingdom, no. 32555/96, 19 October 2005, [2008] ECHR 926, (2006) 42 EHRR 30, §162.

226 Tysiąc v Poland, *supra*, §110.

227 Grare v France, no. 18835/91, 2 December 1992, 15 EHRR CD 100.

228 Acmanne v Belgium, no. 10435/83, 40 DR 251.

229 TV v Finland (dec), no. 21780/93, 2 March 1994.

The case of ***Passannante v Italy (1998)***²³⁰ concerned a five-month delay for a neurological appointment in the state system, whereas a private appointment was available in four days. Pursuant to the positive obligation, it was held that excessive delay on the part of a public health service to provide a medical service to which a patient was entitled can raise an issue under article 8, if the delay has or is likely to have a serious impact on the patient's health. However, on the facts this duty did not arise because no damage to health was evidenced.

The case of ***Glass v United Kingdom (2004)***²³¹ concerned the administration of drugs to a severely disabled child (the second applicant) despite the opposition of his mother (the first applicant). Believing that the child had entered a terminal phase and, with a view to relieving his pain, the doctors administered diamorphine against the mother's wishes. Furthermore, a 'do not resuscitate' notice was added to the child's file without consulting the mother. During this time disputes broke out in the hospital involving family members and the doctors. The child survived the crisis and was able to be discharged home. The applicants argued that UK law and practice had failed to guarantee respect for the child's physical and moral integrity.

The court held that the decision of the authorities to override the mother's objections to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8. The decision to impose treatment in defiance of her objections interfered with the child's right to respect for his private life, and in particular his right to physical integrity. This interference was in accordance with the law and the action taken by the hospital staff had pursued a legitimate aim. However, as to the necessity of the interference, it had not been explained to the court's satisfaction why the hospital had not sought the intervention of the courts in the initial stages to overcome the deadlock. The onus to take such an initiative and defuse the situation in anticipation of a further emergency was on the hospital. Instead, the doctors used the limited time available to try to impose their views on the mother.

Correspondence of patients

In ***Herczegfalvy v Austria (1992)***,²³² the applicant complained that the hospital authorities had violated Article 8 by administering food by force, imposing treatment he complained of and refusing to send on his correspondence. The complaint was directed in particular at the psychiatric hospital's practice of sending all of his letters to the curator for him to select which ones to pass on. The court noted that this interference constituted a breach of Article 8 unless it was 'in accordance with the law', pursued a legitimate aim or aims under paragraph 2, and was 'necessary in a democratic society' for achieving such aims. The expression 'in accordance with the law' required that the impugned measure had a basis in national law; but it also referred to the quality of the law in question, requiring that it was accessible to the person, who must be able to foresee its consequences for him, and compatible with the rule of law. Compatibility with the rule of law implied that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by Article 8(1). If a law conferred a discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required would depend on the particular subject matter.

230 Passannante v Italy (dec), no. 32647/96, 1 July 1998, 26 EHRR CD153.

231 Glass v United Kingdom, no. 61827/00, 9 March 2004, [2004] ECHR 102, (2004) 39 EHRR 15.

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

Although the Austrian government had argued that the impugned decisions were based directly on section 51 of the Hospitals Law, and articles in the Civil Code, these very vaguely worded provisions did not specify the scope or conditions of exercise of the discretionary power. Such specifications appeared all the more necessary in the field of detention in psychiatric institutions because the persons concerned were frequently at the mercy of the medical authorities. Their correspondence might be their only contact with the outside world. In the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or the arrangements for their review, the provisions did not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society, and there had been a violation of Article 8.

Information and Confidentiality

In *Panteleyenko v Ukraine (2006)*,²³³ the applicant complained about the disclosure at a court hearing of confidential information about his mental state and psychiatric treatment. The court found that obtaining from a psychiatric hospital confidential information concerning the applicant's mental state and treatment, and disclosing it at a public hearing, amounted to an interference with his right to respect for his private life. The court noted that the information was incapable of affecting the outcome of the litigation; the first-instance court's request for information was 'redundant' because the information was not 'important for an inquiry, pre-trial investigation or trial'.

In *Szuluk v United Kingdom (2009)*,²³⁴ the court dealt for the first time with the issue of medical confidentiality in prison. A prisoner who had undergone brain surgery discovered that his correspondence with the specialist supervising his hospital treatment had been monitored by a prison medical officer. The court found a violation of his right to respect for his correspondence under Article 8.

Changes of mentor, guardian or similar person in authority

In *JT v United Kingdom (2000)*,²³⁵ the applicant was detained in hospital for treatment under the Mental Health Act 1983. Her statutory 'nearest relative', who exercised important powers under the Act, was her mother. There was no mechanism in the Act which enabled JT to apply for the 'nearest relative' to be replaced. Her mother had persistently taken her stepfather's side and he had (allegedly) sexually abused her, which she said was responsible to a significant extent for her psychiatric difficulties. She complained that because her mother was her nearest relative in law, she was entitled to receive, and then discuss with him, information for tribunal reviews, which violated her right to respect for her private life. The Commission held that the absence of any possibility to apply to a court to change her nearest relative interfered with JT's rights under Article 8(1) and was disproportionate to the aims pursued. There had been a violation. Following that finding, the applicant's case was struck out after a friendly settlement under which the government undertook to seek to amend the legislation.

233 Panteleyenko v Ukraine, no. 11901/02, 29 June 2006.

234 Szuluk v United Kingdom, no. 36936/05, 2 June 2009, [2009] ECHR 845.

235 JT v United Kingdom, no. 26494/95, 30 March 2000, [2000] ECHR 132; [2000] ECHR 133.

The case of **A-MV v Finland (2017)**²³⁶ concerned an intellectually disabled man's complaint about the Finnish courts' refusal to replace his court-appointed mentor, which had the effect that he had been prevented from deciding where, and with whom, he would like to live. His court-appointed mentor had decided that it was not in his best interests to move from his home town in the south to live in a remote village in the far north with his former foster parents. His request to replace the mentor was refused in the domestic proceedings.

The court held that there had been no violation of Article 8. The Finnish courts' decision to refuse to replace the mentor was justified. It was reached following a concrete and careful consideration of the applicant's situation. It had taken into account his inability to understand what was at stake if he moved, namely that it would involve a radical change in his living conditions. Such a decision, taken in the context of protecting his health and well-being, had therefore not been disproportionate. Moreover, the applicant had been involved at all stages of the proceedings and his rights, will and preferences had been taken into account by competent, independent and impartial domestic courts. Nor had there been any violation of Article 2 (freedom of movement) of Protocol No. 4 to the Convention.

Disproportionate deprivation of decision-making legal capacity

In **Shtukaturov v Russia**,²³⁷ the applicant had a history of mental illness and was officially declared disabled in 2003. Following a request filed by his mother, the Russian courts declared him legally incapable on 28 December 2004. This decision deprived him of his capacity to act independently in almost all areas of life: he was no longer able to buy or sell any property on his own, to work, to travel, to choose his place of residence, to join associations or to marry. Even his liberty could henceforth be limited without his consent and without any judicial supervision. His mother was appointed as his guardian and, in November 2005, she admitted him to a psychiatric hospital. The applicant alleged, *inter alia*, that the interference with his private life was disproportionate and so contravened Article 8.

The court held that there had been a violation of Article 8 as a result of the applicant being fully deprived of his legal capacity. The principles for the legal protection of incapable adults set down by the Council of Europe's Committee of Ministers²³⁸ recommended that legislation should provide a 'tailor-made' response to each individual case. However, Russian legislation distinguished only between full capacity and full incapacity and made no allowances for borderline situations.

The interference with the applicant's private life had resulted in him becoming fully dependent on his official guardian in almost all areas of his life for an indefinite period when this was disproportionate to the government's legitimate aim of protecting his interests and health of others.

236 A-MV v Finland, no. 53251/13, 23 March 2017.

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

238 Recommendation no. R (99) 4 of 23 February 1999. 'Although these principles have no force of law for this Court, they may define a common European standard in this area', at §95.

Furthermore, his participation in the decision-making process had been ‘reduced to zero’. The court was particularly struck by the fact that the only hearing on the merits in his case lasted ten minutes. In such circumstances it could not be said that the judge had ‘had the benefit of direct contact with the persons concerned’, which normally would call for judicial restraint on the part of the European Court of Human Rights. Given the seriousness of the interference complained of, the court proceedings were perfunctory at best and the reasoning inadequate:

‘94 ... the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure — see, mutatis mutandis, *Winterwerp*, cited above, §40.’

In the applicant’s case, the questions to the doctors formulated by the judge did not concern ‘the kind and degree’ of his mental illness, and the medical report did not analyse the degree of his incapacity in sufficient detail, nor explain what kind of actions he was unable to understand and control.

Having examined the decision-making process and the reasoning behind the domestic decisions, the court concluded that the interference with the applicant’s private life was disproportionate to the legitimate aim pursued. There had therefore been a breach of Article 8 ‘on account of the applicant’s full incapacitation (§96).’

In *Ivinović v Croatia (2014)*,²³⁹ the applicant, who was born in 1946, had suffered from cerebral palsy and used a wheelchair since early childhood. The case concerned proceedings, brought by a social welfare centre, in which she had been partly divested of her legal capacity. The court held that there had been a violation of Article 8, finding that the Croatian courts, in depriving partially the applicant of her legal capacity, did not follow a procedure which could be said to be in conformity with the guarantees under Article 8.

In *AN v Lithuania (2016)*,²⁴⁰ the applicant had a history of mental illness. He complained that he had been deprived of his legal capacity without his participation or knowledge and that, as an incapacitated person, he had then been unable to request the restoration of his legal capacity. The court held that there had been a violation of Article 8, finding that the interference with the applicant’s right to respect for his private life had been disproportionate to the legitimate aim pursued. The district court had had no opportunity to examine the applicant in person and essentially had relied in its decision on the testimony of his mother and the psychiatric report. While the court did not doubt the competence of the medical expert or the seriousness of the applicant’s illness, it stressed that the existence of a mental disorder, even a serious one, could not be the sole reason to justify full incapacitation. The court also held that there had been a violation of Article 6§1 (right to a fair trial), finding that the regulatory framework for depriving people of their legal capacity had not provided the necessary safeguards. The applicant had been deprived of a clear, practical and effective opportunity to have access to court in connection with the incapacitation proceedings.

239 *Ivinović v Croatia*, no. 13006/13, 18 September 2014.

240 *AN v Lithuania*, no. 17280/08, 31 May 2016.

Lack of legal representation of a disabled child

The case of **AMM v Romania (2012)**²⁴¹ concerned proceedings to establish the paternity of a 10-year old minor AMM who was born outside marriage and had a number of disabilities. He had been registered on his birth certificate as having a father of unknown identity. His putative father Z did not attend the domestic court hearing or co-operate with forensic tests. Before the domestic court, the applicant was first represented by his mother and subsequently, since his mother suffered from a serious disability which resulted in her being placed under the care of the social welfare authorities, by his maternal grandmother. The court held that there had been a violation of Article 8. The domestic courts did not strike a fair balance between the child's right to have his interests safeguarded in the proceedings and the right of his putative father not to undergo a paternity test or take part in the proceedings. As concerned the issue of whether the Romanian State had acted in breach of its positive obligation under Article 8, the guardianship office had not taken part in the proceedings as it was required to do. Nor had the applicant or his mother had been represented by a lawyer at any point in the proceedings. The Court pointed out that it had previously held that consideration must be given to the vulnerability of certain individuals and their inability in some cases to plead their case coherently or, indeed, at all. Having regard to the child's best interests, it had been up to the authorities to act on his behalf in order to compensate for the difficulties facing his mother, so as to avoid him being without protection.

Strip-searches

In **Wainwright v United Kingdom (2006)**,²⁴² Mr Patrick O'Neill (the first applicant's son and the second applicant's half-brother) was arrested on suspicion of murder and detained on remand at HM Prison Armley. Following a report by a senior prison officer raising suspicions that he was involved in the supply and use of drugs within prison, the prison governor ordered that all of his visitors be strip-searched before visits. A complaint was made that this contravened Article 8. The court held that due to their manner the strip searches of the applicants did breach Article 8 but did not reach the minimum level of severity prohibited by Article 3.

Other case law

In **X and Y v the Netherlands (1985)**,²⁴³ a girl with an intellectual disability (the second applicant) lived in a home for children with mental disabilities. On the day after her sixteenth birthday (which was the age of consent for sexual intercourse in the Netherlands) she was raped in the home by a relative of the person in charge. She was traumatised by the experience but deemed unfit to sign an official complaint given her low mental age. Her father (the first applicant) signed in her place but proceedings were not brought against the perpetrator because the girl had to make the complaint herself. The domestic courts recognised that there was a gap in the law.

241 AMM v Romania, no. 2151/10, 14 February 2012.

242 Wainwright v United Kingdom, no. 12350/04, 26 September 2006, [2006] ECHR 807.

243 X and Y v Netherlands, no. 8978/80, 26 March 1985, (1985) 8 EHRR 235, [1985] ECHR 4.

The court recalled that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities. However, it does not merely compel the state to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. In the present case, the protection afforded by the civil law in a case of wrongdoing of the kind inflicted on the second applicant was insufficient. This was a case where fundamental values and essential aspects of private life were at stake. Effective deterrence was indispensable in this area and could be achieved only by criminal-law provisions. Observing that the Dutch Criminal Code had not provided her with practical and effective protection, the court concluded that the second applicant had been the victim of a violation of Article 8.

In *Kutzner v Germany (2002)*,²⁴⁴ the applicants, husband and wife, and their two daughters had lived since the children's birth with the first applicant's parents and an unmarried brother in an old farmhouse. The applicants had attended a special school for people with learning difficulties. Owing to their late physical and, more particularly, mental development, the girls were examined on a number of occasions by doctors. On the advice of one of the doctors and their own application, the girls had received educational assistance and support from a very early age. The applicants complained that the subsequent withdrawal of their parental authority and the placing of their daughters with foster families, mainly on the ground that they lacked the intellectual capacity to bring up their children, breached their right to respect for their family life. The court held that there had been a violation of Article 8. The authorities may have had legitimate concerns about the late development of the children, as noted by the social services departments concerned and psychologists. However, the placement order and its implementation had been unsatisfactory. Although the reasons relied on by the administrative and judicial authorities had been relevant, they had been insufficient to justify such a serious interference in the applicants' family life. Notwithstanding a margin of appreciation, the interference had not been proportionate to the legitimate aims pursued.

In *AK and L v Croatia (2013)*,²⁴⁵ the first applicant was the mother of the second applicant, who was born in 2008. Soon after his birth, the second applicant was placed with a foster family in another town on the grounds that his mother had no income and lived in a dilapidated property without heating. The first applicant had consented to this. Her complaint was that she had not been represented in the subsequent court proceedings which resulted in a decision divesting her of her parental rights, on the ground that she had a mild mental disability, and that her son had been put up for adoption without her knowledge, consent or participation in the adoption proceedings. The court held that there had been a violation of Article 8. Despite it being a requirement of domestic law, and the authorities' findings that the first applicant suffered from a mild mental disability, she had not been represented by a lawyer in the proceedings divesting her of parental rights. In addition, by not informing her of the adoption proceedings, the national authorities had deprived her of the opportunity to seek a restoration of her parental rights before the ties between her and her son had been finally severed by his adoption. The first applicant had thus been prevented from enjoying her right guaranteed by domestic law and had not been sufficiently involved in the decision-making process.

²⁴⁴ Kutzner v Germany, no. 46544/99, 26 February 2002, (2002) 35 EHRR 653; [2002] ECHR 160.

²⁴⁵ AK and L v Croatia, no. 37956/11, 8 January 2013, [2013] ECHR 290.

In *Kocherov and Sergeyeva v Russia (2016)*,²⁴⁶ the first applicant, who had a mild intellectual disability, lived in a care home between 1983 and 2012. In 2007, he and another resident of the care home had a daughter, the second applicant. A week after her birth the child was placed in public care where, with the first applicant's consent, she remained for several years. In 2012, the first applicant was discharged from the care home and expressed an intention to take the second applicant into his care. However, the domestic courts restricted his parental authority over the child. The second applicant remained in public care although the first applicant was allowed to maintain regular contact with her. In 2013, he managed to have the restriction of his parental authority lifted and the second applicant went to live with him. The applicants complained that, as a result of the restriction of the first applicant's parental authority, their reunification had been postponed for a year.

The court held that there had been a violation of Article 8. The reasons relied on by the Russian courts to restrict the first applicant's parental authority had been insufficient to justify the interference with the applicants' family life, and therefore been disproportionate to the legitimate aim pursued. As to the first applicant's mental disability, it appeared from a report submitted to the domestic authorities that his state of health allowed him fully to exercise his parental authority. However, the domestic court had disregarded this evidence. The question whether the mother posed a danger to the child was directly relevant when it came to striking a balance between the child's interests and those of her father. However, the domestic courts had based their fears for the second applicant's safety on a mere reference to the fact that she lacked legal capacity, without demonstrating that her behaviour had or might put the second applicant at risk. Their reference to the mother's legal status was thus not a sufficient ground for restricting the first applicant's parental authority.

In *Dmitriy Ryabov v Russia (2013)*,²⁴⁷ the applicant complained about having only restricted access to his son following his son's placement in the care of maternal grandparents soon after being born. The applicant and his wife both suffered from schizophrenia and he alleged that court decisions to restrict his parental rights on the ground he was a danger to his son had not been convincing. Any contact that had been granted to him had been illusory because it had to take place with the consent of his son's guardian, the maternal grandmother, who was hostile to him having any contact. The court held that there had not been a violation of Article 8. The interference with the applicant's parental rights constituted an interference with his right to respect for his family life. However, it had been in accordance with the law, pursued the legitimate aim of protecting the health and morals and rights and freedoms of the child, and had been necessary in a democratic society, within the meaning of Article 8.

ARTICLE 12

*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*²⁴⁸

246 Kocherov and Sergeyeva v Russia, no. 16899/13, 29 March 2016, [2016] ECHR 312.

247 Dmitriy Ryabov v Russia, no. 33774/08, 1 August 2013, [2013] ECHR 771.

248 Article 23 (Respect for home and the family) of the UNCRPD requires State parties to ensure that the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The right contained in Article 12 is closely related to Article 8 which secures a right to respect for one's private and family life, home and correspondence.

In *Lashin v Russia (2013)*,²⁴⁹ the applicant suffered from schizophrenia and had been legally incapacitated since 2000. In 2002 he and his fiancée applied to the competent authority in order to register their marriage. However, they were unable to do so because the Russian Family Code prohibited persons who were legally incapacitated due to mental disorder from getting married. Having already found a violation of Article 8 on account of the maintenance of the applicant's status as an incapacitated person and his inability to have it reviewed, the court considered that there was no need for a separate examination under Article 12. The applicant's inability to marry was one of many legal consequences of his incapacity status.

Pending application

*Delecolle v France*²⁵⁰ is a pending application which was communicated to the French Government on 18 September 2015. The applicant, who was born in 1937, complains that he is unable to marry, and criticises the fact he must obtain authorisation from a supervisor or the guardianship judge in order to marry. The court gave notice of the application to the French Government and put questions to the parties under Article 12 of the Convention.

ARTICLE 14

Article 14 prohibits discrimination based on 'any status', such as mental ill-health.

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

free and full consent of the intending spouses is recognized. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

249 Lashin v Russia, no. 33117/02, 22 January 2013, [2013] ECHR 282.

250 Delecolle v France, no. 37646/13.

The right under Article 14 not to be discriminated against on account of one's physical or mental condition has also been examined by the court, which has expressly acknowledged health as being one of the protected grounds which can be relied on in non-discrimination cases.²⁵¹ Relevant case law has been referred to above in the course of summarising the case law concerning persons suffering from mental ill-health.

RIGHT TO VOTE (ARTICLE 3 OF PROTOCOL NO. 1)

States undertake to hold elections which ensure the free expression of the opinion of 'the people'.

ARTICLE 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Having been diagnosed with a psychiatric condition in 1991, the applicant in *Alajos Kiss v Hungary (2010)*²⁵² was placed under partial guardianship in May 2005 on the basis of the civil code. In February 2006, he realised that he had been omitted from the electoral register drawn up for upcoming legislative elections. His complaint to the electoral office was to no avail. He further complained to the district court which in March 2006 dismissed his case, observing that under the Hungarian Constitution persons placed under guardianship did not have the right to vote. When legislative elections took place in April 2006, the applicant could not participate. He submitted that his disenfranchisement, imposed on him because he was under partial guardianship for a psychiatric condition, constituted an unjustified deprivation of his right to vote that was not susceptible to any remedy.

The court held that there had been a violation of Article 3 of Protocol No. 1. The indiscriminate removal of voting rights without an individualised judicial evaluation, solely on the grounds of mental disability necessitating partial guardianship, could not be considered compatible with the legitimate grounds for restricting the right to vote. Mentally disabled people were at risk of legislative stereotyping and the state had to have very weighty reasons when restricting fundamental rights to such particularly vulnerable groups in society without an individualised evaluation of their capacities and needs. The applicant had lost his right to vote as a result of the imposition of an automatic, blanket restriction.

251 Kiyutin v Russia, no. 2700/10, 10 March 2011; IB v Greece, no. 552/10, 3 October 2013.

252 Alajos Kiss v Hungary, no. 38832/06, 20 May 2010, [2010] ECHR 692.

The case of *Gajcsi v Hungary (2014)*²⁵³ concerned an applicant who suffered from a psycho-social disability. In 2000 a district court placed the applicant under partial guardianship and as an automatic consequence his name was deleted from the electoral register. In 2008 his legal capacity was restored in all areas in health care matters but his electoral rights were not restored. This meant that he was unable to vote in the general elections in Hungary in 2010.

Referring to its decision in *Alajos Kiss v Hungary*, the court held that there had been a violation of Article 3 of Protocol No. 1.

ARTICLE 2 OF PROTOCOL No 4 (FREEDOM OF MOVEMENT)

Everyone has the right to liberty of movement and freedom to choose his residence. There shall be no restrictions on the exercise of these rights other than such as are in accordance with law, necessary in a democratic society and for one of the expressly permitted purposes.

ARTICLE 2

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Somewhat surprisingly, Article 2 of Protocol No. 4 seems only rarely to have been invoked in respect of restrictions on liberty which fall short of being a deprivation of liberty for the purposes of Article 5. The answer may be that such restrictions, interfering as they do with a person's private life, are dealt with under Article 8.

Article 2 of Protocol No. 4 was relied on by the applicant in the case of *MV v Finland (2017)*,²⁵⁴ where it was dealt with fairly summarily. His application was effectively disposed of under Article 8:

253 Gajcsi v Hungary, no. 62924/10, 23 September 2014.

254 A-MV v Finland, no. 53251/13, 23 March 2017.

'94. In support of his complaint, the applicant also invoked the provisions of Article 2 of Protocol No. 4 to the Convention. In view of the content of that Article as cited above, in particular the fact that paragraph 3 of the Article is closely aligned with paragraph 2 of Article 8, and taking into account the conclusions reached under Article 8 of the Convention above, the Court does not consider that an examination of the applicant's complaint can lead to different findings when reviewed under Article 2 of Protocol No. 4. There has therefore been no violation of that Article, either.'

B – UNCRPD

The text of the Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006. It opened for signature on 30 March 2007. Following ratification by the twentieth party, it came into force on 3 May 2008. As of April 2017, the Convention has 160 signatories and 173 parties. The European Union ratified it on 23 December 2010 to the extent that responsibilities of the member states were transferred to it.

By Article 1, the purpose of the Convention ‘is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’²⁵⁵

DEFINITIONS

“Discrimination on the basis of disability” means ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’²⁵⁶

ARTICLE 12

Article 12

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

255 The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006), Article 1. Referred to in the footnotes which follow as ‘The UNCRPD’. This ‘definition’ is to be found in Article 1 rather than as a definition in ‘Article 2: Definitions’.

256 The UNCRPD, Article 2.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

There is arguably some ambiguity as to the precise meaning of Article 12 and presumably that is because it embodies a compromise of different opinions expressed during the drafting and adoption process.

On the one hand, the article requires states to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life' and 'to take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit ...'

On the other hand, the article provides that all measures that relate to the exercise of legal capacity must provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law; and that such safeguards shall ensure that legal capacity measures 'respect' the rights, will and preferences of the person, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body'. Such safeguards must be proportional to the degree to which such measures affect the person's rights and interests' and states 'ensure that persons with disabilities are not arbitrarily deprived of their property'.

The inclusion of the requirements, conditions and caveats stipulated in the preceding paragraph make no sense whatsoever unless the interventions referred to are permitted by the Convention subject to the appropriate safeguards. Necessarily once such an intervention takes place, the person affected at that point no longer 'enjoys legal capacity on an equal basis with others in all aspects of life'.

The intention may be that Article 12 is to be understood in the same way as Article 8 of the European Convention on Human Rights, in that there is a general statement of rights followed by a statement of the circumstances in which those rights may be qualified and the safeguards and limits attaching to any interference. If so, Article 12 can be understood in the following way:

1. Persons with disabilities shall not by virtue of the fact that they have a disability (whether physical, mental, intellectual or sensory) be denied 'the right to recognition everywhere as persons before the law' or prevented from enjoying 'legal capacity on an equal basis with others in all aspects of life'. States shall 'take appropriate measures to provide access by such persons to the support they may require in exercising their legal capacity' and shall ensure that persons with disabilities may own or inherit property, control their own financial affairs and have equal access to bank loans, mortgages and other forms of financial credit.
2. States shall also ensure that all measures that concern the exercise of legal capacity by a person with a mental or other disability:
 - incorporate appropriate and effective safeguards which are consistent with international human rights and proportional to the degree to which such measures affect the person's rights and interests;
 - protect them from abuse;
 - respect their rights, will and preferences;
 - are free of conflict of interest and undue influence;
 - are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body; and
 - do not arbitrarily deprive the person of their property.

Such a formulation incorporates the fundamental principles set down in Article 12 without ignoring the clearly enumerated conditions and reservations which can only be there for a purpose.

It also acknowledges the reality that some people are so disabled that they cannot exercise certain legal rights even with support. Take for example the person in the final sad stages of dementia, confined to bed and so cognitively impaired as to be unable to form the idea of swallowing let alone mobilising, or the person in a persistent vegetative state following a road traffic accident.

It seems unlikely that more than this is intended given that the UNCRPD recognises the need for some interference with liberty in this and other articles.²⁵⁷ The counterpart of autonomy is accountability for acts autonomously done. The reality is that not all adults are able to assume this burden of legal responsibility. If, in a desire to maximise the autonomy and dignity of a person with a significant learning disability we hold that they are able to enter into a binding contract which they are unable to understand even with full support, with that goes all the potentially disastrous consequences of then being liable for breaches of an ununderstood contract.

²⁵⁷ See e.g. Article 14 below (Liberty and Security of the Person).

Likewise, if we hold that a person who cannot understand the litigation is able to litigate they will be personally liable to pay the often substantial costs of misconceived litigation. In other situations the fact that the individual is held in all cases to have legal capacity may render them liable to pay damages and/or to imprisonment for injuring someone when mentally unwell, bound by gifts made in a manic phase or as a result of delusional beliefs, and so on. We cannot do without capacity laws which define a person's ability to make legally-binding decisions and either to be held legally accountable to others for their acts and omissions or to be released from such liability.

In *A-MV v Finland (2017)*,²⁵⁸ the court rejected a central tenet of the interpretation of Article 12 of the UNCRPR, namely that the will and preferences of an individual should always be determinative of any decision taken in their name. The case concerned an intellectually disabled man's complaint about the Finnish courts' refusal to replace his court-appointed mentor, meaning that he had been prevented from deciding where and with whom he would like to live (see above).

A-MV's application was supported by the Mental Disability Advocacy Centre which argued that 'states were required to ensure that the will and preferences of persons with disabilities were respected at all times and could not be overridden or ignored by paternalistic "best interests" decision-making ... The starting point, based on the current international standards, was that the will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person ... There was a clear move from a "best-interests" model to a "supported decision-making" approach.'

The court accepted that AM-V's right to private life under Article 8 was interfered with by the fact that the domestic courts had refused to change his mentor. The question was whether the interference was justified. The court identified the critical legal contention advanced by the applicant as being that 'there was a measure in place under which the mentor was required not to abide by the applicant's wishes and instead to give precedence to his best interests, if and where the applicant was deemed unable to understand the significance of a specific matter'. The court reminded itself that, in order to determine the proportionality of a general measure, it had primarily to assess the legislative choices underlying it, and further reminded itself of the margin of appreciation left to national authorities. The court noted that under Finnish law the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated:

'The powers of the mentor to represent the ward cover the latter's property and financial affairs to the extent set out in the appointing court's order, but these powers do not exclude the ward's capacity to act for him- or herself. If, like in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance [...]. In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended

²⁵⁸ A-MV v Finland, no. 53251/13, 23 March 2017

on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue. The Court also notes that Finland, having recently ratified the UNCRPD, has done so while expressly considering that there was no need or cause to amend the current legislation in these respects.'

Reminding itself of the review nature of its jurisdiction, the court saw no reason to call into question the factual findings of the domestic courts:

'In the light of the above mentioned findings, the Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.'

The Court was mindful of the need for domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect them and safeguard their interests, especially under circumstances where their individual qualities or situation placed them in a particularly vulnerable position. The Court considered that a proper balance was struck in the AM-V's case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law which ensured that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to his circumstances and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting his health, in a broader sense of his well-being.

For these reasons, the court considered that, in the light of the findings of the domestic courts, the impugned decision was based on relevant and sufficient reasons and the refusal to make changes in the mentor arrangements concerning the applicant was not disproportionate to the legitimate aim pursued. There had been no violation of Article 8.²⁵⁹

Best interests approaches

Properly interpreted, a 'best interests' approach is not dismissive of the significance of the individual's autonomy, wishes, feelings, beliefs and values.

259 This summary of the facts is taken from one prepared by Alex Ruck-Keene, an English barrister at 39 Essex Street Chambers who is an authority on the UNCRPD.

There is much less difference than has commonly been supposed between a properly applied person-centred ‘best interests’ approach and a supported decision model. For example, one of the principles of the English and Welsh Mental Capacity Act 2005 is that ‘a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success’.²⁶⁰ That therefore requires providing the person with the support they require to make their own decision before reaching any decision on evidence that they lack the capacity to decide the matter in issue.²⁶¹ If the person cannot make their own decision, the fact that any decision made on their behalf must be made in their ‘best interests’ simply imposes a person-centred requirement that it is their best interests, not anyone else’s, which is determinative. Furthermore, the fact that the individual’s past and present wishes, feelings, beliefs and values must be considered²⁶² and given due weight tells us that this is not a sterile objective test of best interests. It is not a case of trying to determine what some hypothetical objective or rational person would decide in this situation when presented with these choices. Nor are we seeking to do nothing more sophisticated than impose on the individual an objective and rational analysis based on professional expertise of what they ought sensibly to do in that situation. The person’s wishes and feelings are always the starting point and very often the end point. The decision or outcome will often be that which accords with their wishes because any risks must be significant to outweigh the benefit for them of autonomy and self-determination. After all, why would any person wish another person to receive care or treatment otherwise than in accordance with their wishes if they can be cared for adequately in accordance with their wishes? The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is their welfare in the context of their wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further *their* important and legitimate interests, not one’s own.

It is also the case that, properly interpreted, the objective and subjective importance of individual liberty is a crucial factor in all ‘best-interests’ decision-making. The enduring impression left after spending many years visiting psychiatric wards is not one of fear or dangerousness, but of suffering and an often disarming kindness on the part of those who have lost their liberty. Although compelled to submit to the will of others, and forced to accept medication which, if mentally beneficial, often produces severe physical discomfort, most patients remain dignified and courteous, and retain the compassion to respond to the plight of others in a similarly unfortunate situation.

Equally remarkable is their striving to be free members of society after many years outside society, even when many other higher faculties are profoundly impaired. A hospital is not a prison but for the individual concerned both involve detention and a complete loss of that right most important to them, so that Byron’s words — ‘Eternal spirit of the chainless Mind ! / Brightest in dungeons, Liberty ! thou art’ — are often an apt description of the individual’s predicament.

260 Mental Capacity Act 2005, s.1.

261 This requirement is equivalent to what other jurisdictions may refer to as ‘co-decision-making’ (‘You wouldn’t have capacity on your own to make the decision’) or a decision-making representative scheme (‘You don’t have capacity on your own to make that decision and don’t have a co decision-maker’).

262 Ibid, s4.

Shared and co-decision making

There has been considerable support in recent years for shared decision-making and co-decision making schemes. The difficulty intellectually is that a person is either able with support to make their own decision or is not able. If the person is able to do so then they should be entitled in law to make their own decision, rather than having to share this right with another person. If they wish to relieve themselves of some of the burden of decision-making they can appoint an attorney to act on their behalf and in accordance with such conditions and restrictions as they wish to insert in the power of attorney document. It is not a matter for the state. If the person is not able with support to make their own decision then masking this with a co-decision-making agreement is dubious. Having just found that they are unable to make their own decision even if properly and fully supported, the corollary can only be that it is the co-decision maker or shared decision-maker who is making the decisions for them on a best interests basis.

The Victorian Law Reform Commission's *Guardianship: Final Report*²⁶³ sets out some of the relevant considerations. The Commission itself supported the introduction of co-decision-making. In its view, co-decision making is qualitatively different to substitute decision-making because the person with impaired decision-making ability continues to have legal responsibility for decisions about their own affairs, even though those decisions require the agreement of another person. However, there were a number of 'challenges'. In particular, the co-decision maker might be in a position to exert significant influence over a person with impaired decision-making ability. That created the potential for abuse. In circumstances where a person's decision-making ability fluctuated considerably, it might also be difficult for co-decision makers to determine whether a decision had been jointly made or was really a substitute decision. The Mental Health Legal Centre indicated that while they initially supported the proposal for co-decision makers, negative consumer feedback and concerns about the potential for abuse had changed their view. Victoria Legal Aid expressed concern that a co-decision-making arrangement had the potential to be an 'uneven partnership', where the co-decision maker may heavily influence the person with a disability to agree with a decision that the co-decision maker thinks is appropriate. The Federation of Community Legal Centres shared Victoria Legal Aid's concerns, arguing that 'the co-decision making model ... seems likely to increase complexity without much associated benefit'.

ARTICLE 13

Article 13

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

263 *Guardianship: Final Report*, Victorian Law Reform Commission, 2012.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

This is an important statement of principle and one which, if properly implemented by states, would have enormous benefits both in terms of the rights of people suffering from significant mental ill-health and the fair administration of justice.

Of critical significance is the availability of state-funded legal aid for persons in court proceedings which involve a deprivation or restriction of their liberty or which impact on the exercise by them of a citizen's usual legal rights. The European Court of Human Rights has bit-by-bit extended the requirement for legal representation in Article 5 and Article 8 proceedings without yet laying down the unequivocal principle that representation is required by the Convention.

The relevant factors which affect access to justice in this field of law include:

- The simplicity of the legislative scheme. Laws should be a last resort; impose minimum powers, duties and rights; be unambiguous, just, as short as possible, in plain language, provide a mechanism for enforcing duties and a remedy when powers are exceeded.
- The professional and judicial culture.
- The appointment of specialist mental health judges with experience in the field rather than generic judges.
- The existence of a specialist panel of lawyers to assist applicants.
- The formality of proceedings and the volume and complexity of rules, procedures and forms.
- The availability of publicly-funded legal aid and representation.
- The level of resources (judicial, court space, local authority and health services support in relation to providing court reports and less restrictive alternatives).
- The existence of a system of periodic automatic referral of cases which does not rely on the individual making an application.
- The forensic model (one, two or three person courts or tribunals; the use of assessors; inquisitorial or adversarial).
- The location of hearings (conventional court, tribunal sitting locally, the person's own home).
- Court fee levels.
- Public and press access, publicity, reporting.
- Training.

— The delegation of powers to civil servants.

ARTICLE 14 (LIBERTY AND SECURITY OF PERSON)

Article 14

Liberty and security of person

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

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

The CRPD states that a deprivation of liberty based on the existence of a disability would be contrary to the CRPD and in itself discriminatory. This was also the conclusion of the Chair of the Ad Hoc Committee drafting the CRPD. The chair closed the discussions on Article 14 saying: ‘This is essentially a non-discrimination provision. The debate has focused on the treatment of PWD (persons with disabilities) on the same basis as others. PWD who represent a legitimate threat to someone else should be treated as any other person would be.’²⁶⁴

According to the Office of High Commissioner of Human Rights (OHCHR), ‘unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person’s disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by Article 14 of the CRPD.’ The OHCHR suggests the following interpretation:

‘[Article 14] [...] should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.’²⁶⁵

²⁶⁴ *Involuntary placement and involuntary treatment of persons with mental health problems*, FRA – European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union, 2012, p.15.

²⁶⁵ *Involuntary placement and involuntary treatment of persons with mental health problems*, FRA – European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union, 2012, p.16.

OTHER ARTICLES

The remaining articles contain a number of significant rights, some of which overlap with Article 8 of the European Convention but many of which go further and impact on the considerable economic and social disadvantage experienced by people with disabilities:

Article 17 (Protecting the integrity of the person) provides that, ‘Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’ This is relevant to interventions such as community treatment orders, medication and other treatment without consent, access to one’s home and searches.

Article 19 (Living independently and being included in the community) requires states to ‘recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and [to] take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community’. States must ensure that ‘Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.’ They must ‘have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community’. This will be relevant to people with a disability who are subject to a guardian or mentor with power to determine their place of residence. It will also be relevant to individuals who are required to live in a particular community setting because of their disability, e.g. supported living for a person with Alzheimer’s disease or an intellectual disability.

Article 22 (Respect for privacy) provides that, ‘1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others. This Article has a considerable overlap with Article 8 of the ECHR.

Article 23 (Respect for home and the family) states that, ‘1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others. Inter alia, State parties must ensure that the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized. This article overlaps with Articles 8 and 12.

Article 24 (Education) recognizes the right of persons with disabilities to education and the necessity for persons with disabilities to develop their personality, talents and creativity to their fullest potential. States must enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.

Article 25 (Health) provides that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties must provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, and also such health services as are needed specifically because of their disabilities.

Article 26 (Habilitation and rehabilitation) requires States Parties to take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties must organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services.

Article 27 (Work and employment) provides that States Parties must protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.

Article 28 (Adequate standard of living and social protection) recognizes the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions. State Parties must take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

Article 29 (Participation in political and public life) requires that States Parties guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.

Article 30 (Participation in cultural life, recreation leisure and sport) recognises the right of persons with disabilities to take part on an equal basis with others in cultural life. State Parties must take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats.

OTHER CONVENTIONS, DECLARATIONS AND RECOMMENDATIONS

Over the years a number of other conventions and international documents have been published, including the following:²⁶⁶

European Recommendations

- Recommendation No R (99) 4 of 23 February 1999 of the Committee of Ministers of the Member States of the Council of Europe On Principles Concerning the Legal Protection of Incapable Adults
- Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison;
- Recommendation Rec (2006) 2 on the European Prison Rules.

Recommendation No R (99) 4 on Principles re the Legal Protection of Incapable Adults

The recommendation was adopted by the Committee of Ministers on 23 February 1999. The Committee recommended that the governments of member states take or reinforce, in their legislation and practice, all measures considered necessary with a view to the implementation of the principles set out in the Recommendation. The recommendation is set out in full here because it is surprisingly difficult to download a copy:

PRINCIPLES

Part I — Scope of application

1. The following principles apply to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests.
2. The incapacity may be due to a mental disability, a disease or a similar reason.
3. The principles apply to measures of protection or other legal arrangements enabling such adults to benefit from representation or assistance in relation to those affairs.
4. In these principles "adult" means a person who is treated as being of full age under the applicable law on capacity in civil matters.

²⁶⁶ Some of the language and terms used would today be considered inappropriate but the relevant provisions are summarised as published.

5. In these principles "intervention in the health field" means any act performed professionally on a person for reasons of health. It includes, in particular, interventions for the purposes of preventive care, diagnosis, treatment, rehabilitation or research.

Part II — Governing principles

Principle 1 — Respect for human rights

In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications on those rights contained in the relevant international legal instruments.

Principle 2 — Flexibility in legal response

1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations.
2. Appropriate measures of protection or other legal arrangements should be available.
3. The law should provide for simple and inexpensive measures of protection or other legal arrangements.
4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned.
5. The range of measures of protection should include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers.
6. Consideration should be given to the inclusion of measures under which the appointed person acts jointly with the adult concerned, and of measures involving the appointment of more than one representative.
7. Consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity.
8. Consideration should be given to the need to provide expressly that certain decisions, particularly those of a minor or routine nature relating to health or personal welfare, may be taken for an incapable adult by those deriving their powers from the law rather than from a judicial or administrative measure.

Principle 3 — Maximum preservation of capacity

1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.
3. Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative's consent, to undertake specific acts or acts in a specific area.
4. Whenever possible the adult should be enabled to enter into legally effective transactions of an everyday nature.

Principle 4 — Publicity

The disadvantage of automatically giving publicity to measures of protection or similar legal arrangements should be weighed in the balance against any protection which might be afforded to the adult concerned or to third parties.

Principle 5 — Necessity and subsidiarity

1. No measure of protection should be established for an incapable adult unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned. A measure of protection may be established, however, with the full and free consent of the person concerned.
2. In deciding whether a measure of protection is necessary, account should be taken of any less formal arrangements which might be made, and of any assistance which might be provided by family members or by others.

Principle 6 — Proportionality

1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.
2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention.

Principle 7 — Procedural fairness and efficiency

1. There should be fair and efficient procedures for the taking of measures for the protection of incapable adults.
2. There should be adequate procedural safeguards to protect the human rights of the persons concerned and to prevent possible abuses.

Principle 8 — Paramountcy of interests and welfare of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration.

2. This principle implies, in particular, that the choice of any person to represent or assist an incapable adult should be governed primarily by the suitability of that person to safeguard and promote the adult's interests and welfare.
3. This principle also implies that the property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare.

Principle 9 — Respect for wishes and feelings of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect.
2. This principle implies, in particular, that the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect.
3. It also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view.

Principle 10 — Consultation

In the establishment and implementation of a measure of protection there should be consultation, so far as reasonable and practicable, with those having a close interest in the welfare of the adult concerned, whether as representative, close family member or otherwise. It is for national law to determine which persons should be consulted and the effects of consultation or its absence.

Part III — Procedural principles

Principle 11— Institution of proceedings

1. The list of those entitled to institute proceedings for the taking of measures for the protection of incapable adults should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for proceedings to be initiated by a public official or body, or by the court or other competent authority on its own motion.
2. The person concerned should be informed promptly in a language, or by other means, which he or she understands of the institution of proceedings which could affect his or her legal capacity, the exercise of his or her rights or his or her interests unless such information would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.

Principle 12 — Investigation and assessment

1. There should be adequate procedures for the investigation and assessment of the adult's personal faculties.

2. No measure of protection which restricts the legal capacity of an incapable adult should be taken unless the person taking the measure has seen the adult or is personally satisfied as to the adult's condition and an up-to-date report from at least one suitably qualified expert has been submitted. The report should be in writing or recorded in writing.

Principle 13 — Right to be heard in person

The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.

Principle 14 — Duration, review and appeal

1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.
2. Measures of protection should be reviewed on a change of circumstances and, in particular, on a change in the adult's condition. They should be terminated if the conditions for them are no longer fulfilled.
3. There should be adequate rights of appeal.

Principle 15 Provisional measures in case of emergency

If a provisional measure is needed in a case of emergency, principles 11 to 14 should be applicable as far as possible according to the circumstances.

Principle 16 — Adequate control

There should be adequate control of the operation of measures of protection and of the acts and decisions of representatives.

Principle 17 — Qualified persons

1. Steps should be taken with a view to providing an adequate number of suitably qualified persons for the representation and assistance of incapable adults.
2. Consideration should be given, in particular, to the establishment or support of associations or other bodies with the function of providing and training such people.

Part IV — The role of representatives

Principle 18 — Control of powers arising by operation of law

1. Consideration should be given to the need to ensure that any powers conferred on any person by operation of law, without the intervention of a judicial or administrative authority, to act or take decisions on behalf of an incapable adult are limited and their exercise controlled.
2. The conferment of any such powers should not deprive the adult of legal capacity.
3. Any such powers should be capable of being modified or terminated at any time by a measure of protection taken by a judicial or administrative authority.

4. Principles 8 to 10 apply to the exercise of such powers as they apply to the implementation of measures of protection.

Principle 19 — Limitation of powers of representatives

1. It is for national law to determine which juridical acts are of such a highly personal nature that they cannot be done by a representative.
2. It is also for national law to determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body.

Principle 20 — Liability

1. Representatives should be liable, in accordance with national law, for any loss or damage caused by them to incapable adults while exercising their functions.
2. In particular, the laws on liability for wrongful acts, negligence or maltreatment should apply to representatives and others involved in the affairs of incapable adults.

Principle 21 — Remuneration and expenses

1. National law should address the questions of the remuneration and the reimbursement
2. Distinctions may be made between those acting in a professional capacity and those acting in other capacities, and between the management of personal matters of the incapable adult and the management of his or her economic matters.

Part V — Interventions in the health field

Principle 22 — Consent

1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.
2. Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that:
 - a. it is for his or her direct benefit, and
 - b. authorisation has been given by his or her representative or by an authority or a person or body provided for by law.
3. Consideration should be given to the designation by the law of appropriate authorities, persons or bodies for the purpose of authorising interventions of different types, when adults who are incapable of giving free and informed consent do not have a representative with appropriate powers. Consideration should also be given to the need to provide for the authorisation of a court or other competent body in the case of certain serious types of intervention.

4. Consideration should be given to the establishment of mechanisms for the resolution of any conflicts between persons or bodies authorised to consent or refuse consent to interventions in the health field in relation to adults who are incapable of giving consent.

Principle 23 — Consent (alternative rules)

If the government of a member state does not apply the rules contained in paragraphs 1 and 2 of Principle 22, the following rules should be applicable:

1. Where an adult is subject to a measure of protection under which a given intervention in the health field can be carried out only with the authorisation of a body or a person provided for by law, the consent of the adult should nonetheless be sought if he or she has the capacity to give it.
2. Where, according to the law, an adult is not in a position to give free and informed consent to an intervention in the health field, the intervention may nonetheless be carried out if:
 - a. it is for his or her direct benefit, and
 - b. authorisation has been given by his or her representative or by an authority or a person or body provided for by law.
3. The law should provide for remedies allowing the person concerned to be heard by an independent official body before any important medical intervention is carried out.

Principle 24 — Exceptional cases

1. Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which, because of their special nature, require the provision of additional protection for the person concerned.
2. Such rules may involve a limited derogation from the criterion of direct benefit provided that the additional protection is such as to minimise the possibility of any abuse or irregularity.

Principle 25 — Protection of adults with a mental disorder

Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, an adult who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.

Principle 26 — Permissibility of intervention in emergency situation

When, because of an emergency situation, the appropriate consent or authorisation cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the person concerned.

Principle 27 — Applicability of certain principles applying to measures of protection

1. Principles 8 to 10 apply to any intervention in the health field concerning an incapable adult as they apply to measures of protection.

2. In particular, and in accordance with principle 9, the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes should be taken into account.

Principle 28 — Permissibility of special rules on certain matters

Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedom of others.

United Nations and WHO Declarations and Guidelines

- ‘The protection of persons with mental illness and the improvement of mental health care’ (Universal Declaration of Human Rights, UN Resolution of 1991, No. A/RES/46/119, 75th Plenary Meeting);
- The United Nations Declaration on the Rights of Mentally Retarded Persons, proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.
- The United Nations Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975;
- The Guidelines for the Promotion of Human Rights of Persons with Mental Health Disorders (WHO/MNH/MND/95.4).

INTERNATIONAL CONVENTIONS & PRINCIPLES

A. UNITED NATIONS

Principles for the protection of persons with mental illness and the improvement of mental health care.

Adopted by General Assembly resolution 46/119 of 17 December 1991

The exercise of the rights set forth in these Principles may be subject only to such limitations as are prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and freedoms of others

Determination of mental illness	Principle 4	<ol style="list-style-type: none"> 1. A determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards. 2. A determination of mental illness shall never be made on the basis of political, economic or social status, or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental health status. 3. Family or professional conflict, or non-conformity with moral, social, cultural or political values or religious beliefs prevailing in a person's community, shall never be a determining factor in diagnosing mental illness.
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		4. A background of past treatment or hospitalization as a patient shall not of itself justify any present or future determination of mental illness.
		5. No person or authority shall classify a person as having, or otherwise indicate that a person has, a mental illness except for purposes directly relating to mental illness or the consequences of mental illness.
Standards of care	Principle 8	2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort.
Treatment	Principle 9	1. Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others. 4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.
Medication	Principle 10	1. Medication shall meet the best health needs of the patient, shall be given to a patient only for therapeutic or diagnostic purposes and shall never be administered as a punishment or for the convenience of others. Subject to the provisions of paragraph 15 of Principle 11, mental health practitioners shall only administer medication of known or demonstrated efficacy. 2. All medication shall be prescribed by a mental health practitioner authorized by law and shall be recorded in the patient's records.
Consent to treatment	Principle 11	6. Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 below, a proposed plan of treatment may be given to a patient without a patient's informed consent if the following conditions are satisfied: (a) The patient is, at the relevant time, held as an involuntary patient; (b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2 above, is satisfied that, at the relevant time, the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, if domestic legislation so provides, that, having regard to the patient's own safety or the safety of others, the patient unreasonably withdraws such consent; and (c) The independent authority is satisfied that the proposed plan of treatment is in the best interest of the patient's health needs. 11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient. 15. Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment, but only with the approval of a competent, independent review body specifically constituted for this purpose.
Resources for mental health facilities	Principle 14	2. Every mental health facility shall be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with these Principles.

Monitoring and remedies	Principle 22	States shall ensure that appropriate mechanisms are in force to promote compliance with these Principles, for the inspection of mental health facilities, for the submission, investigation and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.
Implementation	Principle 23	<p>1. States should implement these Principles through appropriate legislative, judicial, administrative, educational and other measures, which they shall review periodically.</p> <p>2. States shall make these Principles widely known by appropriate and active means.</p>
Scope of principles	Principle 24	These Principles apply to all persons who are admitted to a mental health facility.
Saving of existing rights	Principle 25	There shall be no restriction upon or derogation from any existing rights of patients, including rights recognized in applicable international or domestic law, on the pretext that these Principles do not recognize such rights or that they recognize them to a lesser extent.

Declaration on the Rights of Mentally Retarded Persons

Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971

Right to a guardian	Para. 5	5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
Protection from abuse	Para. 6	6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
Legal safeguards	Para. 7	7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

Declaration on the Rights of Disabled Persons

Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975

Right to protection	Para. 10	10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.
Right to legal aid	Para. 11	11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

B. WORLD HEALTH ORGANISATION

**The Guidelines for the Promotion of Human Rights of Persons with Mental Health Disorders
(WHO/MNH/MND/95.4)**

The instrument aims to depict basic legal principles for the field of mental health with as little influence as possible from given cultures or legal traditions. Embodiment of these principles into the legal body of a jurisdiction in a format, structure and language that suit local requirements is best handled on an ad hoc basis by state authorities.

Promotion of Mental Health and Prevention of Mental Disorders	Principle 1	Everyone should benefit from the best possible measures to promote their mental well-being and to prevent mental disorders.
Access to Basic Mental Health Care	Principle 2	Everyone in need should have access to basic mental health care.
Mental Health Assessments in Accordance with Internationally Accepted Principles	Principle 3	Mental health assessments should be made in accordance with internationally accepted medical principles and instruments (e.g: WHO's ICD-10 Classification of Mental and Behavioural Disorders - Clinical Descriptions and Diagnostic Guidelines, Tenth Revision, 1992).
Provision of the Least Restrictive Type of Mental Health Care	Principle 4	Persons with mental health disorders should be provided with health care which is the least restrictive.
Self-Determination	Principle 5	Consent is required before any type of interference with a person can occur.
Right to be Assisted in the Exercise of Self-Determination	Principle 6	In case a patient merely experiences difficulties in appreciating the implications of a decision, although not unable to decide, he/she shall benefit from the assistance of a knowledgeable third party of his or her choice.
Availability of Review Procedure	Principle 7	There should be a review procedure available for any decision made by official (judge) or surrogate (representative, e.g. guardian) decision-makers and by health care providers.
Automatic Periodical Review Mechanism	Principle 8	In the case of a decision affecting integrity (treatment) and/or liberty (hospitalization) with a long-lasting impact, there should be an automatic periodical review mechanism.
Qualified Decision-Maker	Principle 9	Decision-makers acting in official capacity (e.g. judge) or surrogate (consent-giving) capacity (e.g. relative, friend, guardian) shall be qualified to do so.
Respect of the Rule of Law	Principle 10	Decisions should be made in keeping with the body of law in force in the jurisdiction involved and not on another basis nor on an arbitrary basis.

C – JUDICIAL DECISION-MAKING²⁶⁷

Mental health law comprises two main areas: the circumstances in which detention and other forms of compulsion are justified and decision-making on behalf of people who in law lack the capacity to make their own decision(s).

The statutory criteria to be applied in both areas almost always confer considerable discretion on the judge or tribunal. This recognises the reality that personal welfare cases are personal (person-based) and fact sensitive. Consequently, the law variously requires the court or tribunal in very general terms to consider whether detention or compulsion is ‘necessary’ or ‘appropriate’ or ‘justified’ or what decision is in the relevant person’s ‘best interests’.

The qualities required of the judge

At its most prosaic, the judge needs to know the relevant law and procedure and to be a competent evaluator of evidence. This ensures that the decisions of the court are lawful and if that is the sole concern of the judiciary it suffices.

For anyone concerned with the quality of the decision-making — whether a citizen continues to be detained who could have been released, whether a citizen has been released without an adequate understanding of the dangers they pose to themselves or others, whether a decision made as being in a person’s best interests adds to their woe rather than their happiness — a great deal more is required. Sympathy, empathy and compassion are important but other judicial qualities are also necessary and perhaps equally important. In particular, experience in the field, understanding and courage are key attributes.

Experience

It is unsatisfactory to seek to determine principles by reason only, without regard for human experience of the world within which principles are formulated and applied. Our value judgements are judgements about experienced objects.²⁶⁸

Unless it consists only of making the same mistakes over many years, experience of front-line practice is advantageous in any field but especially so in mental health law.

The purpose served by compassion is to alleviate suffering. Achieving this requires that a judge’s interventions are efficient and effective.

We do not need to think about what we know. Relevant experience cuts down on thinking time and increases a judge’s efficiency and effectiveness.

267 This part of the paper is taken from A Eldergill, Compassion and the Law: A Judicial Perspective, Elder Law Journal Vol. 5, No. 4, 11.2015.

268 J Dewey, The Quest for Certainty (Milton, Balch & Co, 1929), at p 265.

If the judge's knowledge and experience of the lives of people experiencing mental ill-health is based on reading, literally paper-thin, their decisions are less likely to be effective.

A judge who has experience of working *in situ* with people who are experiencing acute or chronic mental health problems will have dealt many times before with the vast majority of legal situations which they face. This enables them to calibrate the likely effect of their decisions on the lives of those affected by them. Unlike the judge whose experience of the experiences of others is limited to the bench, who usually never knows or sees first-hand the consequences of their final orders, the former will know from their experience of outcomes what is likely to be an effective response and what not, and which strategies tend to maximise or minimise the happiness of the person concerned.

Understanding

There are limits to our imaginative understanding. Therefore, personal interaction, listening and observation are important as catalysts to understanding and empathy. Provided that the person is not hard-hearted, spending time with people who are experiencing mental ill-health triggers a desire to understand their feelings, experiences, hopes and fears. From this a range of insights emerge in relation to life in psychiatric units, run-down housing, police stations and prisons, and the daily struggles of service users, their families and professionals. Containment on an acute psychiatric ward is a frightening, and in itself largely untherapeutic, experience at the best of times, the more so if the person is unfamiliar with the environment.

Part of this understanding is a practical awareness of the limits of legislation and judicial orders. The law provides a useful framework for managing conflict, conferring authority, enforcing legal duties and restraining the unlawful exercise of power. It cannot solve family conflict and resentment, that feeling of not being a loved or favoured child, a scarcity of resources, the disease process itself or the fact that the person concerned must soon die. It is a relatively ineffective means of modifying personal behaviour and attitudes —'he that complies against his will, is of his own opinion still' — so that one can legislate for marriage but not for a happy marriage. Although it can provide a framework for managing violence associated with mental disorder, it cannot significantly reduce these risks. That this is so is clear following most psychiatric homicides and suicides. Had the professional carers foreseen what was about to happen, they had power under the law to intervene. That they did not intervene was due, not to any lack of legal powers, but to the fact that they did not foresee what was about to occur. Yet no amount of laws and orders can improve foresight.

What one can always do is no harm: there are many we cannot help but none we cannot avoid harming. This principle is as important to the practice of law as it is to the practice of medicine: The 'wicked are wicked, no doubt, and they go astray and they fall, and they come by their deserts; but who can tell the mischief which the very virtuous do?'²⁶⁹

Practical experience in the field also provides some understanding of the problems and natural limits of science, medicine and in particular psychiatry.

269 WM Thackeray, *The Newcomes* (Bradbury & Evans, 1855).

Many lawyers new to the area think of medicine as a science and tend to believe that words like disease and schizophrenia have established meanings which are universally accepted by medical practitioners. This is an idealized view and the tendency to regard both legal and medical terms as having value-free fixed meanings rather than as expressing concepts is misplaced. For example, ideas about what causes mental disorder depend on how normal mental health and, by elimination, mental disorder are defined. Classifications of mental disorders are unstable and the nosology of mental disorders (the study of their classification and relationship to one another) is split into rival schools. Although a single patient may acquire many different diagnoses over time, these are rarely explicable in terms of corresponding objective changes in their condition.

Underlying the question of nosology is that of ontology: the study of whether things actually exist in the real world or are merely products of our own ways of studying and classifying the world. The following passage is a good example of the essence of the problem:²⁷⁰

'Your pier-glass or extensive surface of polished steel made to be rubbed by a housemaid, will be minutely and multitudinously scratched in all directions; but place now against it a lighted candle as a centre of illumination, and lo ! the scratches will seem to arrange themselves in a fine series of concentric circles round that little sun. It is demonstrable that the scratches are going everywhere impartially, and it is only your candle which provides the flattering illusion of a concentric arrangement, its light falling with an exclusive optical selection. These things are a parable. The scratches are events, and the candle is the egoism of any person now absent ...'

Classifying certain paintings as abstract may, as with mental disorder, be based on a conception that their essential distinguishing feature is a lack of any order. If so, the objects may be placed in the class 'disordered' but attempting to minutely sub-divide these disordered objects in Linnean fashion may be contradictory and offend reality. Consequently, Allport's view of psychiatric classifications was that 'all typologies place boundaries where boundaries do not belong ... each theorist slices nature in any way he chooses and finds only his own cuttings worthy of admiration'.²⁷¹

These practical problems arise from the fact that it is not illnesses per se which are being classified but people — litigants or parties in a judicial context — suffering from illness. Each patient has some attributes which they share with all patients, certain attributes which they share with some but not all patients, and yet other attributes unique to that individual. Because this is so, the same disorder or disease is likely to affect all people identically in certain respects, different classes of people distinguished by certain key attributes in ways common only to members of the class, and each person within a class in yet other ways peculiar to them. Variability 'is the law of life. As no faces are the same, so no two bodies are alike, and no two individuals react alike and behave alike under the abnormal conditions which we know as disease'.²⁷² The clinical picture is 'most often profoundly coloured and

270 G Eliot, Middlemarch (Penguin English Library, 1965) at p 297.

271 G Allport, Personality: A Psychological Interpretation (Henry Holt & Co, 1937), at pp 295-296.

272 Sir W Osler, Medical Education in Counsels and Ideals (Houghton Mifflin, 2nd ed., 1921).

sometimes decisively shaped by factors specific to the individual and his environment. Hence the notorious difficulty in identifying separate disease processes in psychiatry'.²⁷³

The lessons for the judge are to concentrate on this individual's circumstances and unhappiness, to listen to them in the hope of understanding what it is they need from us and before interfering to be mindful that we are all profoundly ignorant and will be revealed as such by future generations. Seek the truth but beware those who have found it.

Courage

It is the courage to acknowledge and then accept risks inherent to mental health practice which is the most important quality of all for judges, social workers and psychiatrists.

The weak practitioner or judge will choose the least 'risky' option, which they take to be the one least likely to result in harm to the person's physical safety. It makes *them* less anxious and is the least 'risky' if appealed. The judge will set a high bar on the level of understanding necessary for autonomous decision-making and fall back on false ideas such as that best interests is an objective test based on professional opinion.

Such an approach leaves little room for compassionately promoting the happiness of people who value their freedom because freedom comes at a price in terms of safety and safety bears a price in terms of freedom. It is not possible to have it both ways. If the individual has clear feelings and beliefs about the life they wish to lead, the compassionate option may be the one which allows them to lead that life, even for a short period, rather than the one freest of risks. A ship is safest in harbour but that is not what ships are for.

The purpose of compulsory powers, including 'best interests' interventions, is not to eliminate that element of risk in human life which is a consequence of being free to act and to make choices and decisions.

Nor, strange though it may sound, is their purpose to protect an individual from risks which arise when their understanding of substantial risks, or their capacity to control behaviour associated with such risks, is significantly impaired by mental disorder.

Compulsory powers are means not ends. The purpose of compulsory powers is to increase human happiness or to reduce human suffering.

Consequently, when decision-making for incapacitated people we are seeking the outcome which maximises the individual's happiness not, if different, the one which is safest.

All personal welfare decisions involve balancing competing risks of unhappiness of which the risk of physical harm is but one. Deprivation of liberty and compulsory treatment risk the loss of employment, family contact, self-esteem and dignity; unnecessary loss of liberty; institutionalisation; social isolation; and disabling adverse effects.

273 WA Lishman, *Organic Psychiatry, The Psychological Consequences of Cerebral Disorder* (Blackwell Scientific Publications, 2nd ed., 1987), at p 3.

While we must do our best to assess the risks to a person's physical safety in any decisions we make for them in truth it is difficult to impossible to predict outcomes:²⁷⁴

- a. A risk can in theory be measured and is the basis of actuarial prediction — in theory because in practice all of the critical variables never are known. The risk depends on the situation but the situations in which the person may find themselves in the future can only be speculated upon.
- b. Because future events can never be predicted, it is important to put in place an adequate system for supervising an incapacitated person whose own safety may potentially be at risk or who may pose a threat to the safety of others. However, this approach is not fail-safe: it is based on the assumption that most episodes of harm do not erupt like thunderstorms from clear skies. In reality, as with weather systems, only the pattern of events for the next 24 hours can usually be forecast with some accuracy; and contact with supervisors is less regular.
- c. Even a very low risk from time to time becomes an actuality. However careful the assessment, it is inevitable that some individuals will later take their own lives, come to harm or commit a serious offence.
- d. An outcome is often the result of a complex series of events and the choice of one particular causal factor may be arbitrary.
- e. Small differences in one key variable can result in vastly different behaviours and outcomes: just as a sudden change in the physical state of water into steam or ice occurs with the rise or fall of temperature beyond a critical level so the addition of a small additional stress on an individual may have a profound effect on their mental state or behaviour.
- f. All harm and violence takes place in the present and the past is a past, and so unreliable, guide to present and future events.
- g. Understanding the situations in which a person has previously been harmed or been dangerous, and avoiding their repetition, can give a false sense of security about the future. Although life is understood backwards, it must be lived forwards, and the difference between explanation and prediction is significant: explanation relies on hindsight, prediction on foresight, and the prediction of future risk involves more than an explanation of the past.
- h. Predictions are most often founded not on fact but on 'retrospective predictions' of what occurred in the past ('retrodiction').

²⁷⁴ A Eldergill, 'Is Anyone Safe? Civil Compulsion under the Draft Mental Health Bill', *Journal of Mental Health Law*, Dec 2002; A Eldergill, *Mental Health Review Tribunals: Law and Procedure* (Sweet and Maxwell, London, 1997).

A judge must have sufficient courage to accept that all decisions in mental health are risk-laden and not be paralysed by this or practise too defensively. The primary purpose of the personal welfare provisions of the Mental Capacity Bill was a desire to protect and increase the autonomy, happiness, dignity and independence of vulnerable people, not that the legislation should be used as a risk management tool.

Empathy, sympathy and compassion

Translating a compassionate desire to alleviate a person's suffering into effective compassion in the form of a remedy is difficult without some understanding of what is causing their suffering and what it is that makes them happy or fulfilled.

If the person understands the causes of their unhappiness and can communicate this it may simply be a case of listening to them so that little empathy is required.

If, however, they are confused, embarrassed, depressed, anxious, experiencing hallucinations, affected by delusional beliefs or have a severe learning disability then empathy is important.

While medicine benefits from a traditional scientific approach and the objective recording of a patient's symptoms and signs, these symptoms and signs are the external public manifestation of inner mental processes. Seeking out the underlying causes and associations, the private unobservable conflicts, requires empathy and without it there can be no understanding of the individual or the causes of their symptoms.

Because this is so the development and application of sympathy and intuitive understanding becomes a prerequisite for the *objective* observation of mental phenomena in others. Consequently, Jaspers wrote that 'natural science is indeed the groundwork of psychopathology and an essential element in it but the humanities are equally so and, with this, psychopathology does not become any less scientific but scientific in another way'.²⁷⁵

The same can be said of the law. The notion that judicial objectivity requires being dispassionate and that objective decision-making is contaminated by empathy, sympathy and compassion is impossible to support. A person's behaviour is determined by the way in which they perceive reality at any moment and not by reality as it can be described in physical objective terms. It is not in accordance with reason or logic for a judge not to value, or to dismiss or disregard, beliefs expressed by the relevant person which the judge believes are irrational or illogical.

In the first place, because mental illness is often the response of an individual to their life situation one must always ask the threefold question: 'Why did this person break down, in this way, at this time?' The person's beliefs and feelings offer the judge an insight into the underlying causes or triggers of their illness and distress, and an opportunity to ensure that the judge's order adequately responds to their situation and needs.

275 K Jaspers, General psychopathology (Manchester University Press, 1962).

Secondly, if their beliefs are unlikely to change one must seek to develop and hopefully agree a plan which can accommodate them. The case of *Re P (capacity to tithe inheritance) (2014)*²⁷⁶ involved a gentleman with a history of schizophrenia who wished to tithe 10% of his inheritance to the Church of the Latter Day Saints. The case is a typical example of this principle:

123. The law has always sought to show due respect for liberty of conscience and religious belief and the European Convention on Human Rights reinforces this. Even if a person lacks capacity in law to make a religious gift, there remains the need to show respect for genuinely held beliefs and values. Good reasons are required to interfere in matters of conscience and spiritual belief. A person's religion is no less real to them because some of their beliefs may be coloured by illness and their conscience is no less offended when they are not permitted to practise their religion. In MS's case, both his conventional and unconventional religious beliefs are well-established and unlikely to change in time. This is not a situation where ambiguous beliefs are being reinforced or acted on precipitously, or it is likely that he will regret his tithe in the foreseeable future. His religion is now part of his life and is embedded in his existence. What he wishes is now his will. Even if his choice is founded on a belief that facts exist which do not, it is now his authentic voice and a true expression of his mind and the world within which he moves; and, like everyone, he needs to find peace.

Thirdly, in some cases it may be upsetting or damaging to the individual to attempt to modify their beliefs if they are performing a protective function. A not uncommon example would be an increased risk of suicide.

Because proceedings involve a person's personal welfare, an objective 'rational' decision is one based on the subjective personal feelings of the relevant people: how they will feel if the judge chooses one alternative rather than another; the effect on their happiness, self-esteem and so on.

Only a patient may lack 'insight' if one artificially defines the word as referring only to the patient's awareness of the abnormality of their experiences and the fact that their symptoms are evidence of the presence of a mental illness which requires treatment. If one prefers the natural meaning of seeing within and understanding — understanding one's own mental processes or those of another, which is the meaning adopted by psychologists — then a doctor and a judge may also lack insight. The content of any judgment and any medical report consists of the contents of the patient's mind as elicited and interpreted by the contents of the judge's or doctor's mind. If the judge or doctor is uninterested in the patient's problems and the underlying causes, being interested only in obtaining enough information to sustain a judgment or diagnosis, such a narrow field of view necessarily leads to a narrow understanding of the overall situation.

²⁷⁶ *Re P (capacity to tithe inheritance) [2014] EWCOP B14 (COP), [2014] All ER (D) 46 (Apr), (2014) 17 CCLR 229, [2014] WTLR 931.*

If it is fundamental to the person's happiness to be at liberty then considerable weight must be given to this. The importance of individual liberty is of the same fundamental importance to incapacitated people who still have clear wishes and preferences about where and how they live as it is for those who remain able to make capacious decisions. This desire to determine one's own interests is common to almost all human beings. Society is made up of individuals, and each individual wills certain ends for themselves and their loved ones, and not others, and has distinctive feelings, personal goals, traits, habits and experiences. Because this is so, most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this.

The enduring impression left after spending many years visiting psychiatric wards is not one of fear or dangerousness, but of suffering and an often disarming kindness on the part of those who have lost their liberty. Although compelled to submit to the will of others, and forced to accept medication which, if mentally beneficial, often produces severe physical discomfort, and may physically disable for life, most patients remain dignified and courteous, and retain the compassion to respond to the plight of others in a similarly unfortunate situation. Equally remarkable is their striving to be free members of society after many years outside society, even when many other higher faculties are profoundly impaired. A hospital is not a prison but for the individual concerned both involve detention and a complete loss of that right most important to them, so that Byron's words — 'Eternal spirit of the chainless Mind! / Brightest in dungeons, Liberty! thou art' — are often an apt description of the individual's predicament. This desire for autonomy, and many people cannot conceive of a life which is worthwhile and fulfilling without such self-determination, is not to be confused with any desire to abuse liberty, and so not to be caught up in contemporary controversies about how the law should respond to those who show a disregard for the law and for civic responsibility. While it is sometimes necessary to deprive an individual of their liberty on the ground of mental disorder, and one must have the courage to do that where necessary, one must always be appreciative of the enormity of the act — of the fact that the right enjoyed by those others present, and denied to this individual, is the most important right known to English law.

The critical error which a judge must avoid is an analysis of the person's best interests which disregards or downplays their wishes, feelings, values and beliefs in the perverted belief that objectivity is undermined by subjective considerations.

What we are seeking is objective analysis not objective outcomes. The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is their welfare in the context of their wishes, feelings, beliefs and values that is important.

This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests, not one's own. Meaningful sustainable progress, as opposed to the mere management of symptoms, requires engaging with the person and their life and exploring how they can be assisted to live a life which they find fulfilling. This requires the judge to emotionally evaluate their evidence and to try to feel and understand what the case and possible outcomes mean for them. Empathy and compassion become instruments of justice and in this context a more intelligent justice.

One may hear lawyers say that such cases 'turns on the judge's values'.

Whatever the truth of that observation as a statement of reality it is misleading as a statement of law. The judge's role is to ascertain the values, beliefs wishes and feelings of the relevant individual and then to decide what is in their best interests having regard to their values, beliefs, wishes and feelings, not the judge's.

If the facts of two residence cases are identical except that one of the individuals places their health and safety first and the other their liberty, their different values may well mean it is in the best interests of one to live in a care home and the other in their own home.

The only value the judge needs is not to impose what they themselves value on the two individuals. The judge is their servant. As William Hazlitt once said, 'The love of liberty is the love of others. The love of power is the love of ourselves'.

D – PRINCIPLES OF MENTAL HEALTH LAWS

When legislating or working in this area, it is useful to bear the following principles in mind:²⁷⁷

1. It is unsatisfactory to seek to determine principles by reason only, without regard for human experience of the world within which principles are formulated and applied. Our value judgments are judgments about experienced objects.²⁷⁸
2. There are many reasons to limit state intervention in people's lives: errors in law spread their negative effects throughout the nation as opposed to individual errors that are limited in scope; the damage of erroneous laws affect citizens more than legislators, who are thus less inclined to repeal them; it takes longer to repair the damage done by legislation than the damage done by individuals by their own private choices; because of the constant watch of critics, politicians are less inclined to publicly admit error and undo the damage done; politicians are more inclined than citizens to make decisions based on political gain and prejudice, rather than principle.²⁷⁹
3. An effective democratic Constitution separates powers, the aim being to keep executive powers in check and under proper scrutiny, and so to secure good government. This is necessary because the 'whole art of government consists in the art of being honest',²⁸⁰ and 'it is not by the consolidation, or concentration of powers, but by their distribution, that good government is effected.'²⁸¹
4. Promoting liberty, protecting individuals from harm caused by those at liberty, and those not at liberty from abuse by those who are, alleviating suffering, and restoring to health those whose health has declined, are all legitimate objectives, in that they reflect values embraced by virtually all members of our society.²⁸²
5. We are, however, 'faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others.'²⁸³ Whether individuals 'should be allowed certain liberties at all depends on the priority given by society to different values, and the crucial point is the criterion by which it is decided that a particular liberty should or should not be allowed, or that its exercise is in need of restraint.'²⁸⁴

²⁷⁷ A Eldergill, Is Anyone Safe? Civil Compulsion under the Draft Mental Health Bill, 'Journal of Mental Health Law', January 2003; A Eldergill in Court of Protection Handbook, ed. A Ruck-Keene (LAG, London), 2014, pp76–79.

²⁷⁸ J Dewey, The Quest for Certainty (Milton, Balch & Co, 1929), at p 265.

²⁷⁹ Benjamin Constant: Political Writings (trans. and ed. B Fontana), Cambridge University Press 1988.

²⁸⁰ Thomas Jefferson: Rights of British America, 1774. The Writings of Thomas Jefferson, Memorial Edition (ed., Lipscomb & Bergh), Washington, DC, 1903-04.

²⁸¹ Thomas Jefferson: Autobiography, 1821. The Writings of Thomas Jefferson, Memorial Edition (ed., Lipscomb & Bergh), Washington, DC, 1903-04, 1:122.

²⁸² Eldergill, AC, Mental Health Review Tribunals — Law and Practice (Sweet & Maxwell, 1997), p.45.

²⁸³ Berlin, Sir I, Four Essays on Liberty (Oxford University Press, 1969), p.168.

²⁸⁴ Dias, RWM., Jurisprudence (Butterworths, 5th ed., 1985), p.109.

6. When enacting mental health legislation, the legislature has generally sought to erect a balanced legal structure that harmonises three things: individual liberty; bringing treatment to bear where treatment is necessary and can be beneficial; the protection of the public.²⁸⁵ Those we describe as ‘patients’ are themselves members of the public, so that the law must seek to ensure that members of the public are not unnecessarily detained, and also that they are protected from those who must necessarily be detained.
7. The purpose of compulsory powers, including ‘best interests’ interventions, is not to eliminate that element of risk in human life which is a consequence of being free to act and to make choices and decisions. Nor, strange though it may sound, is their purpose to protect an individual from risks which arise when their understanding of substantial risks, or their capacity to control behaviour associated with such risks, is significantly impaired by mental disorder. That is its function but not its purpose: compulsory powers are means not ends. The purpose of compulsory powers is to increase human happiness or to reduce human suffering.
8. Consequently, when decision-making for incapacitated people we are seeking the outcome which maximises the individual’s happiness not, if different, the one which is safest. All personal welfare decisions involve balancing competing risks of unhappiness of which the risk of physical harm is but one. Deprivation of liberty and compulsory treatment risk the loss of employment, family contact, self-esteem and dignity; unnecessary loss of liberty; institutionalisation; social isolation; and disabling adverse effects.
9. The use of compulsion has been permitted when significant harm is foreseeable if an individual remains at liberty. While we must do our best to assess the risks to a person’s physical safety in any decisions we make for them in truth it is difficult to impossible to predict outcomes.
10. Other risks are, constitutionally, matters for citizens to weigh in their own minds. The purpose of compulsion is not to eliminate that element of risk in human life that is simply part of being free to act and to make choices and decisions. A person who obeys our laws is entitled to place a high premium on their liberty, even to value it more highly than their health. Subject to the stated limits, people are entitled to make what others regard as errors of judgement, and to behave in a manner which a doctor regards as not in their best interests, in the sense that it does not best promote health.
11. This desire to determine one’s own interests is common to human beings, and so not to be portrayed as an abuse of liberty. On the one hand stands liberty, a right which the legislature and the law should always favour and guard, on the other licence, a wilful use of liberty to contravene the law, which the law must of necessity always punish.

²⁸⁵ Hansard, H.C. Vol. 605, col. 276.

12. Any power given to one person over another is capable of being abused. No legislative body should be deluded by the integrity of their own purposes, and conclude that unlimited powers will never be abused because they themselves are not disposed to abuse them.²⁸⁶ Mankind soon learns to make interested uses of every right and power which they possess or may assume.²⁸⁷
13. This risk of abuse is multiplied if the individual is not free to escape abuse, is incapacitated or otherwise vulnerable, or their word is not given the same weight as that of others. Children and adults with mental health problems are particularly at risk and the law has usually afforded them special protection.
14. This protection involves imposing legal duties on those with power, conferring legal rights on those in their power, and independent scrutiny of how these powers and duties are exercised. The effectiveness of such schemes depends on whether, and to what extent, they are observed.
15. This is a matter of constitutional importance, for the observance of legal rights and the rule of law are the cornerstones of all liberal democracies. The rule of law ‘implies the subordination of all authorities, legislative, executive [and] judicial ... to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual.’²⁸⁸
16. In any legal system, ‘it implies limitations on legislative power, safeguards against abuse of executive power, adequate and equal opportunities of access to legal advice and assistance, ... proper protection of the individual and group rights and liberties, and equality before the law ... It means more than that the government maintains and enforces law and order, but that the government is, itself, subject to rules of law and cannot itself disregard the law or remake it to suit itself.’²⁸⁹
17. In framing these principles and laws, the legislature has sought to be just, justice being ‘a firm and continuous desire to render to everyone that which is his due.’²⁹⁰
18. When new laws are necessary, they should impose minimum powers, duties and rights; provide mechanisms for enforcing duties and remedies for abuse of powers; be unambiguous, just, in plain language, and as short as possible.
19. Because there is a long record of experimentation in human conduct, cumulative verifications give these principles a well-earned prestige. Lightly to disregard them is the height of foolishness.²⁹¹

²⁸⁶ Thomas Jefferson: Notes on Virginia Q.XIII, 1782. Memorial Edition (*supra*), 2:164.

²⁸⁷ Thomas Jefferson: Notes on Virginia Q.XIII, 1782. Memorial Edition (*supra*), 2:164.

²⁸⁸ David M Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980), p.1093.

²⁸⁹ *Ibid.*

²⁹⁰ Justinian, *Inst.*, 1, 1.

²⁹¹ Dewey, J, *Human Nature and Conduct* (Allen & Unwin, 1922).

E – ABOUT THE AUTHOR

ANSELM ELDERSGILL – RESUME – MAY 2019

PUBLIC SERVICE

Judge of the Court of Protection (mental health/incapacity court) from 2010 onwards

24 significant judgments reported in the All England Reports Digest, Community Care Law Reports, Court of Protection Law Reports, Wills and Trusts Law Reports, Mental Health Law Online and Bailii

Member of the United Nations Expert Judicial Group on Capacity and Access to Justice, 2018.

Chairman of the Mental Health Tribunal Legislative Reform Working Group – Ministry of Justice & Department of Health Independent Review of the Mental Health Act, 2018.

Legal Aid Lawyer of the Year Special Award, 2019 (conferred on the President of the Family Division of the High Court the previous year):

This is only the third time the LAPG Committee has chosen to make Special Awards, which celebrate campaigners and others who make an exceptional contribution to legal aid and access to justice. The previous recipients included Baroness Doreen Lawrence OBE, who was honoured in 2012.

LAPG Special Awards are reserved for truly exceptional individuals who have achieved incredible things, often alongside of their day to day legal practice. Anselm was a mental health lawyer for 25 years, and is a true legend in this field. He now sits as a District Judge in the Court of Protection, and has been responsible for developing the law in relation to people with impaired capacity, in ways far beyond his formal status as a judge. He has made an incomparable contribution to the protection of those with mental illness. Through his 1997 book 'Mental Health Review Tribunals', he shared his expertise, and equipped many practitioners to represent the most vulnerable clients in a way that would not otherwise have been possible in what was a developing area of law. It explicitly recognised the Tribunal as a way of enforcing civil rights and had a transformative effect. Now that he is on the bench, Anselm has lost none of his approachability, and remains vigilant to ensure people can exercise their rights."

Mental Health Act Commissioner, 1992-1998

Chairman of the Mental Health Act Commission Law & Ethics Committee

Head of Mental Health Act Commission Statutory Complaints Investigations

Chairman of the Review of National Statutory Complaints Investigations Procedures (Department of Health)

Member of the Mental Health Act Commission's Mentally Disordered Offenders' Committee and author of its papers on the reform of Part III of the Mental Health Act 1983

Legal adviser to Mental Health Commission in Dublin (training lawyers in the Republic of Ireland on their new mental health tribunal scheme)

Legal member of the Mental Health Commission for Northern Ireland in Belfast

Chairman of the MHCNI's Committee on Mental Health Law Reform

Advising Her Majesty's Prison Service on the procedures for discretionary lifers' hearings

Legal Chairman of ten Government Inquiries following the commission of homicides and numerous inquiries into suicides and serious incidents of abuse, including:

2008 – *Inquiry into the Death of GB, CNWL, London. In print.*

2006 – *Chairman of the Independent Inquiry into the Care and Treatment of Alfred Garner and six other patients (Westminster). 4,000 pages of evidence. Report 137 pages + appendices.*

2004 – *Chairman of two independent inquiries following homicides (Birmingham). 12,000 pages of evidence. Report 173 + xii pages.*

2002 – *Chairman of the Confidential Review of the X Eating Disorders Unit (London). 2,600 pages of evidence. Report 94 pages.*

2003 – *Chairman of one independent inquiry following homicide (Kent). 14,000 pages of evidence. Report 283 + xvi pages (+ appendices).*

2002 – *Chairman of three independent inquiries following homicides (Hampshire). 13,000 pages of evidence. Report 173 + viii pages.*

2000 – *Chairman of two independent inquiries following homicides (Berkshire). 13,500 pages of evidence. Two reports: 73 + viii pages and 79 + vi pages.*

Tribunal Judge, 2005-2011

Assistant Coroner, Essex

Member of two Department of Health Reviews of Mental Health Review Tribunal decision-making, pre-2000.

Legal aid practitioner in south London and Kentish Town working on behalf of people with mental health problems for 25 years.

ACADEMIA

Honorary Professor of Mental Capacity Law, University College, London (UCL is ranked 7th in the QS World University Rankings)

Lecturer and trainer, Academy of European Law (European Judicial College): Mental Health Law, Disability Law, Human Rights, Criminal law; Lecturer and trainer, Judicial College for England & Wales.

Visiting Professor of Mental Health Law, Northumbria University

Alexander Maxwell Law Scholarship (the leading UK law scholarship for barristers and solicitors)

David Hallett Prize for Government

Member of the editorial board of the *Journal of Mental Health Law*

Member of the editorial board of *Medicine, Science & the Law*

1400-page textbook on Mental Health Law (reprinted twice)

Extensive publications and conferences record, at home and abroad, for publications such as *The Princeton University Law Journal*, Johns Hopkins University, *The Journal of Forensic Psychiatry* and *The Guardian*, including:

Mental Health Review Tribunals — Law & Practice (Sweet & Maxwell, lxvii, 1333 pages). Sold out and reprinted twice

Court of Protection Handbook (Co-author, LAG, London, 928pp, 2014, 3rd ed. due 2018)

Mental Health Law (The Law Society, London, 2019)

The Patient's Voice (Ed. J Young-Mason, Davis & Co, Philadelphia, 2015)

Compassion and the Law: A Judicial Perspective (*Elder Law Journal* Vol. 5 No. 4, November 2015, pp 392-398). This article was delivered as a paper at a one-day international symposium on 'Law and Compassion', hosted by the Institute of Advanced Legal Studies in London and funded by the Socio-Legal Studies Association

Psychopathy, the law and individual rights, *Princeton University Law Journal*, Volume III, Issue 2, Spring 1999 (abstract published in *The Guardian newspaper*)

The Best is the Enemy of the Good: Part II, Journal of Mental Health Law, December 2008; *The Best is the Enemy of the Good: Part I, Journal of Mental Health Law*, May 2008

'The law and individual rights' in *Personality Disorder and Serious Offending* (ed. Newirth et al.), Hodder Arnold, Oxford, 2006

The Principles of Mental Health Legislation, Philosophy, Psychiatry and Psychology, Johns Hopkins University, 2005

Is Anyone Safe? Civil Compulsion under the Draft Mental Health Bill, *Journal of Mental Health Law*, December 2002.

The Legal Structure of Mental Health Services, *Journal of Mental Health Law*, September 2002

The Mental Health Act Commission, *Journal of Forensic Psychiatry*, March 2002

Reforming Inquiries following Homicides', JMHL, October 1999

The legal logistics of independent inquiries: Common steps and principles for navigating through tragedy, *British Journal of Health Care Management*, May 1998

Social Exclusion and Mental Health, *Mental Health Lawyers Association Occasional Paper*, June 2004

Lecturer at numerous national and international conferences.

Recent conference presentations include lecturing at the European Judicial College in Trier (training EU judges on mental health and mental capacity law), delivering a lecture on mental capacity law to the Lord Chief Justice and other senior judges in Belfast, delivering the keynote address at the annual national 'Taking Stock' conference in Manchester (the previous addresses being given by the President of the Family Division, Lady Hale and Lord Justice Baker) and at the Scottish Law Commission Mental Capacity conference in Glasgow; presentations on law reform with the Irish Minister and our Law Commission; a Chatham House conference on press reporting and the Court of Protection; invitational lectures in Dublin on Irish legislative proposals; and delivering a lecture at the Welsh national conference on mental capacity.

Numerous other national and international presentations at institutions such as the Sorbonne addressing subjects such as legislative reform, deprivation of liberty, mental incapacity, criminal law provisions and mentally disordered offenders, comparative mental health law; international law and mental health, homicide inquiries and untoward incident reviews and the European Convention on Human Rights and Mental Health.

DRAFTING

Undertook the government review of the Mental Health Act Commission and formulated proposals for its reform — Legislation Branch, Department of Health. Report 226 + xviii pages, 2001

Appointed by the Department of Health to draft the new departmental guidance and 'sectioning forms' in relation to the deprivation of liberty provisions in the Mental Capacity Act 2005

Appointed by the Department of Health to draft a Mental Health Act Forms Manual for use by the NHS and local social services authorities

Appointed by the Department of Health to draft the community treatment order 'sectioning forms' under the Mental Health Act 2007

Member of the Mental Health Review Tribunal Rules Committee

CRIMINAL LAW

Conduct of murder and manslaughter cases; Preparing over one thousand criminal cases, including rapes, armed robbery, etc; Extensive advocacy experience, including Crown Court bail applications; Attending police stations, identification parades, post-mortems, conferences, trials.

PUBLIC LAW

Judicial review; habeas corpus; chairing government inquiries; Coroner's Court proceedings.

CIVIL & FAMILY LAW

Tort (assault and battery, trespass to the person and to goods, police misconduct); care proceedings; divorce proceedings; Coroners' court proceedings; landlord and tenant (possession proceedings, disrepair, nuisance); contract and partnership law.

MEDIA WORK

This includes leading televised press conferences dealing with the publication of homicide and other reports; interviews for various television programmes on the law (BBC, Channel 4, Canadian TV); advising the BBC's Public Eye series; being interviewed for Law Society and LNTV law training videos; providing comments and articles for daily newspapers, including The Guardian, The Independent and The Times; representations and evidence to Parliament.

PRO BONO WORK

President of the Mental Health Lawyers Association, 2003-2010

President of the Institute of Mental Health Act Practitioners, 2005-2010

Honorary Legal Adviser to the African Regional Council for Mental Health, 2004-2010

Chairman, London NHS Ethics Committee

Chief Assessor, Interviewer and Member of the Law Society's Mental Health Panel

High volume free legal advice service for service users referred by MIND's Legal Department

Legal Adviser to the Tooting Advocacy Project

Inaugural member of the LINK mental health scheme

Founding a 24-hour London police station scheme in the 1980s for people with mental health problems

Writing mental health legal rights leaflets for MIND

Drafting the Law Society's pilot MHRT rights leaflet and application form

Member of Network for the Handicapped

PROFESSIONAL STANDING

Included each year in the Leaders' Profiles — Mental Health section of Chambers' & Partners' A Guide to the Legal Profession. Ranked 1:

'Anselm Eldergill is considered "authoritative" and has been recommended again as a leading authority on the Mental Health Act, particularly the detention, tribunal and criminal law provisions' (and in subsequent years)

'The sage of mental health law, he is renowned for being "hugely clever" and "a highly respected academic and commentator" with "the best theoretical approach." A heavyweight practitioner who chairs and is involved in judicial inquiries nationwide.' 2001/02, Ranked 1: '

"Academically brilliant," whilst able to "link up law and practice," he has chaired six NHS inquiries concerning mental health patients who have committed serious crimes. In addition to this, his "authoritative, thoughtful and reliable" textbook has ... elicited praise for its "empathy for the plight of those suffering from mental health disorders.'

Chambers Directory, 'Leaders in their Field', USA and Europe volumes

Entry in three volumes of Who's Who in America (USA)

Entry in the Dictionary of International Biography

No complaints to professional body and no claims on professional insurance during 25 years in practice

OTHER POSITIONS HELD

Head of Mental Health Law, Eversheds (one of the largest law firms in the world, with 40 offices across the UK, Europe, Middle East, Africa and Asia).

Academy of European Law



THE RIGHTS OF PEOPLE WITH DISABILITIES IN CRIMINAL PROCEEDINGS: ECHR & CRPD

Professor Anselm Eldergill

Judge, Court of Protection, London

Trier, Friday 7 June 2019



THE RIGHTS OF PEOPLE WITH DISABILITIES IN CRIMINAL PROCEEDINGS: ECHR & CRPD

Anselm Eldergill

§1– INTRODUCTION

There is relatively little European Convention case law concerning the specific rights of persons with a disability in criminal proceedings, aside from cases about the conditions in which detainees with disabilities are held. There is therefore an opportunity for the United Nations and CRPD agencies to devise realistic protections that improve the existing situation.

The material in this handout is set out under the following headings:

§1	Introduction	Page 2
§2	The main ECHR articles and CRPD equivalents	Page 2
§3	Arrest, charge and pre-court issues	Page 14
§4	The court proceedings	Page 22
§5	Post-sentence	Page 33
§6	Prison conditions (remand pending trial and post-sentence)	Page 40

§2– THE MAIN ECHR ARTICLES AND CRPD EQUIVALENTS

The relevant ECHR articles and their CRPD equivalents are dealt with in detail in the main paper:

- *Eldergill, European Convention on Human Rights, the UNCRPD and the Legal Rights of Citizens Suffering Mental Ill-health*

However, it may help delegates to set out the main provisions here with a brief explanation of their relevance.

ECHR ARTICLE 6 (RIGHT TO A FAIR TRIAL) AND CRPD ARTICLES 12 AND 13

The fair trial provisions in Article 6 of the European Convention cover not only the court process but matters such as the charging of an individual and access to legal assistance in a police station.

Article 6 of the Convention – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- (b) *to have adequate time and facilities for the preparation of his defence;*
- (c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The key principle governing the application of Article 6 is fairness.¹ The requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6.²

CRPD Article 13

Article 13 (Access to Justice) provides as follows:

Article 13 Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

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.

¹ Gregačević v. Croatia, no. 58331/09, 10 July 2012, §49.

² Moreira Ferreira v. Portugal (no. 2) [GC], no. 19867/12, 11 July 2017, §67; Carmel Saliba v. Malta, no. 24221/13, 29 November 2016, §67.

CRPD Article 12

Article 12 has proved controversial in the context of serious mental disabilities because it includes the statement that, ‘States Parties shall recognize that persons with disabilities enjoy legal capacity *on an equal basis* with others in all aspects of life’.

Some commentators and agencies have interpreted the ‘equal legal capacity’ provision as meaning that defendants who are disabled by acute mental illness must or should be tried and sentenced on the same basis as other defendants.

If that approach was ever adopted by state parties, it would have significant repercussions in terms of subjecting people who are acutely mentally ill to inhuman or degrading treatment, unfair trial and unjust sentences. Suicide and self-harm rates would be likely to increase substantially.

Article 12

Equal recognition before the law

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
- 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
- 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.*
- 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

ECHR ARTICLE 2 (RIGHT TO LIFE) AND CRPD ARTICLE 10

Article 2 provides that everyone's right to life shall be protected by law. It is particularly relevant to prison and police station conditions.

ARTICLE 2

Right to life

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

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

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

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

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

CRPD Article 10

Article 10 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is cast in similar terms:

'10. States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.'³

The positive obligation under Article 2

Under Article 2, state agents are obliged to refrain from acts or omissions of a life-threatening nature or which place the health of individuals at grave risk.⁴ Without Convention-compliant justification, they must not use lethal force or force which, while not resulting in death, gives rise to serious injury. However, states also have positive obligations under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction.⁵

Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.⁶ An issue may arise under Article 2 where it is shown that the authorities of a contracting state have put a person's life at risk through the denial of health care which they have undertaken to make available to the population in general.⁷

³ The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

⁴ İlhan v Turkey [GC], no. 22277/93, 27 June 2000. In the absence of any indication to the contrary the cited text is a judgment on the merits delivered by a Chamber of the court.

⁵ Cyprus v Turkey [GC], no. 25781/94, 10 May 2001, §219; LCB v the United Kingdom, judgment of 9 June 1998, Reports 1998-III, p140, §36.

⁶ Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242, §91; Younger v United Kingdom (dec), no. 57420/00, ECHR 2003-I; Trubnikov v Russia, no. 49790/99, 5 July 2005, §68.

⁷ Cyprus v Turkey [GC], *supra*, §219; Nitecki v Poland (dec), no. 65653/01, 21 March 2002; Oyal v Turkey, no. 4864/05, 23 March 2010.

Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.⁸

ECHR ARTICLE 3 (INHUMAN OR DEGRADING TREATMENT) AND CRPD ARTICLE 15

Article 3 of the European Convention prohibits torture and inhuman or degrading treatment or punishment. As with Article 2, it is particularly relevant to prison and police station conditions, but also to matters such as interrogation.

ARTICLE 3

Prohibition of torture etc

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

Article 3 is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.⁹ The court has often stated that it must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe.

‘Ill-treatment’

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and sometimes the victim’s sex, age and state of health.¹⁰

Although the purpose of such treatment is a factor, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3.¹¹

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

‘Degrading treatment’

‘Degrading treatment’ is that which arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. It has also been described as involving treatment such as would lead to breaking down the physical or moral resistance of the victim¹² or drive them to act against their will or conscience.¹³

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

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

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

11 Peers, *supra*, §74.

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

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

The positive obligation under Article 3

In general terms, the Convention does not confer a right to a particular standard of medical service or access to medical treatment in any particular country.¹⁴ Nor does it guarantee to any individual a right to receive medical care which if given would exceed the standard level of health care available to the population generally.¹⁵

The court will, however, have regard to legal and policy materials relating to healthcare which have been adopted within the framework of the Council of Europe. The case law refers to the recommendations of the Committee of Ministers in the health sector,¹⁶ as well as to conventions such as the Oviedo Convention¹⁷ and the Council of Europe Convention,¹⁸ and the European Social Charter on health-related issues.¹⁹ Such conventions and charters enable the court to assess the margin of appreciation enjoyed by contracting states and to set baseline standards compatible with the human rights of individuals. In effect, therefore, there is no guarantee to high quality healthcare or to a particular treatment but in certain circumstances a minimum standard of healthcare is guaranteed.

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

There is a particular need for states to take such measures in the context of psychiatric hospitals, where patients are typically in a position of inferiority and helplessness.²⁰ Prison detainees are also in a special situation because of their dependence on the authorities when it comes to their living conditions, including access to medical care. In addition, the fact that they are deprived of their liberty means that any acts and omissions of the authorities are likely to have a greater impact on their psychological well-being. The state must ensure that detainees are held in conditions which are compatible with respect for human dignity. It must also ensure that the manner and method of execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured through requisite medical assistance.²¹ Diagnosis and care in detention facilities, including prison and psychiatric hospitals, should be prompt and accurate. Where necessitated by the person's medical condition, supervision should be regular and involve a comprehensive therapeutic strategy aimed at ensuring the detainee's recovery or at least preventing a deterioration of their condition.²² In order to determine whether these requirements have been met, the court will thoroughly examine, in the light of the particular allegations, whether the authorities have followed the medical advice and recommendations.²³

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

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

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

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

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

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

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

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

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

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

CRPD Article 15

Article 15 of the UNCRPD (Freedom from torture or cruel, inhuman or degrading treatment or punishment) is cast in similar terms to Article 3 of the ECHR but adds the word 'cruel':

'1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

...

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

ECHR ARTICLE 8 (RIGHT TO RESPECT FOR PRIVATE LIFE, ETC) AND CRPD ARTICLE 22

Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence. It is particularly relevant to matters such as searches, fingerprinting, surveillance and the retention of information about a suspect or offender. It will also be relevant to the imposition of bail, parole or licence conditions.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

There must be no interference by a public authority with the exercise of Article 8 rights unless the interference is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article 8.

The term 'private life' is a broad term not susceptible to exhaustive definition.²⁴ However, Article 8 'secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality'.²⁵ It protects the moral and physical integrity of the individual, including the right to live privately away from unwanted attention.²⁶

While Article 8 contains no explicit procedural requirements, 'the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8'.²⁷ The extent of the state's margin of appreciation turns partly on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism.²⁸

24 Peck v United Kingdom, no. 44647/98, 28 January 2003, (2003) 36 EHRR 41, [2003] ECHR 44, §57.

25 Sidabras v Lithuania, nos. 55480/00 and 59330/00, 27 July 2004, (2006) 42 EHRR 6, §43; Brüggeman v Germany, no. 6959/75, 12 July 1977, (1981) 3 EHRR 244, §55.

26 X and Y v Netherlands, no. 8978/80, 26 March 1985, (1985) 8 EHRR 235, [1985] ECHR 4, §§22–27.

27 Shtukaturov v Russia, *supra*, §89; Görgülü v Germany, no. 74969/01, 26 February 2004, §52.

28 Shtukaturov v Russia, *supra*, §89; Sahin v Germany, no. 30943/96, 11 October 2001, §§46 et seq.

The issue of proportionality (the interference must be ‘necessary in a democratic society’) is a consistent theme in case law. When considering whether an interference is proportionate, the burden lies on the state to justify its action. The ‘proportionality’ test entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of the individual with those of the whole community.

The positive obligation

Article 8 gives rise to both negative and positive obligations. States are under a positive obligation to secure the right to effective respect for physical and psychological integrity.²⁹ This obligation may require the state to take measures to provide effective and accessible protection of the right to respect for private life,³⁰ through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures.³¹

Criminal proceedings

All criminal proceedings entail certain consequences for the private life of an individual who has committed a crime. These are compatible with Article 8 of the Convention provided that they do not exceed the normal and inevitable consequences of such a situation.³²

The storing by a public authority of information relating to an individual’s private life amounts to an interference within the meaning of Article 8, especially where such information concerns a person’s distant past.³³

CRPD Article 22 (Respect for privacy)

Article 22 of the CRPD is concerned with respect for privacy:

- ‘1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.*
- 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.*

ARTICLE 5 (DEPRIVATION OF LIBERTY) AND CRPD ARTICLE 14

Article 5 is particularly relevant in criminal cases concerning people with significant mental health problems and it covers detention on the ground of ‘unsoundness of mind’. Article 14 is the CRPD equivalent.

29 Sentges v Netherlands (dec), no. 27677/02, 8 July 2003; Pentiacova and Others v Moldova (dec) no. 14462/03, 4 January 2005; Nitecki v Poland (dec), no. 65653/01, 21 March 2002.

30 Airey v Ireland, no. 6289/73, 11 September 1979, (1979) 2 EHRR 305, [1979] ECHR 3, §33; McGinley and Egan v United Kingdom, nos. 10/1997/794/995-996, 9 June 1998, [1998] ECHR 51, §101; Roche v United Kingdom, no. 32555/96, 19 October 2005, [2008] ECHR 926, (2006) 42 EHRR 30, §162.

31 Tysiąc v Poland, *supra*, §110.

32 Jankauskas v Lithuania (no. 2), no. 50446/09, 27 June 2017, §76.

33 Rotaru v. Romania [GC], 28341/95, 4 May 2000, §§ 43-44.

The special protections associated with Article 5(1)(e) must be observed where the justification for a person's detention — whether during criminal proceedings or in pursuance of a court-imposed sentence committing the person to hospital — is 'unsoundness of mind', rather than e.g. punishment or a need to remand the person in custody because of a risk of further offending or of absconding.

Article 5 also confers certain other rights on all persons involved in criminal proceedings, such as the right to be told the reasons for one's arrest and the right of an arrested person to be brought promptly before a judge.

Article 5 of the Convention – Right to liberty and security

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

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

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

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

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

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty (*S, V and A v Denmark* [GC], § 73; *McKay v the United Kingdom* [GC], § 30).

The state is under a positive obligation not only to refrain from actively infringing the rights in question, but also to take appropriate steps to protect everyone within its jurisdiction from any unlawful interference with these rights (*El-Masri v the former Yugoslav Republic of Macedonia* [GC], § 239).

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

The leading case is *Winterwerp v The Netherlands*.³⁴ In that case, the court set down four conditions that must be satisfied for a person’s detention on the basis of unsoundness of mind to be lawful under Article 5§1(e):³⁵

1. The deprivation of liberty must be lawful.

Lawfulness presupposes conformity with domestic law and the Convention.

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

Domestic law must be in conformity with the Convention, including the general principles expressed or implied by it.³⁶ The general implied principles to which the Article 5§1 case law refers are the principle of the rule of law and, connected to this, the principles of legal certainty, proportionality and protection from arbitrariness, which is the very aim of Article 5.³⁷ A deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention.³⁸

As concerns the principle of legal certainty, the Convention requires that the law is sufficiently clear and precise. It is essential that the conditions for a deprivation of liberty under domestic law are clearly defined and that the law foreseeable in its application, so that so that a person may know to a degree that is reasonable in the circumstances the consequences which a given action may entail, if need be by taking appropriate advice.³⁹

The essential objective of Article 5 is to prevent citizens from being deprived of their liberty arbitrarily.⁴⁰

No detention that is arbitrary can ever be regarded as ‘lawful’. If there are no procedural rules, no criteria, no statement of purpose, no time limits or treatment, and no requirement for continuing clinical assessment, then there is nothing in the law to protect the individual against the arbitrary deprivation of liberty.

Arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the detention do not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5§1; where there is no connection between the ground relied on and the place and

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

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

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

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

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

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

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

conditions of detention; and where there is no proportionality between the ground of detention relied on and the detention in question.⁴¹

The speed with which the domestic courts replace a detention order which has expired or has been found to be defective is a further relevant element in assessing whether a person's detention must be considered arbitrary.⁴²

The absence or lack of reasoning in detention orders is another element taken into account by the court when assessing lawfulness under Article 5§1.⁴³

In terms of the principle of proportionality, the authorities should consider less intrusive measures than detention.⁴⁴

As regards the relationship between the ground relied upon and the place and conditions of detention, in principle the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.⁴⁵

However, where the circumstances justify it, a person may be placed temporarily in an establishment not specifically designed for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.⁴⁶

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

The very nature of what has to be established before the competent national authority — a true mental disorder — calls for objective medical expertise. Except in an emergency, no deprivation of liberty of a citizen considered to be of unsound mind is in conformity with

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

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

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

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

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

46 Pankiewicz v Poland, no. 34151/04, 12 February 2008, §§44-45; Morsink v Netherlands, no. 48865/99, 11 May 2004, §§67-69; Brand v Netherlands, no. 49902/99, 11 May 2004, §§64-66.

Article 5§1 (e) if it has been ordered without seeking the opinion of a medical expert.⁴⁷ A mental condition must be of a certain gravity in order to be considered as a ‘true’ mental disorder.⁴⁸ The relevant time at which a person must be reliably established to be of unsound mind is the date of adoption of the measure depriving that person of their liberty as a result of that condition.⁴⁹

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

In deciding whether an individual should be detained as a person ‘of unsound mind’, the national authorities have a certain discretion because it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case.⁵⁰ The detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate their condition, but also where the person needs control and supervision to prevent them from, for example, causing harm to themselves or others.⁵¹

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

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant’s confinement.⁵² However, the continuation of a deprivation of liberty for purely administrative reasons is not justified.⁵³

CRPD Article 14

Article 14 of the CPRD is concerned with liberty and the security of the person:

Article 14 Liberty and security of person

1. *States Parties shall ensure that persons with disabilities, on an equal basis with others:*
 - a. *Enjoy the right to liberty and security of person;*
 - b. *Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*
2. *States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.*

⁴⁷ Ruiz Rivera v Switzerland, no. 8300/06, 18 February 2014, §59; SR v Netherlands (dec), no. 13837/07, 18 September 2012, §31.

⁴⁸ Glien v Germany, no. 7345/12, 28 November 2013, §85.

⁴⁹ OH v Germany, no. 4646/08, 24 November 2011, §78.

⁵⁰ Plesó v Hungary, no. 41242/08, 2 October 2012, §61; HL v United Kingdom, no. 45508/99, 5 October 2004, ECHR 2004-IX, (2004) 40 EHRR 761, §98.

⁵¹ Hutchison Reid v United Kingdom, no. 50272/99, 20 February 2003, ECHR 2003-IV, [2003] ECHR 94, (2003) 37 EHRR 211, §52.

⁵² Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

⁵³ RL and M-JD v France, no. 44568/98, 19 May 2004, §129.

§3– ARREST, CHARGE AND PRE-COURT ISSUES

In almost all jurisdictions, the investigation of an alleged criminal offence will commence with the arrest of a suspect and often then proceed to the individual's detention in a police station, questioning of the individual and charge. At this stage, European Convention and CRPD issues may also arise in relation to surveillance, stops and searches, taking bodily samples, house arrest, the execution of warrants and the seizure and use of records, including medical records.

ARREST

Subject to rare exceptions, the arrest of an individual based on a suspicion that they have committed a criminal offence gives rise to a deprivation of liberty, with the result that there must be compliance with Article 5 of the European Convention on Human Rights (ECHR).

Arrest of persons suffering from mental ill-health or disability

The arrest of a person suffering from mental ill-health, disability or illness raises critical issues in terms of the effect of arrest and detention on their health, the conditions of detention, access to medical treatment in police custody, diverting people with an active mental illness away from the criminal law system, the fairness of questioning and the risk of false confessions.

State obligations do not only arise on imprisonment. Due consideration must be paid to health issues as soon as a person is taken into police custody. See e.g. *Jasinskis v. Latvia (2010)*,⁵⁴ an Article 2 case involving a 'deaf and mute' arrestee which is dealt with further below:

'59 ... Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability (see Price v. the United Kingdom, no. 33394/96, § 30, ECHR 2001-VII, Farbtuhs v. Latvia, no. 4672/02, § 56, 2 December 2004, and international law sources mentioned in paragraphs 39 to 41 above). More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge (Z and Others v. the United Kingdom [GC], no. 29392/95, § 73, ECHR 2001-V).'

'Arrest' on mental health grounds

In *Guenat v Switzerland (1995)*,⁵⁵ police officers had invited an individual who had been thought to be acting abnormally to accompany them from his home to a police station. After various unsuccessful attempts to contact doctors at the clinic where the applicant had been receiving treatment, a psychiatrist arranged for his compulsory detention in a mental health hospital. The applicant claimed that he had been arrested arbitrarily and detained for some three hours in the police station without being given any explanation for his arrest. However, the majority of the Commission considered that there had been no deprivation of liberty since the police action had been prompted by humanitarian considerations, no physical force had been used, and the applicant had remained free to walk about the police station.

⁵⁴ Jasinskis v. Latvia, no. 45744/08, 21 December 2010

⁵⁵ Guenat v Switzerland, Commission decision of 10 April 1995 ((1995) DR 81, 130 at 134).

Giving reasons for a person's arrest

Article 5(2) of the ECHR requires that, 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.'

The underlying purpose of Article 5(2) is that a person who is arrested must be told why they are being deprived of their liberty. This is an integral part of the scheme of protection afforded by Article 5. It enables the person, if they wish, to apply to a court to challenge the grounds and reasons given and the lawfulness of their detention. This is the right conferred by Article 5(4),⁵⁶ and a person in such a situation cannot make effective use of it unless they are promptly and adequately informed of the reasons for the deprivation of liberty.⁵⁷

The detained person must be told the essential legal and factual grounds for their detention in simple non-technical language that they can understand.⁵⁸ The reasons do not have to be set out in the text of the decision which authorises the person's detention; nor do they have to be in writing or in any special form.⁵⁹ Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features.⁶⁰ However, a bare indication of the legal basis for the arrest or detention, taken on its own, is insufficient for the purposes of Article 5(2).⁶¹

The ZH Case

If the relevant person is incapable of receiving the information, the relevant details must be given to the individuals who represent their interests, such as their lawyer or guardian.⁶² In *ZH v Hungary (2012)*,⁶³ the applicant was a 25 year-old man who was deaf, did not use verbal communication, could not read or write, and had an intellectual disability. His only means of communication was a specific sign language and his mother was the only person who understood him. He was arrested on suspicion of mugging and interrogated at the police station in the sole presence of a sign-language interpreter he said that he was unable to understand. He was then forced him to sign a document to confirm that he understood the charges against him.

The European Court of Human Rights was not persuaded that ZH could be considered to have obtained the information required to enable him to challenge his detention. The condition of a person with intellectual disability must be given due consideration in the process, otherwise it cannot be said that the person has been provided with the requisite information enabling them to make effective and intelligent use of the right of challenge provided by Article 5(4).

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

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

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

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

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

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

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

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

The court said that it was regrettable that the authorities had not taken any truly ‘reasonable steps’ – a notion quite akin to that of ‘reasonable accommodation’ in Articles 2, 13 and 14 of the United Nations Convention on the Rights of Persons with Disabilities – to address his condition, in particular by procuring him assistance by a lawyer or another suitable person. The police officers interrogating the applicant must have realised that no meaningful communication had been possible. They should have sought assistance from the applicant’s mother (who could have at least informed them of the magnitude of his communication problems) rather than simply making the applicant sign the interrogation record. There had been a violation of Article 5(2).

POLICE STATION CONDITIONS

The physical environment of the police station, the availability of medical assistance and the health and social needs of detainees who are mentally ill or disabled are matters with which Articles 2 (Right to Life) and 3 (Inhuman or degrading treatment) of the ECHR are concerned.

ECHR Article 2

In *Jasinskis v. Latvia (2010)*,⁶⁴ the applicant ‘complained about the death in police custody of his deaf and mute son’. He sustained serious head injuries in a fall down some stairs, having been taken to the local police station and placed in a sobering-up cell for 14 hours as the police officers believed him to be drunk.

The ECtHR reiterated that Article 2 requires a state to take appropriate steps to safeguard the lives of those within its jurisdiction. In the case of a disabled person in detention, all the more care should be taken to ensure that the conditions correspond to their special needs. However, the police had not had the applicant medically examined, nor had they given him any opportunity to provide information about his state of health. Taking into account that he was deaf and mute, the police had a clear obligation, under domestic legislation and international standards, to at least provide him with a pen and paper to enable him to communicate his concerns. The police had failed in their duty to safeguard his life by providing him with adequate medical treatment. Furthermore, the investigation into the circumstances of his death had not been effective, in violation of Article 2 under its procedural limb.

ECHR Article 3

In *Price v United Kingdom (2001)*,⁶⁵ the applicant was a four-limb deficient thalidomide victim who also suffered from kidney problems. She was committed to prison for contempt of court in the course of civil proceedings. She was kept one night in a police cell, where she had to sleep in her wheelchair, as the bed was not specially adapted for a disabled person, and where she was cold. She subsequently spent two days in a normal prison, where she was dependent on the assistance of male prison guards in order to use the toilet. The court held that there had been a violation of Article 3. It found that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3.

In *Rupa v Romania (2008)*,⁶⁶ the applicant had suffered from psychological disorders since 1990 and was registered by the public authorities as having a second-degree disability. He alleged that twice he had been detained in inhuman and degrading physical conditions at police stations: firstly in January 1998 and later between March and June 1998.

64 Jasinskis v. Latvia, no. 45744/08, 21 December 2010.

65 Price v United Kingdom, no. 33394/96, 10 July 2001.

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

The court found that in January he spent the night following his arrest in the police holding room. This was furnished only with metal benches that were manifestly unsuitable for the detention of a person with the applicant's medical problems. He had also not had a medical examination on that occasion. The state of anxiety inevitably caused by such conditions had undoubtedly been exacerbated by the fact that he was guarded by the same police officers who took part in his arrest.

As regards his detention from 11 March to 4 June, his behavioural disorders had manifested themselves immediately after he was remanded in custody. These disorders could have endangered his own person. Therefore, the authorities were under an obligation to have him examined by a psychiatrist as soon as possible in order to determine whether his mental condition was compatible with detention, and what therapeutic measures should be taken. Further still, the Romanian government had not shown that the measures of restraint applied during his detention at the police station had been necessary. Subsequently, he was displayed before the court in public with his feet in chains. There had been a violation of Article 3.

In *MS v the United Kingdom (2012)*,⁶⁷ the police were called out in the early hours because the applicant was highly agitated and sitting in a car sounding its horn continuously. He was detained by a police officer under the Mental Health Act 1983 and taken to a police station as a place of safety for a permitted period of up to 72 hours, to enable him to be assessed by a doctor and social worker. The police subsequently found his aunt at his address, seriously injured by him.

Unsuccessful efforts were made on the same day to place MS in a psychiatric medium secure unit. He remained in police custody for more than 72 hours, locked up in a cell where he kept shouting, taking off all of his clothes, banging his head on the wall, drinking from the toilet and smearing himself with food and faeces.

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

QUESTIONING IN A POLICE STATION

The case of *Blokhin v Russia (2016)*⁶⁸ concerned a 12-year old boy who was suffering from a mental and neuro-behavioural disorder. The applicant maintained in particular that the proceedings against him had been unfair, both because he had allegedly been questioned by the police in the absence of his guardian, legal counsel or a teacher and because he had not been given the opportunity to cross-examine the two witnesses against him.

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

68 Blokhin v Russia [GC], no. 47152/06, 23 March 2016.

The Grand Chamber held that there had been a violation of Article 6(1) and 6(3) (right to a fair trial) of the European Convention. The applicant's defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention.

The Grand Chamber underlined in particular that it was essential for adequate procedural safeguards to be in place to protect the best interest and well-being of a child when his or her liberty was at stake. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected. There had also been a violation of Article 3 and a violation of Article 5§1 (right to liberty and security) of the Convention.

CHARGE

Article 5(2) provides that everyone must be informed promptly, in a language which they understand, of the reasons for his arrest and of any charge against them.

Article 6(3) then provides that anyone arrested or charged on reasonable suspicion of having committed an offence shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial, i.e. conditional bail is lawful where appropriate.

Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him.⁶⁹

Persons suffering mental ill-health

In the case of a person with 'mental difficulties', the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him: *Vaudelle v France (2001)*.⁷⁰

In that case, a guardianship judge had granted the applicant's son a special power of attorney to deal with the applicant's affairs, pending a decision about the need to make a guardianship order (*tutelle*) or supervision order (*curatelle*). Three months later, a complaint was lodged against the applicant for several alleged offences of indecent assault on minors. On 29 March 1995, the guardianship judge made a supervision order (*curatelle*), appointing the applicant's son as his supervisor. On the following day, the public prosecutor's office made an order for the applicant's examination by a psychiatrist in connection with the criminal proceedings. The applicant was given two appointments by the psychiatrist – on 20 April and 11 May 1995 – but did not attend either. On 19 October 1995, the Tours Criminal Court found the applicant guilty of sexual assault and sentenced him to a term of imprisonment.

It later transpired that the applicant's son, in his capacity as supervisor, was not informed of his arrest or conviction on 19 October 1995 until 16 April 1996, as all of the summonses and notices of appointment in the criminal proceedings were sent to his father directly. The applicant complained that he had been unable to exercise his defence rights properly in the criminal proceedings that had been instituted against him.

69 Péliſſier and Sassi v. France [GC], no. 56891/00, 21 December 2006, §51; Kamasinski v. Austria, no. 9783/82, 19 December 1989, §79.

70 Vaudelle v France no. 35683/97, 30 January 2001.

The ECtHR noted that the proceedings before the criminal court were begun by direct summons without a prior investigative stage. The criminal court had convicted the applicant in a verdict delivered in adversarial proceedings even though the applicant was absent and unrepresented at the hearing, and it had not received the expert psychiatric report which the public prosecutor's office had itself previously ordered. Because the applicant was legally regarded as being incapable of acting on his own behalf in civil matters, he should also have been regarded as being equally incapable of acting alone in criminal proceedings. The court could not see on what basis or for what reason an individual who it was accepted was incapable of defending his civil interests, and was entitled to assistance for that purpose, should not also be given assistance to defend himself against a criminal charge:

'59. In the Court's opinion ... the Criminal Court was bound out of fairness to take additional steps before trying the case to ensure that the applicant effectively enjoyed the rights guaranteed to him by Article 6 ... In that connection, it reiterates that it is important for the accused to be present in person at first instance ... and points out that under Article 6§3(c) ... the accused is entitled to have a lawyer assigned by the court of its own motion "when the interests of justice so require".

60. In addition: "Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves" (see, mutatis mutandis, Mogyeri v. Germany, judgment of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22; Winterwerp v. the Netherlands, judgment of 24 October 1979, Series A no. 33, p. 24, § 60 in fine; and Prinz, cited above, § 44).

61. In this context the supervision order, which was made seven months before the hearing in the Criminal Court and was still effective at the time, provides useful guidance. It shows that the national authorities had themselves decided at the material time that the applicant was not fully capable of acting alone on his own behalf. Like the applicant, the Court considers that, as he was regarded as being incapable of acting alone on his own behalf in the conduct of his civil affairs, he should have been regarded as being equally incapable of acting alone in the criminal proceedings. At stake in those proceedings was the right to liberty, a right whose importance in a democratic society has been consistently emphasised by the Court ... [and] criminal proceedings produce far more serious consequences than civil proceedings.

62. The Court therefore fails to see on what basis or for what reason an individual who it is accepted is incapable of defending his civil interests and is entitled to assistance for that purpose should not also be given assistance to defend himself against a criminal charge

65. Ultimately, the Court considers that in a case such as the present one, which concerns a serious charge, the national authorities should take additional steps in the interests of the proper administration of justice. They could have ordered the applicant to attend the appointment with the psychiatrist ... and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6§ 3(a) of the Convention; it would also have enabled the Criminal Court to reach its decision entirely fairly. However, that did not happen.

66. In the special circumstances of this case, the Court therefore holds that there has been a violation of Article 6 of the Convention.'

ACCESS TO A LAWYER

The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.⁷¹ In order for the right to a fair trial to remain sufficiently ‘practical and effective’, Article 6(1) requires ‘that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.’⁷²

See also *Vaudelle v France (2001)*,⁷³ *supra*.

SEIZURE AND RETENTION OF RECORDS AND PERSONAL INFORMATION

The seizure of records and personal information raises issues concerning fairness and the use of legally or illegally obtained evidence at trial, i.e. Article 6 rights, but also Article 8 issues to do with privacy and confidentiality.

The Court has established that Article 8 can be engaged where an individual’s name is included in a national sex-offenders database.⁷⁴

FINGERPRINTING

The Court has established that Article 8 can be engaged by the absence of safeguards for the collection, preservation and deletion of fingerprint records of persons suspected but not convicted of criminal offences.⁷⁵

PERSONAL SEARCHES

Strip-searches may constitute inhuman or degrading treatment and so violate Article 3 if conducted unnecessarily or in a way that violates human dignity. Non-intimate searches may violate Article 8 which protects a citizen’s private life, home and correspondence.

Strip-searches

There have been a number of cases on strip-searches where a violation of Article 3 has been established.

71 Salduz v Turkey [GC], no. 36391/02, 27 November 2008, §51; Ibrahim and Others v United Kingdom [GC], nos. 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016, §255; Simeonovi v Bulgaria [GC], no. 21980/04, 12 May 2017, §112; Beuze v Belgium [GC], no. 71409/10, 9 November 2018, §123.

72 Salduz v. Turkey, *supra*, §55.

73 Vaudelle v France no. 35683/97, 30 January 2001.

74 Gardel v France, no 16428/05, 17 December 2009, §58.

75 MK v France, no. 19522/09, 18 April 2013, §26.

In *Valašinas v. Lithuania (2001)*,⁷⁶ the applicant was ordered, following the visit of a relative, to strip naked in the presence of a woman prison officer, which he claimed had been done to humiliate him. He was then ordered to squat, and his sexual organs and the food he had received from the visitor were examined by guards who wore no gloves. The court found that the way in which this particular search had been conducted showed a clear lack of respect for the applicant, and in effect diminished his human dignity. It concluded that it had constituted degrading treatment in breach of Article 3.

See also:

- *Iwańczuk v. Poland (2001)*⁷⁷ (a remand prisoner asked for permission to vote in parliamentary elections; he was told by prison guards that in order to be allowed to vote he would have to undress and undergo a body search; ridiculed and subjected to humiliating remarks; violation of Article 3; there had been no compelling reasons to find that the order to strip naked was necessary and justified for security reasons; lack of respect for his human dignity);
- *Frérot v. France (2007)*⁷⁸ (prisoner subjected to unnecessary anal inspections; violation of Article 3);
- *El Shennawy v. France (2011)*⁷⁹ (searches not based on pressing security needs; liable to arouse in the applicant feelings of arbitrariness, inferiority and anxiety characteristic of a degree of humiliation going beyond the level which the strip-searching of prisoners inevitably entails; violation);
- *SJ (no 2) v Luxembourg (2012)*⁸⁰ (no violation; the layout of the search booth did not ensure complete privacy but no evidence that the prison guards were disrespectful or intended to humiliate the applicant);
- *Milka v Poland (2015)*⁸¹ (inadmissible; no element of debasement or humiliation which might give rise to a violation of Article 3).

SEARCHES OF HOMES AND SURVEILLANCE

Searching a suspect's or defendant's property or keeping them under surveillance may raise Article 3 and Article 8 issues.

In *Van der Graaf v. the Netherlands (2004)*,⁸² the applicant was arrested and taken into custody on suspicion of having shot and killed a well-known politician. He was placed under permanent camera surveillance at the remand centre where he was held. His complaints of a violation of Articles 3 and 8 were held to be inadmissible. It had not been sufficiently established that such a measure had in fact subjected him to mental suffering of a level of severity such as to constitute inhuman or degrading treatment. With regard to Article 8, the measure had a basis in domestic law and pursued the legitimate aim of preventing the applicant's escape or harm to his health. Therefore, given the great public unrest caused by the applicant's offence and the importance of bringing him to trial, the interference could be regarded as necessary in a democratic society in the interests of public safety and the prevention of disorder and crime.

76 Valašinas v Lithuania, no. 44558/98, 24 July 2001.

77 Iwańczuk v Poland, no. 25196/94 15 November 2001, (2001) 38 EHRR 148.

78 Frérot v France, no. 70204/01, 12 June 2007.

79 El Shennawy v France, no. 51246/08, 20 January 2011.

80 SJ (no 2) v Luxembourg, no. 47229/12, 31 October 2013.

81 Milka v Poland, no. 14322/12, 15 September 2015.

82 Van der Graaf v the Netherlands, no. 8704/03, 1 June 2004 (dec.).

TAKING SAMPLES

The taking of a blood and saliva sample against a suspect's wishes is a compulsory medical procedure and, even if of minor importance, therefore constitutes an interference with his right to privacy.⁸³ However, the Convention does not *per se* prohibit recourse to such a procedure in order to obtain evidence of a suspect's involvement in the commission of a criminal offence.⁸⁴

FORCED ADMINISTRATION OF SUBSTANCES

In *Jalloh v Germany (2006)*,⁸⁵ the applicant was forcibly administered an emetic in order to cause him to regurgitate a small bag of drugs he had swallowed just before he was arrested. The ECtHR observed that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny. In the applicant's case the forcible administration of emetics did not appear to have been indispensable (the evidence could have been obtained using less intrusive methods), and the manner in which it was executed was brutal. The treatment was inhuman and degrading, in breach of Article 3.

In *Bogumil v. Portugal (2008)*,⁸⁶ the applicant had swallowed a small bag of cocaine, which was then surgically removed. In finding no breach of Article 3, the court observed that the operation had been required by medical necessity as the applicant risked dying from intoxication and it had not been carried out for the purpose of collecting evidence. Indeed, the applicant had been convicted on the basis of other pieces of evidence.

§–4 THE COURT PROCEEDINGS

GENERAL PRINCIPLE

The key principle governing the application of Article 6 is fairness.⁸⁷ The requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6.⁸⁸

What constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.⁸⁹

83 Jalloh v Germany [GC], no. 54810/00, 11 July 2006, §70; Schmidt v. Germany (dec.).

84 Jalloh v Germany [GC], no. 54810/00, 11 July 2006, §70. See also Caruana v Malta (dec.), no. 41079/16, May 2018, where the court considered that the taking of a buccal swab, was not a priori prohibited in order to obtain evidence related to the commission of a crime when the subject of the test was not the offender but a relevant witness (§32).

85 Jalloh v Germany [GC], no. 54810/00, 11 July 2006.

86 Bogumil v Portugal, no. 35228/03, 7 October 2008.

87 Gregačević v Croatia, no. 58331/09, 10 July 2012, §49.

88 Moreira Ferreira v Portugal (no. 2) [GC], no. 19867/12, 11 July 2017, §67; Carmel Saliba v. Malta, no. 24221/13, 29 November 2016, §67.

89 Ibrahim and Others v United Kingdom [GC], nos. 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016, §250.

Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings.⁹⁰ Moreover, the cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken alone, would not have convinced the court that the proceedings were unfair.⁹¹

Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present their case under conditions that do not place them at a disadvantage *vis-à-vis* their opponent.

WAIVING ONE'S ARTICLE 6 RIGHTS

Any waiver of the right to examine a witness must similarly be strictly compliant with the standards on waiver under case law.⁹² Some Article 6 guarantees, such as the right to counsel, are so fundamental as to be subject to the ‘knowing and intelligent waiver’ standard established by case law, and this protection is especially important for people with impaired capacity and those whose physical disabilities may undermine their determination to insist on their rights.⁹³

'77. In this respect the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...; Kolu v. Turkey, no. 35811/97, § 53, 2 August 2005, and Colozza v. Italy, 12 February 1985, § 28, Series A no. 89). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç v. Turkey, no. 32432/96, 27 March 2007, § 59, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003).

78. The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly waive his rights and respond to interrogation. However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.⁹⁴

90 Ibid, §250.

91 Mirilashvili v Russia, no. 6293/04, 11 December 2008, §165.

92 Murtazaliyeva v Russia [GC], no. 36658/05, 18 December 2018, §118.

93 Dvorski v Croatia [GC], no. 25703/11, 20 October 2015, §101; Pishchalinikov v Russia, no. 7025/04, 24 September 2009, §§77-79.

94 Pishchalinikov v Russia, *supra*, §§77-78.

RIGHT OF ‘EFFECTIVE PARTICIPATION’

Article 6 entitles every person to ‘a fair and public hearing by an independent and impartial tribunal’. If a person lacks the mental capacity to understand what is going on and to participate, this raises an issue of whether the trial is fair.⁹⁵ It is a misuse of the law, and does not reflect well on a civilised legal system, if a person who does not understand the trial is nevertheless forced to endure it. Furthermore, this poses a threat of convicting an innocent person.

A criminal defendant must be able to participate effectively in a court hearing, which must be organised to take account of their physical and mental state, age and other personal characteristics. Assistance by a lawyer may counter-balance a defendant’s personal inability to participate effectively: ***Stanford v UK (1994)***.⁹⁶

It was in the case of ***Stanford v UK (1994)*** that the European Court of Human Rights expressed the principle of effective participation for the first time. Bryan Stanford had been committed for trial by jury at Norwich Crown Court on seven counts arising out of his relationship with a young girl: indecent assault, two counts of rape, unlawful sexual intercourse, kidnapping and two counts of making a threat to kill. During the trial, Stanford was seated in a glass-fronted dock. He complained under Article 6(1) that he did not receive a fair trial because he was unable to hear the proceedings, including the witness statements made by the alleged victim, which resulted in his conviction. The ECtHR found no violation of Article 6, because apart from a minimal loss of sound due to the glass screen, the acoustic levels in the courtroom were satisfactory. Furthermore, counsel for Stanford, who could hear everything that was said and was able to take his client’s instructions at all times, chose for tactical reasons not to bring the accused’s hearing difficulties to the attention of the trial judge at any stage during the six-day hearing. The court stated in the judgment that the right of effective participation includes, amongst other things, the right to be present and the right to hear and follow the proceedings.

A defendant must feel sufficiently uninhibited by the atmosphere of the courtroom, especially when the case is surrounded by excessive public scrutiny, in order to be able to consult with his lawyers properly and participate effectively: ***T and V v. the United Kingdom (1999)***.⁹⁷

In criminal cases involving minors, specialist tribunals must be set up to give full consideration to and make proper allowance for the ‘handicaps’ under which those defendants labour, and adapt their procedure accordingly: ***SC v United Kingdom (2004)***.⁹⁸

In ***SC v United Kingdom (2004)***, an eleven-year-old boy had attempted to rob an 87-year-old woman together with another boy. This led to the woman falling, thereby fracturing her arm. The boy was tried in an adult court and sentenced to detention for two-and-a-half years. The applicant alleged that, because of his youth and low intellectual ability, he was unable to participate effectively contrary to Article 6(1). The Court provided, for the first time, a definition of effective participation:

‘Effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the

95 See the following excellent article: Liselotte van den Anker, Lydia Dalhuisen, Marije Stokkel, Fitness to Stand Trial: A General Principle of European Criminal Law?, *Utrecht Law Review*, upon which this section of the paper draws.

96 *Stanford v United Kingdom*, no. 16757/90, 23 February 1994.

97 *T and V v. United Kingdom* 8 April 1999, (1999) 30 EHRR 12.

98 *SC v United Kingdom*, no. 60958/00, 15 June 2004, [2004] ECHR 263, §§27-37,

general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.'

Taking the Stanford case also into account, the right of effective participation includes:

- the right to be present;
- the right to hear and follow the proceedings;
- the right of an accused to be assisted by, for example, an interpreter, lawyer, social worker or friend;
- that the accused is able to follow what is said in court; and
- that the accused is able to explain his own version of the events and challenge the arguments and statements of the opposing party.

Provided the defendant has sufficient capacity, s/he is required to bring the question of their 'physical or other deficiency' to the attention of the court in order to enable the court to choose the best means of ensuring effective participation. When informed about a serious physical or mental impairment the trial court must ask for a medical expert opinion to rule on the applicant's readiness to participate effectively.⁹⁹

A defendant may participate in a hearing by video-conference, but it should be justified by compelling reasons (for example, security considerations). The system should also function properly and ensure confidentiality of communication between defendants and lawyers.¹⁰⁰

Other cases

In *Liebreich v Germany (2008)*,¹⁰¹ the applicant had been tried on charges of insurance fraud. He complained that he had been unable to participate effectively because of the effects of antidepressant medication. The ECtHR declared his complaint inadmissible as he had been represented by a lawyer with whom he could consult. Furthermore, the domestic German court had received information from a doctor who was treating the accused stating that he was fit to plead. The ECtHR also observed that there was nothing to indicate that the applicant, due to his depression and the effects of his medication, was unable to have a broad understanding of the trial process or unable to understand what was at stake for him. Therefore it could be concluded that the applicant was fit to plead. The court confirmed that good professional legal assistance can compensate for ineffective participation. It explicitly stated how it should be determined that there are reasons for concluding that a defendant is unfit to plead, namely by consulting a doctor.

See also *Vaudelle v France (2001)*¹⁰² above, in which the court could not see on what basis or for what reason an individual who was incapable of defending his civil interests and was entitled to assistance for that purpose should not also be given assistance to defend himself against a criminal charge.

99 Timergaliyev v Russia, no. 40631/02, 14 October 2008.

100 Marcello Viola v Italy, no. 45106/04, 5 October 2006 §§63-77; Golubev v. Russia, no. 26260/02 , 9 November 2006, (dec.)

101 Liebreich v Germany, no. 30443/03, 8 January 2008, (dec).

102 Vaudelle v France no. 35683/97, 30 January 2001.

RIGHT TO CROSS-EXAMINE WITNESSES

Only in exceptional circumstances, such as in cases involving sexual offences like the rape of a woman, or sexual abuse of a child, can the refusal of a key witness – the alleged victim — to testify serve as a legitimate ground for using testimony recorded pre-trial without summoning that witness. The aim here is consideration for the witness' mental state and the avoidance of undesired publicity at trial.¹⁰³

RIGHT TO INTERPRETER, e.g. SIGNER

Article 6(3) requires the translation of some material but not all of the relevant documentation. It covers the translation or interpretation only of documents or statements – such as the charge, bill of indictment, key witness testimony, etc. — that are necessary for the defendant to have the benefit of a fair trial.¹⁰⁴ Because this is so, it is crucial that free translation or interpretation is adequately supplemented by legal assistance of sufficient quality.¹⁰⁵ The use of the word 'free' means that the authorities cannot recover costs of the interpretation at the end of the proceedings, regardless of their outcome.¹⁰⁶

It can reasonably be argued that an inability to understand or speak arising from a physical disability, or a young or very old age, also invokes Article 6(3). However, following the decision in *T and V v. the United Kingdom (1999)*¹⁰⁷ this issue may be looked at more appropriately from the point of view of general fairness under Article 6(1) and the principle of effective participation.

EXPERT REPORTS

Circumstances may require that courts accede to an accused's request for an expert opinion on a particular matter.

In *GB v France (2002)*,¹⁰⁸ it appeared that an expert witness had a brief opportunity to study new documents in the middle of his oral evidence at the applicant's criminal trial. When the hearing resumed, the expert expressed a totally damning opinion that was entirely at odds with the written report he had prepared three and a half years earlier. The expert is alleged to have stated that, 'G.B. is a paedophile, for whom psychotherapy is necessary but would be ineffective because G.B. would have no feelings of guilt. The length of a prison sentence has no effect on an individual of this type and there is a high risk that he will reoffend.'

Having regard to the circumstances, namely the expert's *volte-face*, combined with the rejection of the application for a second opinion, the ECtHR considered that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there had been a breach of Article 6(1) and 3(b) of the Convention taken together.

103 Scheper v. the Netherlands, no. 39209/02, 5 April 2005, (dec.); SN v Sweden, no. 34209/96, 16 January 2001, (dec.).

104 Kamasinski v Austria, no. 9783/82, 19 December 1989.

105 Quaranta v Switzerland, no. 12744/87, 24 May 1991; Czekalla v Portugal, no. 38830/97, 10 October 2002.

106 Işyar v Bulgaria, no. 391/03, 20 November 2008, §§46-49.

107 T and V v. United Kingdom 8 April 1999, (1999) 30 EHRR 12.

108 GB v France (2002) 35 EHRR 36 no. 44069/98.

Note that the detention of a minor accused of a crime during the preparation of a psychiatric report necessary for the taking of a decision on his mental condition has been considered to fall under Article 5(1)(d), as being detention for the purpose of bringing a minor before the competent authority.¹⁰⁹

LEGAL AID

Article 6 provides that everyone charged with a criminal offence has a right ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’.

In general terms, the right to legal aid is subject to two conditions which are to be considered cumulatively:¹¹⁰

- Firstly, the accused must show that s/he lacks sufficient means to pay for legal assistance.¹¹¹ However, s/he need not do so ‘beyond all doubt’. It is sufficient that there are ‘some indications’ that this is so or, in other words, that a ‘lack of clear indications to the contrary’ can be established.¹¹² In any event, the court cannot substitute itself for the domestic courts in order to evaluate the applicant’s financial situation at the material time but instead must review whether those courts, when exercising their power of appreciation in assessing the evidence, acted in accordance with Article 6(1).¹¹³
- Secondly, states are under an obligation to provide legal aid only ‘where the interests of justice so require’.¹¹⁴ This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case.¹¹⁵

When determining whether the ‘interests of justice’ require an accused to be provided with free legal representation, the court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation.¹¹⁶

A further condition of the ‘required by the interests of justice’ test is the complexity of the case¹¹⁷ as well as the personal situation of the accused.¹¹⁸ The latter requirement is looked at especially with regard to the capacity of the particular accused to present their case were s/he not granted legal assistance.¹¹⁹

109 X v Switzerland, no. 8407/78, 6 May 1980.

110 Quaranta v Switzerland, no. 12744/87, 24 May 1991, §27)

111 Caresana v United Kingdom, no. 31541/96, 29 August 2000, (dec.).

112 Pakelli v Germany, no. 8398/78, 25 April 1983, §34; Tsonyo Tsonev v Bulgaria (no. 2), no. 2376/03, 14 January 2010, §39.

113 RD v Poland, nos. 29692/96 and 34612/97, 18 December 2001, §45.

114 Quaranta v Switzerland, no. 12744/87, 24 May 1991, §27.

115 Granger v United Kingdom, no. 11932/86, 28 March 1990 §46.

116 Benham v United Kingdom [GC], no. 19380/92, 24 May 1996, §61; Quaranta v Switzerland, no. 12744/87, 24 May 1991, §33; Zdravko Stanev v Bulgaria, no. 32238/04, 6 November 2012, §38.

117 Quaranta v Switzerland, no. 12744/87, 24 May 1991, §34; Pham Hoang v France, no. 13191/87, 25 September 1992, §40; Twalib v Greece, no. 42/1997/826/1032, 9 June 1998, §53.

118 Zdravko Stanev v Bulgaria, no. 32238/04, 6 November 2012, §38.

119 Quaranta v. Switzerland, no. 12744/87, 24 May 1991, §35; Twalib v Greece, no. 42/1997/826/1032, 9 June 1998, §53.

The right to legal aid is also relevant for the appeal proceedings.¹²⁰ In this context, in determining whether legal aid is needed, the court takes into account three factors in particular: (a) the breadth of the appellate court's power; (b) the seriousness of the charges against applicants; and (c) the severity of the sentence they face.¹²¹

Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel 'of one's own choosing' is necessarily subject to certain limitations where free legal aid is concerned. Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced.¹²²

Cases involving persons suffering mental ill-health

In the **Megyeri Case (1992)**,¹²³ the applicant's confinement was grounded on a finding in criminal proceedings that he was not responsible for his acts because he was suffering from a schizophrenic psychosis with signs of paranoia. Sometime later, in July 1986, the Aachen Regional Court had before it expert evidence stating that his condition had deteriorated, he was unwilling to undergo treatment and he had shown a distinct propensity towards aggressive behaviour and violence. Before the Commission, Mr Megyeri submitted that the failure to appoint a lawyer to assist him in the 1986 regional court proceedings concerning his possible release violated Article 5(4). The court found it was doubtful 'to say the least' whether, acting on his own, he was able to marshal and present adequately points in his favour on the relevant issues, involving as they did matters of medical knowledge and expertise. It was even more doubtful whether, on his own, he was in a position to address adequately the legal issue arising: would his continued confinement be proportionate to the aim pursued (the protection of the public). There had been a breach of Article 5(4).

The court stated that the principles enshrined within Article 5(4) included the following:

1. A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings 'at reasonable intervals' before a court to put in issue the 'lawfulness' of their detention (see, *inter alia*, *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52).
2. It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v Netherlands*, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR 387, §60).
3. Article 5(4) does not require that persons committed to care under the head of 'unsound mind' should themselves take the initiative in obtaining legal representation before having recourse to a court (see *Winterwerp v Netherlands*, *supra*, §66).
4. It followed that where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences, but in respect of which he could not be held responsible on account of mental illness, he should (unless there were special circumstances) receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what was at

120 Volkov and Adamskiy v Russia, nos. 7614/09 and 30863/10, 26 March 2015, §§56-61.

121 Mikhaylova v Russia, no. 46998/08, 19 November 2015, §80.

122 Lagerblom v Sweden, no. 26891/95, 14 January 2003, §55.

123 Megyeri v Germany, no. 13770/88, 12 May 1992, (1993) 15 EHRR 584, [1992] ECHR 49.

stake for him (personal liberty) taken together with the very nature of his affliction (diminished mental capacity) compelled this conclusion.

In *Aerts v Belgium (1998)*,¹²⁴ the court found that the refusal of the Legal Aid Board to fund a lawyer for Mr Aerts' further appeal breached article 6(1) because it impaired the very essence of the right to a fair hearing. It was not appropriate for the Legal Aid Board to assess the merits of his claim, and refusing to fund counsel denied him the opportunity to have his civil rights determined before a tribunal:

*'That being so, the applicant, who did not have sufficient means to pay a lawyer, could legitimately apply to the Legal Aid Board with a view to an appeal on points of law, since in civil cases Belgian law requires representation by counsel before the Court of Cassation. It was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal. There has accordingly been a breach of Article 6 § 1.'*¹²⁵

DETENTION ON MENTAL HEALTH GROUNDS AND ARTICLE 5(1)(e)

The essential objective of Article 5 is to prevent citizens from being deprived of their liberty arbitrarily.¹²⁶ No detention that is arbitrary can ever be regarded as 'lawful'.

Arbitrariness may arise where there is no proportionality between the ground of detention relied on and the detention in question.¹²⁷ In terms of the principle of proportionality, the authorities should consider less intrusive measures than detention.¹²⁸

Place and conditions of detention

As regards the relationship between the ground relied upon and the place and conditions of detention, in principle the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.¹²⁹ However, where the circumstances justify it, a person may be placed temporarily in an establishment not specifically designed for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.¹³⁰

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

125 Aerts, *supra*, para. 60.

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

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

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

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

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

In *Aerts v Belgium (1998)*,¹³¹ national legislation provided only for the detention of a mentally ill person in a prison as a provisional measure, pending a designation by the mental health board as to the institution where the person was to be detained. The applicant maintained that his detention for seven months in the psychiatric wing of Lantin Prison, pending transfer to the Paifve Social Protection Centre (his designated place of detention), breached Article 5. The prison psychiatric wing was not an appropriate institution for the treatment of the mentally ill and the treatment he received there had done him harm. The court reiterated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic or other appropriate institution. Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind. Indeed, on 2 August 1993, the Mental Health Board had expressed the view that the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. The proper relationship between the aim of the detention and the location and conditions in which it took place was therefore deficient, and there had been a breach of Article 5.

The need for a medical opinion

Except in an emergency, no deprivation of liberty on the ground of unsoundness of mind will be compatible with Article 5(1)(e) if it has been ordered without seeking a medical expert opinion.¹³² The individual must be reliably shown to be of ‘unsound mind’, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.

A mental condition must be of a certain gravity in order to be considered as a ‘true’ mental disorder.¹³³ The relevant time at which a person must be reliably established to be of unsound mind is the date of adoption of the measure depriving that person of their liberty as a result of that condition.¹³⁴

Refusal to co-operate with a psychiatric assessment

Where the lack of co-operation by the individual prevents a diagnostic report being issued, it is acceptable for the court ruling or the detention on mental health grounds to rely on other medical reports, opinion: and examinations showing clearly that he is nonetheless mentally disturbed.¹³⁵

Orders of public prosecutors

In *Varbanov v Bulgaria (2000)*,¹³⁶ the applicant refused an invitation by the prosecutor to undergo psychiatric examination, as a result of which he was forcefully detained at a psychiatric hospital. This was done without consulting a medical expert and no emergency was claimed. By not requiring a medical opinion prior to detention, domestic law failed to protect against arbitrariness:

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

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

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

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

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

135 Constancia v Netherlands, no.73560/12, 3 March 2015, (dec.).

136 Varbanov v Bulgaria (2000), 5 October 2000, ECHR 2000-X at §§4-48.

'47. The Court considers that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1(e) if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention.

The particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases a prior consultation should be necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be required, failing which it cannot be maintained that a person has reliably been shown to be of unsound mind.

Furthermore, the medical assessment must be based on the actual state of mental health of the person concerned and not solely on past events. A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed.'

See also **CB v Romania (2010)**,¹³⁷ where the applicant was taken forcibly into custody following vexatious complaints lodged by him against a police officer. He was handcuffed and transferred to a psychiatric hospital for 14 days on order of a public prosecutor without any medical examination by an appropriately qualified doctor.

Standard of proof required for detention for assessment

Proof of an established mental disorder is not required at the initial taking into detention for an initial period of assessment. It may be enough that there is some medical evidence, and genuine concerns that the person is a risk to themselves or others.¹³⁸ The medical opinion relied on should, however, reflect the applicant's condition at the time of the decision, a delay between the medical examination and the presentation of the opinion in court being capable of disclosing arbitrariness.¹³⁹

Whether in criminal proceedings the person must lack criminal capacity

Lawful detention under Article 5(1)(e) in criminal matters does not require that the person also lacks criminal capacity. It is sufficient that the detainee, in this case one diagnosed with dissocial personality and paedophilia, is a risk to others: **Glien v Germany (2013)**.¹⁴⁰

Whether the person's condition must be treatable

The requirement that a person is suffering from mental disorder warranting compulsory confinement does not include or infer an additional requirement that the condition is amenable to medical treatment, the so-called 'treatability criteria' found in some domestic laws.¹⁴¹ Confinement may be necessary not only where a person requires treatment or therapy, but also when the person needs

137 CB v Romania, no. 21207/03, 20 April 2010, §§48–59.

138 SR v Netherlands, no. 13837/07 (dec.), 28 September 2012.

139 Musial v Poland, 25 March 1999, ECHR 1999-11, 31 E.H.R.R. 720, §50, where the court decision ordering continued detention was based on an examination which took place some 11 months earlier; see also Varbanov v Bulgaria, no. 31365/96, ECHR 2000-X, §47; Magalhaes Pereira v Portugal, no. 44872/98, 26 February 2002. See also HW v Germany, no. 17167/11, 19 September 2013, where a 12-year old assessment of a prisoner's mental disorder and dangerousness meant that there was no sufficient lawful basis or justification for his continued detention.

140 Glien v Germany, no. 7345/12, 28 November 2013, §§84–91.

141 Koniarska v UK, no.33670/96) (dec.), 12 October 2000.

control and supervision to prevent harm to himself or others: *Hutchison Reid v UK (2003)*.¹⁴² In that case, the applicant's psychopathic disorder was not appropriate for hospital treatment. However, the ECtHR found that it was not contrary to Article 51(e) to detain him in hospital as it was not disputed that his mental disorder made him a risk to the public.

Whether it must be proved that the person did the act that led to him being charged

It is not necessary to establish whether the person has committed the acts which led to the proceedings against him, if it is duly established that s/he is of unsound mind requiring confinement.¹⁴³ It is also not arbitrary that this detention flows from proceedings concerned with a criminal defendant's fitness to plead.

SENTENCING

See also: Detention on Mental Health Grounds and Article 5(1)(e), above.

Automatic life sentences and persons with mental ill-health

In *Drew v United Kingdom (2006)*,¹⁴⁴ it was held that a statutory requirement that courts pass an automatic life sentence for a second serious sexual or violent offence in the absence of exceptional circumstances, even in the case of 'a mentally-disordered offender', did not breach Article 3 or Article 5.

Suspending execution of the sentence on medical grounds

In *Xiros v. Greece (2010)*¹⁴⁵ the Court found that a refusal to suspend the execution of the applicant's prison sentence in order to allow him to undergo specialist hospital treatment for his eyesight had amounted to a violation of Article 3.

In *Contrada (no 2) v. Italy (2014)*,¹⁴⁶ an 82-year old applicant alleged that, in view of his age and his state of health, the authorities' repeated refusal of his requests for a stay of execution of his sentence, or for the sentence to be converted to house arrest, had amounted to inhuman and degrading treatment. The European Court held that there had been a violation of Article 3. It observed that it was beyond doubt that the applicant suffered from a number of serious and complex medical disorders, and all the medical reports and certificates submitted to the authorities had consistently and unequivocally found that his state of health was incompatible with the prison regime to which he was subjected. In the light of the medical certificates available to the authorities, the nine months that elapsed before he was placed under house arrest, and the reasons given for the decisions refusing his requests, his continued detention had violated Article 3.

142 Hutchison Reid v United Kingdom, no. 50272/99, 20 February 2003, ECHR 2003-IV, [2003] ECHR 94, (2003) 37 EHRR 211, § 51.

143 Juncal v UK, no.32357/09) (dec.), 17 September 2013.

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

145 Xiros v. Greece, no. 1033/07, 9 September 2010.

146 Contrada (no 2) v. Italy (2014), 7509/08, 11 February 2014.

§-5 POST-SENTENCE

An individual may be detained post-sentence in a prison following the imposition of a term of imprisonment (see below, **§6 Prison Conditions**) or in a psychiatric facility pursuant to an order made by the criminal court committing him to hospital.

DETENTION IN HOSPITAL UNDER A COURT ORDER

Where a defendant is committed to a psychiatric unit by the criminal court, the validity of their continued confinement depends upon the persistence of a mental disorder justifying detention.

Delay in discharging a patient

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant's confinement.¹⁴⁷ However, the continuation of a deprivation of liberty for purely administrative reasons is not justified.¹⁴⁸

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

In **Johnson v United Kingdom (1997)**,¹⁵⁰ the applicant's detention in Rampton [high secure] Hospital was reviewed by a tribunal on 15 June 1989. The tribunal accepted the medical evidence that he was not then suffering from mental illness, stating that the episode of mental illness from which he formerly suffered has come to an end. It ordered his conditional rather than absolute discharge, because he required rehabilitation under medical supervision in a hostel environment, and a recurrence of his mental illness requiring recall to hospital could not be excluded. This discharge was deferred until arrangements could be made for his suitable accommodation. Considerable efforts to secure a hostel were unsuccessful. Eventually, on 12 January 1993, a tribunal ordered his absolute discharge. The applicant complained that his detention between 15 June 1989 and 12 January 1993 violated Article 5(1). More particularly, the tribunal in 1989 should have ordered his immediate and unconditional discharge, since he had made a full recovery from the episode of mental illness specified in the hospital order imposed by the court.

The court observed that it does not automatically follow from a finding by an expert authority that the mental disorder which justified confinement no longer persists that therefore the patient must be immediately and unconditionally released into the community. Such a rigid approach would place an unacceptable degree of constraint on the responsible authority's exercise of judgment when determining whether the interests of the patient and the community will be best served by such a course of action. In the field of mental illness, the assessment as to whether the disappearance of symptoms is confirmation of complete recovery is not an exact science. Whether or not recovery from the episode of illness which justified the confinement is complete and definitive, or merely apparent, cannot always be measured with absolute certainty. It is the patient's behaviour outside the confines of the psychiatric institution which will be conclusive of this. Therefore, a responsible authority is

¹⁴⁷ Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

¹⁴⁸ RL and M-JD v France, no. 44568/98, 19 May 2004, §129.

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

¹⁵⁰ Johnson v United Kingdom, no. 22520/93, 24 October 1997, (1997) 27 EHRR 296, [1997] ECHR 88.

entitled to exercise a measure of discretion in deciding whether it is appropriate to order immediate and absolute discharge in a case as this. It is, however, of paramount importance that appropriate safeguards are in place which ensure that any deferral of discharge is consonant with the purpose of Article 5(1)(e) and, in particular, that discharge is not unreasonably delayed.

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

Recall to hospital of patients discharged on conditions

Where a patient is released on conditions, there have been a number of cases which deal with what needs to be shown in order to lawfully recall the person to hospital for a further period of detention there.

In *X v United Kingdom (1981)*,¹⁵¹ a patient who was subject to special restrictions because of a risk of serious harm to others complained that it had been unlawful for the Home Secretary to recall him to Broadmoor (high-secure) Hospital without any doctor having certified first that he was of unsound mind. This argument was rejected by the court. The court noted that the Home Secretary's power of recall was concerned,

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

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

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

As with *X v United Kingdom (1981)*, the applicant in *Kay v United Kingdom (1994)*¹⁵² complained about his recall to Broadmoor Hospital without a prior medical assessment, in his case on the expiration of a lengthy prison sentence. The Commission noted that his recall was in accordance with the procedures prescribed by domestic law. Furthermore, the Home Secretary was entitled to be concerned about the protection of the public in the light of the applicant's history of psychopathy, and his serious criminal record involving extreme violence towards girls and women. However, this historical background did not mean that one could dispense with the need to obtain up-to-date medical evidence about the applicant's mental health before ordering his recall. The most recent tribunal decision in 1986 had found that there was no evidence the applicant was then suffering from a psychopathic disorder and the weight of medical evidence at the time of recall was in his favour. It had not been impossible to have him assessed in prison, and the existence of a dissenting report from a Broadmoor doctor who had not interviewed him could not outweigh the tribunal's finding, nor provide a sufficient scientific basis for his continued compulsory confinement in hospital nearly three years later. Consequently, when the Home Secretary decided to recall the applicant to Broadmoor certain minimum conditions of lawfulness were not respected. In particular, there was no up-to-date objective medical expertise showing that the applicant suffered from a true mental disorder, or that his previous psychopathic disorder persisted. In the absence of any emergency, there were no particular circumstances to justify the omission. Accordingly, the applicant's recall and return to Broadmoor could not be qualified as the lawful detention of a person of unsound mind for the purposes of Article 5(1)(e).

In *Roux v United Kingdom (1996)*,¹⁵³ the applicant was subject to special restrictions because of a risk of serious harm to others. He complained that it had been unlawful for the Home Secretary to recall him to Broadmoor [high-secure] Hospital because of a concern that he was beginning to repeat the pattern of behaviour evident before the commission of his two offences against prostitutes. Mr Roux complained that his recall contravened Article 5 because he had not failed to comply with or breached any condition of the tribunal order discharging him and no breach of an obligation prescribed by law. Furthermore, no court had determined the state of his mental health at the time of his recall. The Government submitted that the Home Secretary's power of recall was not limited by the conditions attached to release and there could be occasions where recall was appropriate even though no conditions had been breached. Conversely, some breaches of the conditions of discharge from hospital would not warrant recall to hospital. In the event, a friendly settlement was reached, whereby the Government agreed to pay £2,000 to the applicant together with the agreed costs.

RIGHT OF APPEAL AND ARTICLE 5(4)

Article 5(4) provides that everyone who is deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful.¹⁵⁴

Article 5(4) is the *habeas corpus* provision of the Convention. It provides detained persons with the right to seek a judicial review of their detention¹⁵⁵ and this extends to both the procedural and substantive justifications of the deprivation of liberty.¹⁵⁶

¹⁵² Kay v United Kingdom, no. 17821/91, 1 March 1994, [1994] ECHR 51.

¹⁵³ Roux v United Kingdom, no. 25601/94, 4 September 1996.

¹⁵⁴ As concerns access to justice, see also Article 13 of the UNCRPD. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

¹⁵⁵ Mooren v Germany [GC], no. 11364/03, 9 July 2009, §106; Rakevich v Russia, no. 58973/00, 28 October 2003, §43.

¹⁵⁶ Idalov v Russia [GC], no. 5826/03, 22 May 2012, §161; Reinprecht v Austria, no. 67175/01, 12 April 2006, ECHR 2005-XII, (2007) 44 EHRR 39, IHRL 3254, §31.

Furthermore, the notion of ‘lawfulness’ in Article 5§4 has the same meaning as in Article 5§1. Consequently, the detained person is entitled to a review of the ‘lawfulness’ of their detention not just in terms of the requirements of domestic law but also the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1.¹⁵⁷

The remedy of habeas corpus does not enable a judicial determination as wide as this because where the terms of a statute afford the executive a discretion, whether wide or narrow, the review exercisable by the courts in habeas corpus proceedings bears solely on the conformity of the exercise of that discretion with the empowering statute.¹⁵⁸

The Article 5§1(e) criteria for ‘lawful detention’ necessitates that the review guaranteed by Article 5§4 in relation to the continuing detention of a mental health patient should be made by reference to their contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the time of the initial decision to detain.¹⁵⁹

A person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings ‘at reasonable intervals’ to put in issue the lawfulness of their detention.¹⁶⁰ A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own.¹⁶¹

The forms of judicial review which satisfy the requirements of Article 5§4 may vary from one domain to another and will depend on the type of deprivation of liberty in issue.¹⁶²

Where the European Court of Human Rights court has found no breach of the requirements of Article 5§1, this does not release the court from carrying out a review of compliance with Article 5§4. The two paragraphs are separate provisions. Observance of the former does not necessarily entail observance of the latter.¹⁶³

It is not always necessary that an Article 5§4 procedure is attended by the same guarantees as are required under Article 6 for criminal or civil litigation but it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty.¹⁶⁴

The ‘court’ to which the detained person has access does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country.¹⁶⁵ However, it must be a body of ‘judicial character’ offering certain procedural guarantees appropriate to the kind of deprivation of liberty in question.¹⁶⁶ To satisfy the requirements of the Convention the review must comply with both

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

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

159 See X v United Kingdom, *supra*.

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

160 *Ibid*, §77.

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

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

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

164 A and Others v United Kingdom [GC], no. 3455/05, 19 February 2009, §203; Idalov v Russia [GC], no. 5826/03, 22 May 2012, §161.

165 Weeks v United Kingdom, no. 9787/82, 2 March 1987, Series A no. 114, (1988) 10 EHRR 293, §61.

166 See e.g. De Wilde, Ooms and Versyp v Belgium, nos. 2832/66; 2835/66; 2899/66, 18 June 1971, Series A no. 12, §§76 and 78.

the substantial and procedural rules of national legislation and be conducted in conformity with the aim of Article 5, which is to protect the individual against arbitrariness.¹⁶⁷ The ‘court’ must be independent both of the executive and of the parties to the case,¹⁶⁸ and have the power to order release if it finds that the detention is unlawful. A mere power of recommendation is insufficient.¹⁶⁹

A ‘speedy’ decision

Article 5§4 also proclaims the right to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it is unlawful.¹⁷⁰

The term ‘speedily’ cannot be defined in the abstract. As with the ‘reasonable time’ requirements of Article 5§3 and Article 6§1, whether the decision has been made ‘speedily’ must be determined in the light of the circumstances of the particular case.¹⁷¹

The notion of ‘speedily’ (*à bref délai*) indicates a lesser urgency than that of ‘promptly’ (*aussitôt*) in Article 5§3.¹⁷² However, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of ‘speediness’ of judicial review under Article 5§4 comes closer to the standard of ‘promptness’ under Article 5§3.¹⁷³ The relevant starting point is the date when the application for release was made/the proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant’s detention, including any appeal.¹⁷⁴

Where the judicial determination involves complicated issues — such as the detained person’s medical condition — this may be taken into account when considering how long is ‘reasonable’ under Article 5§4. However, even in complicated cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention.¹⁷⁵

If the length of time before a decision is taken is *prima facie* incompatible with the notion of speediness, the court will look to the state to explain the reason for the delay.¹⁷⁶

In assessing the speedy character required by Article 5§4, factors such as the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state’s responsibility may be taken into consideration.¹⁷⁷

167 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §27.

168 Stephens v Malta (no. 1), no. 11956/07, 21 April 2009, §95.

169 Benjamin and Wilson v United Kingdom, no. 28212/95, 26 September 2002, §§33-34.

170 Ibid, §154; Baranowski v Poland, no. 28358/95, 28 March 2000 ECHR 2000-III, §68.

171 RMD v Switzerland, no. 19800/92, 26 September 1997, §42; Rehbock v Slovenia, no. 29462/95, 28 November 2000, ECHR 2000-XII, §84.

172 E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; Brogan and Others v United Kingdom, nos. 11234/84 and 11209/84, 29 November 1988, Series A no. 145-B, (1988) 11 EHRR 117, §59.

173 Shcherbina v Russia, no. 41970/11, 26 June 2014, §§65-70, where a delay of sixteen days in the judicial review of the applicant’s detention order issued by the prosecutor was found to be excessive.

174 Sanchez-Reisse v Switzerland, no. 9862/82, 21 October 1986, Series A no. 107, [1986] ECHR 12, (1986) 9 EHRR 71, §54; E. v Norway, §64.

175 Frasik v Poland, no. 22933/02, 5 January 2010, §63; Jablonski v Poland, no. 33492/96, 21 December 2000, §§91-93.

176 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §29.

177 Mooren v Germany [GC], no. 11364/03, 9 July 2009, §106; Kolompar v Belgium, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §42.

Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.¹⁷⁸

In the case of *Barclay-Maguire v United Kingdom (1983)*,¹⁷⁹ the Commission declared admissible an application which alleged that a delay of 18 weeks between the making of a tribunal application and its determination contravened Article 5(4). The government, seeking a settlement from the Commission, suggested 13 weeks as a reasonable target time. It subsequently failed to meet this target. A number of patients subsequently sought judicial review in relation to delayed hearings but judgment was avoided by offering them an earlier date, necessarily at the expense of other patients.¹⁸⁰

In *Koendjbiharie v Netherlands (1990)*,¹⁸¹ the relevant period was held to have begun on 17 May 1984 when the application to extend the patient's confinement was filed with the Court of Appeal. The decision was received more than four months later. Such a lapse of time was not compatible with the notion of speediness. The court, accordingly, found a failure to comply with the requirement of 'speediness' laid down in Article 5(4).

In *Kay v United Kingdom (1994)*,¹⁸² the Commission referred to the court's case law that periods of eight weeks to five months in mental health determinations were difficult to reconcile with the notion of 'speedily' in Article 5(4) of the Convention.¹⁸³

It was not contested by the government that mental health review tribunals frequently took up to six months to determine cases like the applicant's. In Kay's case, the determination took just over two years and the first hearing date proposed by the tribunal was nearly five months after referral. In the Commission's view, the system itself was inherently too slow. The tribunal proceedings were not conducted 'speedily' within the meaning of Article 5(4).

In *Pauline Lines v United Kingdom (1997)*,¹⁸⁴ the applicant was subject to special restrictions because of a risk of serious harm to others. She was readmitted to hospital on 27 July 1993. On 7 December 1993, the Home Secretary referred her case to a tribunal which then heard the matter on 23 February 1994. The patient complained about the length of time it took for her to have a review following admission, contrary to Article 5(4). The Commission unanimously declared her complaint to be admissible. In the event, a friendly settlement was reached, whereby the government paid the applicant's representatives £3591.75, of which £2000 represented compensation and the remainder costs.

In *RSC v United Kingdom (1997)*,¹⁸⁵ the applicant was subject to special restrictions because of a risk of serious harm to others. He was recalled to Broadmoor [high-secure] Hospital on 16 November 1994. On 22 November 1994, the Home Secretary referred his case to a tribunal, which adjourned the initial hearing on 20 September 1995 and did not determine his detention until 25 March 1996. The applicant alleged a violation of Article 5(4), *inter alia* on the ground that the tribunal did not decide

¹⁷⁸ E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §66; Bezicheri v Italy, no. 11400/85, 25 October 1989, Series A no. 164, (1990) 12 EHRR 210, [1989] ECHR 19, §25.

¹⁷⁹ *Barclay-Maguire v United Kingdom (dec)*, no. 9117/80, 9 December 1983.

¹⁸⁰ See e.g. the judicial review applications in *R. v Mental Health Review Tribunal, ex p. Hudson* (unreported, 1986) and *R. v Mental Health Review Tribunal, ex p. Mitchell* (unreported, 1985).

¹⁸¹ *Koendjbiharie v Netherlands*, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820.

¹⁸² *Kay v United Kingdom*, no. 17821/91, 1 March 1994, [1994] ECHR 51.

¹⁸³ E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; *Van der Leer v the Netherlands*, *supra*, §§ 27-28; X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §§32-36.

¹⁸⁴ *Pauline Lines v United Kingdom*, European Commission, no. 2451/94, 17 January 1997.

¹⁸⁵ *RSC v United Kingdom*, European Commission, no. 27560/95, 28 May 1997.

the matter ‘speedily’. A friendly settlement was reached. The government agreed to pay the applicant £2,000 compensation, together with £2,800 costs. It also undertook to amend the tribunal rules, so that when a conditionally discharged patient was recalled there must be a tribunal hearing within two months from the date on which the case was referred to the tribunal.

Periodic reviews

The detention of persons on the ground of unsoundness of mind constitutes a special category with its own specific problems. In particular, the reasons initially warranting confinement may cease to exist. The very nature of the deprivation of liberty ‘would appear to require a review of lawfulness to be available at reasonable intervals. By virtue of Article 5(4), a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is thus in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the lawfulness ... of his detention, whether that detention was ordered by a civil or criminal court or by some other authority.’¹⁸⁶

Whereas one year per instance may be a rough rule of thumb in Article 6§1 cases, Article 5§4 concerns issues of liberty which require particular expedition.¹⁸⁷ Where an individual’s personal liberty is at stake, the court has very strict standards concerning the state’s compliance with the requirement of speedy review of the lawfulness of detention.

The applicant in *Turnbridge v United Kingdom (1990)*¹⁸⁸ was detained in Broadmoor [high-secure] Hospital. He complained that an annual review of the lawfulness of his detention by a tribunal was insufficient. The Commission found nothing to suggest that the period of a year which the applicant must respect before reapplying to a tribunal for his discharge was an unreasonable interval in the circumstances. Inadmissible.

§-6 PRISON CONDITIONS

When a person who is mentally ill, or who is disabled or suffering from physical ill-health, is detained in prison pending trial or sentence, or such a person is sentenced to a term of imprisonment, this can raise issues under Articles 2 and 3 of the ECHR, and on occasions probably Article 5 also.

ECHR ARTICLE 2 (RIGHT TO LIFE)

The following cases deal with Article 2 obligations in relation to prison detainees.

Prison authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them

¹⁸⁶ X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52, referring to Winterwerp v Netherlands, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR, §§ 57 and 60.

¹⁸⁷ Panchenko v Russia, §117.

¹⁸⁸ Turnbridge v United Kingdom (dec), European Commission, no. 16397/90, 17 May 1990.

will depend on the circumstances of the case.¹⁸⁹ In the case of mentally ill persons, regard must be had to their particular vulnerability.¹⁹⁰

Mental health cases

In *Keenan v United Kingdom (2001)*,¹⁹¹ the applicant's son Mark Keenan had committed suicide by hanging while serving a prison sentence at HM Prison Exeter. Mr Keenan had been receiving anti-psychotic medication intermittently from the age of 21. His medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. Mrs Keenan alleged a violation of Article 2. In deciding whether there had been a violation, the court examined whether the authorities knew or ought to have known there was a real and immediate risk of the detainee committing suicide and whether they did all that could be reasonably expected of them, having regard to the nature of the risk. The court found that Mr Keen had not actually been diagnosed as suffering from schizophrenia. On the whole, the authorities responded reasonably to his conduct, placing him in hospital care and under watch when he showed suicidal tendencies. He was subject to daily medical supervision by the prison doctors, who on two occasions had consulted external psychiatrists with knowledge of his case. The prison doctors, who could have required his removal from segregation at any time, found him fit for segregation. On the day of his death there was no reason to alert the authorities that he was in a disturbed state of mind rendering a suicide attempt likely. It was not apparent therefore that the authorities omitted any step which should reasonably have been taken and the Article 2 complaint was not upheld.

In *Renolde v France (2008)*,¹⁹² the applicant was the sister of Joselito Renolde, who died aged 35 after hanging himself in a cell in Bois-d'Arcy Prison where he was being held in pre-trial detention. Three days after a suicide attempt in prison, he had been given most severe disciplinary penalty possible for an assault, namely 45 days detention in a punishment cell. The court examined whether the authorities knew or ought to have known that he posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent the risk. The court found that the authorities knew that Mr Renolde was suffering from psychotic disorders capable of causing him to commit acts of self-harm. The risk was real and he required careful monitoring in case of a sudden deterioration. The case could be distinguished from that of *Keenan* because, despite Mr Renolde's suicide attempt and diagnosed mental condition, there was never any discussion of whether he should be admitted to a psychiatric institution. Having regard to the state's obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that state authorities, knowing of such a risk, would take special measures geared to his condition to ensure its compatibility with continued detention. Given that the authorities did not order his admission to a psychiatric institution, they should at the very least have provided him with medical treatment corresponding to the seriousness of his condition. In fact, the evidence indicated that his medication was handed to him twice a week without any supervision of whether he took it. Expert toxicological reports revealed that at the time of his death he had not taken his neuroleptic medication for at least two to three days. This lack of supervision of his daily medication played a part in his death. It was also the case that the imposition of 45 days detention in a punishment cell could not be supported and was likely to have aggravated any existing risk of suicide. In the light of all these considerations, the authorities had failed to comply with their positive obligation to protect Mr Renolde's right to life. There had been a violation of Article 2.

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

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

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

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

Jasinska v Poland (2010)¹⁹³ concerned the suicide of the applicant's grandson while he was serving a prison sentence. The applicant alleged that her grandson was able to steal medicines and kill himself as a result of negligence on the part of the prison authorities. The court held that there had been a violation of Article 2, finding that the Polish authorities had failed to comply with their obligation to protect the prisoner's life. The prison authorities had been informed of the deterioration in his health and should have considered him as a suicide risk, rather than simply renewing his medical prescriptions. There was a clear deficiency in a system that had allowed a first-time prisoner, who was mentally fragile and whose state of health had deteriorated, to gather a lethal dose of drugs without the knowledge of the medical staff responsible for supervising his medicine, and to subsequently commit suicide. The authorities' responsibility was not confined to prescribing medicines. It extended to ensuring that they were properly taken, in particular in the case of mentally disturbed prisoners.

In **De Donder and De Clippel v Belgium (2011)**,¹⁹⁴ the applicants' son was convicted and sentenced to a special regime because he was receiving psychiatric treatment. Subsequently, he was transferred to the ordinary section of the prison and even spent several days segregated in a punishment cell. He committed suicide. The court noted that the applicants' son had been detained under the Social Protection Act. This provided that the persons to whom it was applicable were not subject to the rules on ordinary detention but to the rules on compulsory admission, so that they could be given the psychological and medical support their condition required. Furthermore, the decision by the deputy public prosecutor recalling the deceased to prison had specified that he should be admitted to the psychiatric wing. Accordingly, the applicants' son should never have been held in the ordinary section of a prison. By holding him there in breach of domestic law, the authorities had contributed to the risk of him committing suicide. On the facts there had been a violation of the substantive aspect of Article 2. The court could not find any evidence that the state's investigation had not satisfied the requirements of an effective investigation. There was no violation of Article 2 in its procedural aspect.

The case of **Ketreb v France (2012)**¹⁹⁵ concerned the suicide in prison by hanging of a drug addict. His sisters alleged that the French authorities had failed to take proper steps to protect their brother's life when he was placed in the prison's disciplinary cell. They also complained that the disciplinary measure was unsuitable for a person in his state of mind. The court held that there had been a violation of Article 2, finding that the French authorities had failed in their positive obligation to protect Mr Ketreb's right to life. It must have been clear to both the prison authorities and medical staff that his state was critical and placing him in a disciplinary cell had only made matters worse. That should have led the authorities to anticipate a suicidal frame of mind, which had already been noted during a previous stay in the punishment block some months earlier, and should, for example, have alerted the psychiatric services. Nor had the authorities set in place any special measures, such as appropriate surveillance or regular searches, which might have found the belt he used to commit suicide. There was also a violation of Article 3.

The case of **Coselav v Turkey (2012)**¹⁹⁶ concerned a 16-year-old juvenile's suicide in an adult prison. His parents alleged that the Turkish authorities had been responsible for the suicide of their son and that the ensuing investigation into his death had been inadequate. The court held that there had been a violation of Article 2 in relation to both its substantive and procedural limbs. The Turkish authorities had been indifferent to the deceased's grave psychological problems, even threatening him with disciplinary sanctions for previous suicide attempts. They had also been responsible for a deterioration of his state of mind by detaining him in prison with adults without providing any medical or specialist

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

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

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

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

care, thus leading to his suicide. Furthermore, the Turkish authorities had failed to carry out an effective investigation to establish who had been responsible for the applicants' son's death, and how.

In *Ionel Garcea v Romania (2015)*,¹⁹⁷ which concerned access to proper medical treatment for a mentally-ill prisoner whilst in detention, the court found that the ineffectiveness of the investigation and the time it had taken the authorities to establish the circumstances of the prisoner's death amounted to a procedural breach of Article 2. In particular, the prosecutor's office had not dealt with the complaint of ill-treatment in detention lodged by the applicant association.

In *Isenc v France (2016)*,¹⁹⁸ the applicant's son had committed suicide 12 days after he was admitted to prison. The applicant alleged a violation of his son's right to life. The court held that there had been a violation of Article 2. Although provided for in the domestic law, the arrangements for collaboration between the prison and medical services in supervising inmates and preventing suicides had not worked. The court noted that a medical check-up of the deceased when he was admitted was required as a minimum precautionary measure. Although the government submitted that he had received such a medical consultation, it failed to furnish any documentary evidence corroborating this and had not proved that he had been examined by a doctor. In the absence of any proof of an appointment with the prison medical service, the court considered that the authorities had failed to comply with their positive obligation to protect the applicant's son's right to life.

Drug dependency cases

In *Marro and Others v. Italy (2014)*,¹⁹⁹ the applicants were the relatives of a detained drug addict who died in prison as a result of an overdose. Relying on Article 2, they blamed the Italian authorities for failing to prevent their relative from obtaining the substances which led to his death. The ECtHR declared the application inadmissible as being manifestly ill-founded. The fact that the deceased had been able to obtain and make use of drugs could not, in itself, make the Italian state liable for the death in question. The applicants had not alleged that the authorities were aware of information which could have led them to believe that their relative was in a particularly dangerous position compared to any other prisoner suffering from drug addiction. Moreover, no failing could be identified on the part of the prison staff. Indeed, they had undertaken numerous measures (searches, inspection of parcels, etc.) to prevent drugs from being brought into prisons.

The case of *Patsaki and Others v Greece (2019)*²⁰⁰ also concerned the death of a drug addict in prison. The applicants complained that the Greek State had not complied with its positive obligation to protect their relative's life in prison. The ECtHR held that there had been a violation of the procedural limb of Article 2 in that the length of the judicial investigation (four years and eight months) had breached the requirements of diligence and promptness for an effective investigation. There had been no violation of Article 2 under its substantive limb because the circumstances of the death did not clearly point to any state responsibility.

Other cases

In *Kats and Others v Ukraine (2008)*,²⁰¹ the deceased had suffered from schizophrenia and was infected with HIV. It was alleged that the state had failed to provide her with adequate medical care during her pre-trial detention. The ECtHR found that she was refused access to a specialist hospital or

197 Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v Romania no. 2959/11, 24 March 2015.

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

199 Marro and Others v Italy, no. 29100/07 (Dec.), 8 April 2014.

200 Patsaki and Others v Greece, no. 20444/14, 7 February 2019.

201 Kats and Others v Ukraine, no. 29971/04, 18 December 2008.

the prison's medical wing and had been provided with a striking lack of medical attention to her health problems. The Ukrainian Government had not contested the accuracy of a report which concluded that inadequate medical assistance had indirectly caused her death. There had been a violation of Article 2.

In *Dzieciak v. Poland* (2008),²⁰² a detainee suffering from a serious heart disease died after almost four years in pre-trial detention. The Court found that the numerous failings on the part of the authorities – such as keeping the applicant in a detention facility without a hospital wing, cancelling his bypass surgery on three occasions and prolonging his detention despite medical opinion to the contrary – constituted a breach of the substantive limb of Article 2. Furthermore, the investigation into the applicant's death had lasted more than two years and been discontinued by the prosecutor without consideration of the concerns that had been raised by medical experts over the decisions to postpone the applicant's surgery on three occasions. More importantly, the incomplete and inadequate character of the investigation was highlighted by the fact that the exact course of events directly preceding the applicant's death had never been established. The authorities had thus failed to carry out a thorough and effective investigation into the allegation that the applicant's death was caused by ineffective medical care during his pre-trial detention.

In *Salakhov and Islyamova v. Ukraine* (2013),²⁰³ the first applicant, who was HIV positive, was placed in pre-trial detention where his health sharply deteriorated. A specialist diagnosed him with pneumonia and candidosis and concluded that the HIV infection was at the fourth clinical stage, but that there was no urgent need for hospitalisation. The ECtHR issued an interim measure under Rule 39 requiring the first applicant's immediate transfer to hospital for treatment. However, he was only transferred three days later and was kept under constant guard by police officers while allegedly still handcuffed to his bed. He was ultimately sentenced to the payment of a fine but remained in detention for two weeks after the verdict as a preventive measure, despite his critical condition. He died two weeks after his release. The Court found that there had been violations of Article 3 in respect of the inadequate medical assistance provided in the detention facilities and hospital and of his handcuffing in the hospital. It also found violations of Article 2 in respect of the authorities' failure to protect his life and to conduct an effective investigation into the circumstances of his death. Lastly, it found a violation of Article 3 in respect of the mental suffering endured by the second applicant, the first applicant's mother.

ECHR ARTICLE 3 (INHUMAN OR DEGRADING TREATMENT)

The following cases deal with Article 3 obligations in relation to prison detainees.

Prisons, prison conditions and medical treatment

Article 3 requires the state to ensure that:

- prisoners are detained in conditions which are compatible with respect for human dignity;
- the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention;
- given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance.²⁰⁴

202 Dzieciak v. Poland no. 77766/01 9 December 2008.

203 Salakhov and Islyamova v. Ukraine, no. 28005/08, 14 March 2013.

204 See *Hurtado v Switzerland*, no. 17549/90, 28 January 1994, Series A no. 280-A, §79; *Mouisel v France*, no. 67263/01, 14 November 2002, ECHR 2002-IX, (2002) ECHR 740, §40.

The Convention does not impose a general obligation on state authorities to release detainees on health grounds, or to transfer them to a civil hospital in order to provide particular treatment, even if the person is suffering from an illness that is particularly difficult to treat.²⁰⁵ However, the detention of a person who is ill can raise issues under Article 3, and a lack of appropriate medical care can amount to inhuman or degrading treatment contrary to that provision:

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

*... [T]here are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant ...'*²⁰⁶

Positive obligations

It was noted above that under Article 3 the state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility. Thus, for example, states may be under a positive obligation to prevent the spreading of contagious disease. After finding a structural problem of inadequate medical care in Georgian prisons, the court required the Georgian authorities to take the necessary legislative and administrative measures to prevent the spreading of contagious diseases, such as tuberculosis and hepatitis, in the prisons, to introduce a screening system for prisoners upon admission and to guarantee prompt and effective treatment (*Poghosyan v. Georgia (2009)*²⁰⁷ and *Ghavtadze v. Georgia (2009)*²⁰⁸).

Positive obligations may also arise under Articles 5 and 8.

Prison conditions (overcrowding, lack of basic hygiene, lack of food, etc)

There have been many cases on the inadequacy of prison conditions:

In *Peers v. Greece (2001)*,²⁰⁹ the applicant was first detained in the prison's psychiatric hospital before being moved to segregation units. He complained about the conditions of his detention. The European Court of Human Rights held that there had been a violation of Article 3. The applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell, with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate. The prison conditions had diminished his human dignity and given rise in him to feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.

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

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

207 Poghosyan v. Georgia, no. 9870/07, 24 February 2009.

208 Ghavtadze v. Georgia (2009) no 23204/07 3 March 2009.

209 Peers v. Greece (2001), no. 28524/95, 19 April 2001.

In *Kalashnikov v. Russia (2002)*,²¹⁰ the applicant spent almost five years in pre-trial detention before being acquitted. He complained about the conditions in the detention centre where he was held. His cell was overcrowded (24 prisoners sharing 17 square metres), it was impossible to sleep properly as the TV and cell light were never turned off, his cell was overrun with cockroaches and ants, and he contracted skin diseases and fungal infections, losing his toenails and some fingernails as a result. The court found a violation of Article 3. As regards the overcrowding, the court emphasised that the European Committee for the Prevention of Torture (CPT) had set 7m² per prisoner as an approximate desirable guideline for a cell.

*Modârcă v. Moldova (2007)*²¹¹ concerned an applicant suffering from osteoporosis who spent nine months of his pre-trial detention in a 10m² cell with three other detainees. The cell had very limited access to daylight; it was not properly heated or ventilated; and electricity and water supplies were periodically discontinued. The applicant was not provided with bed linen or prison clothes; the dining table was close to the toilet, and the daily expenses for food were limited to 0.28 euros for each detainee. The ECtHR concluded that the cumulative effect of the conditions and the time the applicant he had been forced to endure them amounted to a violation of Article 3. The Court further observed that the European Committee for the Prevention of Torture (CPT) had reported that the food was ‘repulsive and virtually inedible’ following a visit to the prison in September 2004.

The applicant in *Florea v. Romania (2010)*²¹² suffered from chronic hepatitis and arterial hypertension. He was detained in prison from 2002 to 2005. For about nine months he had to share a cell that had only 35 beds with between 110 and 120 other prisoners. Throughout his detention he was kept in cells with other prisoners who were smokers. He complained of overcrowding, poor hygiene conditions, including having been detained with smokers, and of a diet unsuited to his medical conditions. The court found a violation of Article 3. The state had to ensure that all prisoners were not subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that their health was not compromised.

The case of *Ananyev and Others v. Russia (2012)* concerned complaints by a number of applicants that they had been detained in inhuman and degrading conditions in remand centres whilst awaiting criminal trial. The applicants complained, in particular, that they had been held in overcrowded cells. The ECtHR found that the applicants had been subjected to inhuman and degrading treatment. The applicants had been given less than 1.25 square metres and 2 square metres of personal space and the number of detainees had significantly exceeded the number of sleeping places available. In addition, they had remained inside their cells all the time, except for a one hour period of outdoors exercise. They had also eaten their meals and used the toilet in those cramped conditions.

*Canali v. France (2013)*²¹³ concerned the conditions of detention in the Charles III Prison in Nancy, which was built in 1857 and shut down in 2009 on account of its extremely dilapidated state. The court held that there had been a violation of Article 3. The cumulative effect of the cramped conditions and failings in respect of hygiene regulations had aroused in the applicant feelings of despair and inferiority capable of debasing and humiliating him. These conditions of detention amounted to degrading treatment.

210 Kalashnikov v. Russia (2002), no. 47095/99, 15 July 2002.

211 Modârcă v Moldova, no. 14437/05, 10 May 2007.

212 Florea v Romania, no. 37186/03, 14 September 2010.

213 Canali v France, no. 40119/09, 25 April 2013.

The case of **Vasilescu v. Belgium (2014)**²¹⁴ concerned conditions in Antwerp and Merksplas Prisons. The ECtHR found a violation of Article 3 on account of overcrowding and insanitary conditions. While there was nothing to indicate a real intention to humiliate or debase the applicant, his physical conditions of detention had subjected him to hardship exceeding the unavoidable level of suffering inherent in detention, and amounted to inhuman and degrading treatment.

In **Szafrański v. Poland (2015)**,²¹⁵ the applicant complained that in seven of the ten cells where he was detained the sanitary facilities were separated from the rest of the cell only by a 1.2 metre high fibreboard partition and had no doors. The Court held that there had not been a violation of Article 3. The only hardship the applicant had had to bear was the insufficient separation of the sanitary facilities from the rest of the cell. Apart from that, the cells were properly lit, heated and ventilated and he had access to various activities outside the cells. The overall circumstances had not caused distress and hardship which exceeded the unavoidable level of suffering inherent in detention, and did not exceed the threshold of severity under Article 3.

There had, however, been a violation of Article 8 (right to respect for private life) because the domestic authorities had a positive obligation to provide access to sanitary facilities separated from the rest of the prison cell in such a way as to ensure a minimum of privacy. The Court also noted that, according to the *European Committee for the Prevention of Torture (CPT)*, a sanitary annex which was only partially separated off was not acceptable in a cell occupied by more than one detainee. In addition, the CPT had recommended that a full partition in all the in-cell sanitary annexes be installed.

See also:

- **Moisejevs v. Latvia (2006)**²¹⁶ (applicant detained pending trial; complained that he had been denied food on the days he was transported from the prison to the regional court to attend the hearings of his criminal case; ECtHR found that the applicant had regularly suffered from hunger on the days of the hearings; violation of Article 3);
- **Orchowski v. Poland (2009)**²¹⁷ (serving a prison sentence since 2003, the applicant had been transferred twenty-seven times between eight different prisons and remand centres. For most of the time he had less than 3 square metres of personal space inside his cells, which was the minimum prescribed under Polish law. At times he even had less than 2 square metres; the lack of space had been made worse by aggravating factors, such as lack of exercise, particularly outdoor exercise, lack of privacy, insalubrious conditions and frequent transfers; violation of Article 3);
- **Mandic and Jovic v. Slovenia and Štruc and Others v. Slovenia (2011)**²¹⁸ (applicants held for several months in cells in which the personal space available to them was 2.7 square metres and in which the average afternoon temperature in August was approximately 28°C; violation of Article 3);
- **Torreggiani and Others v. Italy (2013)**²¹⁹ (overcrowding in Italian prisons; living space in cells of 4 square metres per person exacerbated by other conditions such as the lack of hot water over long periods, and inadequate lighting and ventilation; violation of Article 3);

214 Vasilescu v Belgium, no. 64682/12, 18 March 2014.

215 Szafrański v Poland, no. 17249/12, 15 December 2015.

216 Moisejevs v Latvia, no. 64846/01, 15 June 2006.

217 Orchowski v Poland, no. 17885/04, 22 October 2009.

218 Mandic and Jovic v Slovenia and Štruc and Others v. Slovenia, nos. 5903/10, 6003/10 and 6544/10, 20 October 2011.

219 Torreggiani and Others v Italy, no. 43517/09, 8 January 2013 (pilot judgment).

- **Varga and Others v. Hungary (2015)**²²⁰ (widespread overcrowding; limited personal space available to all six detainees in the case, aggravated by a lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells; violation of Article 3);
- **Muršić v. Croatia (2016)**²²¹ (ECtHR confirmed that 3 sq. of surface area per detainee in a multi-occupancy cell was the prevalent norm in its case-law, being the applicable minimum standard for the purposes of Article 3. When that area fell below 3 sq. m, the lack of personal space was regarded as so serious that it gave rise to a strong presumption of a violation of Article 3);
- **Rezmineş and Others v. Romania (2017)**²²² (overcrowded cells, inadequate sanitary facilities, lack of hygiene, poor-quality food, dilapidated equipment, presence of rats and insects in cells; violation of Article 3);
- **Valentin Baştovoi v. the Republic of Moldova (2017)**²²³ (poor conditions of prison detention; violation of Article 3);
- **Koureas and Others v. Greece (2018)**²²⁴ (the evidence submitted was inadequate; ECtHR unable to find that the applicants' overall conditions of detention exceeded the unavoidable level of suffering inherent in detention and amounted to degrading treatment; lack of personal space had not been coupled with inadequate physical conditions of detention);
- **Pocasovschi and Mihaila v. the Republic of Moldova and Russia (2018)**²²⁵ (Moldovan prison; lack of water, electricity, food and warmth; violation of Article 3).

Conditions of detainees said to require special security

In *Ilascu and Others v. Moldova and Russia (2004)*,²²⁶ the first applicant complained that while on death row he had no contact with other prisoners, no news from the and no right to contact his lawyer or receive regular visits from his family. His cell was unheated, he was deprived of food as a punishment and he was able to take showers only very rarely. These conditions and a lack of medical care caused his health to deteriorate. The court held that as a whole these conditions amounted to torture, in violation of Article 3.

In *Ramirez Sanchez v. France (2006)*,²²⁷ the applicant, an international terrorist known as 'Carlos the Jackal', was detained in solitary confinement for eight years following his conviction for terrorist-related offences. He was segregated from other prisoners, but had access to TV and newspapers, and was allowed to receive visits from family and lawyers. The ECtHR held that there had been no violation of Article 3. Having regard to the applicant's character and the danger he posed, the conditions in which he had been held had not reached the minimum level of severity necessary to constitute inhuman or degrading treatment.

220 Varga and Others v Hungary , nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015 (pilot judgment).

221 Muršić v Croatia [GC], no. 7334/13, 20 October 2016.

222 Rezmineş and Others v Romania (pilot judgment), nos. 61467/12, 39516/13, 48213/13 and 68191/13, 25 April 2017.

223 Valentin Baştovoi v the Republic of Moldova, no. 40614/14, 28 November 2017.

224 Koureas and Others v Greece, no. 30030/15, 18 January 2018.

225 Pocasovschi and Mihaila v the Republic of Moldova and Russia, no. 1089/09, 29 May 2018.

226 Ilascu and Others v Moldova and Russia [GC], no. 48787/99, 8 July 2004.

227 Ramirez Sanchez v France [GC], no. 59450/00, 4 July 2006.

In *Khider v. France (2009)*, the applicant, who was on remand, complained of his detention conditions and the security measures imposed on him as a ‘prisoner requiring special supervision’. The Court held that there had been a violation of Article 3. The applicant’s conditions of detention, his classification as a high-security prisoner, his repeated transfer from prison to prison, his lengthy solitary confinement and the frequent full body searches he was subjected to all added up to inhuman and degrading treatment. Note, however, that in a subsequent case, *Khider v. France (2013)*,²²⁸ the applicant’s complaints under Article 3 in respect of frequent changes of establishment, prolonged periods in solitary confinement and strip-searches were declared inadmissible.

The applicant in *Payet v. France (2011)*²²⁹ was serving a prison sentence for murder. He complained about his frequent moving between cells and prison buildings for security reasons and the disciplinary penalty to which he was subjected, which entailed placement in cells lacking natural light and proper hygienic conditions. The Court found a violation of Article 3 with regard to the poor conditions of detention in the punishment wing where the applicant was placed (dirty and dilapidated premises, flooding, lack of sufficient light for reading and writing). However, there had been no violation of Article 3 as regards the security rotations.

The cases of *Piechowicz v. Poland (2012)*²³⁰ and *Horych v. Poland (2012)*²³¹ both concerned a regime in Polish prisons for detainees who were classified as dangerous. The European Court of Human Rights found a violation of Articles 3. Keeping detainees under the regime for several years, in isolation, without sufficient mental and physical stimulation, and without examining if there were concrete reasons for the prolonged application of that regime, was unnecessary in order to ensure safety in prison.

In *Öcalan v. Turkey (no. 2) (2014)*,²³² the applicant, who was the founder of the PKK (Kurdistan Workers’ Party), an illegal organisation, complained about his social isolation and the restrictions on his communication with members of his family and his lawyers in prison on the island of İmralı, where he was held in solitary confinement until 17 November 2009. The Court held that taken overall the duration and degree of social isolation constituted a violation of Article 3.

The case of *Harakchiev and Tolumov v. Bulgaria (2014)*²³³ concerned the life imprisonment without commutation of the first applicant and the strict detention regime, involving isolation, in which he and the second applicant, another life prisoner, were held. The court held that there had been a violation of Article 3. As concerned the strict detention regime, the cumulative effect of the conditions, which included isolation, inadequate ventilation, lighting, heating, hygiene, food and medical care, had been inhuman and degrading. The applicants’ isolation appeared to be the result of the automatic application of domestic legal provisions regulating the prison regime rather than any particular security concerns relating to their behaviour.

In the case of *Ilgiz Khalikov v. Russia (2019)*,²³⁴ a prisoner had been seriously wounded by a stray bullet during a shoot-out between escorting officers and detainees attempting to escape during their transfer to another facility. The Court held that there had been a violation of Article 3. The state had been responsible for the applicant’s injury because the escorting officers had disregarded the regulations put in place for the security of detainees during transfers.

228 Khider v France, no. 56054/12, 1 October 2013 (dec).

229 Payet v France, no. 19606/08, 20 January 2011.

230 Piechowicz v Poland, no. 20071/07, 17 April 2012.

231 Horych v Poland, no. 13621/08, 17 April 2012.

232 Öcalan v Turkey (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014.

233 Harakchiev and Tolumov v Bulgaria, nos. 15018/11 and 61199/12, 8 July 2014.

234 Ilgiz Khalikov v Russia, no. 48724/15, 15 January 2019.

Passive smoking

The applicant in *Elefteriadis v. Romania (2011)*²³⁵ suffered from chronic pulmonary disease and was serving a life sentence. Between February and November 2005, he was placed in a cell with two prisoners who smoked. In the waiting rooms of the courts where he was summoned to appear on several occasions between 2005 and 2007, he was also held together with prisoners who smoked. The court held that there had been a violation of Article 3. The state is required to take measures to protect a prisoner from the harmful effects of passive smoking where, as in the applicant's case, medical examinations and the advice of doctors indicated that this was necessary for health reasons.

See also *Florea v. Romania (2010)*²³⁶ (applicant had never had an individual cell and had had to tolerate his fellow prisoners' smoking even in the prison infirmary and the prison hospital, against his doctor's advice; violation of Article 3).

Detainees with physical disabilities

Where persons with disabilities are detained, the authorities must take care to provide conditions that meet any special needs resulting from the person's disability.²³⁷

The applicant in *Vincent v France (2006)*²³⁸ was serving a ten-year prison sentence imposed in 2005. He had experienced paraplegia since an accident in 1989 and could not move around without the aid of a wheelchair. He complained that the conditions in which he was detained in different prisons were not adapted to his disability. The court found a violation of Article 3. It had been impossible for the applicant to move autonomously around Fresnes Prison, which was particularly unsuited to the imprisonment of persons with a physical handicap who could move about only in a wheelchair. The circumstances amounted to degrading treatment.

In *Serifis v. Greece (2006)*,²³⁹ the applicant's left hand has been paralysed since a road-traffic accident and he also suffered from multiple sclerosis. He complained that his continued detention amounted to inhuman treatment. The court found a violation. The Greek authorities had procrastinated in providing him with medical assistance corresponding to his actual needs and had subjected him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

In *Hüseyin Yıldırım v. Turkey (2007)*,²⁴⁰ the applicant suffered from paresis on the left side and general hyperesthesia. He was arrested on 5 July 2001. On 17 July 2001 the applicant was diagnosed with quadriplegia and atrophy of the hands, and declared medically unfit to remain incarcerated. His state of health deteriorated during his detention. On 13 November 2001, he was obliged to undergo a bifrontal craniotomy on account of a rupture of the cerebral membrane, which was causing a discharge of cerebral fluid. He subsequently began to suffer from sphincter problems, requiring him to wear a urethral catheter, and was subject to various more or less serious dermatological, neurological or respiratory illnesses; he also showed signs of chronic depression. In January 2002 specialist board No. 3 from the Istanbul Institute of Forensic Medicine held that his state of health was incompatible with his imprisonment. He alleged that the circumstances in which he had been detained had amounted to inhuman and degrading treatment.

235 Elefteriadis v Romania, no. 38427/05, 25 January 2011.

236 Florea v Romania, no. 37186/03, 14 September 2010.

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

238 Vincent v France, no. 6253/03, 24 October 2006.

239 Serifis v Greece, no. 27695/03, 2 November 2006.

240 Hüseyin Yıldırım v Turkey, no. 2778/02, 3 May 2007.

The court held that there had been a violation of Article 3. The time the applicant had spent in detention had infringed his dignity and had certainly caused him both physical and mental hardship beyond that inevitably associated with imprisonment and medical treatment. During transfers, responsibility for him had been placed in the hands of gendarmes who were not qualified to foresee the medical risks involved in moving a disabled person. Moreover, although the highest medical authorities, including forensic experts, had strongly recommended his early release, stressing the permanent nature of his illness and the unsuitability of prison conditions for a person in his medical condition, his imprisonment had continued.

In *Arutyunyan v. Russia* (2012),²⁴¹ the applicant was wheelchair-bound and had numerous health problems, including a failing renal transplant, very poor eyesight, diabetes and serious obesity. His cell was on the fourth floor of a building without an elevator; the medical and administrative units were located on the ground floor. Owing to the absence of an elevator, the applicant was required to walk up and down the stairs on a regular basis to receive haemodialysis and other necessary medical treatment. The court held that there had been a violation of Article 3. The domestic authorities had failed to treat the applicant in a safe and appropriate manner consistent with his disability, and had denied him effective access to the medical facilities, outdoor exercise and fresh air. For a period of almost 15 months, the applicant was forced at least four times a week to go up and down four flights of stairs on his way to and from lengthy, complicated and tiring medical procedures that were vital to his health. The effort had undoubtedly caused him unnecessary pain and exposed him to an unreasonable risk of serious damage to his health.

In *DG v Poland* (2013),²⁴² the court found that the conditions of detention of a paraplegic prisoner, who was confined to a wheelchair and suffered from incontinence, were inadequate: he did not have daily access to the shower rooms and could not reach the toilets without help from other inmates.

In contrast, in *Zarzycki v Poland* (2013),²⁴³ the court found that the authorities had provided the applicant, a prisoner amputated at both elbows, with the regular and adequate assistance his special needs warranted. In these circumstances, even though his disability made him more vulnerable to the hardships of detention, his treatment had not reached the threshold of severity required to constitute degrading treatment within the meaning of Article 3.

In *Grimailovs v Latvia* (2013),²⁴⁴ the applicant complained that the prison facilities were unsuitable for him as he was paraplegic and wheelchair-bound. The court held that there had been a violation of Article 3. The applicant had been detained for nearly two-and-a-half years in a regular detention facility which was not adapted for persons in a wheelchair. Moreover, he had had to rely on his fellow inmates to assist him with his daily routine and mobility around the prison, even though they had not been trained and did not have the necessary qualifications. The state's obligation to ensure adequate conditions of detention included making provision for the special needs of prisoners with physical disabilities, and the state could not absolve itself from that obligation by shifting the responsibility to cellmates. The applicant's inability to have independent access to various prison facilities, including sanitation facilities, and the lack of any organised assistance with his mobility around the prison or his daily routine, had reached the threshold of severity required to constitute degrading treatment.

241 Arutyunyan v Russia, no. 48977/09, 10 January 2012.

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

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

244 Grimailevs v Latvia, no. 6087/03, 25 June 2013.

The applicant in **Semikhvostov v Russia (2014)**²⁴⁵ was paralysed from the waist down and confined to a wheelchair. He alleged that the facility where he had been detained for almost three years was unsuitable for his condition. The Court found a violation of Article 3. The applicant lacked independent access to parts of the facility, including the canteen and sanitation blocks. This, together with the lack of any organised assistance with his mobility, must have caused him unnecessary and avoidable mental and physical suffering amounting to inhuman and degrading treatment.

In **Amirov v. Russia (2014)**,²⁴⁶ the applicant was a paraplegic wheelchair-bound detainee suffering from a long list of illnesses. The authorities had denied him access to medical experts of his choice and failed to organise an expert medical examination in disregard of the interim measure indicated by the court. Moreover, they failed to demonstrate that the applicant had been receiving effective medical treatment for his illnesses, which led the court to conclude to a violation of Article 3 of the Convention. Under Article 46 of the Convention, the court indicated that the respondent state should admit the applicant to a specialised medical facility where he would be provided with adequate medical treatment, and should regularly re-examine his situation, including with the assistance of independent medical experts.

The applicant in **Helhal v. France (2015)**²⁴⁷ experienced paraplegia of the lower limbs and urinary and faecal incontinence. He complained that, in view of his severe disability, his continuing detention amounted to inhuman and degrading treatment. The court held that there had been a violation of Article 3. Although the applicant's continuing detention did not in itself constitute inhuman or degrading treatment, the inadequacy of the physical rehabilitation treatment provided to him, and the fact that the prison premises were not adapted to his disability, amounted to a breach of Article 3. The assistance washing himself which was provided by a fellow inmate in the absence of showers suitable for persons of reduced mobility did not suffice to fulfil the state's obligations with regard to health and safety.

In **Topekhin v. Russia (2016)**,²⁴⁸ the applicant was a remand prisoner who suffered from serious back injuries, paraplegia and bladder and bowel dysfunction. He complained of the conditions of his detention and of his transfer to a correctional colony. The court held that there had been a violation of Article 3. The applicant's inevitable dependence on his fellow inmates, and the need to ask for their help with intimate hygiene procedures, had put him in a very uncomfortable position. It adversely affected his emotional well-being and impeded his communication with the cellmates who had to perform this burdensome work involuntarily. The conditions had further been exacerbated by the failure to provide him with a hospital bed or other equipment, such as a special pressure-relieving mattress, affording a minimum of comfort. With regard to his transfer, the material conditions of the transfer and the duration of the trip had been serious enough to qualify as inhuman and degrading treatment.

The case of **Ābele v Latvia (2017)**²⁴⁹ 'concerned the complaint by a deaf and mute prisoner who alleged that he had been held in overcrowded cells and that the authorities had failed to cater for his disability. That had led to his being isolated'. The court found that Mr Ābele had lacked the necessary amount of personal space in the cells where he had been held and had suffered anguish and feelings of inferiority due to his inability to communicate that had attained the threshold of inhuman and degrading treatment.

245 Semikhvostov v Russia, no. 2689/12, 6 February 2014.

246 Amirov v Russia, no. 51857/13, 27 November 2014.

247 Helhal v France, no. 10401/12 19 February 2015.

248 Topekhin v Russia, no. 52089/09 10 May 2016.

249 Ābele v Latvia (2017), nos. 60429/12 and 72760/12, 5 October 2017.

Dependence on fellow inmates

In *Farbtuhs v. Latvia (2004)*,²⁵⁰ the applicant, who had a physical disability, was assisted during working hours by the prison medical staff and outside working hours by other inmates on a voluntary basis. The court expressed concern about the appropriateness of such a practice, which left the bulk of responsibility for a man with such a severe disability in the hands of unqualified prisoners, even if only for a limited period. (The case is further dealt with below: see Obligation to release prisoners on health grounds).

In *Semikhvostov v Russia (2014)*,²⁵¹ the ECtHR went further, holding that the state's obligation to ensure adequate conditions of detention includes making provision for the special needs of prisoners with physical disabilities. The state cannot absolve itself from that obligation by shifting the responsibility onto other inmates. By appointing fellow inmates to care for the applicant, the state had not taken the necessary steps to remove the environmental and attitudinal barriers which had seriously impeded his ability to participate in daily activities with the general prison population. This had precluded his integration and stigmatised him even further.

See also: *Topekhin v. Russia (2016)*,²⁵² *supra*.

Obligation to release prisoners on health grounds

The Convention does not impose a general obligation to release detainees on health grounds or to place them in a civil hospital in order to receive particular treatment.

In *Papon v. France (2001)*,²⁵³ the applicant, who was serving a prison sentence for aiding and abetting crimes against humanity, was 90 years old when he lodged his complaint. He maintained that keeping a man of his age in prison was contrary to Article 3, and that the conditions of detention in prison were not compatible with extreme old age and his state of health. The court declared the application inadmissible (manifestly ill-founded). It did not exclude the possibility that in certain conditions the detention of an elderly person over a lengthy period might raise an issue under Article 3 but pointed out that regard was to be had to the particular circumstances of each specific case. In the instant case, the applicant's treatment had not reached the level of severity required to bring it within the scope of Article 3. While he had heart problems, his overall condition had been described as 'good' in an expert report.

The applicant in *Farbtuhs v. Latvia (2004)*²⁵⁴ was found guilty of crimes against humanity and genocide for his role in the deportation and deaths of Latvians during the Stalinist era. He complained that, in view of his age and infirmity, and the Latvian prisons' incapacity to meet his specific needs, his prolonged imprisonment had constituted treatment contrary to Article 3. In 2002 the domestic courts finally excused the applicant from serving the remainder of his sentence after finding *inter alia* that he had contracted two further illnesses while in prison and that his condition generally had deteriorated.

The court held that there had been a violation of Article 3. The applicant was 84 years old when he was sent to prison, paraplegic and disabled to the point of being unable to attend to most daily tasks unaided. Moreover, when taken into custody he was already suffering from a number of serious illnesses, the majority of which were chronic and incurable.

250 Farbtuhs v Latvia, no. 4672/02 2 December 2004.

251 Semikhvostov v Russia, no. 2689/12, 6 February 2014.

252 Topekhin v Russia, no. 52089/09, 10 May 2016.

253 Papon v France, no. 54210/00, 7 June 2001 (dec.).

254 Farbtuhs v Latvia, no. 4672/02, 2 December 2004.

The court considered that when national authorities decided to imprison such a person, they had to be particularly careful to ensure that the conditions of detention were consistent with the specific needs arising out of the prisoner's infirmity. Having regard to the circumstances of the case, the court found that, in view of his age, infirmity and condition, the applicant's continued detention had not been appropriate. The situation in which he had been put was bound to cause him permanent anxiety and a sense of inferiority and humiliation so acute as to amount to degrading treatment within the meaning of Article 3 of the Convention.

In *Tekin Yıldız v. Turkey (2005)*,²⁵⁵ the applicant had been sentenced to a prison term for membership of a terrorist organisation. He went on hunger strike and developed Wernicke-Korsakoff syndrome as a result. His sentence was suspended until he had made a complete recovery. He was then rearrested and, despite an early ruling that he had no case to answer, remained in prison for eight months.²⁵⁶ The court observed that his state of health had been consistently found to be incompatible with detention, and the eight months period of detention despite the lack of change in his condition was incompatible with Article 3.

See also *Hüseyin Yıldırım v. Turkey (2007)*,²⁵⁷ supra.

In *Gülay Çetin v. Turkey (2013)*,²⁵⁸ the detainee was suffering from terminal cancer. The Court observed that, in accordance with Article 3, the health of prisoners sometimes called for humanitarian measures, particularly where an issue arose as to the continued detention of a person whose condition was incompatible in the long term with a prison environment. During the final stages of Ms Çetin's illness, the stress inherent in prison life had had repercussions on her life expectancy and health. At a time when she had become incapable of carrying out everyday activities unaided, she had been placed under the supervision of people with no qualifications in this area (prison staff, fellow prisoners, her sister). The conditions of her detention, both before and after her final conviction, had amounted to inhuman and degrading treatment, and she had been discriminated against because, while in pre-trial detention, she had not been eligible for the protective measures applicable to convicted prisoners suffering from serious illnesses. There had been a violation of Article 3.

See also: *Dorneanu v. Romania (2017)*²⁵⁹ (the applicant had terminal metastatic prostate cancer and eventually died after eight months in detention; he complained that his immobilisation in his hospital bed had amounted to inhuman treatment and that his state of health was incompatible with detention; violation of Article 3; the authorities had not taken into account the realities of the applicant's personal situation, and had not examined whether in practice he was fit to remain in detention).

Medical care in prison for persons suffering from physical illness

There have been numerous cases involving complaints about inadequate medical care in prison:

255 *Tekin Yıldız v Turkey*, no. 22913/04, 10 November 2005.

256 The European Court of Human Rights conducted a fact-finding mission to Turkey in connection with a group of 53 similar cases, inspecting prisons together with a committee of experts with a mandate to assess the applicants' medical fitness to serve custodial sentences.

257 *Hüseyin Yıldırım v Turkey*, no. 2778/02, 3 May 2007.

258 *Gülay Çetin v Turkey*, no. 44084/10, 5 March 2013.

259 *Dorneanu v Romania*, no. 55089/13, 28 November 2017.

Cases where a violation was established

In **Mouisel v. France (2002)**,²⁶⁰ the applicant was diagnosed with lymphatic leukaemia in 1999. When his condition worsened, he underwent chemotherapy sessions in a hospital during the day. He was put in chains during the journey to hospital, and he claimed that during the chemotherapy sessions his feet were chained and one of his wrists attached to the bed. He decided to stop the treatment in 2000, complaining of these conditions and of the guards' aggressive behaviour towards him.

The court found a violation of Article 3. Although his condition had become increasingly incompatible with his continued detention as his illness progressed, the prison authorities had failed to take any special measures. In view of his condition, the fact that he had been admitted to hospital and the nature of the treatment, the court considered that handcuffing the applicant had been disproportionate to the security risk posed. This treatment further fell foul of the recommendations of the *European Committee for the Prevention of Torture (CPT)* regarding the conditions in which prisoners are transferred and medically examined.

In the case of **McGlinchey and Others v. United Kingdom (2003)**,²⁶¹ a close relative of the applicants died in prison as a consequence of severe heroin withdrawal symptoms. She had suffered serious weight loss and dehydration as a result of a week of largely uncontrolled vomiting and inability to eat or hold down liquids. Having observed several failings by the prison authorities in the provision of adequate medical care, the court found a violation of Article 3. When a lack of appropriate medical care results in a detainee's death, it may also raise an issue under the substantive and/or procedural limb of Article 2 of the Convention.

In **Holomiov v. the Republic of Moldova (2006)**,²⁶² the applicant suffered from serious kidney diseases. The court held that there had been a violation of Article 3. He had been detained for almost four years without appropriate medical care for serious kidney diseases, entailing serious risks for his health. This constituted inhuman and degrading treatment.

In **Testa v. Croatia (2007)**,²⁶³ a lack of requisite medical care and assistance for the applicant's chronic hepatitis, coupled with the prison conditions which she had had to endure for more than two years, violated Article 3.

The case of **Aleksanyan v. Russia (2008)**²⁶⁴ concerned the lack of medical assistance to a HIV-positive detainee. In November 2007, the court invited the Russian Government to secure immediately the applicant's in-patient treatment at a hospital which specialised in the treatment of AIDS and concomitant diseases. In February 2008, the trial in the applicant's case was suspended due to his poor health. He was placed in an external haematological hospital where he was guarded round-the-clock by policemen; the windows of his room were covered with an iron grill. He was still there when the court adopted its judgment. The court found that the national authorities had failed to take sufficient care of the applicant's health at least until his transfer to an external hospital. This had undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment in violation of Article 3.

260 Mouisel v France, no. 67263/01, 14 November 2002; ECHR 2002-IX, (2002) ECHR 740.

261 McGlinchey and Others v the United Kingdom, no. 50390/99, 29 April 2003.

262 Holomiov v the Republic of Moldova, no. 30649/05, 7 November 2006.

263 Testa v Croatia, no. 20877/04, 12 July 2007.

264 Aleksanyan v Russia, no. 46468/06, 22 December 2008.

In *Paladi v. Moldova (2009)*,²⁶⁵ the court found a violation of Article 3 on account of the lack of proper medical assistance and the abrupt interruption of neurological treatment that was being administered to a remand detainee.

The case of *Martzaklis and Others v. Greece (2015)*²⁶⁶ concerned the conditions of detention of HIV-positive persons in the psychiatric wing of Korydallos Prison Hospital. The applicants complained of their ‘ghettoisation’ in a separate wing of the hospital, and the authorities’ failure to consider whether those conditions were compatible with their state of health. The court held that there had been a violation of Article 3. The physical conditions and sanitation facilities for persons detained in the prison hospital were inadequate.

See also:

- *Hummatov v. Azerbaijan (2007)*²⁶⁷ (violation on account of inadequate medical care in prison for tuberculosis, causing considerable mental suffering);
- *Kotsaftis v. Greece (2008)*²⁶⁸ (applicant suffering from cirrhosis of the liver caused by chronic hepatitis B; failure to safeguard the applicant’s physical integrity, in particular by providing him with the appropriate medical care; the court deplored the fact that the applicant, who was suffering from a serious and highly infectious disease, had been detained along with ten other prisoners in a cell measuring 24 square metres);
- *Poghosyan v. Georgia (2009)*²⁶⁹ (breach; applicant had not received treatment for his viral hepatitis C; to protect the prisoner’s health it was essential to provide treatment corresponding to the diagnosis, as well as proper medical supervision);
- *VD v Romania (2010)*²⁷⁰ (violation; prisoner had virtually no teeth and required dentures which he could not afford; not provided despite new legislation enacted in January 2007 making them available free of charge);
- *Slyusarev v. Russia (2010)*²⁷¹ (violation; confiscation of the applicant’s glasses for five months could not be explained in terms of the ‘practical demands of imprisonment’ and had been unlawful in domestic terms; unacceptable delay in providing new glasses);
- *Ashot Harutyunyan v. Armenia (2010)*²⁷² (violation; applicant suffered from an acute bleeding duodenal ulcer, diabetes and a heart condition; clearly in need of regular medical care and supervision, which was denied to him over a prolonged period; no medical record to prove that the surgery recommended by his doctors had ever been carried out, or of him receiving any check-up or assistance from the detention facility’s medical staff; considerable anxiety and distress caused, beyond the unavoidable level of suffering inherent in detention);
- *Xiros v. Greece (2010)*²⁷³ (violation; deteriorating vision despite a number of eye operations; stay of sentence so that he could undergo hospital treatment in a specialist eye clinic refused

265 Paladi v Moldova, no. 39806/05, 10 March 2009.

266 Martzaklis and Others v Greece, no. 20378/13, 9 July 2015.

267 Hummatov v Azerbaijan, nos. 9852/03 and 13413/04, 29 November 2007.

268 Kotsaftis v Greece, no. 39780/06, 12 June 2008.

269 Poghosyan v Georgia, no. 9870/07, 24 February 2009.

270 VD v Romania, no. 7078/02, 16 February 2010.

271 Slyusarev v Russia, no. 60333/00, 20 April 2010.

272 Ashot Harutyunyan v Armenia, no. 34334/04, 15 June 2010.

273 Xiros v Greece (2010), no. 1033/07, 9 September 2010.

by the domestic court despite being recommended by three of the four specialists who examined him; medical care likely to be provided in prison fell some way short of what would be available in hospital);

- **Vasyukov v. Russia (2011)** (delay in correctly diagnosing a detainee's tuberculosis amounted to inhuman and degrading treatment within the meaning of Article 3);
- **Vladimir Vasilyev v. Russia (2012)²⁷⁴** (violation; longstanding failure to provide appropriate orthopaedic footwear to life prisoner who had had a toe of his right foot and the distal part of his left foot amputated due to frostbite);
- **Iacov Stanciu v. Romania (2012)²⁷⁵** (violation; applicant developed a number of chronic and serious diseases in the course of his detention, including numerous dental problems, chronic migraine and neuralgia; failure to keep a comprehensive record of his health condition or the treatment prescribed and followed; therefore, no regular and systematic supervision of his state of health had been possible; no comprehensive therapeutic strategy to cure his diseases or to prevent their aggravation, with the result that his health had seriously deteriorated over the years);
- **Gülay Çetin v. Turkey (2013)²⁷⁶** (violation; applicant remanded in custody and then imprisoned following conviction for murder; suffering from advanced cancer and died of her illness in hospital prison ward; held that the conditions of her detention, both before and after conviction, amounted to inhuman and degrading treatment);
- **Nogin v. Russia (2015)²⁷⁷** (violation; applicant suffered from an insulin-dependent form of diabetes; failure to provide appropriate medical treatment);
- **Mozer v. the Republic of Moldova and Russia (2016)²⁷⁸** (violation; the applicant suffered from bronchial asthma, respiratory deficiency and other conditions; although the doctors had considered the applicant's condition to be deteriorating and the prison medical facilities were inadequate, the authorities not only refused to transfer him to a civilian hospital for treatment but also exposed him to further suffering and a more serious risk to his health by transferring him to an ordinary prison);
- **Kolesnikovich v. Russia (2016)²⁷⁹** (violation; the applicant had an ulcer as well as brain and spinal injuries; left without any medical supervision during the first two years of his detention, until his health had worsened to the extent that he could no longer take part in court hearings; his delayed admission to the prison hospital, combined with the failure to provide him with some of the required medication in order to at least relieve his severe stomach pain, had also been a serious shortcoming);
- **Yunusova and Yunusov v. Azerbaijan (2016)²⁸⁰** (violation; the applicants were human rights defenders who both had several serious medical problems prior to arrest; government had failed to submit medical evidence to back up its claim that the couple's health had been stable and had not required a transfer to a medical facility);

274 Vladimir Vasilyev v Russia, no. 28370/05, 10 January 2012.

275 Iacov Stanciu v Romania, no. 35972/05, 24 July 2012.

276 Gülay Çetin v Turkey, no. 44084/10, 5 March 2013.

277 Nogin v Russia, no. 58530/08, 15 January 2015.

278 Mozer v the Republic of Moldova and Russia [GC], no. 11138/10, 23 February 2016.

279 Kolesnikovich v Russia, no. 44694/13, 22 March 2016.

280 Yunusova and Yunusov v Azerbaijan, no. 59620/14, 2 June 2016.

- *Kondrulin v. Russia (2016)*²⁸¹ (violation; applicant died from cancer while serving his sentence; failure to provide the applicant with the medical care he had needed).

Cases where no violation was established

No violation of Article 3 was established in *Sakkopoulos v. Greece (2004)*.²⁸² The applicant suffered from cardiac insufficiency and diabetes, and he submitted that his state of health was incompatible with his continued detention. On the evidence, it did not appear that the deterioration in his health was attributable to the prison authorities. Furthermore, the Greek authorities had provided appropriate medical care.

The applicant in *Shchebetov v. Russia (2012)*²⁸³ was serving a sentence of nine years' imprisonment for aggravated robbery. He complained that he had been infected with HIV and tuberculosis in detention. The court noted that the materials in the case file did not provide a sufficient evidential basis to find 'beyond reasonable doubt' that the Russian authorities were responsible for the applicant's contraction of the HIV infection. Moreover, the evidence available showed that the authorities had utilised all the means at their disposal in the light of the correct diagnosis of the applicant's condition, prescribing appropriate prophylactic treatment and admitting the applicant to medical institutions for in-depth examinations. No violation.

*Cătălin Eugen Micu v Romania (2016)*²⁸⁴ (no violation; authorities had provided adequate medical treatment for prisoner's hepatitis C).

Medical care in prison for persons suffering from mental illness

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

In *Aerts v Belgium (1998)*,²⁸⁵ the applicant was arrested in November 1992 for an assault, having attacked his ex-wife with a hammer. He was placed in detention pending trial in the psychiatric wing of a prison. The applicant complained about the conditions of detention. It was accepted that the general conditions in the wing were unsatisfactory. The European Committee for the Prevention of Torture (CPT) had considered that the standard of care given to patients there fell below the minimum acceptable from an ethical and humanitarian point of view. It also considered that prolonging their detention there for lengthy periods carried an undeniable risk of a deterioration of their mental health. In the present case, however, there was no proof of a deterioration in Mr Aerts's mental health, and the living conditions on the psychiatric wing did not seem to have had such serious effects on his mental health as would bring them within the scope of Article 3. It had not been conclusively established that the applicant had suffered treatment that could be classified as inhuman or degrading. There had been no violation of Article 3.

In *Romanov v Russia (2005)*,²⁸⁶ the applicant, who suffered from a 'profound dissociative psychopathy', complained about the conditions and length of his detention in the psychiatric ward of a detention facility, where he had been held for over 15 months. The court held that there had been

281 Kondrulin v Russia, no. 12987/15, 20 September 2016.

282 Sakkopoulos v Greece, no. 61828/00, 15 January 2004.

283 Shchebetov v Russia, no. 21731/02, 10 April 2012.

284 Cătălin Eugen Micu v Romania, no. 55104/13, 5 January 2016.

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

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

a violation of Article 3. The conditions of detention, in particular the severe overcrowding and its detrimental effect on his well-being, combined with the length of the period during which he had been detained in such conditions, amounted to degrading treatment. They must have undermined his human dignity and aroused in him feelings of humiliation and debasement.

The applicant in *Khudobin v Russia (2006)*²⁸⁷ had a history of chronic illnesses which included epilepsy, pancreatitis, hepatitis and ‘mental deficiencies’. Doctors had recommended out-patient psychiatric supervision. Although Russian law prohibited any form of entrapment or incitement by police officers, he was arrested for supplying heroin to an undercover police agent and held in custody until the criminal proceedings were discontinued 13 months later. During his trial he underwent three psychiatric examinations which ultimately concluded that he was legally insane at the time of the alleged crime, as a result of which he was discharged from criminal liability. Mr Khudobin complained that he did not receive adequate medical assistance at the relevant detention facility and was subjected to inhuman and degrading treatment. He said that his health sharply deteriorated in detention, where he contracted measles, bronchitis, and repetitive pneumonias and had several epileptic seizures. The court found that the Russian government had violated Article 3 by failing to providing him with adequate medical treatment and subjecting him to inhuman conditions of detention. It accepted the applicant’s description of the facts because the government could not refute them, even though the events occurred presumably with the knowledge of the prison authorities. The level of anxiety caused by the lack of medical assistance, compounded by his HIV-positive status, serious mental disorders and physical sufferings, violated Article 3.

In *Novak v Croatia (2007)*,²⁸⁸ the applicant complained about a lack of adequate medical treatment for his post-traumatic stress disorder. The court found that the applicant had not provided any documentation to prove that his detention conditions had led to a deterioration of his mental health and dismissed the application.

The applicant in *Kucheruk v Ukraine (2007)*²⁸⁹ was suffering from chronic schizophrenia. He complained of ill-treatment while in detention, notably handcuffing in solitary confinement, and of inadequate conditions of detention and medical care. The court held that there had been a violation of Article 3. The handcuffing for seven days of the applicant who was mentally ill without psychiatric justification or medical treatment had to be regarded as inhuman and degrading treatment. Furthermore, his solitary confinement and handcuffing suggested that the authorities had not provided appropriate medical treatment and assistance to him.

The applicant in *Dybeku v. Albania (2007)*,²⁹⁰ was suffering from chronic paranoid schizophrenia for which he had treated in psychiatric hospitals for a number of years. Having been sentenced in 2003 to life imprisonment for murder and illegal possession of explosives, he was placed in a normal prison, where he shared cells with inmates who were in good health and where he was treated as an ordinary prisoner. The court held that there had been a violation of Article 3. The fact that the Albanian Government admitted that the applicant had been treated like the other prisoners, notwithstanding his long history of paranoid schizophrenia, showed a failure to comply with the Council of Europe’s recommendations on dealing with prisoners with mental illnesses. Under Article 46 (binding force and execution of judgments), the court invited Albania as a matter of urgency to take the necessary measures to secure appropriate conditions of detention, and in particular adequate medical treatment, for prisoners requiring special care on account of their state of health.

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

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

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

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

In *Sławomir Musiał v Poland* (2009),²⁹¹ the applicant, who suffered from epilepsy, schizophrenia and other mental disorders, was detained in various remand centres without psychiatric facilities. The court found that the generally poor conditions in which he was held were not appropriate for ordinary prisoners, let alone for someone with a history of mental disorder and in need of specialised treatment, who was more susceptible to a feeling of inferiority and powerlessness. The applicant had been kept in detention centres primarily for healthy people for nearly 3½ years of detention. Doctors had recommended that he receive regular psychiatric supervision but even after his attempted suicide he was not given in-patient care. The authorities' failure during most of the applicant's time in detention to hold him in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward had unnecessarily exposed him to a risk to his health which must have resulted in stress and anxiety. It also ignored the Council of Europe Committee of Ministers recommendations in respect of prisoners suffering from serious mental-health problems.²⁹²

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

In *Kaprykowski v Poland* (2009),²⁹³ the applicant was suffering from epilepsy marked by frequent (daily) seizures and also from encephalopathy accompanied by dementia. He was classified by social security authorities as a person with a 'first-degree disability making him completely unfit to work'. He alleged that the medical treatment and assistance offered to him during his detention in a remand centre had been inadequate in view of his severe epilepsy and other neurological disorders. The court found that throughout his incarceration several doctors had stressed that he should receive specialised psychiatric and neurological treatment and be under constant medical supervision. Furthermore, the medical experts appointed by the district court considered that the penitentiary system could no longer offer him the treatment he required and recommended that he undergo brain surgery. Consistent with this, when he was being released from the prison hospital, the doctors clearly recommended that he be placed under 24-hour medical supervision. Given the evidence, the court was convinced that Mr Kaprykowski had been in need of constant medical supervision during his time in the remand centre, in the absence of which he faced major health risks. The lack of adequate medical treatment there, and placing him in a position of dependency and inferiority vis-à-vis his healthy cellmates, undermined his dignity and entailed particularly acute hardship. This caused him anxiety and suffering beyond that inevitably associated with any deprivation of liberty. His continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment, and violated Article 3.

In *Raffray Taddei v France* (2010),²⁹⁴ the applicant suffered from a number of medical conditions, including anorexia and Munchausen's syndrome. She complained about her continuing detention and a failure to provide her with appropriate treatment. In April 2009 a psychiatric expert stated that she required specialised supervision for the treatment of the above conditions. The need for such

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

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

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

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

treatment was confirmed by a psychiatrist assigned to her. The court found that the failure by the national authorities to sufficiently take into account her need for specialised care in an adapted facility, combined with transfers to prison institutions which appeared not to have the facilities necessary for the proper treatment of her illness, had been capable of causing her a level of distress that exceeded the unavoidable level of suffering inherent in detention. Violation of Article 3.

In *Cocaign v France (2011)*,²⁹⁵ the applicant was imprisoned in 2006 for attempted rape committed using a weapon. In January 2007 he killed a fellow-inmate before cutting open his chest and eating part of his lungs. On 17 January 2007, he was condemned to 45 days in a disciplinary cell for this violence' to his deceased cellmate. On 18 January 2007, the prison governor applied to the prefect of the département of Yvelines to have him compulsorily admitted to a psychiatric institution. The prefect acceded to the request, ordering his admission to the Villejuif difficult patients' unit. On 14 February 2007, a hospital doctor concluded that the applicant's condition no longer justified his involuntary placement. The prefect ordered his return to Bois d'Arcy, where he finished serving his disciplinary penalty. On 26 October 2007, a court report by two psychiatrists established that the applicant was legally insane at the time of the murder.

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

In *G v France (2012)*,²⁹⁶ the applicant was suffering from a chronic schizophrenia-type illness with evidence of psychosis, hallucinations, delusions and aggressive and addictive behaviour. He was alternately kept in prison and hospital psychiatric wards between 1996 and 2004. On 21 May 2005, he was sent to Toulon-La Farlède prison after causing damage in Chalucet psychiatric hospital, where he had asked to be admitted. As a result, on 30 June 2005 he was sentenced to 12 months imprisonment, of which ten months were suspended. On his arrival in prison he set fire to his mattress. He was placed under psychiatric observation, then made to share a cell with another detainee, who was known to have psychiatric problems. On 16 August 2005 a fire broke out in his cell. Both detainees suffered serious injuries. With burns to 65% of his body, the applicant's cell mate died from his injuries on 6 December the same year. The applicant said that he 'suffered from schizophrenia, heard voices and saw strange things' but that 'everything was better at the moment'; he added that 'I feel freer since the fire in my cell ... everything has become clearer in my head. I can say that everything is calm now'. On 13 November 2008 the Var Assize Court sentenced the applicant to 10 years imprisonment and declared him civilly liable 'for the prejudice suffered by the civil parties'.

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

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

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

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

In *ZH v Hungary (2012)*,²⁹⁷ ZH had a learning disability. He was also deaf and mute and unable to use sign language or to read or write. He complained that his detention in prison for almost three months constituted inhuman and degrading treatment. The court held that there had been a violation. Given the inevitable feelings of isolation and helplessness that flowed from his disabilities, and ZH's lack of comprehension of his situation and the prison order, he must have suffered anguish and a sense of inferiority, especially as a result of being cut off from the only person (his mother) with whom he could effectively communicate. Although the allegations of molestation by other inmates were not supported by evidence, a person in his position would have faced significant difficulties bringing any such incidents to the wardens' attention, which could have resulted in fear and the feeling of being exposed to abuse.

The applicant in *Claes v Belgium (2013)*²⁹⁸ was a man with an intellectual disability who committed a series of sexual assaults. He was held continuously in the psychiatric wing of a prison for many years. Apart from access to the prison psychiatrist or psychologist, no specific treatment or medical supervision was prescribed for him. The court held that there had been a violation of Article 3. The national authorities had not provided him with adequate care and he had been subjected to degrading treatment as a result. His continued detention over a lengthy period in the psychiatric wing without appropriate medical care or any realistic prospect of change constituted particularly acute hardship which caused him distress that went beyond the suffering inevitably associated with detention. Whatever obstacles were created by his own behaviour, they did not release the state from its obligations, given the position of inferiority and powerlessness typical of patients confined in psychiatric hospitals and even more so of those detained in a prison setting. The applicant's situation stemmed in reality from a structural problem: on the one hand the support provided to persons in prison psychiatric wings was inadequate, on the other placing them in facilities outside prison often proved impossible, either because of a shortage of suitable psychiatric hospital beds or because the relevant legislation did not allow mental health authorities to order their placement in external facilities.

In *Ticu v Romania (2013)*,²⁹⁹ the applicant was serving a 20-year sentence for participating in an armed robbery occasioning the victim's death. In childhood he had suffered from an illness which led to considerable delays in his mental and physical development. He complained about the poor conditions of detention in the prisons where he had been serving his sentence, and especially overcrowding and shortcomings in the provision of medical treatment. The court noted that the recommendations of the Committee of Ministers of the Council of Europe to member States³⁰⁰ advocated that prisoners suffering from serious mental health problems should be kept and cared for in a hospital facility that

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

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

299 *Ticu v Romania*, no. 24575/10, 1 October 2013.

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

was adequately equipped and possessed appropriately trained staff. The living conditions in the institutions where the applicant had been held, and continued to be held, were a particular cause for concern. Such conditions would be inadequate for any person deprived of their liberty but especially so for someone like him on account of his mental health problems and need for appropriate medical supervision. There had been a breach of Article 3.

In **Bamouhammad v Belgium (2015)**,³⁰¹ the applicant was suffering from Ganser syndrome (or ‘prison psychosis’). He alleged that in prison he had been subjected to inhuman and degrading treatment which affected his mental health. He also complained of a lack of effective remedies. The court found that the level of seriousness required for treatment to be regarded as ‘degrading’ had been exceeded. The applicant’s need for psychological supervision had been emphasised in all medical reports. However, endless transfers had prevented such supervision with the result that his already fragile mental health had not ceased to worsen throughout his detention. The prison authorities had not sufficiently considered his vulnerability or viewed his situation from a humanitarian perspective. There had been a violation of Article 3 (and of Article 13 — right to an effective remedy).

The case of **Murray v the Netherlands (2016)**³⁰² concerned a man convicted of murder in 1980 who served his life sentence on the islands of Curaçao and Aruba until being granted a pardon in 2014 due to his deteriorating health. The applicant complained about the imposition of a life sentence without any realistic prospect of release and that he was not provided with a special detention regime for prisoners with psychiatric problems. The court found a violation of Article 3, reiterating that states are under an obligation to provide appropriate medical care to detainees suffering from mental health problems. Mr Murray had been assessed prior to being sentenced as requiring treatment. Subsequently, the domestic court which advised against his release found a close link between the persistence of his risk of reoffending and the lack of treatment. Notwithstanding this, he was never provided with any treatment for his mental condition during the time he was imprisoned, and consequently any request by him for a pardon was in practice incapable of leading to release.

The case of **Roooman v. Belgium (2019)**³⁰³ concerned the question of the psychiatric treatment provided to a sex offender who had been in compulsory confinement since 2004 on account of the danger that he posed and the lawfulness of his detention. The applicant complained that he had not received the psychological and psychiatric treatment required by his mental-health condition. He also alleged that the lack of treatment was depriving him of the prospect of an improvement in his situation and that, as a result, his detention was unlawful.

The Grand Chamber held that from the beginning of 2004 until August 2017 there had been a violation of Article 3, and that from August 2017 onwards there had been no violation of Article 3. It found that the national authorities had failed to provide treatment for the applicant’s health condition from the beginning of 2004 to August 2017. His continued detention without a realistic hope of change and without appropriate medical support for a period of about thirteen years had amounted to particularly acute hardship, causing him distress of an intensity exceeding the unavoidable level of suffering inherent in detention. The Grand Chamber also held that from the beginning of 2004 until August 2017 there had been a violation of Article 5. In that regard, the court decided to refine its case-law principles, and to clarify the meaning of the obligation on the authorities to provide treatment to persons placed in compulsory confinement. The court held that the applicant’s deprivation of liberty between 2004 and August 2017 had not taken place in an appropriate institution that was capable of providing him with treatment adapted to his condition, as required by Article 5§1. However, the relevant authorities had drawn the necessary conclusions from the Chamber judgment of 18 July 2017,

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

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

303 Roooman v. Belgium [GC], no. 18052/11, 31 January 2019.

and had put in place a comprehensive treatment package, leading the court to conclude that there had been no violation of this provision in respect of the period since August 2017.

The case of **WD v Belgium (2016)**³⁰⁴ concerned the confinement for over 15 years of a mentally-ill man in the psychiatric wing of an ordinary prison without appropriate medical care. Previously, WD had been found not to be criminally responsible for the sex offences with which he was charged. The applicant complained that the institution in which he was held was ill-adapted to the situation of people with mental-health problems. The court found that WD was subjected to degrading treatment by being detained in a prison environment for so long without appropriate treatment and with no prospect of reintegrating into society. This had caused him particularly acute hardship and an intensity of distress which exceeded the unavoidable level of suffering inherent in detention. The court considered that his situation originated in a structural deficiency specific to the Belgian psychiatric detention system. Pursuant to Article 46, the court required the state to reorganise its system for the psychiatric detention of offenders in such a way that the detainees' dignity was respected. In particular, it encouraged the Belgian state to take action to reduce the number of offenders with mental disorders who were detained in prison psychiatric wings without appropriate treatment. The court applied the pilot-judgment procedure to the case, giving the government two years to remedy the general situation and adjourning proceedings in all similar cases for that period.³⁰⁵

Prisoners with suicidal tendencies

The applicant in **Kudla v Poland (2000)**³⁰⁶ suffered from chronic depression and twice tried to commit suicide. He complained that he was not given adequate psychiatric treatment in detention.

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

In **Keenan v United Kingdom (2001)**,³⁰⁷ Mark Keenan had been receiving intermittent anti-psychotic medication for several years and his medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. His mother alleged that he had suffered inhuman and degrading treatment due to the conditions of detention. The court found no violation of Article 2 (see above) but did find that there was a violation of Article 3. The lack of effective monitoring of his condition, and the lack of informed psychiatric input into his assessment and treatment, disclosed significant defects in the medical care provided to a mentally-ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment, which may well have threatened his physical and moral resistance, was incompatible with the standard of treatment required in respect of a mentally-ill person.

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

305 The court also found that there had been a violation of Article 5§1. The applicant's detention since 2006 in a facility ill-suited to his condition had broken the link required by Article 5§1(e) between the purpose and the practical conditions of detention. There had also been a violation of Articles 5§4 and 13. The Belgian system in operation at the time had not provided the applicant with an effective remedy in practice in respect of his Convention complaints – in other words, a remedy capable of affording redress for the situation of which he was the victim and preventing the continuation of the alleged violations.

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

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

In **Rivièrē v France (2006)**,³⁰⁸ the applicant complained about his continued imprisonment in spite of his psychiatric problems. He had been diagnosed with a psychiatric disorder involving suicidal tendencies. The experts in his case had been concerned by aspects of his behaviour, in particular a compulsion towards self-strangulation, which indicated a need for treatment outside the prison. The court held that the applicant's continued detention without appropriate medical supervision amounted to inhuman and degrading treatment. It observed that prisoners with serious mental disorders and suicidal tendencies require special measures geared to their condition regardless of the seriousness of their offence.

The case of **Renolde v France (2008)**³⁰⁹ concerned the placement in a disciplinary cell for 45 days and suicide of the applicant's brother who was suffering from acute psychotic disorders capable of resulting in self-harm.

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

In **Güveç v Turkey (2009)**,³¹⁰ the applicant, aged 15 at the time, had been tried before an adult court and found guilty of membership of an illegal organisation. He was held for more than 4½ years in pre-trial detention in an adult prison, where he did not receive medical care for his psychological problems and made repeated suicide attempts.

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

The case of **Ketreb v France (2012)**³¹¹ concerned the suicide in prison by hanging of a drug addict. His sisters alleged that the French authorities failed to take proper steps to protect their brother's life when he was placed in the prison's disciplinary cell. They also complained that the disciplinary measure applied to their brother was unsuitable for a person in his state of mind. The court held that there was a violation of Article 2, finding that the authorities had failed in their positive obligation to protect his right to life (see above). There had also been a violation of Article 3: his placement in a disciplinary cell for two weeks was incompatible with the level of treatment required in respect of such a mentally disturbed person.

Requiring a prisoner to take medication

The applicant in the case of **Gennadiy Naumenko v Ukraine (2004)**³¹² was sentenced to death in 1996. In June 2000 the sentence was commuted to one of life imprisonment. He alleged that during his time in prison from 1996 to 2001 he had been subjected to inhuman and degrading treatment, in that he

308 Rivièrē v France, no. 33834/03, 11 July 2006.

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

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

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

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

had been wrongfully forced to take medication. The court held that there had been no violation of Article 3. No matter how disagreeable, therapeutic treatment could not in principle be regarded as contravening Article 3 if it was persuasively shown to be necessary. From the evidence of the witnesses, the medical file and the applicant's own statements, it was clear that the applicant was suffering from serious mental disorders and had twice made attempts on his own life. He had been put on medication to relieve his symptoms. Furthermore, the applicant had not produced sufficient detailed and credible evidence to show that, even without his consent, the authorities had acted wrongfully in making him take the medication. The court did not have sufficient evidence before it to establish beyond reasonable doubt that the applicant had been forced to take medication in a way that contravened Article 3 of the Convention.

Delays in transfer to hospital

Some lapse of time when assessing the appropriate custodial clinic to which an offender should be transferred is acceptable. However, 15 months did not stroke a reasonable balance: *Morsink v Netherlands* 11 May 2004 at 66-70. *Nelissen v Netherlands* 5 April 2011 at 60 where the period was one year and one month. Eight months delay in transferring a defendant who had been found to lack criminal responsibility due to a delusional disorder, from an ordinary detention centre to a specialised hospital was too long: *CB v Romania* 4 April 2010 at 49-59. Conversely, where the prisoner is clearly a dangerous risk with detention falling within Article 5 para 1(a), and the expert medical opinion is that he is not yet ready to benefit from specialised treatment, the failure to transfer him from detention in prison to a hospital will not offend: *De Schepper v Belgium* 13 October 2009 at 47-50. Failure to transfer a dangerously disturbed person to a suitable therapeutic regime due to lack of places did disclose a violation; nor could the violent conduct of the person be a ground justifying continued long-term detention in an unsuitable setting: *De Claes v Belgium* 10 January 2013 at 117-121. See also *Glien v Germany*.

ECHR ARTICLE 5 (RELATIONSHIP WITH GROUND OF DETENTION)

As to the applicability of Article 5, the case of *Aerts v Belgium (1998)*³¹³ is relevant. There, the court reiterated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic or other appropriate institution. By analogy, there are criminal cases where the ground given for a remanding a person in custody in the course of criminal proceedings is not a risk of further offending or absconding but the person's own protection. This will usually occur where on a first appearance in court the defendant is psychotic and unable to care for themselves if released. In substance, the individual is being detained on the ground of unsoundness of mind rather than on the usual 'criminal' refusal of bail grounds of risk of further offending or of absconding. That being so, it may be argued that a prolonged period of detention in prison pending transfer to a hospital or place of detention properly related to the ground relied upon also offends the Article 5 principle set down in *Aerts*.

This line of argument is consistent with *LB v Belgium (2012)*,³¹⁴ which concerned a serving prisoner. LB was almost continuous detained from 2004 until 2011 in the psychiatric wings of two prisons, despite the authorities' insistence on the need for placement in a structure adapted to his pathology. The applicant complained that the institution in which he was held was ill-adapted to the situation of people with mental-health problems.

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

314 *LB v Belgium*, no. 22831/08, 2 October 2012.

The Court held that there had been a violation of Article 5§1. The applicant had been detained in a prison institution for seven years when all the medical and psychiatric or social workers' opinions and competent authorities agreed that it was ill-adapted to his condition. The conditions of the detention had been incompatible with its purpose. Detention and treatment on a psychiatric wing was supposed to be temporary while the authorities looked for an institution that was better adapted to the applicant's condition. The place of detention was inappropriate, and the applicant's therapeutic care was very limited in the prison.

Prison disciplinary measures and Article 5

Disciplinary steps imposed within a prison which have effects on the conditions of a person's detention cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention, and they fall outside the scope of Article 5. See e.g. *Bollan v United Kingdom (2000)*³¹⁵ and *Munjaz v United (2012)*,³¹⁶ where the applicant's seclusion in a high-security hospital did not amount to a further deprivation of liberty.

ARTICLE 8 AND PRISONER-DOCTOR CORRESPONDENCE

The Court dealt for the first time with the monitoring of a prisoner's medical correspondence in the case of *Szuluk v United Kingdom (2009)*.³¹⁷ The case concerned the monitoring by the prison medical officer of the prisoner's correspondence with the specialist supervising his treatment in hospital, which related to a life-threatening medical condition. The court accepted that a prisoner with a life-threatening medical condition would want to be reassured by an outside specialist that he was receiving adequate medical treatment in prison. Taking into account the circumstances of the case, the court found that, although the monitoring of the prisoner's medical correspondence had been limited to the prison medical officer, it had not struck a fair balance with his right to respect for his correspondence (§§ 49-53).

³¹⁵ *Bollan v United Kingdom*, no. 42117/98, 4 May 2000 (dec.).

³¹⁶ *Munjaz v United Kingdom*, 2913/06, 17 July 2012.

³¹⁷ *Szuluk v United Kingdom*, no. 36936/05, 2 June 2009.

RIGHTS OF PEOPLE WITH DISABILITIES IN CRIMINAL PROCEEDINGS WORKSHOP

TRIER, JUNE 2019. Anselm Eldergill

SCENARIOS TO CONSIDER

In the police station

A has a severe learning disability. He is unable to hear and has limited verbal communication. He is arrested for indecent assault and taken to a police station. When asked by police about what happened he says, 'I know it was wrong. I've been told not to do it. I'm sorry'. The victim identifies him at the police station while giving her statement. Given his statement and the identification evidence, the police do not formally question him. He is charged and his mother is called to take him home. He risks imprisonment if convicted.

Is there anything else the police should have done?

What rights does he have under the ECHR and CRPD?

HANDOUT

See ZH case, page 15, Blokhin, page 17; CRPD, Article 13, page 3

Do the ECHR and the CRPD impose any requirements in terms of police station conditions?

See the cases on pages 16-17; CRPD, article 13, (page 3), article 10 (page 5) and article 15 (page 8)

The court proceedings

B was diagnosed as suffering from paranoid schizophrenia 20 years ago when aged 18, and has had many compulsory admissions to psychiatric hospitals since then. Six months ago, when acutely unwell, he attacked a passer-by in the street who voices told him was a CIA agent sent to kill him. He believed he was acting in self-defence and is a peaceful man when not acutely unwell. He is due to be tried on a charge of murder next week and faces a sentence of life imprisonment if convicted. He continues to insist that he acted in self-defence. There is some evidence that he continues to experience visual and auditory hallucinations but he has not co-operated with a psychiatric assessment. He has also refused a lawyer (he believes they cannot be trusted) and insists on representing himself.

How should the judge deal with this situation? What rights does he have under the ECHR and CRPD?

HANDOUT

See pages 22-25 (effective participation), Vaudelle v France, page 18; CRPD Article 13, page 3.

HANDOUT

See pages 22-25 (effective participation), Vaudelle v France, page 18; CRPD Article 13, page 3.

The trial was adjourned and the judge now has a medical report. This states that B has continued to refuse to co-operate with a psychiatric assessment. However, based on reports of his behaviour and previous psychiatric assessments he was clearly psychotic when he stabbed the passer-by and remains psychotic. An order committing him to hospital would be the appropriate sentence, rather than imprisonment. B invokes the CRPD. He argues that he has a right to be tried on the same basis as all other citizens as a person with capacity. If convicted, he has a right to be sentenced in the same way as all other citizens with capacity, i.e. to receive imprisonment. He relies on Article 12 of the CRPD.

The prosecutor argues that to imprison B would be inhuman and degrading and in breach of Article 3 of the ECHR. It would also violate the fair trial provisions in Article 6. Further still, the hospital option is an ‘adaptation’ of the usual criminal law that is required in order to take account of B’s disability

Who is right?

Sentence

Based on the court psychiatric report, the court orders B’s indefinite detention for treatment in a secure hospital.

B finally agrees to receive help from a lawyer and he appeals on the following grounds:

- a) He did not have the assistance of a lawyer when sentenced and had not been mentally competent to waive his ECHR rights.
- b) The medical report was not based on a medical examination.
- c) It was contrary to the ECHR, and by implication the CRPD, to impose a hospital order sentence for three reasons:
 - he had not been convicted and it had not been proved in court that he did the act alleged.
 - it was established that he did not lack criminal capacity because a conviction for manslaughter was recorded against him.
 - His psychiatric condition was not treatable, as evidenced by many years of readmissions to hospital.

Is he right?

HANDOUT

See ECHR Articles 3 (page 6) and 6 (page 2); pages 22-25 (effective participation) and Vaudelle v France, page 18; CRPD, Article 12, page 4.

HANDOUT

See waivers, page 23; legal aid, pages 18 (Vaudelle) and 27; refusal to co-operate: Varbanov, page 30, and Vaudelle; criminal capacity and treatability, page 31; proving that defendant did the act charged, page 32; pages 22-25 (effective participation). See CRPD, Article 12, page 4, and Article 13, page 3.

Remands to prison

C and D share a prison cell.

C is serving 10 years. He is wheel-chair bound but cannot move around the prison in it. In particular, the medical and recreational areas are inaccessible. He requires help from inmates to shower, toilet and dress.

D is aged 88. He was convicted on six brutal child murders 20 years ago and at the time the judge said that he should never be released. He is now paraplegic and is unable to perform any daily care tasks for himself (feeding, bathing). He also has a serious kidney condition that is rapidly getting worse and is exacerbated by the poor prison conditions.

Are the ECHR and CRPD being complied with?

If not, what steps would be required to ensure compliance?

HANDOUT

See Detainees with physical disabilities, pages 49-51, dependence on fellow inmates, page 52, and duty to release on health grounds, pages 52-53. See CRPD, Articles 10, page 5, and 15, page 8.

I DIRITTI DELLE PERSONE CON DISABILITÀ NEI PROCEDIMENTI PENALI
SESSIONE PARALLELA
TREVIRI, GIUGNO 2019. Anselm Eldergill

SCENARI DA CONSIDERARE

Alla stazione di polizia

A ha una grave disabilità di apprendimento. Non sente e ha una comunicazione verbale limitata. Viene arrestato per un'offesa al pudore e portato in una stazione di polizia. Quando la polizia gli chiede su quello che è successo, dice: «So che è stato sbagliato. Mi è stato detto di non farlo. Mi dispiace». La vittima lo identifica alla stazione di polizia durante la sua dichiarazione. Data la sua dichiarazione e la prova di identificazione la polizia non lo interrogherà formalmente. Gli viene contestato il reato e sua madre è chiamata a portarlo a casa. In caso di condanna rischia la reclusione.

C'è qualcos'altro che la polizia avrebbe dovuto fare?

Quali sono i suoi diritti ai sensi della Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (CEDU) e della Convenzione sui diritti delle persone con disabilità (CRPD)?

➤ **ALLEGATO**

Vedi caso ZH, pagina 15, Blokhin, pagina 17; CRPD, articolo 13, pagina 3.

La CEDU e la CRPD impongono requisiti in termini di condizioni delle stazioni di polizia?

➤ **ALLEGATO**

Vedi casi su pagine 16-17; CRPD, articolo 13, (pagina 3), articolo 10 (pagina 5) e articolo 15 (pagina 8).

Il procedimento giudiziario

20 anni fa, quando aveva 18 anni, B è stato diagnosticato come affetto da schizofrenia paranoide e da allora ha avuto molti ricoveri obbligatori in ospedali psichiatrici. Sei mesi fa, quando era molto malato, ha attaccato un passante per strada che secondo delle voci era un agente della CIA mandato per ucciderlo. Credeva di agire per autodifesa ed è un uomo pacifico quando non sta molto male. La prossima settimana dovrebbe essere processato con l'accusa di omicidio e rischia una condanna all'ergastolo. Continua ad insistere sul fatto che ha agito per autodifesa. C'è qualche prova che egli continui ad avere allucinazioni visive e uditive ma non ha collaborato durante la valutazione diagnostica. Ha anche rifiutato un avvocato (ritiene che non siano affidabili) e insiste nel rappresentarsi da solo.

Come deve comportarsi il giudice di fronte a questa situazione? Quali diritti ha B ai sensi della CEDU e della CRPD?

➤ **ALLEGATO**

Vedi pagine 22-25 (partecipazione effettiva), Vaudelle contro Francia, pagina 18; CRPD, articolo 13, pagina 3.

Il processo è stato rinviato e il giudice ha ora un referto medico. In esso si afferma che B continua a rifiutare di collaborare durante la valutazione diagnostica. Tuttavia, in base ai rapporti del suo comportamento e precedenti valutazioni psichiatriche, quando ha pugnalato il passante era chiaramente psicotico e rimane psicotico. Un ordinanza di ricovero in ospedale sarebbe la sentenza appropriata, piuttosto che l'incarcerazione. B invoca la CRPD. Egli sostiene di avere il diritto di essere giudicato sulla stessa base di tutti gli altri cittadini come un persona capace di intendere e di volere. Se condannato, ha il diritto di essere condannato allo stesso modo di tutti gli altri cittadini capaci di intendere e di volere, vale a dire, ricevere la prigione. Egli si basa sull'articolo 12 della CRPD.

Il pubblico ministero sostiene che imprigionare B sarebbe inumano e degradante e in violazione dell'articolo 3 della CEDU. Questo violerebbe anche le disposizioni sull'equo processo di cui all'art. 6. E ancora, l'opzione dell'ospedale è un «adattamento» della legge penale tradizionale necessario per tener conto dell'invalidità di B.

Chi ha ragione?

➤ **ALLEGATO**

Vedi CEDU articoli 3 (pagina 6) e 6 (pagina 2); pagine 22-25 (partecipazione effettiva) e Vaudelle contro Francia, pagina 18; CRPD, articolo 12, pagina 4.

Sentenza

Sulla base della perizia psichiatrica, il tribunale ordina la detenzione a tempo indeterminato di B per cure in un ospedale protetto.

B finalmente accetta di ricevere aiuto da un avvocato e presenta ricorso sulle seguenti ragioni:

- a) Non ha avuto l'assistenza di un avvocato quando è stato condannato e non era stato capace di intendere o di volere per rinunciare ai diritti della CEDU.
- b) Il referto medico non era basato su un esame medico.
- c) Era contrario alla CEDU e, implicitamente, alla CRPD, imporre una condanna di ricovero in ospedale per tre motivi:
 - Non era stato condannato e non era stato provato in giudizio che ha compiuto il presunto atto.
 - Non è stata provata la sua mancanza di imputabilità perché una condanna per omicidio colposo era stata pronunciata nei suoi confronti.
 - Le sue condizioni psichiatriche non erano curabili, in quanto dimostrato da molti anni di riammissioni in ospedale.

Ha ragione?

➤ **ALLEGATO**

Vedi rinunce, pagina 23; assistenza giudiziaria, pagine 18 (Vaudelle) e 27; rifiuto a collaborare: Vaubanov, pagina 30, e Vuadelle; imputabilità e trattamento, pagina 31; dimostrare che l'imputato ha compiuto l'atto di accusa, pagina 32; pagine 22-25 (partecipazione effettiva). Vedi CRPD, articolo 12, pagina 4, e articolo 13, pagina 3.

Detenzione preventiva

C e D condividono una cella.

C sta scontando 10 anni. È su una sedia a rotelle ma non può muoversi all'interno della prigione. In particolare, le aree mediche e ricreative sono inaccessibili. Ha bisogno dell'aiuto di altri detenuti per fare la doccia, andare al bagno e vestirsi.

D ha 88 anni. È stato condannato per sei omicidi brutali di bambini 20 anni fa e all'epoca il giudice disse che non avrebbe mai dovuto essere rilasciato. Ora è paraplegico e non è in grado di eseguire nessuna attività quotidiana di cura di se stesso (alimentazione, bagno). Ha anche una condizione renale grave che sta rapidamente peggiorando ed è aggravata dalle pessime condizioni carcerarie.

Sono state rispettate la CEDU e la CRPD?

In caso contrario, quali misure sarebbero necessarie per garantire la conformità?

➤ **ALLEGATO**

Vedi Detenuti con disabilità fisiche (*Detainees with physical disabilities*), pagine 49-51, dipendenza da altri detenuti, pagina 52, e obbligo di rilascio per motivi di salute, pagine 52-53. Vedi CRPD, articolo 10, pagina 5, e articolo 15, pagina 8.