

419DV21



Speakers' contributions

# ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

## SEMINAR FOR MEMBERS OF THE JUDICIARY

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The UN Convention on the Rights of Persons with  
Disabilities (UNCRPD): key features

dr Damjan Tatic, Ph.D.

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The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- In December 2006 the UN General Assembly unanimously adopted Convention on the Rights of the Persons with Disabilities and the Optional Protocol to it.
- Both treaties entered in force in May 2008.
- The Convention has been ratified or acceded to by 180 state parties.

The UN Convention on the Rights of Persons with Disabilities  
(UNCRC): key features  
dr Damjan Tatic, Ph.D.

- It is the first global human rights treaty adopted under the auspices of the United Nations that has been ratified by a regional international organisation, the European Union.
- The Optional Protocol to the Convention on the Rights of the Persons with Disabilities has been ratified or acceded to by 96 state parties.

The UN Convention on the Rights of Persons with Disabilities  
(UNCRC): key features  
dr Damjan Tatic, Ph.D.

- 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 foster respect for their inherent dignity“ (article 1).

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- The Convention on the Rights of the Persons with Disabilities reaffirms their
- right to life,
- protection in various situations of risk,
- equal recognition before the law (including full legal capacity),
- access to justice,

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- liberty,
- freedom from torture and other degrading and inhumane treatment and punishment,
- protection from violence, abuse and exploitation,
- personal integrity,
- liberty of movement,

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- nationality,
- freedom of expression and opinion,
- privacy,
- marriage and family life,
- education,
- employment,
- health care,

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- social protection and adequate standard of living,
- participation in political life and conduct of public affairs,
- participation in culture, sports and leisure activities.
- It prescribes for the measures which state parties have to undertake in order to enable persons with disabilities to enjoy the above-mentioned rights effectively.

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- *Articles 4 on general obligations of state parties to the Convention and 5 on equality and non-discrimination constitute the core of Convention on Rights of Persons with Disabilities.*
- Convention prescribes that state parties “undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- Convention prescribes for mainstreaming of disability issues into general policies.
- It stresses the significance of training of professionals and staff working with persons with disabilities on the rights of those persons.
- Persons with disabilities have to be consulted through their representative organizations in development of policies and legislation necessary for implementation of the Convention

The UN Convention on the Rights of Persons with Disabilities  
(UNCPRD): key features  
dr Damjan Tatic, Ph.D.

- Civic and political rights of persons with disabilities have to be implemented immediately, while social, economic and cultural rights will be implemented progressively and gradually, with the maximal use of the available resources
- Convention especially stresses the need for development, promotion, research and application of universal design, as a powerful tool to ensure accessibility of all newly designed and produced goods, objects, infrastructure, ICT systems.

The UN Convention on the Rights of Persons with Disabilities  
(UNCPRD): key features  
dr Damjan Tatic, Ph.D.

- The Convention guarantees effective protection from any form of discrimination, including *denial of reasonable accomodation*, to all persons with disabilities.
- The Convention also addresses multiple, intersectional discrimination. Such a discrimination occurs when an individual belonging to different marginalised groups is being discriminated on different grounds that may interact.



The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- The Convention prescribes the duty of States Parties to 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 (article 13, 1).

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- This means that judiciary buildings have to be accessible, sign language interpretation, and documents in all accessible formats must be provided to parties in proceedings, including in electronic, Braille and Easy- Read.
- Many persons with disabilities who are under guardianship have their legal capacity restricted contrary to article 12 of the Convention thus restricting their possibility to access justice and to participate directly or indirectly in different legal proceedings.

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- Committee on the Rights of Persons with Disabilities reviewed several individual communications alleging violations of right of persons with disabilities to access justice, found violations of article 13 and made different concrete recommendations to states in *Makarov vs. Lithuania*,
- *Beasley vs. Australia* and
- *Lockrey vs. Australia*.

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- Convention specifically addresses situation of women with disabilities and children with disabilities explicitly, as well as disability- specific issues of
- accessibility,
- personal mobility,
- support services and
- habilitation and rehabilitation.

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- *Articles 34 to 39 prescribe for setting up and functioning of Committee on the Rights of Persons with Disabilities.*
- State parties shall elect independent experts to the Committee, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.
- *State parties should submit periodic reports on implementation of the Convention to the Committee for the review.*

The UN Convention on the Rights of Persons with Disabilities  
(UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- State parties are supposed to submit initial reports 2 years after ratification or accession to the Convention
- Civil society, disability movement and national human rights institutions submit alternative reports to the Committee
- Committee holds a dialogue with state delegation and issues concluding observations

The UN Convention on the Rights of Persons with Disabilities (UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- Optional Protocol to the Convention provides for a possibility of submission of complaints to the Committee on the Rights of Persons with Disabilities in cases of violation of provisions of the Convention, once all national legal remedies had been exhausted.
- Committee can also investigate serious violations of the Convention in a particular state party. Still, aforementioned state has to make explicit consent to investigation, as well as lodging of complaints against it.

The UN Convention on the Rights of Persons with Disabilities (UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- The Committee on the Rights of Persons with Disabilities has reviewed 89 initial state party reports on implementation of the Convention, and issued recommendations and concluding observations to those states. In 2017 the Committee commenced reviewing second periodic reports under simplified reporting procedure, sending questions under list of issues to 23 state parties. Spain was first State to have its' second periodic report reviewed.

The UN Convention on the Rights of Persons with  
Disabilities (UNCRPD): key features  
dr Damjan Tatic, Ph.D.

- Thank you kindly for  
your time and  
attention!



Right to political participation of persons with disabilities

dr Damjan Tatic, Ph.D.

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Right to political participation of persons with disabilities

dr Damjan Tatic, Ph.D.

- Human rights are universal and indivisible. They belong to every human being, thus to persons with disabilities who used to be among the most discriminated, segregated and isolated members of human species.
- Article 21 of the Universal Declaration of Human Rights guarantees the right of adult citizens to take part in the government of his country, directly or through freely chosen representatives, access to public service and to express their political will through periodic and genuine elections.
- International Covenant on Civil and Political Rights (ICCPR) provides in article 25 for the right to electoral participation “without unreasonable restrictions”.

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- Persons with disabilities however faced different barriers in the exercise of their rights under articles 21 of the Universal Declaration of Human Rights and 25 of the International Covenant on Civil and Political Rights (ICCPR): .
- In many countries adult persons with disabilities under guardianship's right to vote is restricted by law.
- Persons with physical disabilities face inaccessible polling stations, blind persons face inaccessible voting procedures, persons with sensory, intellectual and/ or psycho- social disabilities face inaccessible information about elections.

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- Article 29 spells out that „States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:
- (a) To 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;



Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- (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;

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- (b) To 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 political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- As different articles of CRPD are interlinked and closely connected, realization of the right of persons with disabilities to vote, be elected and to participate in political life and conduct of public affairs depends on accessibility (article 9),
- equal recognition before the law and full and effective exercise of one's legal capacity (article 12),
- inclusion in the community and provision of support services (article 19),
- freedom of expression and access to information and communication (article 21). Without all of that, persons with disabilities face discrimination in exercise of rights from article 29.

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- ICCPR treaty body, the Human Rights Committee in 1996 in its' General Comment number 25 stated that "...established mental incapacity may be a ground for denying a person the right to vote or to hold office". On the other hand, CRPD entered in force more than twenty years after HRC General Comment number 25 had been adopted. In line with the interpretation that subsequent law derogates previous law that is contradictory to provisions of the new law, CRPD Committee has consequently been very clear that CRPD does not permit removal of legal capacity based on mental or intellectual disability that could serve as a legal basis for the restriction of an adult's right to vote.

Right to political participation of persons with disabilities  
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- The Convention prescribes the duty of States Parties to 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 (article 13, 1).

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- This means that administrative buildings have to be accessible, sign language interpretation, and documents in all accessible formats must be provided to parties in administrative proceedings, including in electronic, Braille and Easy- Read.
- Many persons with disabilities who are under guardianship have their legal capacity restricted contrary to article 12 of the Convention thus restricting their possibility to access justice and to participate directly or indirectly in administrative proceedings.

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- Optional Protocol to the Convention provides for a possibility of submission of complaints to the Committee on the Rights of Persons with Disabilities in cases of violation of provisions of the Convention, once all national legal remedies had been exhausted.
- Committee can also investigate serious violations of the Convention in a particular state party. Still, aforementioned state has to make explicit consent to investigation, as well as lodging of complaints against it.

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- So far the Committee reviewed 34 individual communications
- 3 cases have been discontinued
- Committee found 12 complaints inadmissible either rationae temporis or due to non-exhaustion of domestic legal remedies
- It adopted views in 19 cases, finding violations in 17 cases

Right to political participation of persons with disabilities  
dr Damjan Tatic, Ph.D.

- In 2011 in *Bujdosó and five others v. Hungary*, the CRPD Committee reviewed a case in which persons with intellectual disability were placed under guardianship and their names were automatically removed from the electoral register. Committee concluded that the “exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability

Right to political participation of persons with disabilities  
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Seminar: Access to Justice for Persons with Disabilities

# EU law and Disability

*Academy of European Law (ERA), 13 November 2019, Sofia*

Pekka Pohjankoski, Mag.iur, LL.M., Esq.

Trainee Judge  
Helsinki District Court

## Structure of the presentation

### I. Official texts on disability in EU law

- Treaties, international agreements, legislation

### II. Case law of the EU Court of Justice

- Themes:

- Definition of disability
- Illness/disability
- Reasonable accommodation
- Validity review of EU acts
- Scope of EU law as a limit to protection

# I. Official texts on disability in EU law

Treaties, international agreements and legislation

## Disability and Primary EU law

- **Competence provisions:**
  - **Non Discrimination: Article 19 TFEU**
    - ( ...the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on ... disability )
  - **Harmonization of the Internal Market: Article 114 TFEU?**
    - ( ... the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure ... )
- **Mainstreaming provision: Article 10 TFEU**
  - (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on ... disability )
- **Fundamental rights of persons with disabilities:**
  - **Articles 21 (Non discrimination) and 26 (Integration of persons with disabilities) of the Charter of Fundamental Rights**



## International agreements concluded by the EU (1)

- United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)
  - Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities
  - Annex II of the Decision lists EU acts on matters governed by the UN Convention
  - Mixed agreement
  - Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 C 340/08)
- UN Convention does not have direct effect ( programmatic nature)
- However, obligation of consistent interpretation of EU acts

## Excerpt: UNCRPD Art. 4(1) – General Obligations

States Parties ... undertake:

- a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- f) To undertake or promote research and development of universally designed goods, services, equipment and facilities ...;
- g) ...;
- h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;
- i) ...

## How to realize the UNCRPD?

- The EU *and* the Member States must, in their respective spheres, adopt all necessary measures to ensure full implementation
- More concrete obligations on the *EU institutions* to respect the rights of persons with disabilities
- Implementation by the Union?
  - Rules on accessibility of products and services, transport
  - Judicial interpretation of rights to non discrimination

## International agreements concluded by EU (2)

- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013)
- Exceptions to copyright
- Opinion of the Court 3/15 (holding conclusion of Marrakesh Treaty falls within EU's exclusive competence)
- Implementation: Directive 2017/1564 and Regulation 2017/1563

# Disability in secondary EU law

## Anti discrimination legislation: Employment Equality Directive 2000/78

- Art. 2: general prohibition of discrimination on grounds of disability in employment
  - direct discrimination (“on [...] the grounds [of disability]”)
  - indirect discrimination (“where an apparently neutral provision, criterion or practice would put persons having [...] a particular disability[...] at a particular disadvantage compared with other persons [...]”)
    - In case of disability, may be remedied through reasonable accommodation which eliminates the effects
  - Instruction to discriminate and harassment (in certain circumstances) is also discrimination

## Employment Equality Directive 2000/78 (cont.)

- Art. 4.1: Genuine and determining occupational requirements permitted (+ legitimate aim and proportionality)
- Art. 5: Obligation for employers to provide reasonable accommodation (more on this later)
- Art. 7: Member States may take affirmative action/positive discrimination measures
- Art. 7.2: With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

# Sectoral legislation - examples

- Transport
  - E.g. Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air
- Internal market
  - Public procurement directives 2014/24 and 2014/25
  - Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts
- Accessibility
  - Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services ( European Accessibility Act mostly on digital products and services)
  - Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies
- Judicial cooperation in criminal matters
  - Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime

## II. Case law of EU Courts

“The impact an anti discrimination law may have on society depends, to a large extent, on the attitude of the judiciary rather than on the text of the legislation itself.”

*Theresia Degener,*

*Legal Expert to the UN High Commissioner for Human Rights as co author of the background study to the UNCRPD*

## Relevant case law of the ECJ 2006-2017

- C 13/05, *Chacón Navas* (dismissal from work; first definition of disability)
- C 303/06, *Coleman* (direct discrimination on grounds of disability of another person)
- C 152/11, *Odar* (age discrimination + disability discrimination in the context of a company pension scheme)
- C 335/11 & C 337/11, *Ring and ors* (dismissal from work; impact of UN Convention on definition of disability; reduced working hours as reasonable accommodation)
- C 312/11, *Commission v Italy* (large interpretation of reasonable accommodation for the purposes of Dir. 2000/78)
- C 363/12, *Z.* (lack of uterus not a disability in context of Dir. 2000/78)
- C 356/12, *Glatzel* (validity review of Driving Licence Directive; visual impairment)
- C 354/13, *Kaltoft* (obesity as disability)
- C 198/15, *Innamè Group and ors* (customs classification of motored scooters)
- Case C 395/15, *Daouidi*, (long term nature of accident suffered at work)
- C 406/15, *Milkova* (national regulation on civil servants with disabilities)
- C 573/15, *Oxygène Belgium* (VAT treatment of certain oxygen devices)
- C 270/16, *Ruiz Conejero* (repeated absences as grounds for dismissal)
- C 307/18, *DWZ Medien* (discrimination on grounds of disability)

## Themes in Case Law

- (Re)definition of disability
- Illness or disability?
- Reasonable accommodation
- Validity review of EU acts – persons with disabilities in the Charter of Fundamental Rights
- Scope of EU law as a limit to protection

## Definition of disability in EU law

- Initially no definition
  - ECJ provides one in Case C 13/05, *Chacón Navas*
- Impact of UN Convention: Court moves from “medical” towards “social” understanding of disability
  - New definition in Joint Cases C 335/11 and C 337/11, *Ring and ors*

## Definition of disability #1.0

- Judgment of the Court (Grand Chamber) of 11 July 2006 in Case C 13/05, *Chacón Navas*
- Context: dismissal of worker whilst on leave of absence from her employment on grounds of sickness
- First definition of disability: “[In the context of the Employment Equality Directive], 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.” (Paragraph 43 of the judgment)
- Criticised because of limited (medical) understanding of disability

## Definition of disability #2.0

- Judgment of the Court (Second Chamber) of 11 April 2013 in Joined Cases C 335/11 and C 337/11, *Ring and ors*
- Context: dismissal of workers absent from work because of lumbar pain and whiplash injury from a road accident
- Definition of “disability” 2.0 (taking into account the “evolving nature” of disability in the UN Convention)
- “[...] the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.” (paragraph 38 of the judgment)

## Definition of disability – evolution

- First definition:
  - “limitation ... from impairments ... which hinders participation ... in professional life”
- Current definition:
  - “Limitation ... from ... impairments which in interaction with various barriers may hinder the full and effective participation on an equal basis with other workers.”

## Determination of persons with disabilities – role of national court

- Concrete assessment left to national judge; whether the alleged situation constitutes a “disability” within the test of the case law
  - Not *in itself* enough to be eg. a “worker particularly susceptible to occupational risks” (*DW*, para 49) or “obese” (*FOA*, para 64), or having a lowered visual acuity in one eye (*Glatzel*, para 47)
- How to carry out the assessment?
- UNCRPD would appear to call for a broad interpretation of “persons with disabilities”

## Illness / disability

- “Disability” is not the same as “illness” *stricto sensu*
  - a person ... dismissed ... solely on account of sickness does not fall within ... discrimination on grounds of disability... (*Chacon Navás*, para 52)
- However, an illness may constitute a disability
  - ...it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness (*Ring and ors*, para 40)
- Yet, limitation must be “long term”
  - In order for the limitation to fall within the concept of disability, it must ... be probable that it will last for a long time. (*Chacon Navás*, para 45)
  - limitation is long term ...[when], at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short term progress ... (*Daouidi*, para 56)



## Illness/disability (cont.)

- Case C 354/13, *Kaltoft* (dismissal of childminder suffering from obesity)
- No general principle prohibiting discrimination on grounds of obesity
- “... obesity does not in itself constitute a disability within the meaning of Directive 2000/78 (para 58)
- However, obesity may constitute a disability within Dir. 2000/78
  - The concept ... does not depend on the extent to which the person may or may not have contributed to the onset of his disability. (para 56)
  - ... if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity. (para 60)
- Obesity (and other long term illnesses which fit the definition) may constitute a disability

## Reasonable accommodation: Substance

- UNCRPD Art 2: “Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”
- In employment: Art. 5 of Directive 2000/78: ... 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. ...

## Reasonable accommodation / definition of disability

- Relation to the definition of disability: “the definition of the concept of ‘disability’ within the meaning of Article 1 of Directive 2000/78 comes before the determination and assessment of the appropriate accommodation measures referred to in Article 5 of the same directive.” (Case C 354/13, *Kaltoft*, para 57)
- Cf. US Supreme Court in *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) (myopic candidates applying for commercial air line pilot post; not considered disabled because vision can be corrected)

## What is “reasonable”?

### Caveats

- Art. 4.1: Genuine and determining occupational requirements permitted (+ legitimate aim and proportionality)
- Art. 3.4: Member States may provide Dir. 2000/78 does not apply to the armed forces (as regards discrimination on grounds of disability)
- However:
  - Recital 17 : The directive [2000/78] does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

## What is “reasonable”? (cont.)

- Limit: a “disproportionate” burden is not “reasonable”
  - no obligation for reasonable accommodation if burden on the employer is disproportionate
- What is “disproportionate”?
  - Not the case when burden is “sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.” (Art. 5 *in fine*)

## What is “reasonable”? (cont.)

### Examples:

- ECJ: *Ring and ors*
  - “[...] a reduction in working hours may constitute one of the accommodation measures [...]” (paragraph 64)
- UN CRPD Committee: *Marie-Louise Jungelin v Sweden*
  - Installation of IT software to convert documents to Braille; cost around 1 1,5 MEUR (2% of the Social Security Agency’s IT budget); person would still need an assistant; undue burden

## Indirect discrimination and reasonable accommodation

- Indirect discrimination: unfavourable treatment resulting from application of objective criteria
- Should be remedied by accommodation measures
  - Denial of RA constitutes discrimination
- However, if reasonable accommodation *has* been provided, no indirect discrimination based on disability occurs if unfavourable treatment results from objective criteria
  - See Case C 397/18, *DW*, esp. para 73 (criteria re productivity, multi skilling, absenteeism)

## Validity review of acts of the EU legislature in the domain of disability

- Judgment of the Court (Fifth Chamber) of 22 May 2014 in Case C 356/12, *Glatzel*
- Validity review of the Driving Licence Directive 2006/126 esp. with regard to Articles 21 & 26 of the Charter
- EU legislator had respected proportionality in striking the balance between road safety and rights of persons with visual impairments
- Article 26 is to be respected; does not require that a specific measure be adopted

## Scope of EU law as a limit to protection

- Case C 363/12, *Z*.
- Context:  
Refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child (due to lack of uterus) and who has availed of a surrogacy arrangement – discrimination on the ground of disability?

(Case C 363/12, *Z*.)

ECJ:

- Not having a uterus is not a disability for the purposes of the Employment Equality Directive:
  - “the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. [It does not appear that] Ms Z.’s condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.”  
(paragraph 81)
- UN Convention on the Rights of Persons with Disabilities is “programmatic” and its provisions are not unconditional and sufficiently precise and do not, therefore, have direct effect in EU law. (paragraph 90)

## Scope of EU law as a limit to protection (cont.)

- Definition of “disability” for Employment Equality Directive: professional life
- Z: surrogacy not covered by Directive 2000/78
- Situation not within EU law; no protection
- UN Convention cannot be relied on directly (“programmatic” nature)

## Questions

- Definition Who is (not) disabled?
  - To be interpreted broadly
  - Scope of EU law as a clear limit to protection
- Reasonable accommodation
  - What is reasonable?
  - What is disproportionate?



# Thank you for your attention!

- Contact:

- Pekka Pohjankoski

- [pekka.pohjankoski@post.harvard.edu](mailto:pekka.pohjankoski@post.harvard.edu)





### **Case study: EU law and discrimination on grounds of disability**

Alfonso works as a junior designer in a boutique architect firm with 15 employees. Although he is deaf since his birth, he is very gifted visually and his hearing impairment has not prevented him from becoming successful in his job. For some months now, he has suffered from intense lower back pain. According to his doctor, the back problem is due to a herniated disc at the bottom of his spine. Full recovery is uncertain and will, in any case, likely take years. The back pain is particularly intense when Alfonso works sitting, so he suggests to his employer that a powered height-adjustable desk be installed in his office. However, Alfonso's boss informs him that he cannot have the desk. According to him, if the employer gives one to Alfonso, he will have to give one to everyone. The desks are also pricey, the cheapest model priced at 300 euros. When Alfonso implies that the refusal might be discriminatory in view of his disability, his boss tells him that Alfonso is only disabled because of his hearing impairment, but not because of his back pain.

Besides his work as a designer, Alfonso is a talented painter and he has created a portfolio of paintings in his spare time. As his long-held dream is to become a professional painter, he submits an application to study painting at the national Academy of Visual Arts in his country, a Member State of the EU. The jury of the Academy is thrilled with his portfolio and recommends him for the program. However, Alfonso is refused admission. In the refusal letter, the director of the Academy explains that, notwithstanding Alfonso's excellent scores in the admission examination, following the degree program in painting requires participation in class activities, which in turn necessitates the ability to hear. According to the letter, the government's recent austerity measures have imposed cuts in the Academy's budget and, therefore, it no longer has the resources to cater for people with special needs. At the end of the letter, the director of the Academy regrets the situation, wishing Alfonso all the success in his painting career.

Alfonso sues both his employer and the Academy of Visual Arts in the appropriate first-instance court in his city, claiming discrimination on grounds of disability. Alfonso invokes the national Workers' Anti-Discrimination Act, which is in substance identical to Directive 2000/78, as well as the equality and disability provisions of the EU Charter of Fundamental Rights. Alfonso further invokes Article 24(5) UNCRPD, which states:

"5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities."

***Should the first-instance court consider, on the basis of EU law, that the practices of the employer and/or the Academy constitute discrimination on grounds of disability?***



### **Практически казус: Правото на ЕС и дискриминацията по признак на увреждане**

Алфонсо работи като младши дизайнер в бутикова архитектурна фирма с 15 служители. Макар че е глух по рождение, той има много добри зрителни способности и увреждането на слуха не му е попречило да бъде успешен в работата си. От няколко месеца той страда от силна болка в кръста. Според лекаря му, проблемът в кръста се дължи на дискова херния в долната част на гръбначния му стълб. Пълното възстановяване е несигурно и, във всеки случай, ще отнеме години. Болката в кръста е особено силна, когато Алфонсо работи седнал, затова той предлага на работодателя си в офиса да бъде инсталирано бюро с електрическо регулиране на височината. Шефът на Алфонсо обаче го информира, че не може да получи бюрото. Според него, ако работодателят даде такова бюро на Алфонсо, ще трябва да даде същото на всички. Бюрата освен това са скъпи, като най-евтиният модел е на цена 300 евро. Когато Алфонсо загатва, че отказът може да е дискриминационен предвид неговото увреждане, шефът му казва, че увреждането на Алфонсо е свързано само със слуха, а не с болката в гърба.

Наред с работата си като дизайнер, Алфонсо е талантив художник и в свободното си време е създал портфолио от картини. Тъй като негова отдална мечта е да стане професионален художник, той кандидатства да учи живопис в националната Академия за визуални изкуства в страната си, държава членка на ЕС. Журито на Академията е възхитено от неговото портфолио и го препоръчва за програмата. Алфонсо обаче не е допуснат. В писмото с отказа директорът на Академията обяснява, че независимо от отличните резултати на Алфонсо на приемния изпит, следването на академичната програма по живопис изисква участие в класни дейности, което от своя страна изисква способност за слушане. Според писмото, наскорошните мерки на правителството за строги икономии е наложило свиване на бюджета на Академията и поради това, тя вече няма ресурсите да се грижи за хора със специални нужди. В края на писмото, директорът на Академията изказва съжаление за ситуацията, като пожелава на Алфонсо успех в кариерата му в областта на живописата.

Алфонсо завежда дело за дискриминация по признак на увреждане както срещу работодателя си, така и срещу Академията за визуални изкуства, в съответния първоинстанционен съд в своя град. Алфонсо се позовава на националното антидискриминационно законодателство за работниците и служителите, което по същество е идентично с Директива 2000/78, както и с разпоредбите относно равнопоставеността и уврежданията в хартата на основните права на ЕС. Алфонсо се позовава също така на член 24(5) от конвенцията за правата на хората с увреждания (UNCPRD), в която се заявява:

“5. Държавите участнички гарантират, че лицата с увреждания могат да имат достъп до общо висше образование, професионално обучение, обучение на възрастни и учене през целия живот без дискриминация и равноправно с всички останали. За тази цел, държавите участнички гарантират, че на лицата с увреждания се предоставят подходящи условия.”

***Следва ли първоинстанционният съд да счете, въз основа на правото на ЕС, че практиките на работодателя и/или Академията съставляват дискриминация по признак на увреждане?***



# Equal recognition before the law

Adela Katchaounova

BULGARIAN  
HELSINKI  
COMMITTEE



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## CRPD – general principles

- Respect for inherent dignity of people with disabilities;
- Individual autonomy including freedom of choice and independence;
- Non-discrimination;
- Full and effective participation and inclusion;
- Respect for difference and acceptance of people with disabilities as part of humanity;
- Equality of opportunities and equality between men and women;
- Respect for the evolving capacities of children with disabilities;
- Respect for children with disabilities to preserve their identity.



## CRPD – Article 12

- Highest possible standard – people with disabilities have full legal capacity – recognized before the law;
- No limitations including for people with mental, intellectual or sensory difficulties;
- Support for exercise of their legal capacity;
- Safeguards;
- Support to exercise legal capacity including for financial matters and property management.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## State obligations

- Respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law – provide training for persons receiving support.
- Abolish denials of legal capacity/ guardianship laws – discriminatory in purpose and effect.
- Replace substitute decision-making regimes with supported decision-making.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Supported decision-making regime

- Not over-regulate people with disabilities' lives;
- Support is based on the will and preferences of the person with disability;
- Overcome communication barriers;
- Legal recognition of the supporter including a mechanism for third parties to challenge the action of a support person;
- Lack of financial resources is not a barrier;
- Support is not a justification for limiting other fundamental rights ;
- A person with disability has the right to refuse/ terminate or change the support;
- Safeguards;
- Does not depend on mental capacity assessment.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Non-discrimination

When the State denies legal capacity, it must be on the same basis for all persons.

Accessibility – identification and elimination of barriers to facilities or services open or provided to the public without undue burden for the people

(access to essential buildings such as courts, banks, social benefit offices and voting venues)

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Women with disabilities

Equality with men, full legal capacity;

Ensure women enjoy equality – conclude contracts and administer property; treat them equally in all stages of procedures in courts and tribunals.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Children with disability

Child's best interest

Their views be given due weight in accordance with their age and maturity

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)





## Access to justice. Liberty, security and consent

Persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals - on an equal basis with others.

Police officers, social workers, the judiciary and other first responders must be trained to recognize persons with disabilities as full persons before the law and to give the same weight to their complaints and statements.

Free and informed consent of persons with disabilities prior to any treatment including detention in institutions and psychiatric clinics.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



Right to name and registration since birth;

Independent living within the community – choice and control over everyday life;

De-institutionalization;

Private life;

Political participation and right to vote.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Safeguards

To ensure:

1. The will and preferences of the person with disability;
2. No conflict of interests or undue influence;
3. Proportionate and adapted to the specific needs of the person with disability;
4. Applied for the shortest possible time;
5. Subject to review by an independent and impartial tribunal.

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## Council of Europe

Does not allow for deprivation of legal capacity of whole groups of the society based on a protected characteristic such as disability.

«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.» (Principle 3, Recommendation № R (99) 4 on principles concerning the legal protection of incapable adults)

«... the Court acknowledges that **restrictions on a person's procedural rights**, even where the person has been only partially deprived of legal capacity, **may be justified** for the person's own protection, the protection of the interests of others and the proper administration of justice ...» (ECHR, Stanev v. Bulgaria, § 241).

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## Council of Europe

- «The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide ... In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question...» (ECHR, Alajos Kiss v. Hungary, § 42).

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## Draft Law on physical persons and support measures

In brief – drafted by a broad working group in 2015, introduced in 43th Parliament in 2016, public consultation in 2018.

- Positive reports especially by organizations of people with disabilities, experts in the field, lawyers.
- Broad public negative view on the draft law including by judges and scholars.
- Soft approach, substitute decision-making possible in times of crisis or emergency.

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## Incapacitation in Bulgarian law

Constitutional court decision on c.c. 10/2014

Contradicts both CRPD and ECHR standards

- Right to work;
- Marriage and parenting;
- Political participation;
- Property rights.

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# Равнопоставеност пред закона

Адв. Адела Качаунова

BULGARIAN  
HELSINKI



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## КПХУ – общи принципи

- Зачитане на вътрешно присъщото достойнство на хората с увреждания;
- Самостоятелност на индивида, вкл. свобода на личен избор и независимост;
- Забрана за дискриминация;
- Пълноценно и ефективно участие и включване в обществото;
- Уважение към различията и приемане на хората с увреждания като част от човешкото многообразие;
- Равни възможности и равноправие;
- Зачитане на развиващите се възможности на децата с увреждания;
- Зачитане на правото на децата с увреждания да запазят своята идентичност.



## КПХУ – Член 12

- Най-висок стандарт – признава хората с увреждания за правни субекти;
- Дееспособни и правоспособни наравно с всички останали без ограничения;
- Подкрепа за упражняване на права;
- Гаранции срещу злоупотреба;
- Достъп до собственост и финансиране.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Задължения на държавите

- Да спазват, защитават и изпълняват правото на равнопоставеност пред закона на хората с увреждания – да предоставят обучение за тези, които получават подкрепа.
- Да премахнат режима на запрещение – дискриминиращ по цели и действие.
- Въвеждане на режим на подкрепено вземане на решение – алтернатива на запрещението:

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Подкрепено вземане на решение

- Да не свръхрегулира живота на хората с увреждания;
- Подкрепата се основава на волята и предпочитания на лицето с увреждане;
- Начинът на комуникация не е пречка;
- Правно признаване на подпомагащото лице, вкл. механизъм за третите лица за оспорване действията на подпомагащото лице;
- Без финансови пречки;
- Подкрепата не е оправдание за ограничаване на други права;
- Право да откаже / прекрати или смени подкрепата;
- Предпазни мерки;
- Не зависи от оценката на когнитивния капацитет.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Недопускане на дискриминация

Когато държавата отнема правосубектност, това да не е на една и съща основа за всички лица.

Разумни улеснения – всякакви необходими и подходящи модификации и приспособления, които не водят до непропорционално или неоправдано обременяване на околните

(пр. достъпна среда – идентифициране и премахване на пречки до инфраструктура и услуги, достъпна информация, лична помощ и достъп до подкрепа за упражняване на правосубектност)

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Жени с увреждания

Правосубектност наравно с мъжете;

Равни права при сключване на договори и управление на имущество и равно отношение от съдебни и други органи;

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Деца с увреждания

Защита на интересите на детето

На техните становища се придава подбавяща тежест в съответствие с възрастта и степента им на зрялост

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)





## Достъп до правосъдие

Да бъдат признати за правни субекти пред съда и арбитражния съд, за да търсят осъществяване на правата и задълженията си наравно с останалите.

Отговорните лица да бъдат обучени да признават правосубектността на хората с увреждания и да отдават същото значение на жалбите и показанията им като на останалите хора.

Настаняване в институции да става само след изрично съгласие за това от лицето с увреждания.

Право на най-висок стандарт за здравна грижа и изискване за свободно и информирано съгласие за извършване на процедури, вкл. при настаняване в психиатрични клиники.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



Право на име и регистрация от раждането им;

Възможност да живеят самостоятелно в общността – избор и контрол върху всекидневния им живот;

Деинституционализация;

Личен живот и неприкосновеност;

Политическо участие и право на глас

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Гаранции

Да обезпечат, че:

1. Зачитат волята и предпочитанията;
2. Не позволяват конфликт на интереси или неправомерно влияние;
3. Пропорционални и пригодени към състоянието на лицето;
4. Прилагат се за най-кратък срок;
5. Подлежат на редовен преглед от независим и безпристрастен орган.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Съвет на Европа

Не допуска бланкетно отнемане на дееспособност на цели групи от обществото, обединени от защитен признак, като увреждане.

«Законодателната рамка, доколкото е възможно, следва да признава, че могат да съществуват различни степени на недееспособност и че недееспособността може да се променя във времето. Следователно една защитна мярка не следва автоматично да води до пълно ограничаване на правната дееспособност. **Нейното ограничаване обаче трябва да е възможно**, когато то изглежда очевидно необходимо за защитата на съответното лице». (Препоръка № R (99) 4 относно принципите за правна защита на недееспособните пълнолетни лица)

«... Освен това Съдът признава, че **ограниченията на процедурните права** на едно лице, поставено дори само под ограничено запрещение, **могат да бъдат оправдани**, когато се касае за неговата собствена защита и за защита на интересите на друго лице, както и за доброто функциониране на правосъдието...» (ЕСПЧ, Станев с/у България, § 241).

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Съвет на Европа

« Съдът не може да приеме, обаче, че абсолютна забрана върху правото на глас от страна на лице, поставено под попечителство, без оглед на неговите или нейните реални способности, попада в приемлива свобода на преценка. Макар Съдът да признава, че тази свобода на преценка е широка, тя не е безкрайна ... В допълнение, ако ограничение на основно право се прилага по отношение на уязвима група лица в обществото, които са страдали от съществена дискриминация в миналото, като хората с интелектуални увреждания, тогава свободата на преценка на държавите е значително по-тясна ...» (ЕСПЧ, Алайош Киш с/у Унгария, § 42).

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Проект за Закон за физическите лица и мерките за подкрепа

История – изготвен от широка РГ през 2015 г., внесен в 43 НС през 2016 г., обществена консултация през 2018 г.

- Положителни становища предимно от организации на хората с увреждания, специалисти, адвокати.
- Широко обществено неодобрение включително от съдии и учени.
- Режимът е смекчен, не отрича подмяна на волята, допустимо при криза или при крайна ситуация

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Запрещение

Решение на КС по к.д. 10/2014 г. - чл. 5 от Закона за лицата и семейството

Противоречи на стандартите на КПХУ и на стандартите на ЕСПЧ

- Право на труд;
- Брак и родителство;
- Активно и пасивно изборително право;
- Право на собственост.

# Gender based violence, women with disabilities and access to justice

Adela Katchaounova

BULGARIAN  
HELSINKI



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## International treaties

### **UN Treaties**

Convention on the elimination of all forms of discrimination against women (CEDAW); General recommendations № 35, № 33 и № 19;

Convention on the rights of persons with disabilities (CRPD); General comment № 1

### **Council of Europe Treaties**

European convention on human rights; Convention on preventing and combating violence against women and domestic violence



## Definition

Gender based violence and violence based on prejudice/ hate crime

Premeditated acts, which present serious harm to the society and which have a special motif related to a prejudice towards some characteristics of the victim.

Violence directed against a woman because she is a woman or that affects women disproportionately.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Definition

Effects – the acts of the perpetrators and the results of those acts are penalized not the thoughts;

Specific duties of the States to investigate due to:

- The victim suffers more from a prejudice crime than from a “parallel crime” because her identity is additionally affected;
- The social group also suffers without being affected directly;
- Other vulnerable minority groups also may suffer;
- The whole society is subject to division and confrontation.

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## Intersectional discrimination

Discrimination of women based on their gender is related to other characteristics – such as health status, age, disability or other.

Discrimination of women is disproportionate in comparison to discrimination of men.

States should acknowledge these forms of discrimination and their devastating effect on women and to ban them; to adopt policies for extinguishing them incl. temporary special measures.

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## Violence against women

Forms – violation of sexual and reproductive health, forced sterilization, abortions, pregnancy

**State obligations** – to adopt a policy for elimination of discrimination against women, incl. violence against women:

- Criminalisation of all forms of violence against women;
- Access to justice for all victims and effective compensation;
- Prohibition of all medical procedures on women with disabilities without their explicit informed consent;
- Repeal of guardianship laws – obstructs women to file applications, report or testify in court for cases of violence;
- Definition of rape to be based on the concept of freely given consent for sexual act taking into account the circumstances such as coercion or subordination;

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## Access to justice

Depends directly on legal capacity and guardianship

General solution needed

Difficult for women victims of intersectional discrimination :

- To ensure justiciability, availability, accessibility, good quality, provision of remedies and accountability of justice systems – General recommendation № 33.

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## Standards and recommendations for combating violence against women

**General legislative measures** – all forms of gender-based violence to be criminalized; strengthening of criminal sanctions, repeal of discriminatory laws, reform of criminal legislation with the view of protecting women of all forms of sexual violence.

**Prevention** – measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes; gender equality at all levels of education curricula; awareness raising campaigns; safety of public spaces; mandatory, recurrent and effective capacity-building, education and training for members of the judiciary, lawyers and law enforcement officers, including forensic medical personnel, legislators and health-care professionals; protocols and procedures addressing all forms of gender-based violence in institutions and private sector.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)





## Standards and recommendations

**Protection** – protect and assist women complainants of and witnesses to gender-based violence before, during and after legal proceedings, including through removal of communication barriers for victims with disabilities; effective mechanisms for protection of victims especially in cases of intersectional discrimination; free legal aid and rehabilitation; financial and administrative assistance to women victims and information for legal and social mechanisms for protection; access to protective mechanisms to women in closed institutions (prisons, social institutions, asylum centers, etc.).

**Prosecution and punishment** – effective access to justice including by applying criminal law and, as appropriate, ex officio prosecution, no fees or court charges; ADR techniques to be strictly regulated and allowed in limited cases – to evade impunity.

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## Standards and recommendations

**Reparations** – include different measures, such as monetary compensation, provision of services, specific funds.

**Coordination, monitoring and data collection** – Establish a system to regularly collect, analyse and publish statistical data on the number of complaints and for the effectiveness of the available mechanisms; the number and type of orders of protection issued, the rates of dismissal and withdrawal of complaints, prosecution and conviction and the amount of time taken – disaggregated by type of violence, relationship between the victim/survivor and the perpetrator, and in relation to intersecting forms of discrimination against women – the age of the victim and the perpetrator; surveys, research programmes; system for monitoring and evaluation of legislation and implementation.

**International cooperation** – international bodies and NGOs.

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## ECHR recommendations

### Positive obligations of states (ECHR jurisprudence)

1. Investigate all forms of physical violence against women including by private persons – I.C. v. Romania; Dordevic v. Croatia;
2. Unveil the specific discriminatory motif – Identoba and others v. Georgia; Nachova and others v. Bulgaria;
3. Obligation for prevention – Opuz v. Turkey; Talpis c. Italy; Skorjanec v. Croatia.

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## UNCHR recommendations to Bulgaria

- To strengthen the legislation for protection of women from violence, criminalization of all forms of violence, including domestic violence and marital rape;
- To collect statistical data for all cases of violence against women and domestic violence divided by types of crime and age of the victim; reporting and investigation of these cases, the perpetrators – prosecuted and sanctioned proportionally; victims – effective reparations and protection mechanism;
- Capacity building of police workers, prosecutors and judges; mass information campaigns;
- To take steps for ratification of the Istanbul Convention.

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## Recommendations of UN CRPD to Bulgaria

- To prevent ill treatment of people with disabilities especially towards such people in institutions;
- To ensure access for people with disabilities to filing complaints and appropriate compensation including rehabilitation;
- To guarantee that people with disabilities have access to equal and effective legal protection against all forms of discrimination.

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# Насилие, основано на пола, жени с увреждания и достъп до правосъдие

Адв. Адела Качаунова

BULGARIAN  
HELSINKI



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## Международноправни актове

### **Договори на ООН:**

Конвенцията за премахване на всички форми на дискриминация по отношение на жените (КПДЖ);  
Общ коментар № 35, № 33 и № 19;

Конвенция за правата на хората с увреждания (КПХУ); Общ коментар № 1

### **Договори на Съвета на Европа**

Европейска конвенция за правата на човека; Конвенция за превенция и борба срещу насилието над жени и домашното насилие



## Определение

Джендърно-базирано насилие и насилие, основано на предрасъдъци/  
престъпления от омраза.

Умишлени деяния, които сериозно увреждат обществените отношения и са свързани със специфичен мотив, свързан с предрасъдък спрямо определени характеристики на жертвата.

Насилие, насочено срещу жена, защото е жена или което засяга жените непропорционално повече.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Определение

Ефекти – не се наказват мислите, а действията на извършителите, както и резултатите от тях; специфични задължения на държавите да разследват:

- Жертвата изживява увреждането от престъплението по-тежко отколкото подобно «паралелно престъпление» поради допълнителното засягане на нейна ключова идентичност;
- Социалната група, спрямо която е насочено престъплението се чувства засегната, без пряко да е увредена;
- Другите уязвими малцинствени групи могат да се почувстват засегнати;
- Обществото като цяло търпи разделение и противопоставяне, може да се провокират реакции на противопоставяне и насилие.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Пресечна дискриминация

Дискриминацията на жените, на основата на пола е свързана с други характеристики на жените – като здравословното им състояние, възраст, увреждане и др.

Дискриминацията на жени в такива случаи ги засяга в по-голяма степен, отколкото мъжете.

Държавите трябва да разпознаят тези форми и разрушителния им ефект върху жените и да ги забранят; да възприемат политики, насочени към изкореняването им, вкл. временни специални мерки.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Насилие срещу жени

Форми – нарушение на сексуалното и репродуктивно здраве, насилствена стерилизация/ аборт/ бременност. Случаят в Дома в Ровино

**Задължения на държавите** – да приемат възможно най-скоро политика за елиминиране на дискриминацията срещу жени, вкл. насилието срещу жени:

- Криминализиране на всички форми на насилие срещу жени;
- Достъп на всички до правосъдие и ефективно обезщетение;
- Забрана на всякакви медицински процедури върху жени с увреждания без тяхното изрично информирано съгласие;
- Отмяна на запрещението, тъй като то пречатства жените да подават жалби, докладват и свидетелстват в съд за случаи на насилие;
- Дефиницията на изнасилване да се основава на концепцията за свободно дадено съгласие за сексуален акт като се вземат предвид и обстоятелства като принуда или подчинено положение;

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Достъп до правосъдие

Зависи пряко от дееспособността и запрещението

Необходимо е генерално решение

Затруднен е за жени, жертви на множествена/ пресечна дискриминация:

- Да се осигури широка компетентност за правораздаване на съдилищата, достъпност, вкл. в малките и отдалечени населени места, добро качество, широки възможности за постановяване на обезщетения и отчетност на съдебните органи – Обща препоръка № 33.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Стандарти и препоръки за справяне с насилието над жени

**Общи законодателни мерки** – криминализиране на всички форми на джендърно насилие, усилване на наказателните санкции, отмяна на дискриминационни разпоредби, реформа на наказателното законодателство с цел защита на жените от всякакви сексуални посегателства.

**Превенция** – борба с неравенство и патриархални стереотипи; включване на джендърно равенство в учебните програми; информационни кампании; безопасност на обществени места; обучения на правоохранителните и съдебните органи, адвокати и здравни работници, учители и социални работници; създаване на ефективни вътрешни механизми за разглеждане на жалби в институции и компании, вкл. в частния сектор.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)





## Стандарти и препоръки

**Защита** – гарантиране на сигурността на жените-жалбоподателки и свидетелки в съдебни производства, вкл. като се премахнат комуникационните бариери за жените с увреждания; внедряване на ефективни механизми за защита на жертвите, особено за подложените на интересекторна дискриминация; безплатна правна помощ и рехабилитация; предоставяне на финансова и административна помощ на жените-жертви, както и информация за правните и социални средства за защита от насилие; осигуряване на жените в институции (затвори, домове, кризисни центрове) достъп до механизми за защита.

**Наказателно преследване и наказване** – ефективен достъп до правосъдие, вкл. чрез увеличаване на наказателното преследване по общ ред на джандърно насилие и освобождаване от такси и разноски; регулиране на процедурите за постигане на споразумения в наказателното производство с цел да се избегне безнаказаност.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Стандарти и препоръки

**Обезщетение** – съвкупност от мерки – парично обезщетение, предоставяне на съответни услуги; създаване на целеви фондове.

**Координация, мониторинг и събиране на данни** – създаване на система за събиране, анализ и публикуване на данни за джандърното насилие и за ефективността на механизмите за борба с него; събиране на данни за издадените заповеди за защита, нивата на отказ от защита, оттеглените жалби, наказателните мерки, разделени по вид на насилието, връзката между жертва и извършител, при интересекторната дискриминация – и възрастта на жертвата и извършителя; организиране на изследвания по широк кръг от въпроси; създаване на система за наблюдение и оценка на законодателството и правоприлагането.

**Международно сътрудничество** – международни органи и неправителствени организации.

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## Стандарти и препоръки

Позитивни задължения на държавите (практика на ЕСПЧ)

1. Да разследват всякакви форми на физическо насилие над лица под тяхна юрисдикция, вкл. когато е извършено от частни лица – *I.C. v. Romania*; *Dordevic v. Croatia*;
2. Демаскирането на специфичния дискриминационен мотив – *Identoba and others v. Georgia*; *Nachova and others v. Bulgaria*
3. Задължение за превенция – *Opuz v. Turkey*; *Talpis c. Italy*; *Skorjanec v. Croatia*.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Препоръки на КПЧ на ООН към България

- Да ускори приемането на законодателство за засилване защитата на жените от насилие чрез криминализиране на всички форми на насилие, вкл. домашното насилие и изнасилването в брака;
- Да събира статистически данни за случаите на насилие срещу жени, вкл. домашното насилие, разделени по вид на престъплението и възраст на жертвата; тези случаи се докладват и разследват цялостно, извършителите се преследват и санкционират подходящо, а жертвите получават ефективно обезщетение и средства за защита;
- Обучение на полицейски служители, прокурори и съдии и осведомяване на широката общественост;
- Да обмисли предприемането на мерки за ратификация на Истанбулската конвенция.

address: 7 Varbitsa Str., Sofia 1504, Bulgaria tel.: +359 2 943 4876, +359 2 944 0670 fax: +359 2 943 4876 e-mail: [bhc@bghelsinki.org](mailto:bhc@bghelsinki.org) web: [www.bghelsinki.org](http://www.bghelsinki.org)



## Препоръки на КПХУ на ООН към България

- Да се предотврати малтретирането на хората с увреждания, особено по отношение на лица, настанени в институции.
- Да се осигури достъп на тези лица до процедури за подаване на жалби и до подходящо обезщетение, вкл. рехабилитация;
- Да се гарантира на хората с увреждания равнопоставена и ефективна защита срещу всякаква дискриминация на каквито и да било основания.



# Problems arising from the placement of people with disabilities in social care institutions – a judge’s perspective



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## European Convention on Human Rights (ECHR)

### 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**

(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

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.

## 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.

## Convention on the Rights of Persons with Disabilities (CRPD)

### *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.



## Article 19 – *Living independently and being included in the community*

States Parties to the present Convention recognize the equal **right of all persons with disabilities to live in the community**, with choices equal to others, and shall 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, including by ensuring that:

- a) 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;
- b) Persons with disabilities 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;
- c) Community **services and facilities** for the general population are **available on an equal basis** to persons with disabilities and are responsive to their needs.

## 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.**

**GRAND CHAMBER**  
**CASE OF STANEV v. BULGARIA**  
**(Application no. 36760/06)**  
**17 January 2012**

§ 115: In order to determine **whether someone has been deprived of his liberty**, the starting-point must be his specific situation and account must be taken of a whole **range of factors** such as:

- the type,
- duration,
- effects and
- manner of implementation of the measure in question.

§ 118. The Court has found that there was a **deprivation of liberty** in circumstances such as the following:

- (a) where the applicant, who had been declared legally incapable and **admitted to a psychiatric hospital at his legal representative's request**, had **unsuccessfully attempted to leave the hospital** (see *Shtukaturov v. Russia*, no. 44009/05, § 108, ECHR 2008);
- (b) where the applicant had **initially consented** to her admission to a clinic **but had subsequently attempted to escape** (see *Storck*, cited above, § 76); and
- (c) where the applicant was an **adult incapable of giving his consent to admission** to a psychiatric institution which, **nonetheless, he had never attempted to leave** (see *H.L. v. the United Kingdom*, no. 45508/99, §§ 89-94, ECHR 2004-IX).



§§ 124 – 128: **Objective aspect**,

- whether the building was locked is not decisive
- he needed **express permission** to go to the nearest **village**;
- the **time he spent away from the home** and the places where he could go were always **subject to controls and restrictions**;
- **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;
- the **home's location** in a mountain region far away from Ruse (some 400 km) made any journey difficult and expensive for the applicant in view of his income and his ability to make his own travel arrangements;
- 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**;
- 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**.

**Duration of the measure** - more than eight years.

This period is sufficiently lengthy for Stanev to have felt the full **adverse effects of the restrictions imposed on him**.

**Subjective aspect**

§ 117. ...In relation to the placement of mentally disordered persons in an institution, the Court has held that the notion of deprivation of liberty does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional **subjective element**, he **has not validly consented** to the confinement in question.

§ 130. Stanev case:

- the applicant was **not asked** to give his opinion on his placement in the home;
- **never explicitly consented** to it;
- from 2004, the applicant explicitly expressed his **desire to leave** the Pastra social care home.

**Conclusion**: The situation under examination amounts to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention.

§ 145.

As regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied:

- he must reliably be shown to be of **unsound mind**;
- the mental disorder must be of a **kind or degree warranting compulsory confinement**;
- the validity of continued confinement depends upon the **persistence of such a disorder** .

§ 146. As to the second of the above conditions, 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 his condition**,
- but also where the person needs **control and supervision to prevent him, for example, causing harm to himself or other persons** (see Hutchison Reid v. the United Kingdom, no. 50272/99, § 52, ECHR 2003-IV).

§ 156. ...The lack of a **recent medical assessment** would be sufficient to conclude that the applicant's placement in the home was not lawful for the purposes of Article 5 § 1 (e)

§ 158. ... Whether the disorders warranting the applicant's confinement still **persisted**.



**Other relevant case-law:**

*Winterwerp v. The Netherlands*, Application no. 6301/73

*H.M. v. Switzerland*, no 39187/98

*Kędzior v. Poland*, Application no. 45026/07

*D.D. v. Lithuania*, Application no. 13469/06

*Shtukurov v. Russia*, Application no. 44009/05

*Storck v. Germany*, Application no. 61603/00

*H.L. v. The United Kingdom*, Application no. 45508/99

*Rooman v. Belgium*, Application no. 18052/11

*M.S. v. Croatia (No. 2)*, Application no. 75450/12

*A.-M.V. v. Finland*, Application no. 53251/13

**General comment No. 1 (2014) CRPD**

**Legal capacity:** the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency).

**Mental capacity** refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.

**Status approach** - decided simply on the basis of the diagnosis of an impairment.

**Outcome approach** - where a person makes a decision that is considered to have negative consequences.

**Functional approach** - where a person's decision-making skills are considered to be deficient. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons:

- (a) it is discriminatorily applied to people with disabilities; and
- (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law.

Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “**best interpretation of will and preferences**” must replace the “**best interests**” determinations.

This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The “best interests” principle is not a safeguard which complies with article 12 **in relation to adults**.

The “will and preferences” paradigm must **replace** the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.

A person’s mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people

**1288th meeting (6-7 June 2017)**  
**H46-8 Stanev group v. Bulgaria (Application No. 36760/06)**

Measures aimed at preventing violations of Article 5

It should first be recalled that according to the case law of the Court **involuntary placements** in certain types of situations are not incompatible with Article 5, provided that the placement is accompanied by **adequate safeguards** (to establish, in particular, the existence and/or the persistence of a mental disorder and assess whether its severity justifies the placement).

As concerns **voluntary placements**, the Court attaches particular importance to the:

- procedure followed to **inform** the person concerned and
- to **assess his or her capacity to express a valid consent** for the placement in an institution.



**THANK YOU**

[galya.g.valkova@gmail.com](mailto:galya.g.valkova@gmail.com)





# Проблеми, свързани с настаняването на хора с уврежания в специализирани институции за социални услуги (от гледната точка на националния съдия)



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## Конвенция за защита правата на човека и основните свободи (ЕКПЧ)

### Член 5 *Право на свобода и сигурност*

1. Всеки има право на свобода и сигурност. Никой не може да бъде **лишен от свобода**, освен в следните случаи и **по реда, предвиден от закона**.

**е)** законосъобразно лишаване от свобода, с цел да се предотврати разпространението на инфекциозни болести, както и на **душевноболни лица**, алкохолици, наркомани или скитници.

**4.** Всеки арестуван или лишен от свобода има право **да обжалва законосъобразността на своето задържане в съда**, който е задължен в кратък срок да се произнесе; в случай че задържането е неправомерно, съдът е длъжен да нареди незабавното освобождаване на задържаното лице.

## ЧЛЕН 8 *Право на зачитане на личния и семейния живот*

1. Всеки има право на неприкосновеност на **личния** и семейния си **живот**, на жилището и на тайната на кореспонденцията.

2. Намесата на държавните власти в упражняването на това право е недопустима, освен в случаите, предвидени в закона и необходими в едно демократично общество в интерес на националната и обществената сигурност или на икономическото благосъстояние на страната, за предотвратяване на безредици или престъпления, за защита на здравето и морала или на правата и свободите на другите.

## **КОНВЕНЦИЯ за правата на хората с увреждания**

### Член 14 *Свобода и сигурност на личността*

1. Държавите - страни по настоящата конвенция, гарантират, че хората с увреждания **равноправно с всички останали**:

а) упражняват правото на **свобода** и сигурност на личността;

б) не са лишавани неправомерно и произволно от тяхната свобода, както и че всяко лишаване от свобода е в съответствие със закона, като **само по себе си наличието на увреждане в никакъв случай не бива да бъде основание за лишаването им от свобода**.

2. Държавите - страни по настоящата конвенция, гарантират, че в случай, че лица с увреждания бъдат лишени от свобода в резултат на каквато и да било процедура, те ще имат **право** наравно с всички останали **на гаранции в съответствие с международното право в областта на правата на човека**, като с тях ще се отнасят в съответствие с целите и принципите на настоящата конвенция, включително чрез осигуряване на разумни улеснения.



## Член 19 *Независим живот и включване в общността*

Държавите - страни по настоящата конвенция, признават **правата на всички хора с увреждания да живеят в общността с възможности за избор, каквито имат всички останали хора** и предприемат ефективни и подходящи мерки, така че хората с увреждания да бъдат подпомогнати за пълноценно упражняване на това тяхно право и за пълното им включване и участие в общността, включително чрез осигуряване на:

- а) възможност за хората с увреждания **да избират равноправно с всички останали местожителството си**, къде и с кого да живеят, като не биват задължавани да живеят при конкретни условия;
- б) достъп за хората с увреждания до набор от услуги в дома, в социални заведения и **услуги за подкрепа в общността**, в това число и достъп до лична помощ, каквато е необходима за подкрепа на ежедневието и **участие в живота на общността, за да се избегне тяхната изолация и сегрегация**;
- в) равен достъп за хората с увреждания до всички обществени услуги и публични обекти по начин, съобразен с техните нужди

## Член 12 *Равнопоставеност пред закона*

2. Държавите - страни по настоящата конвенция, признават правоспособността и дееспособността на хората с увреждания наравно с всички останали **във всички сфери на живота**.

3. Държавите - страни по настоящата конвенция, предприемат подходящи мерки за осигуряване достъп на хората с увреждания до необходимата им **подкрепа за самостоятелно упражняване на техните права**.

4. Държавите - страни по настоящата конвенция, гарантират, че всички мерки, отнасящи се до самостоятелното упражняване на права от хората с увреждания, съдържат в себе си подходящи и ефективни гаранции срещу злоупотреба в съответствие с международното право в областта на правата на човека. Подобни гаранции обезпечават, че мерките, отнасящи се до самостоятелно упражняване на права от хората с увреждания, **зачитат волята и предпочитанията им**, не позволяват конфликт на интереси или неправомерно влияние, че са **пропорционални и пригодени към състоянието на лицето**, че се прилагат за възможно най-кратък срок и подлежат на редовен преглед по реда на надзора от страна на компетентен, независим и безпристрастен орган или съдебна инстанция. Гаранциите са пропорционални на степента, до която тези мерки засягат правата и интересите на съответното лице.

**ГОЛЯМА КАМАРА**  
**дело Станев срещу България**  
**(жалба по. 36760/06)**  
**17 януари 2012**

§ 115. За да се разбере дали едно лице е било лишено от свобода, следва да се изхожда от конкретното му положение и да се вземе под внимание съвкупност от критерии, присъщи на неговия специфичен случай, като например:

- видът,
- продължителността,
- последиците и
- начините на изпълнение на разглежданата мярка .

§ 118. Съдът направи извода, че лишаване от свобода е налице по-специално при следните обстоятелства:

- а) когато жалбоподателят, поставен под пълно запрещение и настанен **по искане на неговия законен представител** в психиатрична болница, се е **опитал безуспешно да я напусне** (*Щукатуров* срещу Русия, № 44009/05, параграф 108, 27 март 2008 г.);
- б) когато жалбоподателката **първоначално се е съгласила на престой в клиника, но впоследствие се е опитала да избяга** (*Щорк*, по-горе, параграф 76);
- в) в случай, когато жалбоподателят е пълнолетен и **неспособен да даде съгласието си за настаняване в психиатрична институция, но никога не се е опитал да я напусне** (*Х.Л. срещу Обединеното кралство*, № 45508/99, параграфи 89–94, ЕСПЧ 2004- IX).



#### §§ 124 – 128: Objective aspect

- не е от решаващо значение да се установи дали сградата е била заключвана
- можел е да ходи в **най-близкото село**, но това не променя факта, че тези излизания са били възможни само с изрично разрешение;
- **времето, прекарвано извън дома и местата, където жалбоподателят е можел да отиде**, са били винаги контролирани и ограничени.;
- решението за даване на **отпуск** е било изцяло в правомощията на администрацията на дома, която е задържала документите за самоличност на жалбоподателя и е управлявала финансовите му средства, в това число транспортните разноски.
- **местоположението на дома** в планински и отдалечен от Русе район (на около 400 км) е правело пътуването трудно и скъпо;
- когато жалбоподателят **не се е върнал след разрешението за излизане** през 2006 г., администрацията на дома е поискала от полицията на Русе да го издири и върне;
- правителството не е доказало, че здравното състояние на жалбоподателя го е поставяло в положение на непосредствена опасност или е налагало приемане на специални ограничения с **цел** да се защити неговият живот и физическата му неприкосновеност.

**Продължителност на мярката** - повече от 8 години. Този период от време е достатъчно дълъг, за да почувства напълно негативните последици от ограниченията, на които е подложен.

#### Субективен аспект

§ 117. ...Освен това в областта на настаняването на лица, страдащи от психични разстройства, понятието „лишаване от свобода“ не включва само обективен аспект, по-специално затварянето на лице в ограничено пространство за немалък период от време. За дадено лице може да бъде сметено, че е било лишено от свобода – и това е субективен аспект – само ако **не е изразило валидно съгласие да бъде затворено**.

§ 130. По делото Станев:

- лицето не е било поканено **да изрази своето мнение** относно настаняването и
- не е дало **експлицитно съгласието** си във връзка с това;
- най-късно още през 2004 г. жалбоподателят е изразил експлицитно своето **желание да напусне** дома в Пастра .

**Заключение:** разглежданата ситуация представлява лишаване на свобода по смисъла на член 5, параграф 1 от Конвенцията.

## § 145.

По отношение на лишаването от свобода на лица с психични разстройства, едно лице може да се счита за „душевноболно“ и да **бъде лишено от свобода** само ако са налице поне три от следните **условия**:

- нарушението на умствените му способности трябва да е **установено по безспорен начин**;
- разстройството трябва да е с такъв характер и степен, че да **оправдава затварянето**;
- затварянето не може да **продължи** законно, ако това разстройство вече не **съществува**.

§ 118. По отношение на посоченото по-горе второ условие задържането на лице с психични разстройства може да бъде наложено

- не само когато то има **нужда**, за да оздравее или да подобри състоянието си, **от терапия, лекарства или друго клинично лечение**,
- но и когато се окаже, че е необходимо да бъде **наблюдавано, за да му се попречи например да се самонарани или да нарани други лица**.

§ 156. ...Отсъствието на **скорошна медицинска оценка** би била достатъчна да се направи изводът, че настаняването на жалбоподателя не е било законосъобразно, съгласно член 5, параграф 1, буква „е“.

§ 158. ... Дали **продължават да са налице** разстройствата, оправдаващи затварянето.



### Друга относима практика на ЕСПЧ:

*Winterwerp v. The Netherlands*, Application no. 6301/73

*H.M. v. Switzerland*, no 39187/98

*Kędzior v. Poland*, Application no. 45026/07

*D.D. v. Lithuania*, Application no. 13469/06

*Shtukaturov v. Russia*, Application no. 44009/05

*Storck v. Germany*, Application no. 61603/00

*H.L. v. The United Kingdom*, Application no. 45508/99

*Rooman v. Belgium*, Application no. 18052/11

*M.S. v. Croatia (No. 2)*, Application no. 75450/12

*A.-M.V. v. Finland*, Application no. 53251/13

### **Комитет за правата на хората с увреждания, Общ коментар № 1 (2014)**

**Правосубектността** е способността да се придобиват права и поемат задължения (правоспособност) и да се упражняват тези права и задължения (дееспособност).

**Умствените способности** се отнасят до способността за вземане на решения на физическото лице, които естествено се различават между отделните индивиди и може да бъдат различни за даден индивид, в зависимост от много фактори, включително обкръжаващите социални фактори.

**Статусен подход** - въз основа на диагнозата за увреждането.

**Резултативен подход** - когато дадено физическо лице взема решение, което се смята, че има негативни последици.

**Функционален подход** - когато се смята, че способностите за вземане на решения на индивида са недостатъчни. Функционалният подход се опитва да оцени когнитивния капацитет и отрича в съответна степен правосубектността. Често това се основава на това доколко човекът може да разбере естеството и последиците от решението и/или доколко той или тя могат да използват или преценяват относимата информация. Този подход е погрешен поради две основни причини:

- (a) той се прилага дискриминативно спрямо хората с увреждания;
- (b) 15. той предполага възможността за точна преценка на взаимовръзките в човешкия мозък и когато човекът не премине тази преценка, тогава се отрича негово основно човешко право — правото на равнопоставеност пред закона.

Когато, след като са направени значителни усилия, не може да се определят волята и предпочитанията на индивида, **„най-добрата интерпретация на волята и предпочитанията“** следва да замени определянето на „най-добрия“ интерес. Това отчита правата, желанията и предпочитанията на индивида, в съответствие с член 12 параграф 4.

**Принципът за „най-добрите интереси“** не е предпазна мярка, която да съответства на член 12 по отношение на пълнолетните.

**Парадигмата за „желанията и предпочитанията“** трябва да замени парадигмата за „най-добрите интереси“, за да се осигури, че хората с увреждания упражняват своята правосубектност наравно с всички останали.

**Начинът на комуникация** на едно лице не трябва да бъде пречка за получаване на подкрепа при вземането на решения, дори когато тази комуникация е нетрадиционна или се разбира от много малко хора

**1288 среща (6-7 юни 2017)**

**H46-8 Дела от група: Станев срещу България (Жалба  
No. 36760/06)**

Мерки, целящи предотвратяване на нарушения по чл. 5 ЕКПЧ:

Според практиката на ЕКПЧ **недоброволното** настаняване в определени типове ситуации не е несъвместимо с чл. 5, при условие, че настаняването е съпроводено с адекватна защитни мерки (да се установи, в частност, съществуването и/или продължаващото наличие на психическо разстройство, чиято суровост оправдава настаняването).

По отношение на **доброволното настаняване** ЕСПЧ съдът отдава значение на:

- процедурата, при която засегнатото лице бива информирано
- оценяването на неговия/нейния капацитет да изразява валидно съгласие с настаняването в институцията.

**Благодаря за вниманието**

[galya.g.valkova@gmail.com](mailto:galya.g.valkova@gmail.com)





## Case study #1

John was born in 1966. In 1992, at the request of his mother, John was placed in a social care home in Podgumer (an institution located in the rural outskirts of Sofia). In 1995 he was declared 100% unfit to work for the duration of his life, on the grounds that he is suffering from severe mental deficiency (oligofrenia). In 2001, at his mother's request, a court declared him to be fully lacking legal competency. John's mother passed away in 2002. She was the only relative who visited him at the social care institution. John also has two sisters, but they were not in touch with him for a very long time. Both sisters declined to be appointed as their brother's guardian. Eventually, the social worker from the institution was appointed as John's guardian. (She has similar guardianship roles for 25 other patients of the institution).

An amended version of the 1998 Social Assistance Act entered into effect in early 2016 - excludes involuntary placement and introduces different procedures for voluntary placement in an institution or in a "residential service" in the community depending on whether the person is under partial or full guardianship. The amended Act indicates that the will of the person under full or partial guardianship should prevail in case of disagreement with his or her guardian(s). The duration of one's placement in an institution cannot exceed three years. It can be extended beyond that duration only if no other care arrangement is available.

On April 30, 2018 the director of the regional office of Social Support Agency issued an order for temporary administrative placement of John in the Podgumer institution until the case is resolved by the court.

On 22.10.2018 a request by that director was filed with the district court, stating that John is under full guardianship, unable to take care for himself, needs 24 hours support, and therefore he should be placed in the institution for a period of three years after the judgment becomes final. Along with the plea there were presented individual assessments of John's needs, a support plan for the use of social services, as well as a social report and statement from the guardian supporting the necessity of John's institutionalization.

The Court granted John legal aid and an ex-officio advocate was appointed for him. Considering the statements of the initial plea, the Court referred to BAPID (Bulgarian Association of People With Intellectual Disabilities), asking for an expert able to facilitate and interpret the communication with John, to inform him in an a way he could understand the possible available alternatives to institutionalization (if any) and on the actual meaning of the procedure. A psychiatric evaluation was also ordered in order to establish if the institution was suitable for John's needs and what was his statement regarding his placement there.

The Judge received a written report from the interpreter. She informed the court that John was living in different institutions from the age of 9. John's communication is limited, with poor language and speech abilities. He is able to utter a few words, but usually with no relation to the context of the conversation. No other people were found who could understand his way of communication. John follows basic instructions related to routine activities, but has no abilities to function independently and needs constant care. John does not allow other people to touch him and gets easily agitated - in such cases he becomes aggressive with the other people in the institution. In order to make John understand abstract

notions such as where he would want to live, he needs special services provided through supported decision-making. It involves a long process of establishing trust with the person and afterwards - providing education to recognize visual stimuli (drawings) that can be further used in the communication. The function of the interpreter, having its limitations, cannot replace the supported decision-making.

The psychiatrist reported that John has a limited vocabulary of a few 1-2 syllable words. He does not react when his name is called and cannot be involved in an interaction. His abstract thinking is not developed, and his cognitive capacity equals that of a 2-3-year-old.

John cannot use the toilet, uses diapers.

The care that is provided in the institution only meets his basic needs, not his developmental ones. Therefore the institution in question is not adequate for John's overall needs.

Having weighed the reports of the two experts the Judge decided that any attempt to have a hearing of John would be fruitless.

It turned out during the case that the guardian had to hold John's hand and direct him where to put his signature on the initial plea for issuance of the administrative order.

During the oral hearing the ex-officio lawyer stated that since no other alternative is available, the placement in the institution is in John's best interest.

**Questions:**

1. What are the procedural safeguards needed in the case of John's placement in the institution according to ECHR/CRPD?
  2. Is the Judge's assessment that the hearing of John would be fruitless in accordance to ECHR/CRPD?
  3. How could John's will and preferences be best interpreted in that case?
  4. Would you, as a judge, confirm the placement in the institution? If so, for what length of time?
-

## **Case study # 2**

Boyan suffers from paranoid schizophrenia and was declared 95% unfit for labor.

He was placed by the Court under full guardianship at the request of his mother, she being appointed as her son's guardian.

As such, the mother filed a plea for Boyan's placement in a social institution due to her deteriorating health making it impossible to provide care for Boyan.

She claimed that Boyan is aggressive and uncontrollable, that he attempted suicide by cutting his veins, and that he was admitted several times in psychiatric hospitals for treatment with no significant improvement of his mental health. In one occasion he attacked his younger brother. She claimed that a social institution for people with mental illnesses would be beneficial for Boyan because there he could get in contact with other people, and benefit from constant supervision, medical and social support.

After issuance of a temporary administrative order by the director of the regional office of Social Support Agency the case was brought before the Court.

During the hearing Boyan told the Judge that he feels good at the institution, the food is nice, and he has made friends with other people at the institution. He expressed his consent to stay in the institution another 15 days and then return home.

The guardian pleaded that all the care that is necessary for Boyan is provided at the institution therefore the placement should be confirmed by the Court.

The court upheld the plea. The Judge took into consideration that Boyan is incapable to work and is under full-guardianship. His diagnosis requires a high degree of support, as he poses risks to himself and to others. Boyan needs professional care, hence support in his daily routines as well as medical monitoring. The financial resources of his relatives, that provided Boyan with adequate care in the past, have exhausted. On the other hand, the proposed institution offers adequate environment and constant medical support. Both his physical and mental health would be better served in the institution. The proposed placement is in the best interest of Boyan, therefore it should be confirmed for a period of three years after the judgment becomes final.

### **Questions:**

1. What are the procedural safeguards needed in the case of Boyan's placement in the institution according to ECHR/CRPD?

2. How should the Judge interpret Boyan's statement that he wants to stay in the institution for another 15 days?

3. Is the judgment in accordance to Art. 5 § 1 “e” of ECHR?

4. Would you as a judge confirm the placement?

If so - for what length of time?

## Казус #1

Джон е роден през 1996 г. През 1992 г., по молба на неговата майка, Джон е настанен в социална институция в с. Подгумер (дом за пълнолетни лица с умствена изостаналост, намиращ се в полите на гр. София). През 1995 г. му е призната 100% неработоспособност, пожизнено, на основание диагноза „тежка умствена изостаналост – олигофрения“. През 2001 г., по искане на майка му, съдът го поставя под пълно запрещение. Майката на Джон умира през 2002 г. Тя е единственият родственик, който го е посещавал в социалната институция. Джон има две сестри, но те не са поддържали контакт с него от години. За настойник на Джон е определена социална работничка от дома. (Тя е настойник на още 25-ма от настанените в дома).

След измененията в Закона за социалното подпомагане през 2016 г. е изключено недоброволното настаняване в социална институция и се въвежда процедура за доброволно настаняване в социална институция или резидентна услуга в общността, в зависимост от това дали лицето е поставено под непълно или пълно запрещение. Измененият закон указва, че при различие с волята на настойника съдът отдава предпочитание на волята на запрещения. Настаняването в институция се допуска за срок от три години.

На 30.04.2018 г. директорът на ДСП „В“ издава заповед за настаняване на Джон по административен ред в ДПЛУИ с. Подгумер за срок до произнасяне от съда.

На 22.10.2018 г. по молба на директора на ДСП „В“ е поискано настаняването на Джон в ДПЛУИ с. Подгумер за срок от три години, считано от влизане в сила на решението. В молбата се сочи, че Джон е поставен под пълно запрещение, не е способен да се грижи за себе си, нуждае се от 24-часова подкрепа. Към молбата са приложени индивидуална оценка за нуждите на Джон, план за подкрепа, както и социален доклад и становище на настойника относно необходимостта от настаняване на Джон в институцията.

Съдът предоставя служебно на Джон правна помощ чрез осъществяване на процесуално представителство. Отчитайки сезиращата молба, съдът изисква от БАЛИЗ (Българска асоциация на лица с интелектуални затруднения) да посочат експерт, който да тълкува и фасилитира комуникацията с Джон, да го информира по разбираем начин за наличните алтернативи на ДПЛУИ с. Подгумер (ако такива има) и да го запознае със значението и целта на производството. Служебно е назначена и Съдебнопсихиатрична експертиза, която да отговори дали институцията съответства на нуждите на Джон и какво е становището му по исканото настаняване.

Съдът получава експертиза от тълковника, в която се сочи, че Джон живее в институции от 9-годишна възраст. Джон има намалени комуникативни способности, с беден речник и умения за общуване. Той може да каже няколко думи, но обикновено те нямат връзка с контекста на разговора. Не са открити други лица, които разбират начина, по който Джон общува. Той следва основни инструкции, касаещи дейности от ежедневието, но не е способен да функционира самостоятелно и се нуждае от постоянна грижа. Джон не позволява на други лица да го докосват и лесно става избухлив – в тези случаи проявява агресия към другите настанени в институцията. За да бъде обучен Джон да разбира абстрактни понятия - като това къде иска да живее, той се нуждае от специални услуги по подкрепено вземане на решение. Това е дълъг процес на установяване на връзка с настанения и обучение, за да може да разпознава визуални стимули (рисушки), които впоследствие да бъдат използвани в комуникацията. В случая задачата на тълковника по делото, предвид съпътстващите ограничения, не може да замести услугата по подкрепено вземане на решение.

В експертиза психиатърът сочи, че Джон е с ограничен речник и използва няколко думи от 1-2 срички. Той не реагира на името си, когато бива повикан, и не може да бъде въввлечен в интеракция. Абстрактното му мислене не е развито, а когнитивния му капацитет съответства на 2-3-годишно дете. Джон не може сам да ползва тоалетна, използва памперси. Според психиатъра услугата, предоставена в институцията, посреща само базовите потребности, не и нуждата от развитие. Затова институцията се явява неадекватна на цялостната нужда на Джон.

Вземайки предвид становищата на двете вещи лица съдът решава, че всеки опит да изслуша Джон би бил безполезен. В рамките на откритото заседание настойникът споделя, че е държала ръката на Джон при полагане на подписа под искането за издаване на заповед за настаняване по административен ред. Служебният адвокат на Джон заявява становище, че при липса на алтернативи настаняването в институция е в най-добър интерес на Джон.

Въпроси:

1. Какви са процедурните гаранции по ЕКПЧ/КПХУ, които съдът следва да осигури на Джон в производството за настаняване по съдебен ред?
  2. Съответства ли оценката на съда, че изслушването на Джон би било безполезно, на ЕКПЧ/КПХУ?
  3. Как могат най-добре да се интерпретират волята и предпочитанията на Джон?
  4. Като съдия бихте ли настанили Джон в институцията? Ако да – за какъв срок, считано от кога?
-

## Казус # 2

Боян страда от параноидна шизофрения и е с определена 95% неработоспособност. Той е поставен под пълно запрещение по молба на неговата майка, която е определена за настойник на Боян.

Настойникът подава молба за настаняването на Боян в социална институция поради влошаване на здравето ѝ и невъзможност за полагане на грижи за сина ѝ. В молбата се твърди, че Боян е агресивен и неконтролируем, че е опитвал да се самоубие, прерязвайки вените си, няколко пъти е лежал в психиатрии без значително подобрене на здравето. Имало е случай да атакува по-малкия си брат. Настойникът твърди, че социалната институция ще е от полза за Боян, тъй като там той би могъл да контактува с други хора, да бъде под постоянно наблюдение, като му бъде осигурено медицинска и социална подкрепа.

След издаването на заповед за временното настаняване на Боян по административен ред директорът на ДСП подава молба за потвърждаването на настаняването по съдебен ред. По време на изслушването в съда Боян споделя, че се чувства добре в институцията, храната е добра, има приятели сред другите настанени в институцията. Изразява съгласие за настаняването му за още 15 дни, след което иска да се завърне вкъщи. Настойникът заявява, че молбата следва да бъде уважена, тъй като институцията осигурява необходимата грижа за Боян.

Съдът допуска настаняването. В решението съдът посочва, че Боян е поставен под пълно запрещение и е нетрудоспособен. Диагнозата му изисква висока степен на подкрепа, тъй като той съставлява риск за себе си и за околните. Боян се нуждае от постоянна грижа и подкрепа в ежедневието, както и медицинско наблюдение. Финансовите възможности на семейството на Боян да му осигурят подходяща грижа са изчерпани. От друга страна предлаганото настаняване предлага адекватна среда и постоянна медицинска подкрепа. Това е място, където ще бъдат запазено неговото физическо и психическо здраве. По изложените съображения съдът приема, че е в най-добър интерес на Боян да бъде настанен в предложената институция за период от 3 години, считано от влизане на решението в сила.

### Въпроси:

1. Какви са процедурните гаранции по ЕКПЧ/КПХУ, необходими на Боян в това производство?
2. Как следва съдът да интерпретира становището на Боян, че иска да остане в институцията още 15 дни?
3. В съответствие ли е решението с чл. 5, т. 1, б. „е“ ЕКПЧ?
4. Като съдия Вие бихте ли уважили искането за настаняване? Ако да – за какъв период от време?





*Sabrina Wittmann Puri, Lawyer,  
European Court of Human Rights (ECtHR)*

# Migrants, refugees and asylum seekers with disabilities



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## Definitions

- Migrants ↔ Asylum seekers ↔ Refugees
- Face specific barriers to accessing protection and assistance
- UN Convention on the Rights of Persons with Disabilities (CRPD): people with disabilities include those with long term physical, mental, intellectual or sensory impairments; including wheelchair users and people with other mobility impairments, blind and deaf people, people with mental health issues or psychosocial disabilities' and people with intellectual disabilities.

## Reasonable accommodation

- The CRPD (Article 2) clarifies the meaning of 'reasonable accommodation' as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.
- The nondiscrimination provision at Article 5(3) of the CRPD requires that '[i]n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.

## Legal bases - CRPD

- Article 11 CRPD: States must, in accordance with international law, provide "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk"
- Article 18 CRPD: "States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others"

## Legal bases – EU law

- European Union has ratified the CRPD
- Article 21 of the Reception Conditions Directive (2013/33/EU): EU Member States must take into account the specific situation of vulnerable persons, including persons with disabilities
- The Return Directive (2008/115/EC) includes persons with disabilities when defining vulnerable persons
- No absolute prohibition of detaining disabled persons in return procedures (Return Directive, Article 16 (3)).
- In case of asylum-seekers, the Reception Conditions Directive (2013/33/EU, Article 11) requires that their health, including their mental health, shall be of primary concern

## Legal bases – EU law

- Article 14 (2) (b) Asylum Procedures Directive (2013/32/EU): personal interview may be omitted where applicants are unfit or unable to be interviewed owing to circumstances that are long lasting and beyond their control
- Article 6 of the Schengen Borders Code: requires that border control tasks have to be carried out in a way which does not discriminate against a person on grounds of sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation.

## Legal bases - ECHR

- Article 3 prohibition of inhuman and degrading treatment
- Article 5 (1)(f) detention for unauthorised entry or with a view to expulsion
- No procedural protection under Art 6!
- “The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention (see, *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000 X, and *Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001).
- Article 14 : protects against discrimination based on disability (*Glor v. Switzerland*, No. 13444/04, 30 April 2009)

## Specific issues of migrants with disabilities: Social rights

- ECtHR *Koua Poirrez v. France*, no. 40892/98, 30 September 2003:
- denial of disability benefits to a lawfully resident migrant because he was neither French nor a national of a country with a reciprocal agreement with France
- ECtHR found that the applicant had been discriminated against, which was in violation of Article 14 of the ECHR read in conjunction with Article 1 of Protocol No. 1 on the right to peaceful enjoyment of possessions

## Residency rights

- ECtHR *Kiyutin v. Russia*, no. 2700/10, 10 March 2011:
- Uzbek national, who had been married and had a child with a Russian, requested a residence permit from the Russian authorities; permit was refused since he was HIV positive
- The ECtHR stressed the particular vulnerability of persons infected with HIV and accepted that the disease could amount to a form of disability
- The blanket provision of domestic law requiring deportation of HIV positive non nationals left no room for an individualised assessment based on the facts of a particular case and was found not to be objectively justified.
- The Court thus that the applicant had been a victim of discrimination on account of his health status and concluded it to be a breach of Article 14 of the ECHR taken in conjunction with Article 8 (right to private and family life)

## UN Refugee Convention 1951

The UNRC 1951 defines a refugee as someone who 'owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

→ CRPD might require a broader definition of "refugee"

# UN Refugee Convention 1951

- Person with disabilities may not have cognitive capacity to subjectively hold “well founded fear”
  - more weight on objective assessment of fear
- Persons with disabilities as “social group”?
- Does denying reasonable accommodation or systematic discrimination amount to persecution?

# Reception of asylum seekers

- Facilities that receive migrants and asylum seekers such as offices dealing for applications for refugee status need to implement procedures that effectively identify persons with disabilities
- specific protections afforded to ‘vulnerable’ persons
- Reception Conditions Directive requires that Member States assess whether an applicant ‘is an applicant with special reception needs’
- Different practices of identification in different member states
- many people with disabilities remain unidentified in practice
- No systematic data collection



# European Asylum Support Office (EASO) - Tool

- Tool for the identification of persons with special needs (IPSN tool) to support Member States
- Lists indicators that officials involved in the asylum procedure and reception can use to spot possible vulnerabilities, even if they do not have expert knowledge in medicine, psychology or related fields
- <https://ipsn.easo.europa.eu/>

# Reception conditions

- Reception Conditions Directive requires that 'material reception conditions provide an adequate standard of living for all applicants', which protects their physical and mental health
- make reception and detention facilities more accessible, for example through the installation of ramps for wheelchair users
- persons with disabilities can be placed on the ground floor of accommodation centres and close to medical services
- asylum applicants shall be informed 'in a language which they understand' of their rights (e.g. easy read format, braille, translator, etc)

# Mental health support

- PTSD prevalent among asylum seekers and refugees either from home country, or from journey
- Pre existing mental health issues, which migration experience might exacerbate
- psychological strain associated with migration makes responses to mental health problems particularly important
- Women: specifically affected by gender based and/or violence

# Intersectionality

- Definition: the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage
- Intersectionality is where identities and context meet to create both privileges and biases



## Mental health issues

- Factors contributing to development or worsening of mental health issues: lengthy proceedings, lack of information, uncertainty about outcome; fear of being returned; conditions in reception facilities; lack of activities and purpose, overcrowding; isolation; lack of integration; etc.
- Need for therapy in mother tongue
- Problems: limited capacity, long waiting times, short term rather than long term support

## Identification and rehabilitation of victims of torture

- Article 14 of the UN Convention against Torture (CAT) sets out the right to rehabilitation for victims of torture who are asylum seekers and obliges States Parties to ensure in its legal system that the victim of an act of torture obtains redress. Redress includes the means for full rehabilitation, which is 'holistic and include medical and psychological care as well as legal and social services'.
- Victims of torture are more likely to suffer from post traumatic stress disorder; trauma can severely impact on the asylum applicant's memory and his/her ability to present the claim in a credible way
- Early identification is crucial to ensure support of medical and legal experts

## Vicims of torture

- Article 4(3) Asylum Procedures Directive: requires Member States to ensure that people interviewing asylum applicants must also have acquired general knowledge of problems which could negatively impact the applicants' ability to be interviewed, such as indications of past torture
- Reception Conditions Directive: obligation identify vulnerable asylum applicants, including victims of torture (Article 21), to ensure that they have access to appropriate medical and psychological treatment or care (Article 25(1)) and to provide appropriate training to those working with victims of torture (Article 25(2))

## Useful resource: PROTECT-ABLE

- The PROTECT ABLE project aims at disseminating, through training, lobbying, networking and communication a process of early screening and orientation for asylum seekers suffering from consequences of traumatic experiences (torture, rape, serious forms of physical, psychological or sexual violence)
- <http://protectable.eu/>

## Immigration detention of migrants and asylum seekers

- Art 14 CRPD: „... the existence of a disability shall in no case justify a deprivation of liberty.
- However: immigration detention usually on grounds of national security
- Safeguards apply adequate detention facilities and reasonable accommodation

## Standards of detention facilities

- Art 14 (2) CRPD: „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.”
- Case law of the ECtHR:  
[https://www.echr.coe.int/Documents/FS\\_Disabled\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf)
- [https://www.echr.coe.int/Documents/FS\\_Detention\\_mental\\_health\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Detention_mental_health_ENG.pdf)

## Place and Conditions of Detention

- Asylum seekers did commit no criminal offence by entering the country – much rather, they fled their countries, often for fear of their lives.
- Detention must be in appropriate place/conditions, i.e. not in a prison or the like, but in a place specifically adapted to asylum seekers and their needs
- Example of appropriate place/conditions: ECtHR *Saadi v. UK* [GC], no. 13229/03, 29 January 2008
- If detention not in appropriate place/conditions, may be a violation of not only Art. 5 § 1 (f), but also of Art. 3 ECHR

## Immigration detention of vulnerable persons

There is as test of necessity/proportionality:

Alternatives to detention need to be considered

- Consideration of the specific circumstances of the individual case
- UN Office of the High Commissioner of Human Rights (OHCHR): The administrative detention of persons with disabilities in migration and asylum seeking contexts is not consistent with the CRPD when it is applied without the provision of adequate support and reasonable accommodation

## ECtHR case-law

- Failing to provide health care or adequate conditions of detention with regard to level of disability could amount to inhuman and degrading treatment (violation of Article 3 ECHR)
- Assessment of the level of suffering must take into account person's vulnerability and their potential lack of capacity to effectively complain about their situation
- *Price v. the United Kingdom*, no. 33394/96, § 30, 10 July 2001: "...to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention."

## ECtHR *Yoh-Ekale Mwanje v. Belgium*, no. 10468/10, 20 December 2011

Applicant at advanced stage of HIV, kept in detention, where her health deteriorated, for another seven weeks after ECtHR granted interim measures (deportation)

- The authorities knew the applicant's exact identity, who was living at a fixed address known to the authorities, and she had consistently appeared for her appointments with the Aliens Office and had taken several steps to try to regularise her situation
- ECtHR did not perceive any link between the applicant's detention and the Government's aim of securing her removal from the country; a less drastic measure would have sufficed: violation of Art. 5 § 1 (f) ECHR

## *Yoh-Ekale Mwanje v. Belgium*

Applicant's health worsened and the infection progressed while she was in detention

- A number of medical certificates sent to the authorities early on stating that the applicant's survival was in doubt
- However, she had not undergone a medical examination at the request of the Aliens Office for several weeks (in fact, months – she was briefly released in the meantime). When she was examined by hospital specialists, the latter were reportedly shocked by the Belgian authorities' lack of diligence
- Furthermore, the treatment prescribed to the applicant was not administered for another three weeks after the examination.

Conclusion: The authorities did not act with the requisite diligence in failing to take at an earlier stage all the measures that could reasonably have been expected of them to protect the applicant's health and prevent a worsening of her condition. Violation of Art. 3 ECHR

# Thank you!

[sabrina.wittmann@echr.coe.int](mailto:sabrina.wittmann@echr.coe.int)

**Case Study – Migrants with disabilities**

European Court of Human Rights

**CASE OF TEHRANI AND OTHERS v. TURKEY**

nos. 32940/08, 41626/08 and 43616/08, judgment of 13 April 2010

**Complaints:** The applicants submitted that their deportation to Iran and Iraq, respectively, would violate their rights under Article 3 of the Convention. They further complained of the conditions of detention in Turkey.

**Application no. 41626/08, Mr Parviz Norouzi**

**Facts:** The applicant, an Iranian national, was born in 1951. He was arrested by the Turkish authorities on 4 August 2008 and asked for asylum and temporary leave to remain in Turkey. On 5 September 2008 the authorities transferred the applicant to the Kirklareli Accommodation Centre, where he was being held at the time of his application to the Court.

On 12 January 2010 the Court received a letter from the applicant requesting to withdraw his application. On 22 January 2010 the applicant's representative notified the Court that the applicant wished to pursue his application. On 11 February 2010 the applicant's representative sent to the Court two letters written by the applicant on 7 February 2010, in English and in Turkish, noting that he had been held in detention for seventeen months and specifying that he wanted to be deported to Iran where his life would be in danger. The applicant's representative further submitted a psychological status report drawn by C.S., apparently a free lance psychologist. The report indicated that the applicant was showing depressive symptoms, stress and anxiety disorder and that he needed urgent psychological and psychiatric support. In this connection it was further stated that the applicant said that he wished to go back to Iran which meant committing suicide and that he considered this to be better than the vagueness of his present situation.

Following the Court's interim measure requesting diagnosis of the applicant's mental state to be carried out in a fully equipped state hospital, the Government submitted on 5 March 2010 a medical report drawn by a psychiatrist on 1 March 2010. This single paragraph report stated that the applicant did not suffer from a psychotic illness, that he had insight into his condition and further diagnosis could not be carried out since the applicant refused to undergo a thorough psychiatric examination.

**Law:** Referring to Article 37 of the Convention, the Court noted Mr Norouzi initially informed the Court that he wished to withdraw his application and then requested to be deported to Iran where he stated his life would be in danger.

**Article 37 ECHR**

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

- (a) the applicant does not intend to pursue his application; or
- (b) the matter has been resolved; or
- (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.”

**Questions:**

- 1) In the light of Article 37 of the Convention, did the Court have jurisdiction over the applicant's case? What would be the arguments in favour of striking out the application? Which arguments speak against such a decision?
- 2) Judging the applicant's request to withdraw his application in the light of the UNCRPD, how would you treat the applicant's request?



## **Практически казус - Мигранти с увреждания**

Европейски съд по правата на човека

### **ДЕЛО НА ТЕХРАНИ И ДРУГИ С/У ТУРЦИЯ**

номера 32940/08, 41626/08 и 43616/08, съдебно решение от 13 април 2010 г.

**Оплаквания:** Жалбоподателите посочили, че депортирането им съответно в Иран и Ирак, би нарушило техните права по член 3 от Конвенцията. Освен това, те се оплакали от условията на задържането си в Турция.

#### **Жалба № 41626/08, Г-н Парвиз Норузи**

**Факти:** Жалбоподателят, ирански гражданин, е роден през 1951 г. Той бил арестуван от турските власти на 4 август 2008 г. и поискал убежище и разрешение за временно пребиваване в Турция. На 5 септември 2008 г. властите прехвърлили жалбоподателя в център за настаняване Къркларели, където той бил държан към момента на подаването на жалбата си пред съда.

На 12 януари 2010 г. съдът получил писмо от жалбоподателя с искане да оттегли жалбата си. На 22 януари 2010 г. представителят на жалбоподателя уведомил съда, че жалбоподателят желае да поддържа жалбата си. На 11 февруари 2010 г. представителят на жалбоподателя изпратил на съда две писма, написани от жалбоподателя на 7 февруари 2010 г., на английски и на турски език, в които отбелязва, че е бил задържан в продължение на седемнадесет месеца, и уточнява, че желае да бъде депортиран в Иран, където животът му ще бъде в опасност. Представителят на жалбоподателя, освен това, предал доклад за психологически статус, съставен от К.С., очевидно психолог на свободна практика. В доклада се посочвало, че жалбоподателят проявява депресивни симптоми, стресово и тревожно разстройство и че се нуждае от спешна психологическа и психиатрична помощ. В тази връзка по-нататък се изтъквало, че жалбоподателят е казал, че желае да се върне в Иран, което било равносилно на извършване на самоубийство и че той считал това за по-добре отколкото неяснотата на настоящото си положение.

След обезпечителната мярка на съда, изискваща да бъде извършена диагноза на психичното състояние на жалбоподателя в напълно оборудвана държавна болница, правителството предало на 5 март 2010 г. медицински доклад, изготвен от психиатър на 1 март 2010 г. В този доклад с единствен параграф се изтъквало, че жалбоподателят не страда от психична болест, че той има поглед върху състоянието си и не може да бъде извършена допълнителна диагноза, тъй като жалбоподателят е отказал да бъде подложен на пълна психиатрична експертиза.

**Правото:** Позовавайки се на член 37 от Конвенцията, съдът отбелязал, че г-н Норузи първоначално информирал съда, че желае да оттегли жалбата си и после поискал да бъде депортиран в Иран, като заявил, че животът му там ще бъде в опасност.

#### **Член 37 от ЕКПЧ**

“1. Съдът може на който и да е етап от съдебното производство да заличи дадена жалба от списъка на делата, ако обстоятелствата водят до заключението, че

(а) жалбоподателят няма повече намерение да поддържа жалбата си; или

(б) въпросът е вече решен; или

(в) по всяка друга причина, установена от съда, по-нататъшното разглеждане на жалбата е неоправдано.

Въпреки това съдът продължава разглеждането на жалбата, ако спазването на правата на човека, гарантирани от конвенцията и протоколите към нея, го налага.

2. Съдът може да реши да включи отново дадена жалба в списъка, ако счете, че обстоятелствата оправдават такова действие.”

#### **Въпроси:**

- 1) В светлината на член 37 от Конвенцията, компетентен ли е съдът по отношение на делото на жалбоподателя? Какви биха били аргументите в полза на заличаване на жалбата? Кои аргументи говорят срещу такова решение?



- 2) Как бихте третирали молбата на жалбоподателя да оттегли жалбата си, като преценявате молбата в светлината на Конвенцията на ООН за правата на хората с увреждания?

*Sabrina Wittmann Puri, Lawyer,  
European Court of Human Rights (ECtHR)*

# Effective participation of persons with disabilities in criminal proceedings



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## Access to justice

Case of *Herczegfalvy v. Austria* (no. 10533/83, 24 September 1992) ECtHR

- Institution for mentally ill criminal offenders (“paranoia querulans”)
- Violation of Article 5 § 4, Article 8 and Article 10 of the European Convention on Human Rights (“ECHR”)
- Effective access to justice can be challenging for persons with disabilities!
- Goal: to eliminate barriers *reasonable accommodation*

# Definition

- UN Convention on the Rights of Persons with Disabilities (CRPD): people with disabilities include those with long term physical, mental, intellectual or sensory impairments; including wheelchair users and people with other mobility impairments, blind and deaf people, people with mental health issues or psychosocial disabilities' and people with intellectual disabilities.

# Reasonable accommodation

- The CRPD (Article 2) clarifies the meaning of 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.
- The nondiscrimination provision at Article 5(3) of the CRPD requires that '[i]n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.

# Article 13 of the CRPD

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.

# Right to take part in proceedings

- persons with disabilities have the same rights as other court users to go to court, take other people to court, act as witnesses and take part in what happens in court
- Reasonable accommodation
- Parties to CRPD must take appropriate measures positive action
- Use of sign language, documents in accessible formats, braille or easy read, etc.
- Appropriate training for courts, police and prison staff
- Free legal assistance in proceedings

## The freedom to make choices (Art 3 CRPD)

- Status approach: Disability = lack of legal capacity
- Outcomes approach: good vs bad choices
- Functional approach: legal capacity vs mental capacity
- *ECtHR: A. M. V. v. Finland*, no. 53251/13, 23 March 2017
- AWARENESS is the first step!

## Council of Europe (CoE) approach

- CoE and EU law draw on UN CRPD principles
- Article 6 ECHR access to justice
- Article 14 ECHR prohibition of discrimination in enjoyment of Convention rights (disability = "other ground": *Glor v. Switzerland*, no. 13444/04, 30 April 2009)
- Protocol No. 12 to ECHR
- Article 5 ECHR: Procedural protection of persons detained because of mental health problems

## EU law approach

- Article 20 EU Charter of Fundamental Rights (EU FRC) equality before the law
- Article 21 EU FRC prohibition of discrimination on grounds of disability (explicitly)
- Article 47 EU FRC general right of access to justice
- Secondary EU law: Victims' Directive; Directive on right to information in criminal proceedings; Directive on right to interpretation in criminal proceedings; Directive on the right to access to a lawyer; Commission Recommendation on procedural safeguards for vulnerable suspects/accused

## Legal Capacity

- legal capacity the ability to hold rights (*legal standing*) and to exercise those rights (*legal agency*)
- Article 12 CRPD: persons with disabilities are “persons before the law”
- Lack of capacity may prevent persons with disabilities from commencing litigation or hiring a lawyer
- Example ECtHR *Herczegfalvy v. Austria* (see slide 1): EVERYONE has legal standing and may bring case; but allows that persons are stripped of certain aspects of legal capacity
- Blanket withdrawal of legal capacity: violation of Article 8 ECtHR (see *Shtukaturov v. Russia*, no. 44009/05, 27 March 2008; *Nikolyan v. Armenia*, no. 74438/14, 3 October 2019)

## Article 12 CRPD

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- ...

## Article 12 CRPD

- 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. ....



# Legal capacity

- Article 12 § 3 CRPD: 'supported decision making'
- Article 6 of the ECHR requires an applicant's presence at proceedings in which his or her legal capacity is to be determined (see e.g. ECtHR *Stanev v. Bulgaria*, no. 36760/06, 17 January 2012)

# Barriers to accessing justice

- Societal
- Legal
- Financial
- Accessibility
  
- Specific barriers in legal proceedings:
- Civil
- Criminal



## Accessibility (Art 9 UN CRPD)

- “1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.
- ...”

## Accessibility (Art 9 UN CRPD)

- “These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
- a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
- b) Information, communications and other services, including electronic services and emergency services. ...”
- Accessibility key principle of CRPD
- ECtHR: *Farcaș v. Romania*, No. 32596/04, § 48, 14 September 2010 – right of access court could be violated if it is impossible for an applicant to physically gain entry thereto

# Reasonable accommodation

- Refers to individual (while accessibility concerns general public)
- Examples of reasonable accommodation in court proceedings:
  - Change of venue for court hearings for a disabled claimant, accused or victim;
  - Use of braille, sign language or easy read materials
- Example of accomodating jurors with disabilities in criminal proceedings

# Criminal proceedings

Pre trial stage:

- often strongly influences outcome of proceedings
- Essential that persons involved are trained to recognize forms of disability even non apparent ones
- “hidden disabilities”: e.g. Autism, Asperger’s, PTSD
- Outcome could change substantially if recognised in time

## Rights of victims in criminal proceedings

- Victim's rights vs. defendant's rights
- Victims of crime cannot claim fair trial rights under Article 6 of the ECHR, unless they join criminal proceedings to enforce civil law claims within the framework of the criminal procedure
- Victims of crime are entitled to an effective remedy in the form of criminal proceedings (Art 13 ECHR)
- EU Victims' Rights Directive: victims' fair trial rights in EU law, e.g. the right to advice and emotional support
- States must take positive action to prevent human rights violations requires states to criminalise serious human rights abuses, and to take action to prevent and investigate violations of Articles 2 and 3 of the ECHR and Articles 2 and 4 of the EU Charter of Fundamental Rights

## Persons with disabilities as witnesses and victims of crime

- What is « reliable » testimony?
  - clear memory and recollection, 'nonerratic' behaviour on the stand and consistent, straightforward communication of a narrative
- Persons with disabilities often provide information in a way we are not used to
- **There is no reason to assume that a witness who has a learning disability or mental health condition is not competent to give evidence!**
- Important to be aware and accommodate

## Witnesses and victims with disabilities

- Reasonable accommodation could include:
  - Friendlier courtroom environment
  - Use of animals to accompany witness
  - Intermediaries
  - Speaking more slowly
  - Allowing pauses
  - Framing questions differently
  - Dealing with issues in chronological order
  - Use of expert witnesses to explain the meaning of a witness' words and conduct

## Legal responsibility for criminal acts

- If persons with disabilities have the legal capacity to act on an equal basis with others, this implies as a corollary the legal responsibility for those consequences on an equal basis with others
- High Commissioner for Human Rights (OHCHR) has deemed it discriminatory and unlawful to exculpate automatically persons from criminal liability on the basis of disability and that, instead, 'disability neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant'
- Matter of ongoing academic discussion

## Unfitness for trial

- Mental state at the moment of the trial
  - determines a person's lack of mental capacity, typically results in a custodial order or detention, sometimes for indefinite periods
  - Contrary to Art 14 CRPD, if it deprives the person of his/her right to due process and safeguards that are available to every defendant
  - What are the alternatives?
  - Significant challenge for policy makers
  - important related issue is that of the indefinite detention of accused persons found unfit to stand trial

## Not criminally responsible

- refers to the mental state of the accused at the time when the offence was committed
- can lead to deprivation of liberty of persons with disabilities in a discriminatory way instead of being fully acquitted (like other defendants using disability neutral defenses), they are ordered to detention at a hospital or psychiatric institution
- “not criminally responsible” assessments are contrary to Article 14 CRPD!

## Indefinite detention of accused unfit to stand trial or found not criminally responsible

- Art 14 CRPD: „... the existence of a disability shall in no case justify a deprivation of liberty.
- Significant contradiction with Art 5 (1) (e) ECHR, which explicitly allows the „lawful detention ... of persons of unsound mind“
- indefinite custodial orders as such are incompatible with the CRPD
- Even if review mechanisms are in place: incompatible with the CRPD, according to CteRPD
- Different interpretation: detention must be de linked from disability

## Standards of detention facilities

- Art 14 (2) CRPD: „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.“
- Case law of the ECtHR:  
[https://www.echr.coe.int/Documents/FS\\_Disabled\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf)
- [https://www.echr.coe.int/Documents/FS\\_Detention\\_mental\\_health\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Detention_mental_health_ENG.pdf)

Thank you!

[sabrina.wittmann@echr.coe.int](mailto:sabrina.wittmann@echr.coe.int)



***Case Study – Effective participation in criminal proceedings***

European Court of Human Rights

**CASE OF BLOKHIN v. RUSSIA [GC]**

no. 47152/06, judgment of 23 March 2016

**Facts:** The applicant was twelve years old at the material time and suffered from attention-deficit hyperactivity disorder (ADHD) and a neurogenic bladder causing enuresis (a disorder involving urinary incontinence). He was prescribed medication, regular supervision by a neurologist and a psychiatrist and regular psychological counselling.

On 3 January 2005 the applicant was arrested and taken to a police station on suspicion of extorting money from a nine-year old. He was not informed of the reasons for his arrest. He was put in a cell that had no windows and the lights in the cell were turned off. After he had spent around an hour in the dark, he was questioned by a police officer, who urged the applicant to confess. He was told that if he did so, he would be released immediately, whereas if he refused, he would be placed in custody. The applicant signed a confession statement. The police officer then telephoned the applicant's grandfather to tell him that the applicant was at the police station and could be taken home. When his grandfather arrived at the police station, the applicant retracted his confession and protested his innocence.

The applicant's grandfather repeatedly complained to the prosecutor's office that the applicant, a minor suffering from a psychological disorder, had been intimidated and then questioned in the absence of his guardian and that his confession had been obtained under duress. He had been placed in a dark cell for an hour and he had then been questioned by a police officer in the absence of a guardian, psychologist or teacher. The police officer had coerced the applicant into signing the confession statement without the benefit of legal advice. The grandfather requested that the confession statement be declared inadmissible as evidence, and that the pre-investigation inquiry be closed on account of lack of evidence of an offence, rather than the applicant's age.

The prosecutor's office replied that no criminal proceedings had been instituted against the applicant, given that he was below the statutory age of criminal responsibility and hence could not be prosecuted for his actions. He therefore did not have the status of a suspect or a defendant. On 3 January 2005 he had been asked to give an "explanation" rather than been questioned by the police. In those circumstances the participation of a lawyer, psychologist or teacher had not been mandatory. There was no evidence that the applicant had been held in a dark cell before the interview, and he had had to wait no more than ten minutes for an officer from the Juveniles Inspectorate to arrive and interview him. It had been established that the applicant had committed extortion on the basis of the statements of the victim and the victim's mother, and the applicant's admission of guilt during the interview of 3 January 2005.

Subsequently, the applicant he was brought before a court which ordered his placement in a temporary detention centre for juvenile offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing further acts of delinquency.

**Complaints:** The applicant complained that the proceedings against him had been unfair, both because he had been questioned by the police in the absence of his guardian, a legal counsel or a teacher and because he had not been given the opportunity to cross-examine the two witnesses against him.

**Law:** Article 5 of the ECHR



“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;
- (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;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

#### **Article 6 of the ECHR**

“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.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(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;

...”

#### **Questions:**

- 1) *Art 6 - Applicability*: Was Article 6 of the Convention applicable under its civil or its criminal limb?
- 2) *Art 6 - Merits*: Has the applicant been violated in his rights under Article 6 of the Convention?
- 3) What measures could the authorities dealing with the applicant’s case have taken, taking into consideration the principles of the UNCRPD?
- 4) Would the assertion by the prosecutor’s office that it found the applicant’s guilt established have been problematic, if it had not been for the consequences (detention)? If so, under which Convention Article(s)?

## **Практически казус - Ефективно участие в наказателно производство**

Европейски съд по правата на човека

### **ДЕЛО БЛОКИН С/У РУСИЯ [GC]**

№ 47152/06, съдебно решение от 23 март 2016 г.

**Факти:** Жалбоподателят е бил на дванадесет години към момента на настъпване на фактите по делото и е страдал от синдром на хиперактивност с дефицит на вниманието (ADHD) и неврогенен пикочен мехур с нощно напикаване (разстройство включващо уринарна инконтиненция). Предписано му било лекарство, редовно наблюдение от невролог и психиатър и редовно психологическо консултиране.

На 3 януари 2005 г. жалбоподателят бил арестуван и отведен в полицейски участък по подозрение за изтръгване на пари от деветгодишно момче. Не бил информиран за причините за арестуването му. Настанен бил в килия, която нямала никакви прозорци и лампите в килията били изключени. След като прекарал около час в тъмното, бил разпитан от полицейски служител, който подтикнал жалбоподателя към самопризнания. Казал му, че ако го направи, ще го освободят веднага, а ако откаже, ще бъде задържан под стража. Жалбоподателят подписал декларация със самопризнания. Полицейският служител тогава телефонира на бабата на жалбоподателя, за да ѝ каже, че жалбоподателят е в полицейския участък и може да бъде отведен у дома. Когато дядо му пристигнал в полицейския участък, жалбоподателят оттеглил самопризнанията си и заявил, че е невинен.

Дядото на жалбоподателя неколккратно обжалвал пред прокуратурата, че жалбоподателят, малолетно лице страдащо от психично разстройство, е бил сплашен и после разпитан в отсъствието на попечителя си и че неговите самопризнания са получени под натиск. Той бил поставен в тъмна килия в продължение на един час, а после бил разпитван от полицейски служител в отсъствието на попечител, психолог или учител. Полицейският служител заставил жалбоподателя да подпише декларация със самопризнания без да ползва правото на юридически съвет. Дядото поискал декларацията със самопризнания да бъде обявена за недопустима като доказателство и предварителното разследване да бъде закрито поради липса на доказателства за правонарушение, а не толкова поради възрастта на жалбоподателя.

Прокуратурата отговорила, че срещу жалбоподателя не е заведено съдебно производство, предвид това че той е под законоустановената възраст за наказателна отговорност и следователно не може да бъде подведен под отговорност за действията си. Поради това, той нямал статус на заподозрян или ответник. На 3 януари 2005 г. от него по-скоро поискали да даде „обяснение“ отколкото да е бил разпитван от полицията. При тези обстоятелства участието на адвокат, психолог или учител не е било задължително. Не е имало доказателства, че жалбоподателят е държан в тъмна килия преди разпита и че е трябвало да чака повече от десет минути да пристигне служителя от Инспектората за непълнолетни и да го интервюира. Било е установено, че жалбоподателят е извършил изтръгване на пари, въз основа на твърденията на жертвата и майката на жертвата, както и самопризнанията на жалбоподателя по време на интервюто на 3 януари 2005 г.

Впоследствие, жалбоподателят бил изправен пред съда, който постановил поставянето му в център за временно задържане на непълнолетни нарушители за период от тридесет дни, с цел „коригиране на поведението му“ и предотвратяване на по-нататъшни прояви на престъпно поведение.

**Жалби:** Жалбоподателят заявил, че съдебното производство срещу него е било несправедливо както поради това че е бил разпитван от полицията в отсъствието на свой попечител, юридически

съветник или учител, така и поради това че не му е предоставена възможността за кръстосан разпит на двамата свидетели на обвинението.

#### **Право: Член 5 от ЕКПЧ**

“1. Всеки човек има право на свобода и сигурност на личността. Никой не може да бъде лишен от своята свобода, освен в следните случаи и по реда, предвиден от закона:

- (а) законно лишаване от свобода на лице по силата на постановена от компетентен съд присъда;
- (б) законен арест или лишаване от свобода на лице за неизпълнение на законосъобразно съдебно решение или с цел осигуряване на изпълнението на задължение, предписано от закона;
- (в) законен арест или лишаване от свобода на лице с цел да се осигури явяването му пред компетентния, съгласно закона, орган по обосновано подозрение за извършено престъпление или когато задържането обосновано може да се смята за необходимо, за да се попречи на лицето да извърши престъпление или да се укрие, след като е извършило престъпление;
- (г) лишаване от свобода на непълнолетно лице въз основа на законосъобразно решение, за да се осигури надзор с възпитателна цел, или законно лишаване от свобода на такова лице с цел да се осигури неговото явяване пред предвидената в закона институция;
- (д) законно лишаване от свобода на лица с цел да се предотврати разпространението на инфекциозни болести, както и на душевноболни лица, алкохолици, наркомани или скитници;
- (е) законен арест или лишаване от свобода на лице с цел да се предотврати незаконното му влизане в страната; или лице, спрямо което се предприемат действия за експулсиране или екстрадиране.“

#### **Член 6 от ЕКПЧ**

“1. Всяко лице при решаването на правен спор относно неговите граждански права и задължения или основателността на каквото и да е наказателно обвинение срещу него, има право на справедливо и публично гледане на неговото дело в разумен срок, от независим и безпристрастен съд, създаден в съответствие със закона.

...

3. Всяко лице, обвинено в криминално престъпление, има в частност следните права:

...

(в) да се защитава лично или да ползва адвокат по свой избор; ако не разполага със средства за заплащане на адвокат, да му бъде предоставена безплатно служебна защита, когато го изискват интересите на правосъдието;

(г) да участва в разпита или да изисква разпит на свидетелите на обвинението и да изисква призоваването и разпитът на свидетелите на защитата да се извършват при същите условия, както на свидетелите на обвинението;

...”

#### **Въпроси:**

- 1) *Член 6 - Приложимост:* Член 6 от Конвенцията е приложен в своята гражданска или в своята наказателна част?
- 2) *Член 6 - Основателност:* Нарушени ли са правата на жалбоподателя по член 6 от Конвенцията?
- 3) Какви мерки биха могли да са взели органите, занимаващи се със случая на жалбоподателя, предвид принципите на Конвенцията за правата на хората с увреждания на ООН?
- 4) Би ли било проблематично твърдението на прокуратурата, че е установила вината на жалбоподателя, ако не бяха последиците (лишаване от свобода)? Ако е така, по кой(и) член(ове) от Конвенцията?



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# Disability in Employment

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Philip Rostant

Employment Judge

Employment Tribunals England and Wales



2

## UNCRPD and Employment-Article 27

*Appropriate steps, including through legislation to...*

- **Prohibit discrimination** on the basis of disability;
- **Protect the rights** of persons with disabilities;
- Ensure that **reasonable accommodation** is provided to persons with disabilities in the workplace;
- Promote access to training, vocational guidance, work experience and other **measures designed to improve access by people with disabilities to the job market.**

## The constitutional position (1)

- The UNCRP is '**programmatic**'.
- The provisions of the UN Convention are subject, to the **adoption of subsequent measures** which are the responsibility of the Contracting Parties.
- The provisions of the Convention **do not have direct effect** in European Union law.
- *Z v A Government Department* .

## Ending Discrimination-Promoting Participation

UNCRPD-Art 27



Council Directive 2000/78/EC of 27  
November 2000

## The constitutional position (2)

- International agreements concluded by the European Union are **binding** on its institutions, and **prevail over acts of the European Union**
- Instruments of the European Union must as far as possible be **interpreted in a manner that is consistent** with those agreements
- The EU has approved the UN Convention. The provisions of that convention are an **integral part of the European Union legal order**.
- **Directive 2000/78** (the Framework Directive) must, as far as possible, **be interpreted in a manner consistent with that convention**.
- *Ring*

## Council Directive 2000/78/EC of 27 November 2000 (the Framework Directive)

- Article 1
- The purpose of this Directive is to lay down a general framework for **combating discrimination** on the grounds of, ...**disability**, ....as regards employment and occupation, with a view to putting into effect in the Member States the **principle of equal treatment**.

## The Framework Directive

### Article 2

#### Concept of discrimination

For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no **direct** or **indirect discrimination** whatsoever on any of the grounds referred to in Article 1.

+

**harassment** (Article 2(3))

**victimisation** (Article 11).

**reasonable accommodation** (Article 5)

## A claim of disability discrimination

### Preliminary considerations

- Disability
- Nature of claim
- Nature of the disability
- Knowledge of disability

# The Concept of Disability

A medical model



# The Concept of Disability

A social model





## The Concept of Disability



## Proving disability

- Impairment
- Long-term
- Functional deficit and/or
- Barriers hindering full and effective participation {in society}
- In the workplace

## Proving discrimination

### Framework Directive-Art 10.

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, **when persons who consider themselves wronged** because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts from which it may be presumed that there has been direct or indirect discrimination**, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

## Knowledge of disability?

- Direct discrimination
- Indirect discrimination
- Harassment
- Reasonable accommodation

## Reasonable accommodation(1)

### Recital 16

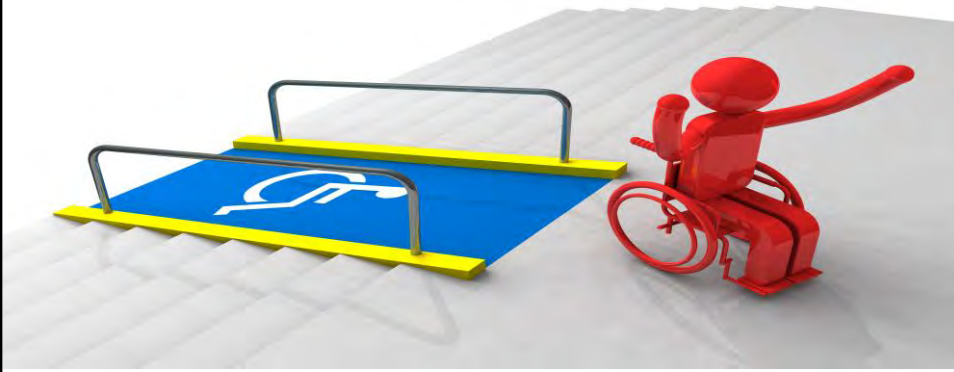
The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

## Reasonable accommodation(2)

- **Article 5**
- Measure to ensure **compliance with the principle of equal treatment**
- Requires employers to take **appropriate measures**, where **necessary**, to enable a person with a disability to have **access to, participate in, or advance in employment**, or to undergo **training**.
- **Unless** such measures would impose a **disproportionate burden** on the employer.

## Appropriate and necessary

- Measure must address the barrier or difficulty.
- Without the measure, the person with the disability is prevented or hindered from participation.



## Disproportionate burden

- The duty is only to provide *reasonable* accommodation



## Structured approach



## Direct Discrimination

Article 2(2)

“2. For the purposes of paragraph 1:  
**direct discrimination** shall be taken to occur where one person is treated **less favourably** than another is, has been or would be treated in a **comparable situation**, on **any of the grounds** referred to in Article 1;”

## Direct Discrimination

### *Comparable situation*



10 years relevant experience  
University degree  
Further professional qualifications



10 years relevant experience  
University degree  
Further professional qualifications  
**History of depression**

## Direct Discrimination

### *Treated less favourably*



## Direct Discrimination

*On any of the grounds*



# Depression?

## Indirect Discrimination

Article 2(2)

(b) **indirect discrimination** shall be taken to occur where an **apparently neutral provision, criterion or practice** would put persons having... a **particular disability**,... at a **particular disadvantage** compared with other persons unless:

- (i) that provision, criterion or practice is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate and necessary**,

## Discrimination by association (1)

- “Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled.”

Case C-303/06 *Coleman*.

## Discrimination by association (2)

- “the concept of ‘discrimination on the grounds of ethnic origin’, ... must be interpreted as being intended to apply in circumstances such as those at issue before the referring court —irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure”.

C-83/14 *CHEZ Razpredelenie Bulgaria AD*



## Harassment

### Article 2(3)

- Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when **unwanted conduct related to any of the grounds** referred to in Article 1 takes place with the **purpose** or **effect** of **violating the dignity of a person** and of creating an intimidating, hostile, degrading, humiliating or offensive environment...

## Harassment

### *Unwanted conduct*



## Harassment

*Related to any of the grounds*



## Harassment

*Purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*



## Victimisation

### Article 11

#### *“Victimisation*

*Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”*

## Victimisation

### *Dismissal or other adverse treatment*



## Positive action

- Article 7
- 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
- 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

The End

Thank You





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## **Case Study**

### **GEORGI POPOV v SADISTICHEN FITZKULTUREN SALON**

#### **Introduction**

You have just finished hearing a case of discrimination brought by Georgi. The case was against his former employer, Sadistischen Fitzkulturen Salon (SFS), which owned the gymnasium in Sofia where he worked until he was dismissed.

Georgi gave evidence at the hearing as did Aleksander the regional manager, and Georgi's immediate line manager Maria, the head of administration at the gymnasium. Viktoria, the manager of the gymnasium at the relevant time did not attend the hearing. By the time the case came to court, she had left the employment of SFS to work as the private fitness coach for a billionaire based in Bermuda.

#### **The following facts have been established.**

1. Viktoria is a former professional athlete and remains very fit. Georgi was employed in administration.
2. The gymnasium has a modern open plan reception area. Georgi's office was on the first floor and to reach it from the main administration office on the ground floor he had to cross reception and go up an open flight of stairs. Georgi regularly had to go between the two offices several times a day and when he did so it was in full view of the customers of the gymnasium who were arriving and leaving. The alternative to the open plan stairs was to take the lift.
3. Georgi is HIV positive and is significantly overweight although not clinically obese. He found using the stairs, particularly if he had to do so several times in a short space of time, very tiring and he sometimes got out of breath. This was made even worse if he had to carry anything of any weight, such as paper files or



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packets of bottled water. For this reason, he almost always used the lift, even though it was often slower than taking the stairs due to the fact that was the only lift and it served several floors.

4. SFS was concerned about the financial performance of this particular gymnasium, which is in competition with several others in Sofia. When she was appointed, Viktoria set about improving the image of the gymnasium. She directed that all staff, even those working in reception and in administration must wear SFS tracksuits at work. Georgi hated this. He thought he looked ridiculous in a track suit because of his weight. His colleagues, who had never mentioned it before, now started making comments about his clothing. The comments were, *prima facie*, sympathetic. For instance, he was encouraged to take off the tracksuit top when he was in the main administration office, out of sight to gymnasium users, because he must "find it very hot". He was also asked by the person in charge of ordering tracksuits for the staff whether she should look for a larger size because the one she had ordered for him "looks a bit uncomfortable". On another occasion, in his hearing, two of his younger colleagues discussed the requirement to wear tracksuits and one of them said that she did not mind but that she thought that other people might mind because "tracksuits do not look good on everybody". Georgi found these comments insensitive and upsetting.

5. At a staff meeting, Viktoria announced that the use of the lift by staff only going as far as the first floor was inefficient and presented a bad image for the gymnasium users. She directed that all staff only going to the first floor must use the stairs, unless they were carrying anything heavy. One afternoon, she saw Georgi walk across reception and stand waiting for the lift. She called across to him, in the hearing of several customers, to remind him that she expected him to take the stairs if he was only going up one floor. Reluctantly Georgi took the stairs. Later that day he complained to Viktoria that it was unreasonable to require him to use the stairs every time and that an exception should be made for him. Viktoria did not agree and said that if she saw Georgi using the lift again he would be disciplined.



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6. A few weeks later, at the end of a long hot afternoon, Viktoria spotted Georgi, carrying a packet of six 33cl bottles of mineral water, coming out of the lift on the first floor. She immediately called him in to her office. Georgi explained that he thought that he was not breaking the rule about using the lift because he was carrying a heavy object. He also pointed out that his colleague, Nikol, who is very slightly built, was permitted to use the lift when she was carrying water bottles. Viktoria was not impressed. She did not agree that the water bottles were heavy. She told Georgi to stop complaining and get fit. She warned Georgi that if she saw him using the lift again, against the rule, he would be dismissed.

7. Georgi appealed this warning to the Regional Manager Aleksander. In his appeal he said that he believed that Viktoria had discriminated against him because of his weight and that he believed that that was discrimination because of disability. His appeal was dismissed.

8. A few months later, there was a redundancy exercise. Viktoria announced that the gymnasium was not performing well enough and that to save money some staff would have to be dismissed. The gymnasium employs fitness instructors, as well as administration staff. She decided that the fitness instructors must remain but that she could make savings in administration.

9. Georgi was one of three administration staff selected for redundancy by Maria, the head of administration. At the time of his selection, the gymnasium had a vacancy for a trainee fitness instructor, which was first offered to the three redundant administration staff. All three applied. Viktoria was on the selection panel. Georgi was not selected. When he asked why, he was told that his image was wrong for the job and also that it was not clear that he had the necessary levels of personal fitness. The person selected was 27 and, although slim, is a heavy smoker.

10. There was also a vacancy for a manager for the restaurant in the gymnasium. Georgi has previous experience in catering and applied for the vacancy. He was the only person to do so. Viktoria was also responsible for appointing to this post. She refused to





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appoint Georgi. She failed to give a reason and Georgi suspects that it is because she is concerned about his HIV positive status, which he had declared when first appointed to his administrative post.

## **Questions**

**1. Do you think that Georgi is a person with a disability? If so, what is the impairment or impairments that results in his disability?**

**For the remaining questions, assume that Georgi meets the definition of disability for both impairments.**

**2. Applying the appropriate burden of proof, assess the chances of any of Georgi's following claims succeeding.**

**2.1 Direct Discrimination because of disability.**

**2.2 Harassment related to disability**

**2.3 Breach of the duty to make a reasonable accommodation**

**2.4 Indirect Discrimination because of disability**

**2.5 Victimization**

**Does your approach change to any of your findings, including your decision on disability, if the following facts are also established?**

1. Georgi is a very keen swimmer and swims a kilometer every day before work although he did not mention that when he was interviewed for the trainee fitness coach job.

2. You conclude that Maria was not being truthful when she said in court that the selection decision for the redundant administration staff was made by her alone and that Viktoria was not involved at all.



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3. SFS produces evidence that if administrative staff used the lift every time they needed to go upstairs, they would, on average spend 30 minutes a day waiting for it to come.

Philip Rostant

Judicial College, England and Wales





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## **Практически казус**

### **ГЕОРГИ ПОПОВ в „САДИСТИЧЕН ГИМНАСТИЧЕСКИ САЛОН“**

#### **Увод**

Току що сте завършили разглеждането на дело за дискриминация, внесено от Георги. Делото е срещу бившия му работодател, „Садистичен гимнастически салон“ (СГС), който притежавал гимнастическия салон в София, където той работел допреди уволнението си.

На съдебното заседание показания са дали Георги, както и Александър, регионален мениджър, и прекият ръководител Мария, завеждащ администрацията на гимнастическия салон. Виктория, управител на гимнастическия салон през въпросния период, не се е явила на съдебното заседание. Към момента на разглеждане на делото в съда, тя е напуснала работата си в СГС, за да работи като частен фитнес инструктор за милиардер в Бермуда.

#### **Установени са следните факти.**

1. Виктория е бивш професионален атлет и поддържа много добра форма. Георги е бил служител в администрацията.
2. Гимнастическият салон има зона на рецепция със съвременен отворен план. Офисът на Георги е на първия етаж и за да стигне до него от главния административен офис на приземния етаж, трябвало да пресича зоната на рецепцията и да се изкачва по открито стълбище. Георги трябвало редовно да минава между двата офиса по няколко пъти на ден и когато правел това, то било пред погледите на клиентите на гимнастическия салон, които идвали и си отивали. Алтернативният вариант на откритото стълбище бил да се ползва асансьора.
3. Георги е HIV-позитивен и със значително наднормено тегло, макар и не клинично затлъстял. Ползването на стълбището, особено ако трябвало да го прави няколко пъти в кратък период време, било за него особено уморително и



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понякога оставал без дъх. Това се влошавало още повече, ако трябвало да носи нещо тежко, като например папки с документи или пакети с бутилирана вода. По тази причина, той почти винаги използвал асансьора, макар че често пъти това било по-бавно от качването по стълбите, поради факта че асансьорът бил единствен и обслужвал няколко етажа.

4. СГС бил обезпокоен относно финансовото представяне конкретно на този гимнастически салон, който е в съревнование с няколко други в София. Когато била назначена, Виктория се заела да подобри имиджа на гимнастическия салон. Тя дала указания всички от персонала, дори работещите на рецепцията и в администрацията, да носят анцузи на СГС на работа. На Георги това никак не му харесвало. Смятал, че изглежда смешен в анцуг поради теглото си. Колегите му, които никога преди не го били споменавали, сега започнали да правят коментари относно облеклото му. Коментарите били на пръв поглед състрадателни. Например, насърчавали го да свали горницето на анцуга, когато е в главния административен офис отвъд полезрението на ползвателите на гимнастическия салон, защото сигурно „му е много горещо“. Също така, служителката, която отговаряла за поръчването на анцузите за персонала, го попитала дали да му потърси по-голям размер, защото този, който била поръчала за него „изглежда малко неудобен“. В друг случай, дочул две от по-младите си колежки да обсъждат изискването да носят анцузи и едната казала, че тя няма нищо против, но смята, че други може да са против, защото „анцузите не стоят добре на всеки“. За Георги тези коментари били безчувствени и неприятни.

5. На събрание на персонала, Виктория обявила, че използването на асансьора от персонала само за един етаж е неефективно и представя лош имидж за ползвателите на гимнастическия салон. Тя наредила всички от персонала да ползват стълбите, когато се качват само до първия етаж, освен ако не носят нещо тежко. Един следобед тя видяла как Георги минава през рецепцията и застава в изчакване на асансьора. Тя му извикала на всеослушание пред няколко клиенти да му напомни, че очаква от него да използва стълбите, ако се изкачва само един етаж. Неохотно Георги поел по стълбите. По-късно през деня той се оплакал на Виктория, че е неразумно да изисква от него да използва стълбите всеки път и за него би трябвало да се направи изключение. Виктория не



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се съгласила и казала, че ако още веднъж отново види Георги да използва асансьора, ще бъде дисциплинарно наказан.

6. Няколко седмици по-късно, в края на един горещ следобед, Виктория забелязала Георги, който носел 330-милилитрови бутилки с минерална вода, да излиза от асансьора на първия етаж. Тя го извикала веднага в офиса си. Георги обяснил, че смята, че не нарушава правилото за използване на асансьора, защото носел тежък предмет. Също така, изтъкнал, че на колежката му Никол, която е с леко телосложение, е позволено да използва асансьора, когато носи бутилки с вода. Това не впечатлило Виктория. Тя не била съгласна, че бутилките с вода са тежки. Казала на Георги да престане да се оплаква и да вземе мерки да се приведе в добра форма. Тя предупредила Георги, че ако го види да използва асансьора отново в нарушение на правилото, ще бъде уволнен.

7. Георги обжалвал това предупреждение пред регионалния мениджър Александър. В жалбата си той казал, че според него Виктория го дискриминира заради теглото му и че той счита това за дискриминация основана на увреждане. Жалбата му била отхвърлена.

8. Няколко месеца по-късно били предприети съкращения. Виктория обявила, че гимнастическият салон не се представя достатъчно добре и че за да се направят икономии, част от персонала ще трябва да бъде съкратен. Наетите на работа в гимнастическия салон са фитнес инструктори, а така също и административен персонал. Тя решила, че фитнес инструкторите трябва да останат, но може да направи спестявания в администрацията.

9. Георги бил един от тримата от административния персонал, избрани за съкращение от Мария, административен началник. По времето на неговото избиране, гимнастическият салон имал свободна длъжност за стажант фитнес-инструктор, която била предложена на тримата от административния персонал. Кандидатствали и тримата. Виктория била в комисията за подбор. Георги не бил подбран. Когато попитал защо, му казали, че няма подходящ имидж за длъжността и че не е ясно дали има необходимите нива на добра лична форма. Подбраната кандидатка била на 27 години и макар и със



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стройна фигура, била страстен пушач.

10. Имало и свободна длъжност за управител на ресторанта в гимнастическия салон. Георги имал предишен опит в кетъринга и кандидатствал за свободната длъжност. Кандидатствал единствено той. Виктория отговаряла за назначението и за този пост. Тя отказала да назначи Георги. Не изтъкнала причина и Георги подозира, че я безпокои неговият HIV-позитивен статус, който той декларирал при първото си назначение на административна длъжност.

## **Въпроси**

**1. Считате ли, че Георги е човек с увреждане? Ако да, какво е разстройството или разстройствата, довели до увреждането му?**

**За останалите въпроси, предположете, че Георги отговаря на дефиницията за увреждане и за двете разстройства.**

**2. Като приложите съответната тежест на доказване, оценете шансовете за успех на всеки от следните съдебни искове на Георги.**

**2.1 Пряка дискриминация по признак на увреждане.**

**2.2 Тормос във връзка с увреждането**

**2.3 Нарушение на задължението да се осигурят подходящи условия**

**2.4 Непряка дискриминация по признак на увреждане**

**2.5 Виктимизация**

**Променя ли се подходът ви към което и да е от заключенията ви, включително решението ви относно увреждането, ако бъдат установени и следните факти?**

1. Георги е запален плувец и плува един километър всеки ден преди работа, макар че не е споменал това, когато е бил интервюиран за длъжността стажант фитнес-инструктор.

2. Заклучавате, че Мария не е казала истината, когато е казала



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В съда, че решението за подбора на съкратения административен персонал е взето единствено от нея и че Виктория не е участвала изобщо.

3. СГС предоставя доказателства, че ако административният персонал използва асансьора всеки път когато трябва да изкачва етажите, те биха прекарвали средно 30 минути на ден в изчакване да дойде асансьорът.

Филип Ростант

Юридически колеж, Англия и Уелс







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Universiteit Leiden  
The Netherlands

## DATA PROTECTION

Prof.dr. Aart (A.C.) Hendriks  
Sofia, 15 November 2019

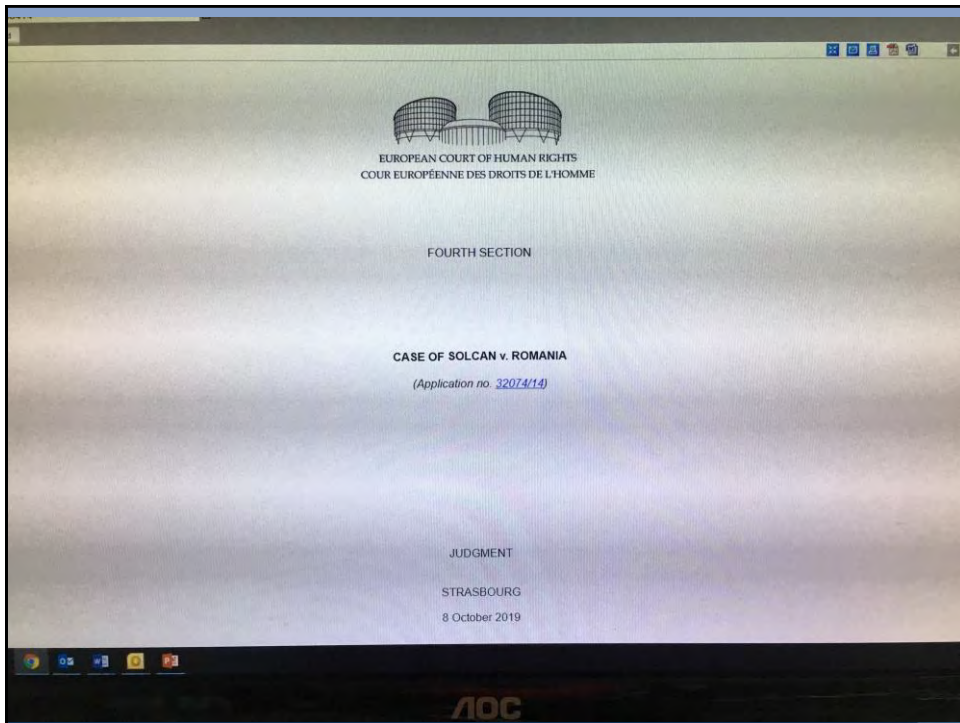
Universiteit Leiden. University to discover.

## Conflict of interests

Professor in health law, surrogate judge (including mental health/involuntary detention), member of Board of Supervisors Erasmus University Medical Hospital and member of various scientific committees

No conflict of interest

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## Questions

- Relation between privacy/GDPR and disability
- Health information, consent and decision making

## Privacy/GDPR

- (Mental and physical) integrity
  - (ECtHR *A/Croatia*, 2010)
- Personal autonomy/Self-determination
  - (ECtHR *Pretty*, 2002)
- GDPR (2016 > 2018) strengthen rights with respect to personal data ('privacy')

## Information

Art. 10 ECHR > limitations? To protect person against him/herself?

But sometimes the provision of information touches upon the private life of other persons

(ECtHR *Odièvre*, 2003)

# Health information and consent

Free and informed consent prerequisite for authorizing a **violation of a person's integrity**

(Art. 8 ECHR, Art. 5 Biomedicine Convention and Art. 25 (d) CRPD)

Informed consent / consentement éclairé  
(ECHR *Glass*, 2004)

Informed consent should be free / voluntary  
(ECHR *Juhnke*, 2008)

Support PWD to get access to information and supportive decision making  
(CRPD)

# Health information and consent (2)

Assumption: person is mentally competent adult in order to be able to give or refuse consent

(ECHR *Pretty* 2002)

Whereas CRPD requires health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.

(Art. 25 (d) CRPD)

Can supportive decision making prevent problems?

## Always informed consent?

Yes, unless

- Therapeutic necessity (ECtHR *Herczegfalvy*, 1992)
- Substitute decision making / incapable to decide - but protect integrity/supportive decision making

Patient should always be treated in a professional way  
(ECtHR *Bataliny*, 2015 - violence against psychiatric patient)

How much freedom to (in)voluntary detained persons?  
(ECtHR *Fernandes de Oliveira*, GC 2018 - gradual differences)

## Health information, consent and representatives

How much information should the substitute decision  
maker receive?

Can person with disability refuse treatment?

Does oral consent suffice?

Is it allowed for persons with disabilities to participate in  
medical research?

## GDPR and disability / capacity

GDPR does not refer to disability / mental capacity – what does that mean?

Do persons with disability also have the right to have (health) information to be deleted / to be forgotten?

Does the right to privacy also apply within families (can individuals prohibit the sharing of information)?

## Remaining issues

Are courts allowed to publish the names of parties?

**Is it permitted for the police to share photo's of suspected individuals?**

Are physicians required to admit legal representatives when talking to a disabled patient?

Are physicians required to give legal representatives access to the medical file of an disabled patient?

## Tentative conclusions

- Privacy/GDPR also apply to persons with disabilities
- Rights/enforcement sometimes different
- Supportive decision making is seen as solution – correct?
- Many issues regulated by right to privacy/GDPR, but much is left to national legislators – and professionals.

Questions or Comments????





*Yonko GROZEV, Judge,  
European Court of Human Rights (ECHR)*

## The role of judges in safeguarding the rights of persons with disabilities European Court of Human Rights' perspective



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## Overview of rights for persons with disabilities under the European Convention on Human rights

Different rights for persons with disabilities? What approach according to the ECtHR.

- Rights set out in the European Convention on Human Rights ("the Convention") are to be guaranteed to "everyone" (Article 1)
- Persons suffering from any form of disability entitled to exercise all the civil, political, economic, social and cultural rights embodied in these and other instruments, and they are recognized as being entitled to exercise them on an equal basis with other persons (Art 14)
- The State should not deny disabled persons their human rights; it places upon the State the duty to take measures providing effective protection of vulnerable persons (*Stanev*)
- The position of inferiority and powerlessness typical of patients in psychiatric hospitals calls for increased vigilance in reviewing compliance with the Convention (*Herczegfalvy*)
- Convention is a living instrument which must be interpreted in the light of present day conditions and relevant international standards

## Role of the courts in protecting rights for persons with disabilities

Type of disabilities of individuals complaining of a violation of their Convention rights

Identical approach of the Court in examining complaints of persons with disabilities under different articles of the Convention

Interchangeability of rights under the Convention (*Herczegfalvy* – detention under Article 3 and Article 5; *H.F. v. Slovakia, Shtukaturov* – guardianship under Article 6 and Article 8)

Rights most often relied on in relation to persons with disabilities:

- Right to life (Article 2)
- Prohibition of inhuman and degrading treatment (Article 3)
- Right to liberty (Article 5)
- Access to courts (Article 6)
- Right to private and family life (Article 8)
- Prohibition of discrimination (Article 14)

## Proportionality analysis carried out by the courts in assessing rights guaranteed under the ECHR

The standard approach in proportionality analysis – assessing whether the national courts provided relevant and sufficient reasons in justifying the necessity of a limitation of a right

Obligation of courts to take into account the particular vulnerabilities of persons with disabilities and guarantee that persons with disabilities:

- Be heard in person/adequately represented in view of the specific vulnerability
- Have their vulnerability assessed in the specific context and the Convention right they rely on
- Are provided with the necessary support

## Two types of proportionality assessment under the Convention:

- Balancing of rights of persons with disabilities and other legitimate public interests (*Jasinskis v. Latvia*, 45744/08, 21.12.2010)
- Balancing between different rights of persons with disabilities (*Fernandes de Oliveira v. Portugal* [GC], 78103/14, 31.1.2019) balancing between personal liberty and autonomy rights (Articles 5 and 8) and the right to life (Article 2)

## Right to life (Article 2)

Negative duties

Positive duties to protect from risk for life:

- Obligation to take reasonable measures in situation of known risk (*Paul and Audrey Edwards v. the United Kingdom*, 46477/99, 14.03.2002)
- Duty to prevent self harm of a mentally disabled person in detention (*Keenan v. the United Kingdom*, 27229/95, ECHR 2001)
- Conditions in a care home for physically and mentally disabled children (*Nencheva et autres c. Bulgarie*, 48609/06, 18 juin 2013)
- Placement in a medical institution not equipped to provide adequate care (*Campeanu v. Romania* [GC], 47848/08, 17.07.2014)

## Prohibition of inhuman and degrading treatment (Article 3)

Negative duties and positive duties to protect and prevent inhuman and degrading treatment of persons with disabilities

Examples:

- In police arrest and prison detention (*Price v. the United Kingdom*, 33394/96, 2001; *Vincent v. France*, no. 6253/03, 24 October 2006; *Zarzycki v. Poland*, no. 15351/03, 12 March 2013; *Shalyavski and Others v. Bulgaria*, 67608/11, 15/09/2017)
- Living conditions in psychiatric institutions and social care homes (*Stanev v. Bulgaria* [GC], 36760/06, 17.01.2012)
- Expulsion and deportation of persons with disabilities (*S.H.H. v. UK*, 60367/10, 29.01.2013). Existence of very exceptional circumstances and compelling humanitarian considerations *N. v. the United Kingdom* [GC], no. 26565/05, 2008; *Paposhvili v. Belgium*[GC], 41738/10, 13.12.2016; *Savran v. Denmark*, 57467/15, 1.10.2019)
- Sexual abuse (*I.C. v. Romania*, 36934/08, 24.05.2016)
- Verbal and physical harassment (*Dordevic v. Croatia*, 24 July 2012)

## Right to liberty (Article 5)

Placement of persons with mental disabilities in psychiatric hospital

- Decision to detain should be in conformity with domestic law and equally in keeping with the purpose of Article 5, to protect against arbitrariness; relevant reasons should be provided by the domestic courts (*Gajcsi v. Hungary*, 34503/03, 3.10.2006; *Aerts v. Belgium*, 25357/94, 30.06.1998; *Varbanov v. Bulgaria*, 31365/96, 5.10.200)
- The medical necessity for detention must be convincingly shown to exist (*Herczegfalvy v. Austria*, 10533/83, 24.09.1992; *Herz v. Germany*, 44672/98, 12.06.2003; *Rooman v. Belgium*, 18052/11, 31.01.2019)
- Review of detention at reasonable intervals should be provided (*Herz v. Germany*, 44672/98, 12.06.2003)

## Access to courts (Article 6)

Access to judicial proceedings by individuals with mental disabilities

Article 6 § 1 of the Convention should be interpreted as guaranteeing in principle that anyone who had been declared partially incapable, as was the applicant's case, had direct access to a court to seek restoration of his or her legal capacity (Stanev v. Bulgaria [GC], 36760/06, 17.01.2012)

Appointment of Official Solicitor to represent mother with learning disabilities in child care proceedings was necessary (R.P. and Others v. the United Kingdom 38245/08, 9.10.2012)

Lack of legal representation of disabled child (A. M. M. v. Romania 2151/10, 14 February 2012)

## Right to private and family life (Article 8)

Access to public space and public buildings, place of living, workplace facilities:

- Existence of direct and immediate link between private life and access (Botta v. Italy, 21439/93, 24.02.1998, Zehnalova and Zehnal v (dec.), Czech Rep., 38621/97, 14.05.2002)
- Adequacy of measures taken to provide access (Molka v. Poland (dec.), no. 56550/00, 11 April 2006, Neeagu v. Romania, 49651/16, 29.01.2019)
- Change of place of living without consent of guardian (A. M.V. v. Finland, 53251/13, 23 March 2017)
- Lack of accessible toilet facilities at work place (Bayrakci v. Turkey (dec.), 5 February 2016)

Duty to provide medical care:

- General duty to provide medical care (Lopes de Sousa Fernandes v. Portugal, 56080/13, 19.12.2017) and specific treatment (Sentges v. the Netherlands, 27677/02, 8.6.2003)
- Consent to medical care (Glass v. UK, 61827/00, 9.3.2004) and confidentiality of medical information (Mockute v. Lithuania, 66490/09, 27.02.2018)

## Right to private and family life (Article 8) continued

### Deprivation of legal capacity

There is no doubt that deprivation of legal capacity is a serious interference with a person's rights under Article 8 of the Convention (*Matter v. Slovakia*, 31534/96, 5 July 1999)

- Strict observance of applicable procedures (*Ivinovic v. Croatia*, 13006/13, 18.09.2014)
- "Tailor made" deprivation reflecting individual circumstances (*Shtukaturov v. Russia*, 44009/05, 28 March 2008)

### Placement of children of persons with disabilities in public care

- Lack of sufficient justification (*Kutzner v. Germany*, 26.02.2002; *Saviny v. Ukraine*, 2008)
- Justified for the protection of the child (*Dmitriy Ryabov v. Russia*, 20013)

Right to marry (*Lashin v. Russia*, 22.01.2013; *Delecolle v. France*, 25.10.2018)

Right of access to information about oneself (*Gaskin v. UK*, 10454/83, 7.6.1989)

## Prohibition of discrimination (Article 14)

Difference in the treatment of persons in analogous or relevantly similar situations based on an identifiable characteristic, or "status" (*Konstantin Markin v. Russia* [GC], 30078/06, 2012)

Centrality of the CRPD in cases raising issues concerning disability rights; "European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment" (*Glor v. Switzerland*, 13444/04, 30.04.2009)

### Difference in treatment in:

- Discharge from military service (*Glor v. Switzerland*, 13444/04, 30.04.2009)
- Access to education (*Çam v. Turkey*, 51500/08, 23 February 2016, *Enver Şahin v. Turkey*, 23065/12, 30 January 2018, *Stoian v. Romania*, 25.06.2019)
- Refusal of tax exemption for the needs of a handicapped child (*Guberina v. Croatia*, 23682/13, 22.03.2016)
- Stigmatization (*Carvalho Pinto de Sousa Morais v. Portugal*, 25.06.2017)