

# Litigating with the CRPD in Ireland

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# *MX v. Health Service Executive* High Court, 23<sup>rd</sup> November 2012

- ▶ Involuntary patient in the Central Mental Hospital
- ▶ Diagnosis of schizophrenia
- ▶ Forcibly administered Clozapine
- ▶ Life threatening adverse reaction - possible destruction of white blood cells
- ▶ Blood samples had to be taken - required restraint and sedation

# *MX v. Health Service Executive* High Court, 23<sup>rd</sup> November 2012

Section 57 of the Mental Health Act 2001

*(1) The consent of a patient shall be required for treatment except where, in the opinion of the consultant psychiatrist responsible for the care and treatment of the patient, the treatment is necessary to safeguard the life of the patient, to restore his or her health, to alleviate his or her condition, or to relieve his or her suffering, and by reason of his or her mental disorder the patient concerned is incapable of giving such consent.*

*(2) This section shall not apply to the treatment specified in section 58, 59 or 60.*

# *MX v. Health Service Executive* High Court, 23<sup>rd</sup> November 2012

- ▶ “Treatment” includes the taking of blood samples
- ▶ Challenge to s 57’s absence of independent review
  - ▶ repugnant to Irish Constitution
  - ▶ incompatible with ECHR
- ▶ Reliance on CRPD - although not ratified by Ireland and ‘monist’
  - ▶ Guide to the Constitution - “a living instrument”
  - ▶ Relied on by ECtHR in interpreting ECHR
  - ▶ EU law - direct effect?

# *MX v. Health Service Executive*

## High Court, 23<sup>rd</sup> November 2012

### Irish Constitution

- “*personal capacity rights*” under the Constitution comprise the values of self-determination, bodily integrity, privacy, autonomy, dignity, and the right to equality before the law
- the broader range of constitutional “*personal capacity rights*” now fall to be informed by the Convention on the Rights of Persons with Disabilities, as well as the principles enunciated in the judgments of the European Court of Human Rights
- the administration of an involuntary drug regime and the taking of blood samples require, in the words of the European Court of Human Rights, “heightened scrutiny”

# *MX v. Health Service Executive*

## High Court, 23<sup>rd</sup> November 2012

### Irish Constitution

- a constitutional duty to ensure that the patient's views are heard, if necessary, through a representative in the form of "assisted" decision-making - e.g. through carers, social workers or, perhaps most appropriately, family members
- capacity should be assessed in a specific and tailored manner, i.e. in respect of particular types of decisions which fall to be made:

*"[a]s the ECtHR judgments point out ... such decision-making in this area should seek to apply a 'functional approach' to capacity, involving both an issue-specific and time-specific assessment of the plaintiff's decision-making ability. One determination should not be permanent; the process must refer to 'differences in capacity'. This involves analysing, not only differences in capacity between patients, but also variations in each patient's capacity at particular times. Only in that manner can their rights be properly vindicated in accordance with the constitutional requirement."*

# *MX v. Health Service Executive*

## High Court, 23<sup>rd</sup> November 2012

### Convention on the Rights of Persons with Disabilities

- ▶ *‘... the values enunciated in the Convention constitute a “paradigm-shift” in the manner in which persons with disabilities are to be treated by, and before, the law’ (para.30)*
- ▶ Of particular relevance to the case were Articles 12(1) and (2) of the CRPD which provide:
  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.*
- ▶ EU law - has the CRPD direct effect?

# *“Paradigm shift”*

## *Academic commentary*

*Attitudinal change is a central element of progress recognising the paradigm shift from the paternalistic system to one where persons with disabilities have rights on an equal basis with others as provided for in the Convention on the Rights of Persons with Disabilities, and particularly Article 12 on legal capacity. One commentator says that Article 12 ‘... lies at the very heart of the revolution in disability - treating people as “subjects” and not as “objects”.*

‘Legal Capacity Law Reform in Europe: An Urgent Challenge’, Mary Keys (founding member of the Centre for Disability Law and Policy Research at the School of Law in NUI Galway), published in European Yearbook of Disability Law, Volume 1, 2009, pages 59-88, the extract being at page 61.



# *“Paradigm shift”*

## *Academic commentary*

*At the heart of the movement behind the development of the CRPD lies a significantly changed understanding of disability. Traditionally, disability was seen through medical criteria and deviation from the norm. This perception stems from the belief that disability in itself is an inhibitor to equality when people cannot perform at a ‘normal’ standard and that disabled persons need to overcome their disability in order to participate fully in society ...*

*In contrast to the medical model, the social model of disability does not perceive the individual impairment, but the physical and social environment, as cause for exclusion. The social model recognises that it is society that needs to adapt in order to allow disabled individuals to participate in society and to enjoy their rights.*

*The CRPD has taken on this significant paradigm shift in the understanding of disability; it recognises that ‘disability resides in society, not in the person’. The CRPD also includes many measures as to how to achieve the integration of persons with disabilities and sets up obligations on States Parties to facilitate disabled persons’ inclusion into mainstream society.*

# *“Paradigm shift”*

## *Academic commentary*

*Read in the context of mental health care, [Article 12.4 of the CRPD] represents a summary of the essential elements of an appropriate approach to medical decision-making processes. The approach is based on the fundamental assumption that persons with disabilities have capacity, and that any suspension of legal capacity should be temporary, for the shortest time possible and subject to regular review. Second, it prioritises the exercise of personal self-determination by privileging the will and preferences of the person concerned. Significantly, the prioritisation of the will and preferences of persons with disabilities are seen as carrying weight throughout the decision-making process, and continue to have relevance even where a determination of incapacity is made. Finally, the approach recognises that decision-making processes involving vulnerable persons may be unduly coloured by the interests of others.*

# Article 12 CRPD

## Equal Recognition before the Law

Requires:

- ▶ recognition of persons with disabilities as equal to others before the law;
- ▶ in particular, recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- ▶ appropriate supports in order to enable persons with disabilities to exercise their legal capacity;

# Article 12 CRPD

## Equal Recognition before the Law

- ▶ effective safeguards for the exercise of legal capacity to ensure that decisions are made free of conflicts of interest or undue pressure;
- ▶ proportionate and “tailored” decisions;
- ▶ that any restriction on the exercise of legal capacity be “for the shortest time possible”;
- ▶ regular review by a competent, independent and impartial authority or judicial body of decisions impinging on the exercise of legal capacity.

# CRPD - direct effect?

## Applicant's submissions

- ▶ Mixed agreement - competence is mixed between the EU and Member States: Declaration pursuant to Article 44(1) of the CRPD.
- ▶ If the CRPD creates rights and obligations in a field covered in large measure by EU legislation, then there is an EU interest that both the EU institutions and its Member States comply with the commitments entered into under the CRPD: *Commission v. France*, Case C-239/03, [2004] ECR I-09352.

# CRPD - direct effect?

## Applicant's submissions

Commission v. France, Case C-239/03, [2004] ECR I-09352

25. *In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9, and Case C-13/00 Commission v Ireland [2002] ECR I-2943, paragraph 14).*

26. *From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Demirel, cited above, paragraph 11, and Commission V Ireland, cited above, paragraph 15).*

# CRPD - direct effect?

## Applicant's submissions

Commission v. France, Case C-239/03, [2004] ECR I-09352

27. In the present case, the provisions of the Convention and the Protocol without doubt cover a field which falls in large measure within Community competence.

28. Environmental protection, which is the subject-matter of the Convention and the Protocol, is in very large measure regulated by Community legislation, including with regard to the protection of waters against pollution (see, in particular, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p. 40), Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1) and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1)).

29. Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments.

# CRPD - direct effect?

## Applicant's submissions

- ▶ The CRPD's main objective is equal treatment and the prohibition of discrimination, an area in large measure covered by EU law - see, for example, Directive 2000/43/EC, Directive 2000/78/EC, Directive 2002/73/EC and Directive 97/80/EC.
- ▶ Article 12 of the CRPD creates rights and obligations in a field in large measure covered by EU law. Its purpose, which is mandatory, is set out in Article 12(2): *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
- ▶ Thus, Member States are obliged to give force to Article 12 as part of their obligations under the Union's legal order to respect equal treatment of citizens and prohibit discrimination on the grounds of disability.



# CRPD - direct effect?

## Applicant's submissions

- ▶ The Court of Justice has adopted a “monist” approach to international agreements, i.e. they have legal effect in the EU legal order and do not require further acts of implementation: see *Haegeman v. Belgium*, Case 181/73, para 5.
- ▶ Article 216(2) of the TFEU provides that the international agreements concluded by the Union are binding for both the Union institutions and the Member States.

# CRPD - direct effect?

## Applicant's submissions

- ▶ Under certain conditions international agreements can be invoked before a court by an individual if there is direct effect: *Demirel*, Case 12/86.
- ▶ In order for there to be direct effect, the provisions relied on must be sufficiently clear, precise and unconditional. In *Demirel*, the Court of Justice stated:

*14. A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.*

# CRPD - direct effect?

## Applicant's submissions

- ▶ The terms of Article 12 of CRPD are clear, precise and unconditional - in particular, the provision in para 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 ... regular review by a competent, independent and impartial authority or judicial body.”*
- ▶ So, the applicant submitted that she could rely on Article 12 of the CRPD as directly effective in Irish law, in respect of decisions which hold that she lacks legal capacity to consent to, or refuse, treatment, in that such decisions must be subject to regular review by a competent, independent and impartial authority or judicial body.

# CRPD - direct effect?

## Attorney General's submissions

- ▶ Article 12 CRPD does not fall within EU competence nor does it fall within a field “in large measure” covered by EU law”
- ▶ Article 12 is not sufficiently clear, precise and unconditional as to be of direct effect.

# CRPD - direct effect?

## Attorney General's submissions

Does Art 12 fall within EU competence?

- ▶ Council Decision 2010/48 sets out EU competence in respect of the provisions of the CRPD.
- ▶ Annex II lists the secondary legislation “*which refer to matters governed by the CRPD*”.
- ▶ European Foundation Centre report 2010 - includes analysis of Decision 2010/48 and Annex II.
- ▶ EFC report concludes:
  - **General provisions:**  
Arts 1, 3, 4, 5, 6, 7 and 9: EU & MS
  - **Substantive provisions**  
Arts 12, 13, 16, 17, 29: MS only  
Art 24: MS & EU supplementary competence  
Arts 19, 27, 31, 32 and 33: EU & MS

# CRPD - direct effect?

## Attorney General's submissions

### Does Art 12 fall within EU competence?

- ▶ During the ratification process, some MS issued reservations and interpretative declarations re Art 12.
- ▶ *Lesoochránárske Zoskupenie*, C-240/09, 8<sup>th</sup> March, 2011 (CJEU).
- ▶ Directives 2000/43, 2002/73, 97/80 and 2000/78 are “contextually and substantively very far removed from issues of direct relevance to the legal capacity, detention and treatment of persons with a mental disorder”.

# CRPD - direct effect?

## Attorney General's submissions

Is Art 12 capable of direct applicability?

▶ No, because it requires “a subsequent measure” in domestic law for effect: *Demirel*; *Lesoochranárske*, para 44.

▶ EFC Report, page 31:

*“As regards the UN CRPD, all provisions are directed to States Parties and none seem to be clear and unconditional. It is therefore unlikely that any specific Articles could have direct effect in the European Legal Order.”*

▶ Controversy over meaning and effect of Article 12 - does it permit any form of “substituted decision-making”?

*“ ... it is going to be a difficult matter for the EU to facilitate agreement among the MS about how this provision is to be implemented.”*

# CRPD - direct effect?

High Court ruling, 23<sup>rd</sup> November 2012

- ▶ Held: Article 12 is solely within the competence of the Member States -
  - EFC report
  - Directives 2000/43, 2002/83 and 97/80 are not “*in the relevant particulars, comparable to the questions of legal capacity, or to the detention and treatment of persons in the category of the [applicant]*”
  
- ▶ “*As far as the present case goes, it has not been shown that the right to equal treatment, as enshrined in the UNCRPD, is presently part of the EU’s legal order such that Article 12 UNCRPD creates directly enforceable rights or obligations.*”



## *E.T. v. Mental Health (Review Board) ...* High Court, January 2012

- ▶ Intellectual disability
- ▶ Investigation into alleged sexual offences in October 2005
- ▶ Charged in May 2007
- ▶ Held unfit to be tried, January 2009
- ▶ Detained in Central Mental Hospital since January 2009
- ▶ Does not require “in-patient “treatment, only supervision
- ▶ Supervised residential accommodation is appropriate

# *E.T. v. Mental Health (Review Board) ...*

## *High Court, January 2013*

### ▶ Article 2 CRPD:

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

### ▶ Article 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 this Convention, including by provision of reasonable accommodation.*

## *E.T. v. Mental Health (Review Board) ...* High Court, January 2013

### ► Article 19 CRPD:

*States Parties to this 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 ...*

*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 ...*

# Article 19 CRPD

## “Living independently and being included in the community”

- ▶ EFC Report - Art 19: EU & MS
- ▶ The EU’s Disability Strategy - the European Commission will promote the transition from institutional to community-based care by: *“...using Structural Funds and the Rural Development Fund to support the development of community based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people.”*
- ▶ See also the Council of the European Union, 20 June 2011, Soc 585 COHOM 174 MI 317, confirming its support for the Disability Strategy.
- ▶ *The European Union and the Right to Community Living: Structural Funds and the European Union’s Obligations under the Convention on the Rights of Persons with Disabilities*, Open Society Foundations, May 2012.

# Article 19 CRPD

## “Living independently and being included in the community”

- ▶ *The European Union and the Right to Community Living: Structural Funds and the European Union’s Obligations under the Convention on the Rights of Persons with Disabilities*, Open Society Foundations, May 2012
- the use of Structural Funds by some EU Member States in Central and Eastern Europe to build new, or renovate existing, long-stay institutions for people with disabilities, rather than develop alternative services that promote community living, is contrary to EU law
- *“because continued investment in institutionalization is a misuse of the entire purpose of Structural Funds and contrary to the underlying purpose of the CRPD and, in particular, to the terms of CRPD Articles 5 and 19”*
- *“the consequences of institutionalization ... are clearly in breach of Article 8 of the ECHR, as well as Article 14 taken in conjunction with Article 8”*