

The Legal Capacity of Persons with Disabilities in the light of Article 12 of the UN Convention on the Rights of Persons with Disabilities

Phil Fennell

Professor of Law

Cardiff Law School

States' Obligations Under the CPRD

- Article 4 Obligation of States “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”
- Must “refrain from engaging in any act or practice that is inconsistent” with the Convention and “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the ... Convention”
- Must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

Purpose and Scope of the CPRD

- Article 1 The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.
- Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.
- Includes mental disorder/psychosocial disability
- Inclusive not exhaustive - Description rather than a definition.
- <http://www.un.org/disabilities/convention/conventionfull.shtml>

Article 3 Principles

- The principles of the present Convention shall be:
- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women;
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 33

- Duty of States to designate one or more focal points within government for implementation of the present Convention
- To give due consideration to the establishment or designation of a coordination mechanism.
- In accordance with their legal and administrative systems to provide one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation
- Duty to ensure that civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Optional Protocol

- Article 1 A State Party to the present Protocol (“State Party”) recognizes the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

Need for Comprehensive Review of Existing Law

- In order to adequately implement the Convention, one of the first steps that States need to undertake is a comprehensive review of the national legislation and policy framework.
- **ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL**
- **Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, para 30.**
- <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>

Equal Access to Legal Protection

- Article 5(1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- 5(2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- See *Dordevic v Croatia* 24 July 2012 Breach of Arts 3, 8 and 13 ECHR also UNCRPD Arts 15 torture or inhuman or degrading treatment, Art 16 freedom from exploitation violence or abuse Art 17 integrity of the person.

Article 12: Capacity

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life
- 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity
- 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests
- The paradigm shift Substituted to supported decision-making.

Article 13 Access to justice

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

Article 14: Liberty and Security of the Person

- 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - Enjoy the right to liberty and security of person;
 - 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 this Convention, including by provision of reasonable accommodation.
- ‘The paradigm shift’ Detention de-linked from the presence of mental disorder.

The UN and the European Convention Paradigms

- P Fennell and U Khaliq 'Conflicting or Complementary Obligations: the UN Disability Rights Convention, the European Convention on Human Rights and English Law (2011) EHLR 662-674.
- European Convention Paradigm based on objective medical evidence of a mental disorder of a nature or degree warranting deprivation of liberty/ deprivation of capacity Development of Strasbourg jurisprudence governing deprivation/restoration of capacity. Acceptance of substitute decision-making and deprivation of liberty on grounds of mental disorder provided the intervention is a proportionate response and a last resort. Strasbourg Court uses UNCRPD to support these developments.

The UNCRPD and the European Court of Human Rights

- *Shtukaturv v Russia* judgment of 27 March 2008
- 71. In a number of previous cases (concerning compulsory confinement in a hospital) the Court confirmed that a person of unsound mind must be allowed to be heard either in person or, where necessary, through some form of representation – see, for example, *Winterwerp*. In *Winterwerp* the applicant's freedom was at stake. However, in the present case the outcome of the proceedings was at least equally important for the applicant: his personal autonomy in almost all areas of life was at issue, including the eventual limitation of his liberty.
- 72. Further, the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity. Court found a violation of Article 6

The UNCRPD and the European Court of Human Rights

- *Shtukaturov v Russia* judgment of 27 March 2008
- Deprivation of legal capacity amounts to an interference with the private life of the applicant. Court did not consider whether a legitimate aim pursued as it decided that the interference was disproportionate.
- 88. At the same time, the margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life.
- 89. Further, the Court reiterates that, whilst Article 8 of the Convention contains no explicit procedural requirements, “the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8”. The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism

The UNCRPD and the European Court of Human Rights

- *Shtukaturov v Russia* (contd) Factors reducing Art 8 margin of appreciation. 90. Interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life.
- 91. Procedurally flawed Applicant did not take part in the court proceedings and was not even examined by the judge in person. Unable to challenge the judgment, since the City Court refused to examine his appeal. In sum, his participation in the decision-making process was reduced to zero. The Court particularly struck by the fact that the only hearing on the merits in the applicant's case lasted ten minutes. In such circumstances it cannot be said that the judge had “had the benefit of direct contact with the persons concerned”, which normally would call for judicial restraint on the part of this Court.
- 94. [I]n the Court's opinion the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with cases on deprivation of liberty, in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure. Breach of Article 8.
- 108. The fact that the applicant lacked *de jure* legal capacity to decide matters for himself does not necessarily mean that he was *de facto* unable to understand his situation.

The UNCRPD and the European Court of Human Rights

- In *Glor v Switzerland* 30 April 2009 applicant partially disabled (Type 1 diabetes) and disputed payment of a tax of 477 Euros instead of doing national service. Swiss did not allow disabled people to do alternative forms of national service. This reserved for conscientious objectors.
- Court referred at para 53 to the ‘European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment (see, for example the recommendation on full social inclusion of persons with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, or the United Nations Convention on the Rights of Persons with Disabilities).
- At para 80 held that ‘there is no doubt that the scope of (Art 14 ECHR) includes discrimination based on disability’
- Found applicant to have been the victim of discriminatory treatment. Violation of Article 14 in conjunction with Article 8 of the Convention.

The UNCRPD and the European Court of Human Rights

- *Kiss v Hungary* Judgment of 20 May 2010 The applicant alleged that his exclusion – required by the Constitution itself – from the electoral register solely on the strength of his placement under partial guardianship amounted to a violation of Article 3 of Protocol No. 1, read alone or in conjunction with Articles 13 and 14 of the Convention
- At Para 14 the Court referred to the CRPD, which was ratified by Hungary on 20 July 2007. Referred to Article 12 and Article 29 which provides that “States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. Also referred at para 15 to Council of Europe Recommendation R(99)4 on Principles Concerning the Legal Protection of Incapable Adults which provides as follows: **Principle 3 – Maximum preservation of capacity**
- “... 2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.”

The UNCRPD and the European Court of Human Rights

- *Kiss v Hungary (contd)*.
- 43. The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing ... 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. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs
- Para 44 The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny. This approach is reflected in other instruments of international law, referred to above (paragraphs 14-17). The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote. There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.

The UNCRPD and the European Court of Human Rights

- *Stanev v Bulgaria* 17 January 2012 Applicant complained about his placement in a social care home for people with mental disorders and his inability to obtain permission to leave the home (Article 5 §§ 1, 4 and 5 of the Convention). Relying on Article 3, taken alone and in conjunction with Article 13, he further complained about the living conditions in the home. He also submitted that he had no access to a court to seek release from partial guardianship (Article 6 of the Convention). Lastly, he alleged that the restrictions resulting from the guardianship regime, including his placement in the home, infringed his right to respect for his private life within the meaning of Article 8, taken alone and in conjunction with Article 13 of the Convention.
- In November 2000 a Bulgarian court declared the applicant to be partially incapacitated on the ground that he had been suffering from simple schizophrenia since 1975 and his ability to manage his own affairs and interests and to realise the consequences of his own acts had been impaired. The court found that the applicant's condition was not so serious as to warrant a declaration of total incapacity. took into account an expert medical report produced in the course of the proceedings and interviewed the applicant. Council officer appointed to act as his guardian and council officer placed him in a care home in December 2002, 400km away from his home. In 2005 the director of the social care home appointed as the applicant's guardian.

The UNCRPD and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) Court referred at paras 72 and 73 to Articles 12 and 14 of the The United Nations CRPD signed by Bulgaria on 27 September 2007 but yet to be ratified at the date of the hearing.
- Also referred to Council of Europe Principles concerning the legal protection of incapable adults”, Recommendation No. R (99) 4:
 - **Principle 2 – Flexibility in legal response**
 - **Principle 3 – Maximum reservation of capacity**
 - **Principle 6 – Proportionality**
 - **Principle 13 – Right to be heard in person**
 - **Principle 14 – Duration review and appeal**

The UNCRPD and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) Court also referred to CPT's conclusion that conditions in the care home had created a situation which could be said to amount to inhuman and degrading treatment. It requested the Bulgarian authorities to replace the Pastra social care home as a matter of urgency. In their response of 13 February 2004 the Bulgarian authorities acknowledged that the home was not in conformity with European care standards. They stated that it would be closed as a priority and that the residents would be transferred to other institutions.

The UNCRPD and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) 150. Under domestic law, the guardian of a person partially lacking legal capacity is not empowered to take legal steps on that person's behalf. Any contracts drawn up in such cases are valid only when signed together by the guardian and the person under partial guardianship (see paragraph 42 above). The Court therefore concludes that the decision by the applicant's guardian R.P. to place him in a social care home for people with mental disorders without having obtained his prior consent was invalid under Bulgarian law. This conclusion is in itself sufficient for the Court to establish that the applicant's deprivation of liberty was contrary to Article 5.
- Para 156. Although ostensible grounds of deprivation were social care, which falls outside Art 5(a)-(f), Court examined the case under 5(1)(e). More than two years elapsed between the expert psychiatric assessment relied on by the authorities and the applicant's placement in the home, during which time his guardian did not check whether there had been any change in his condition and did not meet or consult him... 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).

The UNCRPD and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) para 157. Mental disorder of a kind or degree. In the present case, however, it has not been established that the applicant posed a danger to himself or to others, for example because of his psychiatric condition; the simple assertion by certain witnesses that he became aggressive when he drank (see paragraph 10 above) cannot suffice for this purpose. Nor have the authorities reported any acts of violence on the applicant's part during his time in the Pastra social care home.
- Para 158 Also no assessment of whether the disorders warranting the applicant's confinement still persisted.
- Breach of Article 5(4) because no direct opportunity to seek review of lawfulness of detention.
- Breach of Article 5(5) because no enforceable right to compensation for breach of rights under Arts 5(1) and 5(4).

The UNCRC and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) Complaint of breach of Articles 3 and 13
- Paras 212-213 the living conditions to which the applicant was exposed during a period of approximately seven years amounted to degrading treatment. Breach of Article 3.
- 220. the Court considers that, even assuming that, as a result of the remedy of applying for restoration of capacity, the applicant had been able to have his legal capacity restored and to leave the home, he would not have been awarded any compensation for his treatment during his placement there. Accordingly, the remedy in question did not afford appropriate redress.
- 221. There has therefore been a violation of Article 13 of the Convention, taken in conjunction with Article 3.

The UNCRC and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) Alleged Violation of Article 6 Para 233. None of the parties disputed the applicability of Article 6 to proceedings for restoration of legal capacity.
- Stanev argued that that he had been unable personally to institute proceedings for restoration of his legal capacity – Bulgarian government relied on a 1980 Supreme Court decision. Strasbourg Court found (at para 237) that the need to seek the intervention of the public prosecutor is scarcely reconcilable with direct access to court for persons under partial guardianship in so far as the decision to intervene is left to the prosecutor's discretion. It follows that the Supreme Court's 1980 decision cannot be said to have clearly affirmed the existence of such access in Bulgarian law.

The UNCRPD and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) para 241. In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see also *Shtukaturov*, cited above, § 71). The Court therefore considers that this right is one of the fundamental procedural rights for the protection of those who have been partially deprived of legal capacity. It follows that such persons should in principle enjoy direct access to the courts in this sphere.
- 242. However, the State remains free to determine the procedure by which such direct access is to be realised. At the same time, the Court considers that it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications. Nevertheless, it seems clear that this problem may be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the frequency with which applications may be made or introducing a system for prior examination of their admissibility on the basis of the file.

The UNCRC and the European Court of Human Rights

- *Stanev v Bulgaria* (contd) 244. The Court is obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible. It refers in this connection to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and to Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, which recommend that adequate procedural safeguards be put in place to protect legally incapacitated persons to the greatest extent possible, to ensure periodic reviews of their status and to make appropriate remedies available.
- 245. In the light of the foregoing, in particular the trends emerging in national legislation and the relevant international instruments, the Court considers that Article 6(1) of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable, as is the applicant's case, has direct access to a court to seek restoration of his or her legal capacity.
- 246. Direct access of this kind is not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation. Therefore Article 6 has been breached.

The UNCRPD and the European Court of Human Rights

- *ZH v Hungary* 8 November 2012 Applicant deaf and unable to speak and had medium-grade intellectual disability. Also illiterate. He alleged, in particular, that on account of his disabilities, he could not benefit from proper information about the reasons for his arrest, in breach of Article 5(2), and his subsequent incarceration amounted to inhuman and degrading treatment infringing Article 3. MDAC Intervened and referred to Articles 2, 13 and 14 of the CRPD
- Article 2 definition of “Reasonable accommodation” meaning necessary and appropriate modifications 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; ...”
- **Article 13 - Access to justice** “1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”
- **Article 14 - Liberty and security of the person** “2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

The UNCRPD and the European Court of Human Rights

- *ZH v Hungary (contd)*
- *Para 31.* Given that the applicant undoubtedly belongs to a particularly vulnerable group and that as such he should have benefited from reasonable steps on the side of the authorities to prevent situations likely to result in inhuman and degrading treatment, the Court considers that it was incumbent on the Government to prove that the authorities took the requisite measures. This redistribution of the burden of proof is analogous to the manner in which the Court examines situations where an individual is taken into police custody in good health but is found to be injured at the time of release, so that it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention.
- 32. Court considers in particular that the inevitable feeling of isolation and helplessness flowing from the applicant's disabilities, coupled with the presumable lack of comprehension of his own situation and of that of the prison order, must have caused the applicant to experience anguish and inferiority attaining the threshold of inhuman and degrading treatment, especially in the face of the fact that he had been severed from the only person (his mother) with whom he could effectively communicate. Moreover, while the applicant's allegations about being molested by other inmates have not been supported by evidence, the Court would add that had this been the case, the applicant would have faced significant difficulties in bringing such incidents to the wardens' attention, which may have resulted in fear and the feeling of being exposed to abuse.
- Inhuman and Degrading Treatment contrary to Art 3.
- Violation of Art 5(2) because no 'reasonable accommodation' see Arts 2, 13, 14 of the CRPD

The UNCRPD and the European Court of Human Rights

- *Kedzior v Poland* 16 October 2012 On 22 December 2000 the applicant was partly deprived of his legal capacity by a court because of his mental disorder, as he had been diagnosed with schizophrenia in 2001. In 2001 the Lubaczów District Court appointed his brother, Mr Zbigniew Kędzior, as his guardian. Subsequently, the guardian applied to the court to have the order varied and to have the applicant declared totally incapacitated. Alleged breach of Article 5.
- 68.-70. Court found breach of Art 5(1) because deprivation of liberty had not been authorised in accordance with a procedure prescribed by law. Purpose of the 2001 medical report was not to examine whether the applicant's state of health required him to be placed in a home for people with mental disorders, but solely to determine the issue of his legal protection. Also no periodic psychiatric examination ... The regulatory framework for placing in social care homes persons, like the applicant, who have been totally deprived of their legal capacity, did not provide the necessary safeguards at the material time to comply with Art 5(1).

The UNCRPD and the European Court of Human Rights

- *Kedzior v Poland* 16 October 2012 (contd) Alleged breach of Article 5(4)
- 75. Article 5(4) requires proceedings of a judicial character. They need not always be attended by the same guarantees as those required under Article 6(1) for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; see also *Stanev*, cited above, § 171).
- 76. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances where the applicant's placement in the care home has been instigated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement by the courts (see *D.D. v. Lithuania*, cited above, § 164). Violation of Art 5(4)

The UNCRPD and the European Court of Human Rights

- *Kedzior v Poland* (contd) Alleged breach of Art 6 in that applicant had been prevented from directly applying to a court for restoration of his legal capacity, in spite of the Constitutional Court's judgment finding that the relevant provisions had been unconstitutional.
- 85. The Court has already held, in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6(1) of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity (see *Stanev*, para 245) where the Court observed that eighteen of the twenty national legal systems studied in 2011 provided for direct access to the courts for any partially incapacitated individuals wishing to have their status reviewed. In seventeen States such access was open even to those declared fully incapable (see *Stanev*, paras 95 and 243). This indicates that there is now a trend at European level towards granting legally incapacitated individuals direct access to the courts to seek restoration of their capacity.
- 88. The Court firstly observes that it is not called here to decide whether under the Convention the right of partially incapacitated persons to have a direct access to court, established in the *Stanev* judgment, should be extended to persons totally incapacitated. The question under consideration arose because the Polish Constitutional Court declared unconstitutional the domestic provision that barred persons deprived of their legal capacity from directly instituting proceedings to have a legal incapacitation order varied.
- 89. The right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty. Breach of Article 6 found. No separate issue under Article 8.

The UNCRPD and the European Court of Human Rights

- *Bures v Czech Republic* 18 October 2012
- Applicant alleged he was ill-treated in a sobering-up centre in violation of Article 3 of the Convention and detained in a psychiatric hospital in violation of Article 5 of the Convention.
- 95. both the European and national standards (see “Relevant domestic law” and “Relevant international standards” above) are unanimous in declaring that physical restraints can be used only exceptionally, as a matter of last resort and when their application is the only means available to prevent immediate or imminent harm to the patient or others.
- 96. In line with these standards, the Court considers that using restraints is a serious measure which must always be justified by preventing imminent harm to the patient or the surroundings and must be proportionate to such an aim.

The UNCRPD and the European Court of Human Rights

- *Bures v Czech Republic* (contd)
- 100. The Court thus concludes that even though it is up to the Government to justify the use of restraints on a detained person, it has failed to show that the use of restraints on the applicant was necessary and proportionate in the circumstances.
- 105. The records were far from satisfactory and it is evident that they undermined the proper establishment of the facts and hampered the domestic criminal investigation in the case.
- 106. Having regard to all the circumstances of the present case, the Court is of the view that the applicant has been subjected to inhuman and degrading treatment contrary to Article 3. Both a substantive and a procedural violation of Art 3 see also para 134.

The UNCRPD and the European Court of Human Rights

- *Sykora v Czech Republic* 22 November 2012
- Alleged violation of right to liberty and private life on account of removal of legal capacity and subsequent detention in a psychiatric hospital.
- 68. Guardian consented to the applicant's detention without ever meeting or even consulting the applicant. Moreover, it has never been explained why it would have been impossible or inappropriate for the guardian to consult the applicant before taking this decision, as referred to in principle 9 of R(99)4.
- 69. There were no other substantive safeguards protecting the applicant from detention than the guardian's consent, which was not sufficient - breach of Art 5(1).
- Para 83. Applicant's detention lasted twenty days, which cannot be considered too short to initiate judicial review
- 84. Domestic courts were not empowered to intervene in the applicant's psychiatric confinement, the applicant having been considered to be in the psychiatric hospital voluntarily because of the consent of his guardian.
- 85-86. There were no proceedings in which the lawfulness of the applicant's detention could have been determined and his release ordered. Therefore breach of Art 5(4).

The UNCRPD and the European Court of Human Rights

- *Sykora v Czech Republic* (contd)
- Alleged breach of Article 8
- 101. The removal of the applicant's legal capacity for two and a half years over a period of six years constituted an interference with his private life within the meaning of Article 8 of the Convention
- 103. Any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports
- Court did not consider whether the aim pursued was legitimate, but found that the interference was disproportionate, and that there had been serious breaches of procedure. Most notably, Sykora represented by court employees, and the Court considered (at 108) that given what was at stake for him proper legal representation, including contact between the representative and the applicant, was necessary or even crucial in order to ensure that the proceedings would be really adversarial and his legitimate interests protected .

The UNCRPD and the European Court of Human Rights

- *Sykora v Czech Republic* (contd)
- Applicant not notified of judgments. Court considered (at 110) that being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life. Whilst there may be circumstances in which it is appropriate not to serve a judgment on the person whose capacity is being limited or removed, no such reasons were given in the present case and, indeed, in the present case, when the applicant was aware of the judgment and was able to appeal, his appeal was successful.
- 111. – 113. The 2004 decision was based only on the opinion of an expert who last examined the applicant in 1998... The Court considers that the procedure on the basis of which the Municipal Court deprived the applicant of legal capacity suffered from serious deficiencies, and that the evidence on which the decision was based was not sufficiently reliable and conclusive... the interference with the applicant's private life was disproportionate to the legitimate aim pursued and there was a violation of Article 8

The UNCRPD and the European Court of Human Rights

- *Lashin v Russia* 22 January 2013
- 80. The Court accepts that depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure. In deciding whether legal capacity may be restored, and to what extent, the national authorities have a certain margin of appreciation. It is in the first place for the national courts to evaluate the evidence before them; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33; and *Shtukaturv v. Russia*, cited above, § 67).
- 81. That being said, the extent of the State's margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant's personal autonomy as in the present case (compare *X. and Y. v. Croatia*, no. 5193/09, § 102, 3 November 2011), the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure (see *Shtukaturv v. Russia*, cited above, § 91). Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see *Görgülü v. Germany*, no. 74969/01, § 52, 26 February 2004).
-

The UNCRPD and the European Court of Human Rights

- *Lashin v Russia (contd)*
- *Para 87.* Where the opinion of an expert is likely to play a decisive role in the proceedings, as in the case at hand, the expert's neutrality becomes an important requirement which should be given due consideration. Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention. In the Court's opinion an expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake.
- 91. In the present case the Court faces essentially the same situation as in *Shtukaturov*. On the one hand, it is clear that the applicant suffered from a serious and persistent mental disorder: he had delusory ideas, was a vexatious litigant, etc. On the other hand, the Serbskiy Institute report of 1999 did not refer to any particular incident of violent, self-destructive or otherwise grossly irresponsible behaviour on the part of the applicant since 1996, and did not allege that the applicant was completely unable to take care of himself.

The UNCRPD and the European Court of Human Rights

- *Lashin v Russia* (contd)
- 92. The Court is ready to admit that some measure of protection in respect of the applicant might have been advisable. However, the Russian Civil Code did not provide for any intermediate form of limitation of legal capacity for mentally ill persons – this existed only in respect of drug or alcohol addicts. Therefore, the domestic court in the present case, as in *Shtukaturov*, had no other choice than to apply and maintain full incapacity – the most stringent measure which meant total loss of autonomy in nearly all areas of life. That measure was, in the opinion of the Court and in the light of materials of the case, disproportionate to the legitimate aim pursued.
- 93. In sum, the confirmation of the applicant's incapacity status in 2002 based on the report of 2000 was not justified for at least two reasons: first, because no fresh assessment of the applicant's mental condition was made (either by the doctors, or by the court itself) and the applicant was not personally present in court, and, second, because it is doubtful whether the applicant's mental condition, as described in the report of 2000, required full incapacitation. Therefore, there was a breach of Article 8 of the Convention on that account.

The UNCRPD and the European Court of Human Rights

- In *Lashin* at paras 65-66 the court referred to the Council of Europe Principles concerning the legal protection of incapable adults”, Recommendation No. R (99) 4:
- **Principle 2 – Flexibility in legal response**
- **Principle 3 – Maximum reservation of capacity**
- **Principle 6 – Proportionality**
- **Principle 13 – Right to be heard in person**
- **Principle 14 – Duration review and appeal**

The UNCRPD and the European Court of Human Rights

- *Lashin v Russia* (contd) 66. The United Nations CRPD, which Russia signed on 24 September 2008 and ratified on 25 September 2012, provides in Article 12 (3) that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. Article 12 (4) stipulates:
- “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 ... 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. ...”
- Article 23 (a) of the CRPD establishes that “the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised.

The UNCRPD and the European Court of Human Rights

- *Mihailovs v Latvia* 22 January 2013 Applicant alleged that he had been held against his will in a State social care institution for more than ten years, that he could not obtain release, and that he had been fully dependent on his wife, who had been his guardian, had not represented his interests, and had opposed all attempts by him to defend his rights. Experts concluded on 19 April 2000 that he was not suffering from a mental illness. However, he was suffering from epilepsy, which was described as organic in nature with psychotic syndromes and symptoms conclusion was reached on the basis of the fact that he had had encephalitis, often had small (petit mal) and big (grand mal) seizures, obsessive thinking, mood changes with dysphoria, sullenness, vindictiveness, reduced reasoning and some other psychological findings. It was recommended that he be declared legally incapable. experts also noted that owing to his mental state the applicant was not fit to participate in the hearings or to provide adequate explanations.
- Court (at paras 62-64) referred to Articles 12 and 14 of the UNCRPD and to the Council of Europe principles concerning the legal protection of incapable adults R (99)4 and to Article 17 of Rec(2004)10 on protection of the human rights and dignity of persons with mental disorder.

The UNCRPD and the European Court of Human Rights

- *Mihailovs v Latvia (contd)* Court applied Article 17 of the 2004 Recommendation **Article 17 – Criteria for involuntary placement** 1. A person may be subject to involuntary placement only if all the following conditions are met:
 - i. the person has a mental disorder;
 - ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;
 - iii. the placement includes a therapeutic purpose;
 - iv. no less restrictive means of providing appropriate care are available;
 - v. the opinion of the person concerned has been taken into consideration.'
- 145. The Court has already noted that in certain circumstances the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of individuals capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny

The UNCRPD and the European Court of Human Rights

- Mihailovs was examined in April 2000, but not placed in the institution until January 2002. Para 146 any examination of the applicant's state of health carried out for the purposes of that decision cannot be considered as an "objective medical opinion" for deprivation of liberty taking place more than one year later, let alone an examination that did not establish the existence of a mental illness.
- 149. Other requirements of Article 5 § 1 (e) were not satisfied in the present case either. As regards the need to justify the placement by the severity of the disorder, the Court notes that it has not been established that at the material time the applicant posed any danger to himself or to others, for example because of his psychiatric condition. No information concerning his behaviour before he was placed in the unit. Mere fact that prior to his placement in the social care home he had been admitted to the psychiatric hospital insufficient in this regard. No evidence that he would not submit to treatment voluntarily. No consideration given to a possibility of treating the applicant as an outpatient or to other less restrictive means of social assistance and care. In the Court's view the domestic authorities should have taken a more careful approach in assessing whether or not the applicant's condition warranted his placement. Breach of Art 5(1)(e) and 5(4).

The UNCRPD and the European Court of Human Rights

- Compare *Mihailovs* with *Pleso v Hungary* 2 October 2012 In *Pleso* Court seemed to accept that detention in the interests of preventing deterioration in health could be lawful
- Para 66 The Court is of the view that where, as in this case, the issue is not whether there is an imminent danger to the person's health but rather whether medical treatment would improve his condition or the absence of such treatment would lead to a deterioration in that condition, it is incumbent on the authorities to strike a fair balance between the competing interests emanating, on the one hand, from society's responsibility to secure the best possible health care for those with diminished faculties (for example, because of lack of insight into their condition) and, on the other hand, from the individual's inalienable right to self-determination (including the right to refusal of hospitalisation or medical treatment, that is, his or her "right to be ill"). In other words, it is imperative to apply the principle of proportionality inherent in the structure of the provisions enshrining those Convention rights that are susceptible to restrictions.

The UNCRPD and the European Court of Human Rights

- *Pleso* Para 66 continued
- However, the Court finds that no true effort to achieve that fair balance was made in the case at issue. While aware that the practice in various European jurisdictions is divergent (see paragraph 34 above), the Court considers that, the core Convention right of personal liberty being at stake, the Contracting States' margin of appreciation cannot be construed as wide in this field. Largely sharing the views of the German Federal Constitutional Court (see paragraph 36 above), the Court stresses that involuntary hospitalisation may indeed be used only as a last resort for want of a less invasive alternative, and only if it carries true health benefits without imposing a disproportionate burden on the person concerned.

The UNCRPD and the European Court of Human Rights

- *Pleso* 68. It cannot therefore be said that the decision to deprive the applicant of his liberty was based on an assessment of all the relevant factors including the therapeutic prospects or the viability of less invasive alternatives, as required also by the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (see paragraph 38 above). The Court would note in this connection that the national law does not provide in this case for alternatives such as the postponement of a decision pending observation (see paragraph 23 above).
- 69. It follows from the above that the Court is not persuaded that the applicant's mental disorder was of a kind or degree warranting compulsory confinement. Therefore his detention fell short of the conditions assumed by Article 5 § 1 (e) of the Convention.

The UNCRPD and the European Court of Human Rights

- *RP v United Kingdom* 9 October 2012 RP 28 year old mother of a premature baby KP with multiple disabilities. RP had difficulty understanding and articulating the nature and extent of KP's health needs and refused to accept that she needed help to care properly for her. Care proceedings instituted. RP had a solicitor, but solicitor obtained expert evidence that RP lacked litigation capacity and so Official Solicitor invited to act as guardian ad litem.
- 65. In cases involving those with disabilities the Court has permitted the domestic courts a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned (see, for example, *Shtukurov v. Russia*, para 68, 27 March 2008). This is in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings. However, the Court has held that such measures should not affect the very essence of an applicant's right to a fair trial as guaranteed by Article 6(1) of the Convention. In assessing whether or not a particular measure was necessary, the Court will take into account all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant

The UNCRPD and the European Court of Human Rights

- *RP v United Kingdom* (contd) 66. It is clear that in the present case the proceedings were of the utmost importance to R.P., who stood to lose both custody of and access to her only child. Moreover, while the issue at stake was relatively straightforward – whether or not R.P. had the skills necessary to enable her successfully to parent K.P. – the evidence which would have to be considered before the issue could be addressed was not. In particular, the Court notes the significant quantity of expert reports, including expert medical and psychiatric reports, parenting assessment reports, and reports from contact sessions and observes the obvious difficulty an applicant with a learning disability would have in understanding both the content of these reports and the implications of the experts' findings.
- 67. In light of the above, and bearing in mind the requirement in the UN Convention that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, the Court considers that it was not only appropriate but also necessary for the United Kingdom to take measures to ensure that R.P.'s best interests were represented in the childcare proceedings. Indeed, in view of its existing case-law the Court considers that a failure to take measures to protect R.P.'s interests might in itself have amounted to a violation of Article 6 § 1 of the Convention

The UNCRPD and the European Court of Human Rights

- *RP v United Kingdom* (contd) 70. The Court considers that in order to safeguard R.P.'s rights under Article 6(1) of the Convention, it was imperative that a means existed whereby it was possible for her to challenge the Official Solicitor's appointment or the continuing need for his services. In this regard, the Court observes that the letter and leaflet which the Official Solicitor sent to R.P. informed her that if she was unhappy with the way her case was being conducted, she could speak to either S.C. or to the Official Solicitor, or she could contact a Complaint's Officer. Moreover, in his statement to the Court of Appeal the Official Solicitor indicated that R.P. could have applied to the court at any time to have him discharged. Alternatively, he indicated that if it had come to his attention that R.P. was asserting capacity, then he would have invited her to undergo further assessment. While the Court observes that these procedures fall short of a formal right of appeal, in view of the finding that R.P. lacked litigation capacity, it considers that they would have afforded her an appropriate and effective means by which to challenge the appointment or the continued need for the appointment of the Official Solicitor.

The UNCRPD and the European Court of Human Rights

- *RP v United Kingdom* (contd)
- 75. With regard to the role of the Official Solicitor in the legal proceedings, the Court recalls that he was to act “for the benefit of the protected party”. The Court has taken note of R.P.’s concerns about his focus in the present case on “what was best for K.P.”. However, the Court accepts that the best interests of K.P. were the touchstone by which the domestic courts would assess the case. Thus, in determining whether a case was arguable or not, it was necessary for the Official Solicitor to consider what was in K.P.’s best interests. Consequently, the Court does not consider that the fact the Official Solicitor “bore in mind” what was best for K.P. in deciding how to act amounted to a violation of R.P.’s rights under Article 6 § 1 of the Convention.
- 76. Moreover, the Court does not consider that “acting in R.P.’s best interests” required the Official Solicitor to advance any argument R.P. wished. On the contrary, it would not have been in R.P.’s – or in any party’s – best interests for the Official Solicitor to have delayed proceedings by advancing an unarguable case. Nevertheless, in view of what was at stake for R.P., the Court considers that in order to safeguard her rights under Article 6 § 1 of the Convention, it was imperative that her views regarding K.P.’s future be made known to the domestic court. It is clear that this did, in fact, occur as R.P.’s views were referenced both by the Official Solicitor in his statement to the court and by R.P.’s counsel at the hearing itself.

Role of Article 12 CRPD in the Case Law of the Strasbourg Court

- Decisions to remove capacity are determinations of civil rights and obligations covered by Article 6 ECHR and right to legal capacity an aspect of private life under Article 8 ECHR. Discrimination on grounds of disability contrary to Article 14 ECHR.
- Margin of appreciation under Article 8 reduced by requirement to follow Article 12 CRPD, but also Council of Europe Recommendation (99)4.
- Strasbourg Court has not accepted the Committee on the Rights of Persons with Disabilities version of the paradigm shift from substituted decision-making to supported decision-making.