



WRITTEN COMMENTS

submitted by the

MENTAL DISABILITY ADVOCACY CENTRE

M.P. v Poland

(Application no. 20416/13)

European Court of Human Rights

Submitted by fax and by mail

27 November 2015

Introduction

1. These written comments are submitted by the Mental Disability Advocacy Centre (MDAC) pursuant to leave granted by the President of the Court under Rule 44(3), Rules of Court, by way of letter dated 21 October 2015 and within the extended deadline granted by way of letter dated 6 November 2015.
2. Founded in 2002, MDAC is an international human rights NGO which is independent of all governments. It has participatory status with the Council of Europe, special consultative status with the United Nations Economic and Social Council and it has standing to lodge collective complaints under the European Social Charter. It works to advance the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities (mental disabilities). MDAC operates at the global level as well as regional and domestic levels in Europe and Africa. MDAC has previously served as a third party intervener in a number of cases before the European Court of Human Rights ('the Court'), including *Kedzior v. Poland* (Application No. 45026/07, judgment 16 October 2012), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (Application No. 47848/08, judgment 17 July 2014), *ZH v. Hungary* (Application No. 28973/11, judgment 8 November 2012) and *Blokhin v. Russia* (Application No. 47152/06). It seeks in this intervention to assist the Chamber, in accordance with the Rules of Court and the terms of the Fourth Section's Registrar's letters of 31 October 2014 and 6 November 2015.

I. Background Information: People with disabilities and access to justice

3. Intellectual disability (ID; F.70-F.79; ICD-10)¹ is a lifelong condition, affecting approximately 2.5% of the general population in well-developed countries, and characterised by a) onset during the developmental period (before 18 years of age); b) a significant impairment of intellectual functioning (normally a tested IQ score of ~ 75 or below on a standardised test); and c) significant impairments in adaptive functioning (such as communication skills, motor, social abilities).
4. Intellectual disability arises from a diverse range of genetic and/or medical impairments and social factors. People with intellectual disabilities (ID) are a heterogeneous group: many need support only with complex tasks (such as managing money, parenting children) while others need support with every aspect of life (eating, washing, dressing). Even in well-developed countries, the difficulties of people with IDs are exacerbated by exclusion from many of the opportunities that are available to the general population and limited understanding of their needs and how best to provide support.
5. Across Europe, people with intellectual and/or psycho-social disabilities disproportionately experience a variety of human rights violations, which segregate them from their communities. They are at a higher risk of becoming a victim of ill-treatment, exploitation and other forms of sexual, psychological or physical abuse.² As the Special Rapporteur on Torture noted, people with disabilities often find themselves in situations of powerlessness – due to their dependence on a caregiver, for example – and “in a given context, the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target for abuse.”³ Although there is limited research evidence available to justify the assertion that people with IDs are at increased risk of abuse, including sexual abuse, compared with the general population, of abuse, what is known is as follows:

¹ World Health Organisation: ICD-10 Classifications of Mental and Behavioural Disorder: Clinical Descriptions and Diagnostic Guidelines, 1992.

² World Health Organisation and World Bank: World Report on Disability, 2011, [59]; House of Lords and House of Commons Joint Committee on Human Rights: Seventh Report of Session 2008-08: *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*, 1, 2008, [68]; and Neta Ziv (2007), *Witnesses with Mental Disabilities: Accommodations and the Search for Truth — The Israeli Case*, *Disability Studies Quarterly*, 27 (4). 1.

³ UN Human Rights Council: Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/63/175,2008 [50].

- a) People with IDs are sometimes the victims of abuse, including sexual abuse,⁴ and, reflecting their need for support and their isolation from society, in many cases, this is by care-givers⁵;
 - b) There is no evidence that distressing psychological experiences have a less severe or shorter impact on people with IDs than on the rest of the population. Among people with IDs, as in the general population, this distress can present as the symptoms of Post-Traumatic Stress Disorder (F 43.1, ICD-10)¹. Among those with more severe IDs and/or more limited communication skills, distress may take a different form such as behaviour that is unusual for the person or appears to reflect a loss of skills (re-enacting their experience, urinary or faecal incontinence).⁶
 - c) As a consequence of their impairments and widely-held beliefs that little can be accomplished by involving the criminal justice system, it can be difficult for people with IDs to report their experiences. They are often dependent, instead, on the observations of those who know them well, such as family members and other carers. Any behaviour that is unusual for the person should be reported immediately to relevant health and social care practitioners for investigation. If there is any possibility that the person with an ID has been the victim of a criminal offence, a report should be made to the police.
 - d) Unfortunately, care-givers do not always report, or report immediately, the possible victimisation of people with IDs. The reasons vary but paid care-givers may feel distressed about the putative victimisation. They may be concerned about the impact on their employment, particularly if the alleged abuser is a senior member of staff. Family members may also feel very distressed. They may feel very guilty if they have agreed to the placement of someone with ID where they may have been victimised by someone in a position of trust, such as a member of staff.⁷
6. We know that throughout Europe and beyond, justice systems are frequently inaccessible, inflexible and fail to uphold the rights of people with disabilities and provide remedies when these rights are violated. Abuses often remain unreported and even if they are reported, people with mental disabilities are frequently underserved by criminal justice systems. Once within the criminal justice system, their experience, particularly as victims of alleged sexual violence, can be especially problematic. People with disabilities are often intimidated and discouraged from fully participating due to complex rules of criminal procedure, difficulties in understanding legal terminology and formal and rigid codes of conduct.⁸ People with mental disabilities may not be able to communicate in words, meaning that it can be difficult for others to understand them. They may not be able to access information which others can understand and they may behave in ways with which justice professionals are unfamiliar. Their testimonies are often deemed incomprehensible or self-contradictory and are thus ignored by paternalistic justice systems. These barriers are exacerbated where necessary and appropriate modifications and adjustments are not provided to accommodate these characteristics. In order to address such recurrent problems, governments must ensure, through the provision of reasonable accommodations, that their justice systems are accessible to those with mental disabilities and that justice professionals are fully trained to facilitate access to justice. Legal principles both at the European and international level inform States of their obligations in this regard and provide them with guidance on how to comply with these obligations.

⁴ A.C. Rowsell, I.C.H. Clare, and G.H. Murphy, "The psychological impact of abuse on men and women with severe intellectual disabilities". *Journal of Applied Research in Intellectual Disabilities*, 26(4) (2013): 257-270

⁵ H. Brown, K. Stein and V. Turk, "The sexual abuse of adults with learning disabilities: report of a second two-year incidence survey", *Journal of Applied Research in Intellectual Disabilities*, 8 (1) (1995): 3-24.

⁶ G.H. Murphy, A.C. O'Callaghan, and I.C.H. Clare, "The impact of alleged abuse on behaviour in adults with severe intellectual disabilities". *Journal of Intellectual Disability Research*, 51(10) (2007): 741-749

⁷ A.C. O'Callaghan, G.H. Murphy, and I.C.H. Clare, "The impact of abuse on men and women with severe learning disabilities and their families", *British Journal of Learning Disabilities*, 31 (4) (2003): 175-180.

⁸ BIZCHUT, The Israel Human Rights Center for People with Disabilities, *The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice, Accommodations in the Criminal Process* (2013), 4.

II. Legal principles

A. The positive obligation to prevent torture, inhuman and degrading treatment: Article 3

a) **Prevention of torture, inhuman and degrading treatment at the European level**

7. Article 3 of the European Human Rights Convention (EHCR) provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". It is established law that Article 3 entails a positive obligation for a State to provide protection through its legal system against a person suffering such ill-treatment at the hands of others. One aspect of the duty is the provision of a legal system for bringing to justice those who commit serious acts of violence against others. This includes requiring States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.⁹
8. In *MC v. Bulgaria*, the European Court of Human Rights (ECtHR) held that Bulgaria had violated Article 3 by failing to establish and apply effectively a criminal justice system for punishing rape. The Court established that "any rigid approach to the prosecution of sexual offences (...) risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".¹⁰

b) **Prevention of torture, ill-treatment, violence and abuse at the United Nations level**

9. At the international level, the United Nations Convention on the Rights of Persons with Disabilities (CRPD)—a landmark international treaty ratified by 41 Council of Europe Member States—firmly protects people with disabilities from torture or cruel, inhuman or degrading treatment or punishment.¹¹ The CRPD—based on the lived experiences of people with disabilities subjected to violence and abuse both in institutional and community settings—requires States to take measures to protect them from exploitation, violence and abuse happening "both within and outside the home",¹² including in services provided in the community, such as day care centres. States are under the obligation "to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted."¹³

B. The right to access to justice for victims of crime: Articles 6 and 13

a) **The right to access to justice at the European level**

10. In international law, "access to justice" is an evolving concept. It has been described as enabling the "effective access to systems, procedures, information and locations used in the administration of justice."¹⁴ "Access to justice" is a fundamental principle of the rule of law. In procedural terms, it encapsulates the right to be able to access the mechanisms of justice, including the courts. This includes victims of crime having access to redress in the courts and criminal justice system of a Member State.

⁹ See *A. v. the United Kingdom*, Application No. judgment 23 September 1998 [22]; *Z and Others v. the United Kingdom* [GC], Application No. 29392/95, judgment 10 May 2001, [73-75]; and *E. and Others v. the United Kingdom*, Application No. 33218/96, judgment 26 November 2002.

¹⁰ *MC v. Bulgaria*, Application No. 39272/98, judgment 4 December 2003 [166].

¹¹ Article 15 of CRPD.

¹² Article 16(1) of the CRPD.

¹³ Article 16(5) of the CRPD.

¹⁴ Janet E. Lord et al. *Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities*, 2nd edition (Minneapolis: University of Minnesota Human Rights Centre, 2012).

11. Article 6 of the ECHR provides the right to a fair trial, which includes an obligation on States to ensure access to justice.¹⁵ Further, Article 13 of the ECHR establishes the right to an effective remedy at the domestic level. Access to remedies must be guaranteed on an equal basis to everyone without discrimination, according to Article 14 of the ECHR. And it is trite law that the rights enshrined in the ECHR are supposed to be practical and effective, as opposed to theoretical or illusory.¹⁶
12. The importance of access to the justice system is also underlined within EU law, by the specific protection afforded by Directive 2012/29/EU ('Protection of Victims of Crime Directive') of the European Parliament and of the Council, which establishes minimum standards on the rights, support and protection of victims of crime. The 'Protection of Victims of Crime Directive' seeks to ensure that victims, based on their personal characteristics including disability, both understand and can make themselves understood during criminal proceedings (linguistically or otherwise) and that authorities pro-actively assist victims to do so throughout criminal proceedings. Article 3 clarifies 'communication safeguards' and ensures both the right to understand and to be understood: "1. Member States shall take appropriate measures to assist victims to understand and to be understood from the first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority." Article 3, paragraph 2 is about practical aspects of giving victims particular information. It is intended to cover explicitly the personal situation of a victim regarding literacy, hearing, speech, sight impairment etc. "Member States shall ensure that communications with victims are given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood". Furthermore, Article 3, paragraph 3 gives victims the right to be accompanied by a person of their choice in their first contact with the authorities if they need assistance due to the impact of the crime or if the victim has difficulties understanding proceedings or to be understood. The purpose of this right is to practically assist the victim and to provide moral support when reporting a crime. This provision may also cover a person whom the victim has not explicitly chosen, but who has volunteered to help because of the victim's mental/physical state in relation to the crime (e.g. a taxi driver who finds a victim on the street or person helping a traumatised older person after a robbery).

b) *The right to access to justice at the United Nations level*

13. International legal standards equally require authorities to take measures and organise criminal justice systems so as to ensure the safety and well-being of victims and witnesses and to respect their rights. Access to justice is related to the rule of law and is so embedded within international law that it can be traced back to the advent of the modern human rights era. Article 8 of the UN Universal Declaration of Human Rights ("UDHR") states that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed to him by the constitution or by law."
14. As international human rights law has developed, so too has the guarantee of an effective remedy and access to justice for various marginalised sections of society. The CRPD acknowledges that people with disabilities may have personal barriers to accessing legal procedures for defending their rights, therefore it specifically requires that State Parties ensure effective access to justice on an equal basis with others for people with disabilities and a right to the provision of procedural and age-appropriate accommodations to facilitate such access.¹⁷ Further, Article 2 of the CRPD requires reasonable accommodation which it defines 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". Such accommodations ensure the rights to an effective remedy and access to justice by requiring careful and

¹⁵ *Golder v United Kingdom*, Application No. 4451/70, judgment 21 February 1975.

¹⁶ *Airey v. Ireland*, Application. No. 6289/73, judgment 9 October 1979 [24].

¹⁷ Article 13 of the CRPD.

tailored consideration and acceptance of witness testimony based on the individuals' circumstances as opposed to blanket rejection or dismissal of its probative weight.

15. Europe is not alone in recognising the importance of ensuring that everyone has equal access to courts. A body of international case law also acknowledges that victims of alleged crime have an equal right to access to the courts without discrimination.¹⁸

C. The right to protection from discrimination: Article 14

a) *The right to protection from discrimination at the European level*

16. Article 14 of the ECHR requires State Parties not to discriminate in areas which fall within the competency of the Convention. As set out above, the right of access to justice for victims of crime falls both within Articles 6 and 3 and everyone should be equally free to enjoy the protection of these rights without exception; this includes those who experience disabilities. "Equal treatment" is not however equivalent to "identical treatment"¹⁹; and this does not prohibit treating certain groups differently in order to correct "factual inequalities" between them and article 14 also encompasses a right to reasonable accommodation requiring positive action by the State.²⁰ Reasonable accommodation has been a feature of the Court's own jurisprudence to the extent that it upholds the right of individuals to non-discrimination and other rights by treating individuals in different circumstances differently.²¹ The result has been the finding of violations of the rights of people with disabilities for the failure by the State to take steps to provide alternatives or to adapt to the individual's circumstances and needs.²²
17. According to the Court's own jurisprudence, if the State fails to afford different treatment to overcome such inequalities²³ or fails to attempt to correct inequality through different treatment, this may in itself give rise to a breach of Article 14.²⁴ Furthermore, the Court has also acknowledged that there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment²⁵ - by the recognition and application of the reasonable accommodation principle under Article 14 of the European Convention.

b) *The right to protection from discrimination at the United Nations level*

18. The European definition of discrimination is broadly mirrored in the UN system's treatment of the same: the definition of discrimination is similar across the UN Conventions on human rights and refers to

¹⁸ See UN Human Rights Committee, General Comment 32: Right to equality before courts and tribunals and to a fair trial [8-11]; *Good v Republic of Botswana*, Application No. 313/05, decision 26 May 2010 (African Commission on Human and People's Rights) [163]; and *Rosendo Cantu et al v Mexico*, judgment of 31 August 2010 (Inter American Court of Human Rights) [184].

¹⁹ UN Human Rights Committee, General Comment No. 18: Non-discrimination, 2008 [2], [8].

²⁰ *Glor v Switzerland*, Application No. 13444/04, judgment 6 November 2009.

²¹ *Thlimmenos v. Greece*, Application No. 34369/97, judgment 6 April 2000 [44].

²² See for instance *Price v. the United Kingdom*, Application No. 33394/96, judgment 10 July 2001; *Khudobin v. Russia*, Application No. 59696/00, judgment 26 October 2006; *Xiros v. Greece*, Application No. 1033/07, judgment 9 September 2010; *Vasyukov v. Russia*, Application No. 2974/05, judgment 5 April 2011; *Vladimir Vasilyev v. Russia*, Application No. 28370/05, judgment 10 January 2012; *Artyunyan v. Russia*, Application No. 48977/09, judgment 10 January 2012; *Grzywaczewski v. Poland*, Application No. 18364/06, judgment 31 May 2012; *D.G. v. Poland*, Application No. 45705/07, judgment 12 February 2013. In each of these instances, the Court conducted a review of the measures taken by the authorities with respect to the specific circumstances and needs of the individual prisoners, persons with disabilities and/or persons with chronic illnesses. The Court concluded that the authorities failed to take measures to ensure they were accommodated in terms of accessible or adapted facilities nor did they have access to adequate medical care during their detention thereby leading the Court to find that the treatment surpassed the minimum severity necessary for a finding of Article 3 violations. These cases point to the fact that disabled prisoners were disadvantaged in comparison to their non-disabled inmates and the appropriate steps were not taken to remove that disadvantage which caused them suffering and distress beyond that associated with detention. In other words, the failure to provide reasonable accommodation to prisoners with disabilities resulted in them being subjected to inhuman and degrading treatment.

²³ *Thlimmenos v. Greece*, [GC], Application No. 34369/97, judgment 6 April 2000 [44].

²⁴ *Ibid.*; *Belgian Linguistics case*, Application No. 2126/64, judgment 23 July 1968; *Stec and Others v. the United Kingdom* [GC], Application No. 65731/01, judgment 12 April 2006 [51]; and *Horváth and Kiss v. Hungary*, Application No. 11146/11, judgment 29 January 2013 [101].

²⁵ *Glor v Switzerland* [53].

measures which have 'the purpose or effect of nullifying or impairing' the exercise of a right (and not necessarily the intent to do so).²⁶

19. The CRPD was ratified by Poland on the 25 September 2012. The CRPD defines discrimination in Article 2 as: "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."
20. This Court has recognised that the Convention and its Protocols are living instruments and should be interpreted in light of present-day conditions,²⁷ which means also in light of the prohibition of discrimination under the CRPD.²⁸

D. The requirement of non-discrimination in the context of access to justice

21. It is clear that in order to meet their positive obligations under Articles 3, 6, 13 and 14 Member States need to make reasonable and procedural accommodations to ensure that those with disabilities are not excluded from the protection of the justice system. The provision of reasonable, procedural and age appropriate accommodations to people with intellectual disabilities in judicial proceedings contributes to the fairness of these proceedings and aims to place people with disabilities in a position which is more equal to that of people without disabilities.

Interviewing people with intellectual disabilities

22. Research suggests that people with ID may have more difficulties than the general population in forensic interviews as a consequence of:
- a) Their cognitive impairments, associated with difficulties in communicating in words, dealing with concepts of time, and responding to complex questions;
 - b) Their experiences of discrimination, leading to anxiety or defensiveness, particularly in the presence of perceived authority figures, such as doctors, police and lawyers.
23. As a result of these factors, people with IDs are at increased risk of: (i) *Acquiescence*: saying 'yes' to forced choice 'yes'/'no' questions, regardless of their content,²⁹ particularly when they do not understand the content or phrasing of those questions;³⁰ (ii) *Compliance*: agreeing with instructions or suggestions from others regardless of their own views; and (iii) *Interrogative suggestibility*: this refers to (i) a tendency to be (mis)led by leading questions (questions that suggest the answer); and (ii) a tendency to change the initial responses following *perceived* negative feedback.³¹ People with IDs are more suggestible³² because of their susceptibility to misleading questions, rather than their tendency to change their initial

²⁶ See Human Rights Committee, General Comment 18: Non-discrimination [7]; and HRC Views on Communication No. 516/1992, decision 31 July 1995, concerning the Czech Republic [11.7]. A similar definition can be found in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of the International Convention on the Elimination of All Forms of Discrimination against Women.

²⁷ See *Marckx v. Belgium*, Application No. 6833/74, judgment 13 June 1979 [41] and many subsequent cases, such as *Vo v. France* [GC], Application No. 53924/00, judgment 8 July 2004 [82] and *Emonet and Others v. Switzerland*, Application no. 39051/03, judgment 13 December 2007 [66].

²⁸ *Glor v Switzerland*.

²⁹ I.C.H. Clare and G.H. Gudjonsson, "Interrogative suggestibility, confabulation, and acquiescence in people with mild learning disabilities: Implications for reliability during police interrogations", *British Journal of Clinical Psychology*, 32 (3) (1993): 295-301.

³⁰ G.H. Gudjonsson, G.H. Murphy and I.C.H. Clare, "Assessing the capacity of people with intellectual disabilities to be witnesses in court", *Psychological Medicine*, 30 (2) (2000): 307-314.

³¹ N.K. Clark and G.H. Gudjonsson, "Suggestibility in police interrogation: A social psychological model", *Social Behaviour*, 1 (1986): 83-104.

³² R. Milne, I.C.H. Clare and R. Bull, "Interrogative suggestibility among witnesses with mild intellectual disabilities: The use of an adaptation of the GSS", *Journal of Applied Research in Intellectual Disabilities*, 15 (1) (2002): 8-17.

responses.³³ The implication is that it is not necessarily safe to rely on information just because it is repeated. An individual may simply be restating an account that was 'shaped' by earlier questioning.

24. These factors do *not* mean that alleged victims with IDs cannot give statements to the police³⁴ or that they cannot be credible witnesses in court.³⁵ In some EU jurisdictions, for example England and Wales, guidance has been produced by Her Majesty's Government for 'achieving best evidence in criminal proceedings'.³⁶ While this is not mandatory, it is stated that significant departures from the best practice advocated may have to be justified in Court. According to this guidance:

- a) As soon as a report of alleged victimisation is made, a brief interview should be held to elicit information about what took place, where and when, and who was involved or otherwise present. Questions should be kept to a minimum since the aim of this interview is only to determine what action to take immediately, for example medical and forensic examinations. People with IDs may benefit from being able to present their initial accounts as drawings or through the use of dolls. If possible, this initial interview should be audio-recorded, or at least written down verbatim.
- b) Prior to any more formal interviewing, and subject to his or her consent, an assessment of the witness with ID should be carried out by someone, such as a psychologist, familiar with the condition in order to identify the person's skills in relation to an interview and support needs. Any formal interview should be video-recorded, so that both the questions and the answers are available for scrutiny. Where, for some reason, this is not possible, the questions put to the alleged victim and his or her answers should be written down verbatim, and signed. Transcripts are rarely adequate, because: (i) material is often omitted because its importance is not recognised and (ii) they rarely reflect the way people speak and so the Court will be ill-prepared to provide the support the witness needs to provide 'best evidence';
- c) The alleged victim should, subject to his or her wishes, have the support of someone he or she knows, in any interview, including a video interview,³⁵ to alleviate feelings of anxiety.

25. Where the responses from the alleged victim are limited, broad and general questions that are non-leading are most likely to produce the most accurate results ('What happened next?' rather than 'What did you do next?').³⁷ When asking about time, it is often helpful to provide an anchor, in terms of a meaningful event for the person ('Did that happen before lunch?' 'Was that after your birthday?' rather than 'At what time/day/date did that happen?').

26. A so-called "bench book" of equal treatment for all judicial office-holders on how to accommodate litigants, defendants and witnesses with disabilities was published by the Judicial Studies Board in 2005. The accommodations proposed for taking evidence from witnesses with mental disabilities include: speaking slowly and with pauses, using simple words, avoiding questions that can be answered with only "yes" or "no", refraining from asking suggestive or abstract questions, dealing with issues chronologically, explaining when a new topic is discussed and rephrasing misunderstood communications.³⁸

³³ I.C.H. Clare and G.H. Gudjonsson, "The vulnerability of suspects with intellectual disabilities during police interviews: A review and experimental study of decision-making", *Mental Handicap Research*, 8 (2) (1995): 110-128.

³⁴ I.C.H. Clare, G.H. Murphy and G.H. Gudjonsson, "Assessing the capacity of people with intellectual disabilities to be witnesses in court", *Psychological Medicine*, 30 (2) (2000): 307-314.

³⁵ G.H. Gudjonsson and J. Gunn, "The competence and reliability of a witness in a criminal court", *British Journal of Psychiatry*, 141 (7) (1982) 19-21.

³⁶ Ministry of Justice of the UK: *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures*, 2011.

³⁷ G.H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (London: Wiley & Sons, 1992).

³⁸ Judicial College, Judiciary of the United Kingdom, *Equal Treatment Bench Book*, 2005, available at: <http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book> (last accessed 23 November 2015) Section 7-6 [32-39].

Acting as a witness in Court

27. People with IDs may have difficulties in acting as witnesses. While there is little evidence available, they are likely to have a limited understanding of legal terminology, or of the roles of judges, lawyers and others officers of the Court; and, particularly if the defendant is someone who was in a position of authority or trust, may be intimidated by that person's presence. At the same time, there is evidence³⁹ that lawyers make few allowances for witnesses with ID: they ask questions that are as complex as those they ask other witnesses.
28. In England and Wales, the Government's guidance recommends⁴⁰ that witnesses of all kinds receive support from the same person before and during the trial process. This may include visits to the court where the trial is to be held, the provision of information, or the use of special books designed for people with IDs.⁴¹ Such support, which can be provided by police officers, or other professional staff, or by volunteers, must be carried out by someone who is independent and who is not involved in the preparation of the case; nor can discuss the details of the case.
29. In England and Wales, a number of supports ('special measures') at trial were introduced under the *Youth Justice & Criminal Evidence Act 1999* for victims and other witnesses who are defined under s. 16 as 'vulnerable' (such as child witnesses under 18 years of age; people with IDs or mental health problems) or under s. 17 as 'intimidated' (for example, alleged victims of sexual offences, domestic violence, trafficking). If they are agreed by the Court, these special measures can include, but are not limited to: (i) the use of screens to shield the witness from the defendant (s.26); (ii) the use of video-recorded interviews obtained before the trial as the witness' evidence-in-chief (s.27); and, for 'vulnerable' witnesses (iii) the appointment by the court of an intermediary to assist the witness to give evidence. The intermediary is allowed to explain questions or answers to enable them to be understood by the witness or questioner but without changing the substance of that evidence (s.29), and (iv) the use of communication aids that may be unfamiliar to the Court, such as Makaton signs (s.30). Anecdotal evidence suggests that these measures are helpful in promoting access to justice for alleged victims with IDs.
30. Training of professionals within justice systems is also crucial, as some of the significant barriers to accessing justice for people with disabilities flow from the attitudes of those involved in the administration of justice.⁴² Particularly in relation to people with intellectual disabilities or people with psycho-social disabilities, exclusionary attitudes are often the norm amongst lawyers, judges, clerks, court experts and others.⁴³ Therefore it is especially important that the CRPD explicitly obliges State Parties to provide appropriate training for those working in the field of administration of justice, including police and prison staff to ensure that stereotypes of people with disabilities do not inform the working of the court system.⁴⁴ The CRPD Committee has already recommended several State Parties to the CRPD to raise awareness on non-discrimination among members of the judiciary and court personnel including through training programmes on the concept of reasonable accommodation⁴⁵ and how it should be applied in practice.⁴⁶ In the U.K. in 2009, the High Court ruled that if a witness with a mental health condition is not given appropriate support but instead treated as an unreliable witness because of stereotyping or false

³⁹; C. Hatton, S.D. Johnson and M.R. Keibell, "Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?" *Legal and Criminological Psychology*, 9 (1) (2004) 23-25.

⁴⁰ Ministry of Justice of the UK: *Achieving Best Evidence in Criminal Proceedings* [4.19].

⁴¹ S.Hollins, C. Stone, V. Sinason, and C. Brighton, *Supporting Victims*, (London: www.booksbeyondwords, 2007).

⁴² See, for example, Clare Edwards et al., "Access to Justice for People with Disabilities as Victims of Crime in Ireland", University of Cork, February 2012, 127.

⁴³ Eilionaí Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Farnham: Ashgate, 2015), Chapter 3.

⁴⁴ Article 13(2) of the CRPD.

⁴⁵ Committee on the Rights of Persons with Disabilities, Concluding Observations: Tunisia, 13 May 2011, CRPD/C/TUN/CO/1 [13].

⁴⁶ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Gabon, 2 October 2015, CRPD/C/GAB/CO/1 [7].

assumptions, this may amount to a breach of the right to be free from degrading treatment: the court in its reasoning relied on Article 3 of the ECHR.⁴⁷

E. Comparative analysis in other jurisdictions

31. The need for reasonable accommodation in the consideration of witness testimony has been well recognised in other jurisdictions throughout the world. The Israeli Investigation and Testimony Procedural Act (Accommodations for Persons with Mental and Cognitive Disabilities) from 2005 ensures a wide range of reasonable accommodations are available for people with mental disabilities when they come into contact with the criminal justice process either as suspects/defendants or as victims or witnesses. Since it is important to provide accommodations at every stage of criminal proceedings, the Act covers questioning and interrogation by police and acts during procedures before court such as giving testimony or cross-examination. The Act acknowledges that “environmental factors – such as the type of questions presented to a witness, their framing, the setting in which they are asked – affect the capability of a witness with a disability to provide accurate information and thus affect her credibility.”⁴⁸ Therefore, when interrogating a person with mental disability, he or she must be questioned by a “special investigator”, who is a trained professional – a psychologist, a psychiatrist, a social worker or expert in criminology or a person trained in special education. Family members must be notified about the investigation and the person with cognitive disability can be accompanied by a person of his or her choice during the investigation. The investigation has to be video recorded or if not possible, documented by audio or manual recording. The role of the professionals mentioned above is essential at later stages of the proceedings as well. They act as mediators between the person with mental disability and the court: they assist the court in recommending what accommodations might be required during the proceedings and in interpreting the testimony and the behaviour of the person with disabilities. They might advise the court on how to frame a question in an easy-to-understand way, communicate with the witness through alternative and augmentative communication methods – such as pictures, board images or electronic devices – or explain to the court what a certain gesture, behaviour or expression means in the case of the person concerned.⁴⁹ Other accommodations might include giving witness testimony in a friendlier environment: rather than on the witness stand, in the judges’ chamber, without the presence of the defendant, without the official attire, or in the company of a person that the witness knows.⁵⁰ If the person cannot testify in person or it would harm her, video testimony is admissible.
32. In the Canada Evidence Act, there are provisions which permit evidence to be heard “by any way that enables the evidence to be intelligible” if a witness has difficulty communicating by reason of physical or mental disability.⁵¹ The Evidence Act also allows for a witness to give evidence as to the identity of an accused whom the witness is able to identify visually or in any other sensory manner.⁵²
33. In the United States of America the Department of Justice has prepared a guidebook for law enforcement officers, with specific instructions on dealing with victims with disabilities.⁵³ Furthermore, the Judicial Conference has adopted a policy whereby federal courts are required to provide reasonable accommodations to persons with communications disabilities.⁵⁴ Many federal courts have established specific procedures through which such requests for accommodations may be made.⁵⁵ Additionally, the

⁴⁷ (R (B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening) [2009] EWHC 106 (Admin) [2009] WLR (D) 25 QBD.)

⁴⁸ Neta Ziv, “Witnesses with Mental Disabilities”, *Disability Studies Quarterly* Vol. 27, No.4, (Fall 2007) 4.

⁴⁹ *Ibid*, 13-14.

⁵⁰ BIZCHUT, *The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice*, 15.

⁵¹ Canada, Evidence Act, RSC, 1985, c. C-5, s. 6 (Evidence Act).

⁵² *Ibid* at s. 6.1

⁵³ U.S. Department of Justice, *First Response to Victims of Crime: A Guidebook for Law Enforcement Officers*, 2008, available at: <http://www.ojp.usdoj.gov/ovc/publications/infores/pdf/FirstResponseGuidebook.pdf> (last accessed 23 November 2015).

⁵⁴ U.S. Judicial Conference, *Guide to Judiciary Policy*, 2014, Vol. 5, Ch. 2, § 255.

⁵⁵ U.S. District Court, Central District of California, *Guidelines for Providing Accommodations for Trial Participants with Communications Disabilities, Jurors, and Members of the Public*, 2008, available at:

[http://court.cacd.uscourts.gov/CACD/Forms.nsf/0b2b50f03ce1d589882567c80058610a/909f5d3acb8d802988256c71006b0e6f/\\$FILE/G-](http://court.cacd.uscourts.gov/CACD/Forms.nsf/0b2b50f03ce1d589882567c80058610a/909f5d3acb8d802988256c71006b0e6f/$FILE/G-)

Supreme Court in *Tennessee v. Lane*, (2004) made clear that Title II of the Americans with Disabilities Act (the “ADA”) applies to state courts.⁵⁶ The ADA provides that state court services, programs and activities must be accessible to qualified individuals with disabilities.⁵⁷ State courts must make reasonable modifications in policies, practices, or procedures when modifications are necessary to avoid discrimination on the basis of disability.⁵⁸ In addition, the ADA requires courts to ensure communications with applicants, participants, members of the public and companions with disabilities are as effective as communications with others.⁵⁹

III. Conclusion

34. It is widely recognised under international law that the right to protection from torture, ill-treatment, violence and abuse, and the rights to access to justice and an effective remedy apply to all, irrespective of whether they experience a disability or not. This includes not discounting evidence on the basis that a witness or complainant is a person with a disability. To discount a person’s testimony simply because of their disability would leave that person without recourse to justice and would exclude a section of the population of Europe from the protection of the criminal law in each Member State. Furthermore, the criminal proceeding itself will not achieve its overall aim of establishing the truth, securing justice and preventing future crime. Providing equal access to justice for all will frequently necessitate reasonable accommodations to ensure those with disabilities are empowered and afforded effective and inclusive participation in the justice system on a basis of equality and non-discrimination. This will require both individualised and structural accommodations during criminal proceedings.

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[122A.pdf](#); (last accessed 23 November 2015); U.S. Bankruptcy Court, Western District of New York, Services Provided to the Hearing Impaired and Other Persons with Communication Disabilities, Bankr. 2005, available at: <http://www.nywb.uscourts.gov/sites/nywb/files/nta%202000-05%20Amended.pdf> (last accessed 23 November 2015).

⁵⁶ 541 U.S. 509, 124 S.Ct. 1978 (2004).

⁵⁷ 28 C.F.R. § 35.130(a).

⁵⁸ 28 C.F.R. § 35.130(b)(7).

⁵⁹ 28 C.F.R. § 35.160.