IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 45026/07

B E T W E E N :

STANISLAW KEDZIOR

Applicant

v.

POLAND

Respondent

WRITTEN COMMENTS BY THE MENTAL DISABILITY ADVOCACY CENTER AS AMICUS CURIAE, PURSUANT TO ARTICLE 36(2) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULE 44(2) OF THE RULES OF COURT

IINTEREST AND EXPERTISE OF THE INTERVENOR

1. These written comments are submitted by the Mental Disability Advocacy Center (MDAC) pursuant to leave granted by the President of the Chamber in accordance with Rule 44(2) of the Rules of Court, communicated to MDAC by way of letter dated 3 September 2009.

2. MDAC is an international, non-governmental human rights organisation headquartered in Budapest, Hungary. Its mission is to advance the rights of children and adults with intellectual disabilities and those with mental health disabilities in Europe and further afield. Its activities include research and monitoring, law reform, strategic litigation and capacity building of lawyers, governments and nongovernmental organisations (NGOs). MDAC has participatory status with the Council of Europe, and is an international NGO entitled to lodge collective complaints under the European Social Charter.

3. These written comments have been prepared with considerable expedition in view of the Court's short deadline. Because of the timescale and the page restriction MDAC would be pleased to file a supplemental brief with particular focus on comparative law and to expand upon or clarify any of the points it makes in this document.

OVERVIEW

4. The instant case concerns several human rights issues facing persons with actual or perceived mental health disabilities. The factual matrix, as set out in the Statement of Facts are, in MDAC's experience, far from unusual. The numbers of persons deprived or restricted of legal capacity across Council of Europe Member States are unknown as there is no standardised way of gathering data at Member State level. MDAC estimates there to be in the region of one million adults deprived of legal capacity in the region.

5. This amicus brief is written with the intention to assist the Court in the effective administration of justice. It lays out the international legal framework concerning legal capacity, and deals in European Convention terms with aspects connected to the instant case, including the need for a more flexible response to persons needing assistance in decision-making, access to justice for persons restricted/deprived of legal capacity, the different legal tests for legal capacity and for detention, the issue of proxy consent for mental health or social care detention under Article 5 of the Convention, the need for regular and meaningful review of such detention under Article 5(4), the state obligation to provide support for people wishing to challenge their detention, fair trial guarantees of any such challenge under Article 6, proportionality of restrictions to legal capacity under Article 8, the right to live in the community under Article 8 of the European Convention on Human Rights (hereinafter "**ECHR**") as

well as Article 2 of Protocol No. 4 to the ECHR, and disability-based discrimination under Article 14 of the ECHR. MDAC outlines the emerging international legal and policy framework, referring primarily to the UN Convention on the Rights of Persons with Disabilities (hereinafter "**CRPD**"), as well as several Council of Europe instruments.

LEGAL CAPACITY

6. The *Kedzior* case is the latest in a line of cases in which the Court has been asked to decide upon the lawfulness of legal architecture allowing for the deprivation of legal capacity. In March 2008, the Court decided in the not dissimilar case of *Shtukaturov v. Russia* (Application no. 44009/05, judgment 27 March 2008) that there had been a violation of Article 6 ECHR. The Applicant's mother had, acting in her capacity and within her lawful authority as his guardian, consented to his detention despite his objections: the Court found that such detention violated Article 5(1). Mr Shtukaturov was prohibited from challenging judicially or otherwise his detention, which the Court found constituted a violation of Article 5(4) of the ECHR. Of significance, the Court found a violation of Article 8 due to the deprivation of legal capacity and the impact this measure had on Mr Shtukaturov's life. The major difference between the *Shtukaturov* and the *Kedzior* cases is the location of the detention: in *Shtukaturov* it was a psychiatric hospital where the periods of detention are generally shorter and supposedly subject to periodic judicial review under mental health legislation. In *Kedzior*, the Applicant's detention is in a social care institution, into which a guardian can place a person lawfully despite that person's objections, and where there is no provision for the lawfulness of detention to be periodically examined by a court.

7. In October 2009, the Court decided in *Salontaji-Drobnjak v. Serbia* (Application No. 36500/05, judgment 13 October 2009) that the Applicant, who had "an inclination towards vexatious litigation" (para. 130) was deprived of his legal capacity and was prohibited from applying to have it restored. The Court found that the domestic courts had failed to examine his requests during four years, which violated Article 6(1) of the Convention. The Court also found that deprivation of legal capacity as a means to stop vexatious litigation was disproportionate and violated Article 8 of the Convention.

8. These cases both involve deprivation of legal capacity, a mechanism intended to provide protection for people with mental impairments: protection against themselves and against society. Such a worldview is embedded in legislation across many Council of Europe Member States, and was fuelled by nineteenth century notions of therapeutic segregation as well as socialist policies of removal from society of people who were deemed not to be economically useful. The law followed the so-called medical model of disability, which looks at the person's diagnosis as the cause of the problems, and as a result of the diagnosis, the law removes the person's rights in many areas of life. Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe, summed up the situation in a recent "Viewpoint" (21 September 2009 "Persons with mental disabilities should be assisted but not deprived of their individual human rights"):

> Individuals with mental health or intellectual disabilities have been discriminated, stigmatised and repressed even in recent years. Their mere existence has been seen as a problem and they have sometimes been hidden away in remote institutions or in the backrooms of family homes. They have been treated as non-persons whose decisions are meaningless. Though much of this has changed with the progress of the human rights cause, persons with mental health or intellectual disabilities do still face problems relating to their right to take decisions for themselves, also in important matters. Their *legal capacity* is restricted or deprived completely, and they are placed under the guardianship of someone else who is entitled to take all decisions on their behalf.

9. In *Shtukaturov*, the Court noted that "the 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. Furthermore, 'full incapacitation' was applied for an indefinite period and could not, as the applicant's case shows, be challenged otherwise than through the guardian, who opposed any attempts to discontinue the measure" (para 90). In many jurisdictions, including Poland, persons who are deprived of legal capacity are also, as an automatic consequence, deprived of the right to manage their finances, their right to vote and stand for election, their right to marry and found a family, and their right to decide where and with whom to live.

10. The international community has unanimously agreed that such binary and monolithic laws which do not allow for a tailor-made approach to an individual's needs and aspirations, fail to protect people. In fact,

they have facilitated abuse, neglect and exclusion, as the growing case law demonstrates. Thus the CRPD, which was adopted unanimously by the UN General Assembly on 13 December 2006, has shifted the paradigm of viewing people with disabilities as *objects* of management, treatment, care, pity and fear into *subjects* of the full range of human rights afforded to every person by dint of their being a human being.

11. Citing the CRPD, the Court has confirmed that it "considers that there is European and universal consensus on the necessity to protect persons suffering from a disability from discriminatory treatment" (*Glor v. Switzerland*, no. 13444/04, judgment of 30 April 2009, para. 53). At the time of submitting this Brief the CRPD has been ratified by 71 States and signed by a further 143. All Members of the European Union have signed the CRPD, including Poland, and 42 out of the 47 Member States of the Council of Europe have signed or ratified the treaty (Albania, Andorra, Liechtenstein, Moldova and the Former Yugoslav Republic of Macedonia have not).

12. Art. 12 of the CRPD entitles "equal recognition before the law", and sits at the CRPD's heart. It acts as a gateway to enabling the fulfilment of the purpose of the CRPD which 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" (Art. 1 CRPD). Art. 12(2) provides the right of persons with disabilities to "enjoy legal capacity on an equal basis with others in all aspects of life", a notion which encompasses both holding rights and exercising them. For those who require assistance in exercising rights, the CRPD provides in Art. 12(3) for States Parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." Thus, the international community has agreed that the recognition of universal legal capacity, even for those with diminished functional capacity, is a prerequisite for the full participation in society on an equal basis with others, and is a recognition that all human beings live both independently and interdependently.

13. The CRPD is already guiding and inspiring significant law reform in several Council of Europe Member States: to the best of MDAC's knowledge, this includes the Czech Republic, France, Ireland, Latvia, Portugal, Slovakia and Slovenia. On 21 September 2009, the Hungarian Parliament voted in a new Civil Code, which makes several important changes regarding legal capacity. It prohibits total/plenary guardianship (such as that in the *Shtukaturov* case), it introduces partial decision-making between guardian and adult in specified areas of life (e.g. finance, health, and personal care), and crucially, the law introduces alternatives to guardianship which include supported decision-making where legal capacity remains intact and a group of supporters help the adult understand, make and communicate decisions. It also introduces advance directives for persons planning for a time of future diminished functional capacity. Thus law reform is not only an aspiration, but it can be achieved in a country which shares with the Respondent State in the instant case a similar economic situation and a post-socialist heritage.

14. On 23 February 1999, the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The Court cited these in *Salontaji-Drobnjak* and also in *Shtukaturov* where it pointed out that "[a]lthough these principles have no force of law for this Court, they may define a common European standard in this area." (para. 59). The Principles are of considerable importance and although (for reasons of space) they are not transcribed in full in this Brief, include Principle 2 (Flexibility in legal response), Principle 3 (Maximum reservation of capacity), Principle 6 (Proportionality), Principle 13 (Right to be heard in person), and Principle 14 (Duration review and appeal).

15. There is significant political momentum to focus on legal capacity law at both domestic and European levels. In 2006, the European Disability Action Plan 2006-2015 called on Member States "to provide appropriate assistance to those people who experience difficulty in exercising their legal capacity and ensure that it is commensurate with the required level of support" (Council of Europe Committee of Ministers Recommendation No. R(2006)5, para. 3.12.3.(vi)).

16. On 26 January 2009, the Parliamentary Assembly of the Council of Europe adopted its Resolution 1642(2009) entitled "Access to rights for people with disabilities and their full and active participation in society". The Resolution states that "the Assembly considers that certain key areas of action need to be given priority" (para. 6) and the first priority area is legal capacity reform. The Resolution "invites member states to guarantee that people with disabilities retain and exercise legal capacity on an equal

basis with other members of society" by *inter alia*, "ensuring that their right to make decisions is not limited or substituted by others, that measures concerning them are individually tailored to their needs and that they may be supported in their decision making by a support person" (para. 7.1) and "taking the necessary measures to ensure that, in accordance with the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, people placed under guardianship are not deprived of their fundamental rights (not least the rights to own property, to work, to a family life, to marry, to vote, to form and join associations, to bring legal proceedings and to draw up a will), and, where they need external assistance so as to exercise those rights, that they are afforded appropriate support, without their wishes or intentions being superseded" (para. 7.2).

Access to justice of people deprived of legal capacity

17. The ECHR provides protection for people who are considered to lack the necessary functional capacity[1] to make a sufficiently informed choice about their place of residence. The protection afforded by the ECHR can be seen as a spectrum of safeguards that become more intense and heightened the greater the individual's lack of functional capacity and the greater the restraint he or she experiences. The protection is, however, graduated and exists: even in the absence of a detention; even in the absence of evidence that the person is distressed; and even in the absence of bad faith on the part of the restraining authority.

18. The protections exist because of the vulnerable position of people whose functional capacity is questioned. A state's safeguarding obligation in relation to such persons arises by virtue of the obligations assumed in Article 1 of the ECHR and delineated in particular in Articles 3, 5, 6, 8, 13 and 14. The obligations are not subject to undue compartmentalisation. They include the duty to take measures to provide effective protection for vulnerable persons (see for example *Z and Others v. the UK*, no. 29392/95, judgment of 10 May 2001, para. 73, and *Osman v. the UK*, judgment of 28 October 1998, para. 116); the duty to ensure that all deprivations of liberty are in accordance with procedures that, inter alia, provide clarity as to the reasons for admission, the period of detention, the treatment or care provided, the need for continuing clinical assessment, the nomination of a representative (see for example *H.L v. the UK,* no. 45508/9992, judgment of 5 October 2004 at para. 120); the duty to ensure that such persons are afforded a fair hearing in relation to any interferences with their civil and political rights occasioned by the curtailment of their decision making powers (*Shtukaturov*, cited above, paras. 68 and 69), and in relation to restraints on individual liberty they include the positive obligation to protect against unnecessary interferences with a person's private life (*Storck v. Germany*, no. 61603/00, judgment of 16 June 2005, para. 150).

19. The need for a seamless spectrum of protections that spans situations where such persons are actually deprived of their liberty or alternatively have their liberty severely restricted, stems from the difficulty in establishing a clear bright line as to when restriction becomes detention and when a person lacks the necessary functional capacity to decide – particularly given that functional capacity may fluctuate as may the extent and nature of the restrictions and the levels and type of medication administered. Notwithstanding the continuum of a state's legal obligations to persons who are adjudged to have impaired functional capacity to make decisions, this Brief approaches the specific issues by reference to the relevant articles of the ECHR.

Article 5(1): requisite evidence

20. For a person to be lawfully detained by virtue of being of "unsound mind" there is a requirement (except in cases of emergency) that amongst other things the person must be reliably shown not only to have a "true mental disorder" established on the basis of objective medical expertise, but that the disorder must also be of a "nature or degree" warranting compulsory confinement, and that continuance of that confinement must be contingent on the persistence of the disorder (see for example *Winterwerp v. the Netherlands*, judgment of 24 October 1979, para. 39).

[1] MDAC uses the term "functional capacity" to mean the mental competence/ability of the person. Functional capacity is both time and transaction specific; that is to say, a person's functional capacity is different across time (e.g. can be affected by drink or drugs, by degenerative mental disabilities, by cyclical mental illnesses), and depending on the particular transaction (e.g. a person may have the capacity to decide where to live, but may need some assistance in understanding complex medical procedures, or investing a lottery win). There is no automatic link between functional capacity and legal capacity, although in most legal systems some evidence of the former is necessary to justify the deprivation of the latter.

21. A finding of incapacity does not negate a person's right to liberty or to independent living (for discussion on the right to independent living see below). It is essential for Convention purposes, that a mental capacity assessment is not mistaken for, or conflated into, an assessment for Article 5(1) purposes. Objective medical evidence of the existence of a mental health diagnosis does not establish functional incapacity and a functional capacity assessment may not establish a mental health diagnosis – (as opposed to a disturbance in the functioning of the mind – for example, due to the transient effects of alcohol or drugs). The World Health Organization says that one-in-four people at some time in their lives will have a mental health problem. A subsection of these will be serious. A proportion of those may require inpatient medical treatment. Many people with mental health problems have unimpaired functional capacity, and conversely, the vast majority of people that lack functional capacity to decide where to live will not have a mental disorder of a nature or degree warranting a deprivation of their liberty.

22. In this context it should be noted that Article 14 ("Liberty and security of the person") of the CRPD, provides for the following:

    1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
        a. Enjoy the right to liberty and security of person;
        b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
    2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

23. The Mental Disability Advocacy Center urges the Court to re-examine its mental health detention jurisprudence in light of the CRPD, and to indicate that, for example, mental health laws which allow detention based on projected harm where a person retains functional capacity to consent to treatment cannot be considered to be in accordance with the ECHR: in other words, a refusal of treatment by a person with functional capacity to make that decision should be respected in the same way that, for example, it would be unlawful to impose surgery on a person with a broken leg. The existence or otherwise of an objective psychiatric assessment prior to one's incarceration is not therefore of relevance unless that assessment addressed the specific (but weak) requirements of the *Winterwerp* test – namely the existence of a mental disorder of a nature or degree that warrants compulsory detention. Additionally, the *Winterwerp* test requires that the assessment be timely, in the sense of immediately preceding the confinement (see *Varbanov v. Bulgaria*. no. 31365/96, judgment of 5 October 2000). The assessment must be subject to repeated review: a person's mental health, its nature and degree, (like a person's functional incapacity) can and frequently does, fluctuate over time.

Legality of proxy consent for mental health or social care detention

24. In order to determine whether there has been a deprivation of liberty, for the purposes of Article 5(1) "context" is everything (see the above-cited *H.L.* case at para. 89) and this is especially so when the person is considered to be legally incapable of consenting to, or refusing, their placement in the institution (see *H.L.* at para. 89). Detention takes on a particular and insidious countenance for many people whose capacity to make decisions is impaired, and as the Court has noted, the right to liberty is too important for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention (see *H.L.* at para. 90 and *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, at paras. 64-65).

25. People who lack the necessary functional capacity may not understand why they are so confined, when it will end, or the process for testing the parameters of their confinement. They may have attempted to leave, but been repeatedly and forcibly returned such that they have learned that it is futile to attempt flight – although they may have forgotten the experiences or the precise sequence of events that led them to come to that understanding. As a consequence, they may become withdrawn and compliant – even when the barriers or practices in question have been removed, or their sedation lifted. As the Commissioner for Human Rights, Thomas Hammarberg, noted on 14 September 2009 ("Viewpoint: A neglected human rights crisis: persons with intellectual disabilities are still stigmatised and excluded")

> "Conditions in some of the 'social care homes' are appalling in many countries across Europe. In these segregated institutions very little, if any, rehabilitation is provided. Not infrequently, persons with intellectual disabilities are placed together with persons having psychiatric problems and unnecessarily given sedatives against their will. They are in some cases deprived of their liberty and treated as if they were dangerous."

26. Given the particular vulnerability of such persons, review and inspection procedures should exist, not only to satisfy the requirements of Article 5(1) but also those of Article 8 (considered below) to ensure that their continued detention is strictly necessary, that the environment is therapeutic (see for example *Aerts v. Belgium*, judgment of 30 July 1998, para. 49) and that all interferences (for example by way of medical treatment) are the least intrusive and/or restrictive as is possible. On this point, MDAC asks the Court to bear in mind that mental health and social care services in many jurisdictions, including the Respondent State in the instant case, are heavily institution-based, with the consequence that the "least restrictive" therapy and environment is one in the same as the most restrictive, simply because of a lack of alternative, community-based, modern and humane mental health and social care services. In this regard, an articulation of the positive obligations under Article 5 of the ECHR is urgently needed to safeguard against unnecessary detention and forced treatment. A State's "effective supervision and review" obligation (see *Storck,* para. 103) in such cases will be considered under Article 5 and/or Article 8 of the Convention depending upon the nature, severity and the extent of the interferences in question. In this Brief, however, MDAC addresses these issues under Article 8, below.

Article 5(4): A personal and inalienable right

27. Where a person's lack of functional capacity is such that a guardian has been appointed to make substituted 'best interest' judgments on his or her behalf, the requirements of Articles 6 and/or 8 require that there be a legal process by which the person restricted or deprived of legal capacity may challenge that finding, and challenge the appointment of a guardian (this aspect is considered below). There is however a fundamental distinction between a right to challenge the appointment of a guardian and the right to challenge a person's deprivation of liberty, and it is vital that these distinct rights are not conflated or confused.

28. In *Gorshkov v.Ukraine* (No. 67531/01, judgment of 8 November 2005, paras. 44 and 45), the Court reiterated its view that "a key guarantee" under Article 5(4) was that detained patients "must have the right to seek judicial review on his or her own motion" and that whatever other guarantees were available they could "not eliminate the need for an independent right of individual application by the patient". As a matter of fundamental principle as well as practical reality, the appointment of a guardian for a detained person cannot detract from Article 5(4) guarantees. If this were otherwise, the detainee would have to take legal proceedings to challenge or displace the guardian (as was the factual scenario in *Shtukaturov*), which may be a lengthy process, and only if this were successful could the person then access their Article 5(4) rights. This would place a non-Convention obstacle in the way of such a person to the enjoyment of their rights under Article 5(4) and mean that the remedy was not for them "speedily" available.

The right to support to enable a challenge to be made

29. A *sine qua non* for a person of impaired functional capacity to be able to challenge their detention is that the domestic legal process permits such an application to be made. This alone, however, is insufficient and continues to discriminate against disabled people because it does not equalise upwards far enough: in order to make the right meaningful on an equal basis with others, the Court should specify the obligations which states are under in order to provide assistance and reasonable accommodation to persons with disabilities, particularly when the person in question is without family, friends or other support to assist in the framing of the application and in the conduct of the resultant process, or when there is a clear family conflict, such as in *Shtukaturov*, in *Salontaji-Drobnjak,* and, from what can be gleaned from the Statement of Facts, the instant case.

30. By virtue of the position of inferiority and powerlessness which is typical of patients confined in such situations, increased vigilance is required of States (see *Herczegfalvy v. Austria,* judgment of 24 September 1992, Series A no. 244, para. 82) to ensure that the Article 5(4) rights of such persons are not illusory and theoretical (see *Artico v. Italy*, judgment of 13 May 1980, para. 33 and *R.M.D. v. Switzerland*, 26 September 1997). This requirement imposes upon States a number of positive

obligations in relation to detainees whose capacity is impaired. Firstly, it requires that an independent third party be able to challenge the detention on behalf of the detainee. Secondly, that a system of periodic reviews exist: of *automatic* referrals to a 'court', (see for example the *X v. UK* judgment of 5 November 1981 at para. 52 and the above-mentioned *Gorshkov* case at para. 45). Thirdly, that facilities be made available to enable the detained person to attend the hearing (*Niedbala v Poland*, 4 July 2000). Fourthly, that where the detainee (or a third party on his or her behalf) seeks to challenge the detention special procedural safeguards must exist in order to protect their interests (see for example *Winterwerp*, cited above at para. 60; and *Megyeri v. Germany*, no. 13770/88, judgment of 12 May 1992 at para. 22) including legal assistance (*Bouamar v Belgium*, Series A No. 129 1988 and *Megyeri* at para. *23*).

31. Having regard to the importance of what is at stake in terms of personal liberty, taken together with the very nature of any disability, and having regard to the requirement that such a process ensure 'equality of arms' and be adversarial (*Frommelt v. Liechtenstein* no. 49158/99, judgment of 24 June 2004, para. 29), it follows that not infrequently legal representation alone may be insufficient, particularly where the level of the detainee's intellectual and or communication abilities is so impaired as to require an advocate or other expert to act as an interpreter and/or go-between the lawyer and the client.

32. The Court could be assisted in these areas by the CRPD's provision of "reasonable accommodation" (a concept endorsed but not named as such, by the Court in *Glor v. Switzerland*, cited above). The CRPD defines the term to mean the "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" (Art. 2 CRPD). A failure to provide reasonable accommodation is one important form of disability discrimination. Reasonable accommodation requires steps to be taken to remove obstacles which would otherwise make it particularly difficult for a person with disabilities to access and enjoy rights on an equal basis with others. It places obligations upon duty-bearers - including the justice system, the social care system and the medical system - to modify or adjust the standard way in which they operate.

Article 6 ECHR

33. As has been noted above, the ECHR distinguishes between an adjudication that an individual lacks the necessary mental capacity to make a specific decision (and a concomitant determination that a guardian be appointed to discharge this function), and an adjudication that an individual has a mental disorder of a nature and degree that warrants his or her detention. Whilst these two factual contexts and processes are distinct, the "procedural" guarantees under Article 5 §§ 1 and 4 are broadly similar to those under Article 6(1) of the Convention (see instance, *Shtukaturov* cited above para. 66; *Winterwerp*, cited above, para. 60; *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986; *Kampanis v. Greece*, judgment of 13 July 1995; and *Ilijkov v. Bulgaria*, no. 33977/96, judgment of 26 July 2001 at para. 103).

34. In the context of Article 6(1) of the ECHR, the provision extends to individual States a certain margin of appreciation including in the designation of the procedural arrangements that secure sound administration of justice and the protection of the health of the person concerned (see for example *Shtukaturov* cited above, para. 66). The margin available to States is however limited (particularly so when the proceedings are concerned with the interests of a person with impaired functional capacity) and the procedural measures should not undermine the very essence of the individual's right to a fair hearing as guaranteed by Article 6 of the Convention.

35. The very essence of a person's right to a fair hearing can be undermined in mental incapacity adjudication proceedings in a number of ways, including:
    - where the domestic law provides for a person to be adjudged as totally incapable of making decisions, since (apart from people who are unconscious) there will generally be many questions on which he or she is capable of making suitably informed decisions – particularly decisions that are dictated primarily by preference and for which the consequences of deciding or not deciding approach insignificance; and
    - where the domestic law does not provide for the person adjudged as incapable of making a decision with a right of direct access to a court to challenge the decision that he or she is so incapable – but, for example, instead leaves the power to instigate such an application to the court itself or a third party.

36. In assessing whether or not a particular measure meets the requirements of Article 6(1) all relevant factors fall to be considered, including the nature and complexity of the issue before the domestic courts, and what was at stake for the individual in question and so on (see again *Shtukaturov* at para. 68). The Court has said that when examining fair trial issues for persons with mental health disabilities under Article 6, it will read across Articles 5(1) and 5(4) jurisprudence (see *Salontaji-Drobnjak* at para. 124). Fundamental requirements include:

a. Reasonable steps were taken to ensure that the individual was aware of the application for deprivation of legal capacity (*Shtukaturov* at para. 69).
b. Reasonable steps were taken to ensure that the individual was aware of the fact that he or she was being subjected to a forensic psychiatric examination for the purposes of legal capacity proceedings (*Shtukaturov* at para. 69).
c. The individual was afforded the right to participate in the proceedings, to present and challenge evidence, and to be heard either in person or, where necessary, through some form of representation (*Winterwerp* at para. 79; *Shtukaturov* at paras. 69 and 71; *Salontaji-Drobnjak* at para. 127).
d. Regardless of the individual's wish to participate in the proceedings, where a major decision concerning legal capacity is to be taken, the presiding judge (or perhaps an independent and impartial professional with the requisite understanding of the law concerning mental incapacity) should have at the very least visual contact with the applicant and the opportunity to question him or her (*Shtukaturov* at para. 73).
e. Although States have a margin of appreciation as to the means to be used in guaranteeing parties their rights under Article 6(1), the obligation remains that these measures must ensure for all individuals, an effective right of access to the courts for the determination of their 'civil rights and obligations' (*Airey v. Ireland*, judgment of 9 October 1979, at para. 26). Accommodating the needs of persons with mental health disabilities "should not affect the very essence of the applicant's right to a fair hearing as guaranteed by Article 6" (*Shtukaturov* at para. 68; *Salontaji-Drobnjak* at para. 126).
f. States should ensure that applicants have the opportunity to present their case effectively and that they are able to enjoy equality of arms with the party making the application (see, among many other examples, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997 at para. 53). The question of whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon (a) the importance of what is at stake for the party in the proceedings, (b) the complexity of the relevant law and procedure and (c) the person's capacity to represent him or herself effectively (see *Steel and Morris v. UK*, no. 68416/01, judgment of 15 February 2005 at para 59; *Airey* cited above at para. 26). Dealing with these three criteria:
   (i) in cases where the consequences could be a severe (or even a 'total') negation of a person's ability to make decisions for him / herself, the importance of what is at stake – deprivation of legal capacity (including subsequent and automatic loss of the right to vote, work, associate, family life, privacy, deciding where to live), mental health detention, forced psychiatric treatment – cannot be overestimated;
   (ii) whilst it may be possible to envision domestic law and procedures of such elemental simplicity that legal advice and assistance could never be required, legal capacity issues are usually contested legal hearings with expert evidence (see *Megyeri* cited above, para. 23);
   (iii) given that the substance of the proceedings relate to the person's capacity to represent him or herself, it appears self evident that this requirement is also satisfied in such cases.

   It follows that in cases of this nature there must, at the very least, be a presumption that the measures taken by a state to satisfy its Article 6(1) obligation will include the provision of a lawyer who provides quality legal assistance to the person (not merely a cosmetic nicety in the courtroom as in *Pereira v. Portugal*, no. 44872/98, judgment of 26 February 2002; emphasised in *Salontaji-Drobnjak* at para. 127) together with a legal aid scheme.

Article 8 ECHR

37. A decision that a person lacks sufficient functional capacity to make some or all decisions will invariably constitute an interference with that person's private life and may amount to an interference with his or her family life, home and correspondence. Private life, for the purposes of Article 8(1) includes a

person's physical and psychological integrity and the guarantee which it affords is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see *Botta v. Italy*, judgment of 24 February 1998, para. 32).

38. A ruling that a person is incapable of making any decision will strip that person of the very essence of his or her personal autonomy, human dignity and human freedom. Such a decision renders a person in some respects a 'non-person', stripped of their identity as an individual human being (see, *inter alia*, *Pretty v. UK*, no. 2346/02, judgment of 29 April 2002, para. 62; *Mikulić v. Croatia,* no. 53176/99, judgment of 7 February 2002, para. 53; *Christine Goodwin v. UK*, no. 28957/95, judgment of 11 July 2002, para. 90). Only in the face of compelling evidence and most anxious judicial scrutiny could such a determination be made. Such a finding denies the person the right to privacy in virtually every arena of his or her life; it gives third parties access to the person's private papers and medical history; it places severe restrictions on the person's ability to enter into social activities and relationships and almost certainly negates any possibility of his or her developing intimate or sexual relationships. Such a decision has the power to strip the individual of the right to refuse medical treatment and most probably render the person liable to forced medication – possibly without the person administering the medication requiring any prior judicial approval.

39. A ruling that a person is incapable of making any decision will almost inevitably mean that he or she no longer has the right to keep their correspondence private, and will mean that the person's letters will be read by others, and will interfere with the person's ability to send letters, emails and so on. A ruling that a person is incapable of making any decision may well remove from that person the right to chose where to live and to move freely throughout their state (raising an Article 2 of Protocol 4 point – see below). A ruling that a person is incapable of making any decision may give to others the right to make decisions about which of his family members she or he sees, corresponds with and indeed lives with.

40. Because of the draconian consequences for an individual of such a decision being made, Article 8(1) places significant positive obligations on States to secure for such persons – to the maximum extent possible – effective respect for their integrity (see for example, *Glass v. UK*, no. 61827/00, paras. 74-83). Such an obligation has as an essential object, the protection of the person from arbitrary interference by the public authorities (*Botta,* cited above at para 33), and brings with it procedural obligations to ensure that interferences in personal autonomy and all other aspects of the Article 8(1) right are minimised.

The objective justification and proportionality of each Article 8 interference

41. Article 8(1) requires a State to show respect for the broad range of rights protected by the provision. The Article requires the State to respect these rights individually as well as collectively. Accordingly, any interference with any of these rights requires that it be established in each case that the interference is in accordance with domestic law, serves a legitimate aim and is not disproportionate. It follows that (with the possible exception of a person who is unconscious) adjudications as to a person's ability to make decisions must be matter-specific, and that only in the most extreme of cases would it be justified for a decision to be made that strips an individual of all decision-making powers.

42. The requirement that matter-specific decisions be made as to mental capacity is enshrined in the laws of several Council of Europe states. Space permits the intervener to provide only one example. In England and Wales, the 2007 Code of Practice to the Mental Capacity Act 2005 explains that the Act's definition of incapacity (para.3) reflects the fact that:
    - a person may lack capacity to make some decisions for themselves, but will have capacity to make other decisions. For example, they may have capacity to make small decisions about everyday issues such as what to wear or what to eat, but lack capacity to make more complex decisions about financial matters.
    - a person who lacks capacity to make a decision for themselves at a certain time may be able to make that decision at a later date. This may be because they have an illness or condition that means their capacity changes. Alternatively, it may be because at the time the decision needs to be made, they are unconscious or barely conscious whether due to an accident or being under anaesthetic or their ability to make a decision may be affected by the influence of alcohol or drugs.
    - a person may always lack capacity to make some types of decisions – for example, due to a condition or severe learning disability that has affected them from birth – others may learn new skills that enable them to gain capacity and make decisions for themselves

43. Even where the evidence on analysis does justify a ruling that a person is unable to make any decisions, such an interference would only be sustainable on the basis that it was deemed to be a temporary measure to be discontinued as soon as circumstances permit (see, by analogy *Kutzner v. Germany*, no. 46544/99, judgment of 26 February 2002). Such a conception brings with it the need to keep such determinations under constant review.

The obligation to ensure independent living

44. Confinement in a social care institution against a person's will (irrespective of whether it amounts to a deprivation of liberty for Article 5(1) purposes) must be regarded as an interference with the right to respect for private life under Article 8 (see *Storck* cited above at para. 143) and must accordingly be a proportionate response to the needs of the individual.

45. As noted above, the Court has cognisance of the CRPD (see *Glor v. Switzerland*, cited above), Article 19 of which specifically addresses the right to independent living. It provides as follows:

> State Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
> b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
> c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsible to their needs.

46. It has been suggested (prior to the widespread adoption of the CRPD by Council of Europe Member States) that Article 8 of the ECHR also enshrines the right to independent living, or at the very least makes such a right the default position for disabled people, in the sense that any interference with this right requires specific justification.[2] As Commissioner Bratza (as he then was) observed in *Botta v Italy* (cited above) the ECHR places a duty on States to take action to "the greatest extent feasible to ensure that [disabled people] have access to essential economic and social activities and to an appropriate range of recreational and cultural activities" to ensure that their lives are not "so circumscribed and so isolated as to be deprived of the possibility of developing [their] personality": such compensatory measures, as Judge Greve has observed, are fundamental to a disabled person's rights (*Price v. UK,* no. 33394/96, judgment of 10 July 2001, para. 30).

47. Given that the CRPD has been signed by virtually every Member State of the Council of Europe (see above), a strong argument exists that this global disability-specific treaty constitutes a 'European standard', such that the burden falls squarely on States to justify (if they chose so to do) any interference with its norms and in particular that of Article 19 CRPD.

The procedural obligation under Article 8

48. Any interference with the rights of a person who is adjudged to lack sufficient functional capacity will be considered to be "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. As the Court has noted, although States enjoy a margin of appreciation, the margin is narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, *Dudgeon v. UK*, judgment of 22 October 1981, para. 52; and *Gillow v. UK*, judgment of 24 November 1986, at para. 55).

[2] See C. Parker and L. Clements (2008) *The UN Convention on the Rights of persons with Disabilities: a New Right to Independent Living?* in European Human Rights Law Review Issue 4 2008 pp508 – 523.

49. The Court has emphasised that the procedural safeguards available to the individual will be especially material in determining whether a State has, when fixing the regulatory framework, acted within the margins: in particular whether the decision-making process leading to measures of interference is fair and such as to afford due respect to the interests safeguarded (see *Buckley v. UK,* judgment of 26 September 1996 para. 76; and *Chapman v. UK*, no. 27138/95, judgment of 18 January 2001 at para. 92).

50. The Court has additionally emphasised that the vulnerable position of a particular group of persons (in the instant case, people considered to lack sufficient functional capacity) means that some special consideration should be given to their particular needs both in the relevant regulatory framework and in reaching decisions in particular cases (*Connors v. UK,* no. 66746/01, judgment of 27 May 2004, para. 84). To this extent, Article 8 creates a positive obligation to ensure that there is a procedure available to persons in similar situations to the Applicant, so that they are able to challenge significant interferences, such as medical treatment decisions, restrictions on their liberty and significant restraints (even if these interferences fall short of a deprivation of liberty in Article 5 terms).

51. The obligation to provide a procedure for challenging such fundamental restrictions will exist even if the applicant is not resisting the medical treatment or the confinement, since the right to personal integrity protected by Article 8(1) is too important in a democratic society for a person to lose it simply for the reason that she or he is not considered to be resisting (see by analogy *H.L. v UK* cited above, para. 90; and *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, paras. 64-65).

52. In addition to the procedural obligations on States in respect of substantial interferences with the Article 8(1) right, a supervisory obligation exists in relation to the social care institutions where disabled people such as the Applicant are placed, given that there is widespread evidence of neglect as well as psychological, physical and sexual abuse occurring in such settings (to which reference is made to the submissions above, and the above-cited comments of the Commissioner for Human Rights of 14 September 2009). As the Court noted in its above-cited *Storck* judgment, the obligation on a State in such cases is to "secure to its citizens their right to physical and moral integrity"; "to exercise supervision and control" over such institutions; and in discharge of this duty "retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant" (*Storck*, para 150). Finally, whilst the nature of the process put in place to safeguard the Article 8(1) rights of such vulnerable persons is within the discretion of the State, the procedural safeguards must be such as to ensure there is sufficient scrutiny to address and consider "sensitive factual questions" (*McCann v UK*, no. 19009/04, judgment of 13 May 2008, para. 53).

Article 2 of Protocol No. 4 to the Convention

53. The consequences of total deprivation of legal capacity of the type described by the 'Statement of Facts' of 14 May 2009 in this matter are that such measures may curtail or negate a person's right to liberty of movement and freedom to chose his or her residence, within the meaning of Article 2 of the Protocol No. 4 to the ECHR. MDAC respectfully suggests to the Court to read across into Article 2 of the Protocol No. 4 the more detailed provisions on choosing a place of residence articulated by Article 19(a) of the CRPD, which provides that "[p]ersons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement", and to consider the benefits in jurisprudential terms of outlining its thinking under this Article.

Resource considerations

54. Whilst it would be inappropriate to underestimate the legal changes that would be required for many States to develop graduated laws concerning assessments of mental capacity, graduated decision making powers and obligations in relation to independent or community living, it should be noted that many Member States of the Council of Europe have adopted (or are in the process of adopting) measures of this nature without apparent hardship to the public purse or public interest. It should be further noted that in so far as these new procedures may produce other challenges for the *status quo*, it is suggested that "society may reasonably be expected to tolerate a certain inconvenience" to enable such persons "to live in dignity and worth" (see for example the above-cited *Christine Goodwin* judgment at para. 91).

Article 14 in conjunction with Article 8 of the Convention

55. The status of 'lacking capacity' is one conferred on a person by domestic law and accordingly is attributable to the State. People with disabilities, including people who are adjudged to lack sufficient functional capacity to make decisions without support, constitute a group of persons afforded protection by Article 14 of the Convention (see the above-cited *Glor* case at para. 53). The evidence suggests that more disabled than non-disabled people are accommodated in social care institutions, such that this disparate treatment engages Article 14 in conjunction with Article 8 of the Convention and the reasonableness of the measures adopted by the State falls to be considered.

56. In analysing whether this difference in treatment is objectively and reasonably justified and whether there exists a reasonable relationship of proportionality between the means used and the aim pursued, it will be reasonable for the Court to consider the efforts made by a Contracting State to ensure that people with disabilities are not inappropriately placed in institutions (see for example and by analogy *D.H. v Czech Republic,* no. 57325/00, judgment of 13 November 2007, para. 208; and see the above-cited Art. 19 of the CRPD).

57. Whilst there appears to be no European judgment concerning this question, there is relevant authority for this proposition in the form of a US Supreme Court decision: *Olmstead v LC*, 527 US 581 (1999). *Olmstead* concerned a care planning regime in the state of Georgia, which skewed funding arrangements to favour institutional placements of disabled people, rather than community based independent living placements. The applicants in *Olmstead* alleged that the arrangements constituted unlawful discrimination and the majority of the Supreme Court agreed. Emphasising in its judgment that the financial resources of States were relevant factors in determining their policies, the Supreme Court stressed the importance of policies being rational and fair and of the basic principle that "unnecessary institutionalisation" should be avoided if possible. In the view of the majority:

> The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life [...]
>
> and
>
> confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

58. It is suggested that although the above analysis raises a distinct issue concerning Article 14 ECHR, the consequence of this line of reasoning is to strengthen the proposition that the default position for any interference with the living arrangements of a person whose mental capacity is believed to be impaired, is via the promotion of independent living. It follows that this question may, in the instant case, be best subsumed into the analysis of a substantive claim under Article 8.

Oliver Lewis
Executive Director
Mental Disability Advocacy Center
Website: www.mdac,info
Email mdac@mdac.info
22 October 2009