
WRITTEN SUBMISSIONS OF THE MENTAL DISABILITY ADVOCACY CENTRE

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 on 15th January 2016. MDAC seeks in this intervention to assist the Fourth Section of the Court, in accordance with the Rules of Court and the terms of the Registrar's letter of 15th January 2016.

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 ("CoE"), a special consultative status with the United Nations ("UN") 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. It has previously served as a third party intervener in a number of cases before the European Court of Human Rights ("the Court").¹

The Context of this Application

3. The rights set out in the European Convention on Human Rights ("the Convention") are to be guaranteed to "*everyone*" (Article 1). This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, including persons with disabilities. Far from disability entitling the State to deny such people human rights, rather it places upon the State (and upon others) the duty to make reasonable accommodation for people with disabilities.² This is confirmed in the United Nations Convention on the Rights of Persons with Disabilities (the "CRPD") which requires States to ensure that reasonable accommodation is provided so that persons with disabilities enjoy and exercise all human rights and fundamental freedoms on an equal basis with others (Articles 2 and 5). As the UN Secretariat for the CRPD (UN Enable) puts it,

*"In accordance with the purposes and principles of the Charter of the United Nations and the International Bill of Human Rights, not only are persons suffering from any form of disability entitled to exercise all the civil, political, economic, social and cultural rights embodied in these and other instruments, but they are recognized as being entitled to exercise them on an equal basis with other persons."*³

4. It is well established that the Convention should be interpreted consistently with the general principles of international law; it cannot be interpreted in a vacuum. The Court has repeatedly reiterated that the Convention is a living instrument which must be interpreted "*in the light of present-day conditions*"⁴ and relevant international standards⁵: it must be read "*in the light of the notions currently prevailing in*

¹ Including *Kedzior v Poland* Application No. 45026/07, judgment of January 16, 2013; *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* Application No. 47848/08, judgment of 14 July, 2014; and *Blokhin v Russia* Application No. 47152/06 (judgment pending).

² See e.g. the UK case of *P v Cheshire West* [2014] 1 AC 896, per Lady Hale JSC, para. 45.

³ 'Human Rights and Disabled Persons,' *Human Rights Studies Series*, Number 6, Centre for Human Rights: Geneva (UN publication, Sales No. E.92.XIV.4), para. 27, available at <http://www.un.org/esa/socdev/enable/dispaperdes1.htm> (last accessed 5 February 2016).

⁴ See, among many other authorities, *Selmouni v France* (GC), Application No. 25803/94, judgment of July 28, 1999 at para. 101.

⁵ *Neulinger and Shuruk v Switzerland*, Application No. 41615/07, judgment of 6 July 2010 at para. 131.

*democratic States.*⁶ In interpreting its provisions and the scope of States' obligations in specific cases, the Court will look "*for any consensus and common values emerging from the practices of European States and specialised international instruments... as well as giving heed to the evolution of norms and principles in international law.*"⁷ These instruments include the CRPD, the International Covenant on Civil and Political Rights ("ICCPR"), and Council of Europe material.⁸

5. Thus, in this case, the Convention falls to be interpreted in line with the CRPD and its guiding principles, including the freedom to make one's own choices, independence, non-discrimination, full and effective participation in society, respect for difference, and equality of opportunity (Article 3). In *Glor v Switzerland*⁹ the Court recognised the centrality of the CRPD in cases raising issues concerning disability rights and referred to, "*a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.*"¹⁰

6. Of particular significance in this case is the international recognition that the paramount principles of non-discrimination and equality of all before the law require (i) that States recognise that persons with disabilities exercise legal capacity on an equal basis with others in all aspects of life, and (ii) therefore States are required to ensure that the will and preferences of persons with disabilities must at all times be respected, and must not be overridden or ignored by substituted or paternalistic 'best interests' decision-making.¹¹ The will and preferences expressed by persons with disabilities in respect of their family relationships, and their right to choose their place of residence, should be respected and protected. Personal relationships and one's choice of a place of residence are an inherent part of a person's autonomy, independence, dignity and self-development, and are central to a person's independent living in their wider community.¹² In order to ensure that persons with disabilities are both protected from violations, and that they have the ability to obtain effective remedies when violations occur, States have a positive obligation to apply stringent and effective safeguards in order to ensure that their rights to exercise legal capacity are "*practical and effective*" rather than "*theoretical and illusory.*"¹³ This is also necessary to ensure compliance with the overarching requirement of Article 1 of the Convention, requiring States to secure its rights for "*everyone*", including persons with disabilities.

Key International Standards

7. European Social Charter (revised 1996): Article 15 of the revised European Social Charter (ETS No. 163) explicitly guarantees people with disabilities the effective exercise of the right to independence, social integration and participation in the life of the community.

8. Council of Europe Committee of Ministers Recommendation No. R (99)4¹⁴: This Recommendation outlines principles concerning the legal protection of "*incapable adults.*" It includes Principle 1, respect for human rights; Principle 3, maximum preservation of capacity; and Principle 9, respect for the wishes and feelings of the person concerned.

⁶ *Van der Musselle v Belgium*, Application No. 8919/80, judgment of 23 November 1983 at para. 32.

⁷ *Opuz v. Turkey*, Application No. 33401/02, judgment of 9 June 2009 at para 164 where the Court refers to the UN Convention on the Elimination of All Forms of Discrimination Against Women as one such specialised instrument to which the Court will look.

⁸ See, amongst other authorities, *Glor v Switzerland*, Application No.13444/04, judgment of 30 April 2009 at para. 53; *Kiss v Hungary*, Application No. 38832/06, judgment of 20 May 2010 at para. 14; *Jasinskis v Latvia*, Application No. 45744/08, judgment of 21 December 2010 at para. 40; *Kiyutin v Russia*, Application No. 2700/10, judgment of 10 March 2010 at para. 32; *Seal v UK*, Application No. 50330/07, judgment of 7 December 2010 at paras 41-43; *Stanev v Bulgaria*, Application No. 36760/06, judgment of 17 January 2012 at para. 72; and *DD v Lithuania*, Application No. 13469/06, judgment of 14 February 2012, at para 84.

⁹ *Glor v Switzerland*, Application No. 13444/04, judgment of 30 April 2009.

¹⁰ *Ibid*, para. 53.

¹¹ CRPD, Articles 3(a) and 12; Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), paras 17, 20-22.

¹² Issue Paper of the Council of Europe Commissioner for Human Rights, *The right of people with disabilities to live independently and be included in the community*, June 2012.

¹³ These phrases are well-established in the Court's case law: see, for example, *Airey v Ireland*, Application No. 6289/73, judgment of 9 October 1979 at para 26; *Artico v Italy*, Application No. 6694/74 1 judgment of 3 May 1980 at para 33; *Glor v Switzerland*, para 76.

¹⁴ Available at [http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec\(99\)4E.pdf](http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf) (last accessed 5 February 2016).

9. Council of Europe Parliamentary Assembly Resolution 1642(2009): The Resolution entitled “Access to rights for people with disabilities and their full and active participation in society” states that “the Assembly considers that certain key areas of action need to be given priority” (para. 6) and that 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). The Parliamentary Assembly also recommends member states “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).

10. CRPD: The CRPD was adopted by the United Nations General Assembly on 13th December 2006 and it entered into force on 3rd May 2008. As of 3rd February 2016 it was signed by 160 and ratified by 161 Parties including the European Union; and 43 Council of Europe Member States have ratified it, with all except Liechtenstein having signed it. It was signed by Finland on 30th March 2007.¹⁵

11. The CRPD has been characterised as a major leap forward in international human rights law which represents the first serious effort to discontinue the marginalisation of disability within human rights.¹⁶ Professor Peter Bartlett has described it as promising a “*paradigm shift in the rights of people with disabilities*.”¹⁷ Whilst it does not create new rights, it is the first legally binding instrument to comprehensively reaffirm and reinforce existing rights in a framework specific to persons with disabilities.¹⁸ The fundamental purpose of the CRPD 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.¹⁹ The principles of equality and non-discrimination are among the main features of the CRPD. The general provision on equality and non-discrimination can be found in its Article 5(2). The latter expressly obliges States to “*prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds*”. This general wording is further emphasised and reiterated throughout the other provisions of the CRPD, including Article 12 which concerns equal recognition before the law.

12. As noted above, the Court in *Glor v Switzerland*²⁰ made explicit reference to the CRPD’s importance, despite the fact that the relevant events had taken place before the adoption of the CRPD by the General Assembly in 2006. Since then the Court has cited the CRPD in a number of other cases.²¹

13. The CRPD has been described by the UN Special Rapporteur on Disability in the following terms:

“[The CRPD] has risen from the very core of the human rights principles of the United Nations. It is founded on the principles of dignity and justice; and rooted in the concepts of inalienability, universality and indivisibility of human rights. It highlights the right to full participation, and rests upon the notion of equality without distinctions; underlines the right to enjoyment without

¹⁵ <http://www.un.org/disabilities/countries.asp?navid=17&pid=166> (last accessed 5th February 2016).

¹⁶ Andreas Dimopoulos, *The UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing Limited, 2010), 79.

¹⁷ ‘Implementing a Paradigm Shift: Implementing the CRPD in the Context of Mental Disability Law,’ in *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report* (Washington: Centre for Human Rights and Humanitarian Law, American University Washington College of Law, 2014), 169-180.

¹⁸ UN, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), 5.

¹⁹ UN CRPD, Article 1.

²⁰ *Glor v Switzerland*, para 53.

²¹ *Kiss v Hungary*, Application No. 38832/06, judgment of 20 May 2010, para 40; *Jasinskis v Latvia*, Application No. 45744/08, judgment of 21 December 2010, para 40; *Kiyutin v Russia*, Application No. 2700/10, judgment of 10 March 2010, para 32; *Seal v UK*, Application No. 50330/07, judgment of 7 December 2010, paras 41-43; *Stanev v Bulgaria*, Application No. 36760/06, judgment of 17 January 2012, para 72; *DD v Lithuania*, Application No. 13469/06, judgment of 14 February 2012, para 84.

discrimination; stresses the belief in the dignity and worth of all human beings, and their right to equality and protection by the law.”²²

And:

“[The CRPD is] authoritative guidance on the rights of persons with disabilities supplementing the Covenant and other core human rights treaties. ...The CRPD ... adopts a standpoint of equality and non-discrimination in all aspects of life, and provides that persons with disabilities, including persons with psychosocial disabilities, have the right to exercise legal capacity and decision-making...”²³

14. CRPD Committee General Comment No. 1 (2014) on Article 12: Equal recognition before the law: The Committee here addressed the basic general principle of human rights protection, equality before the law, set out in CRPD Article 12. It noted that,

“the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making.”²⁴

15. The General Comment then proceeds to explore the obligations deriving from the different component parts of Article 12, *“premised on the general principles of the Convention... namely, respect for inherent dignity, individual autonomy — including the freedom to make one’s own choices — and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility...”²⁵*

International consensus on ‘Will and Preferences’ over ‘Best Interests’

16. A key issue underpinning the submissions that MDAC advances below in relation to Article 8, Article 2 of Protocol 4 (“A2P4”), and Article 14 / Article 1 of Protocol 12 (“A1P12”) to the Convention concerns the distinction between, on the one hand, a paternalistic, ‘best interests’ approach to legal capacity, and on the other, an approach which respects the individual’s autonomy, and in particular their will and preferences. There is an emergent and growing international consensus that the latter approach is an essential part of a human rights-based model of disability – as the CRPD Committee describes it, there has been a shift from substituted decision-making to supported decision-making.²⁶ The starting point, based on the current international standards outlined above, is that the will and preferences of a person with disabilities should take precedence over other considerations when it comes to decisions affecting that person.

17. This significant shift towards respect for will and preferences is clear from the CRPD itself, particularly Articles 3(a), 12 and 19. They recognise the rights of the individual to make decisions in all areas of their life, and the obligation on States to respect the person’s inherent dignity and autonomy. Article 12(3) makes clear that the primary response to situations where someone is considered to have difficulties in making decisions and/or communicating them to others should be to provide support. The CRPD Committee requires that substituted decision-making regimes should be abolished and replaced by supported decision-making alternatives,²⁷ but emphasised that “support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.”²⁸ The Committee has also pointed out that the purpose of the safeguards “that

²² Statement by the UN Special Rapporteur on Disability, *Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument*, September 2006, www.un.org/esa/socdev/enable/srstatohrc2006.html.

²³ [Letter from the UN Special Rapporteur on Disability to Members of the UN Human Rights Committee](#), re: General Comment No. 35 (CCPR/C/107/R.3) on Article 9 (right to liberty and security of person), 27th May 2014.

²⁴ Ibid, para 3.

²⁵ Ibid, para 4.

²⁶ There are distinctions between a ‘best interests’ and a ‘substituted judgment’ approach, which we do not explore in this intervention, as the consensus is to move away from both such approaches towards supported decision-making.

²⁷ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), para. 3.

²⁸ Ibid, para 17.

must be present in a system of support in the exercise of legal capacity”²⁹ as required by Article 12(4) of the CRPD, must be to ensure the respect of the person’s rights, will and preferences, “including the right to take risks and make mistakes.”³⁰ In the Committee’s view thus the “best interests” principle clearly fails to comply with Article 12 of the CRPD as a safeguard and must be replaced by the “will and preferences” paradigm “to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”³¹

18. Similarly, a 2012 Issue Paper for the Council of Europe Commissioner for Human Rights, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*,³² explains the significance of Article 12 in the move towards supported decision-making and away from “the old paradigm, where substituted decision-making was the main rule” to a model based on support in decision-making that empowers people with intellectual and/or psycho-social disabilities to formulate their choices.³³

19. A clear indication of the international consensus on an approach to legal capacity which respects the will and preferences of persons with disabilities is that, even in jurisdictions with a former reliance on the best interest approach, there is an emerging trend placing more emphasis on the will and preferences of the person.

20. The Scottish Law Commission in a 1995 report criticised the overly paternalistic best interests standard, raising concerns regarding it not giving “due weight” to the wishes and feelings of the adult.³⁴

21. In the UK, the Supreme Court has, in the recent case of *Aintree University Hospitals NHS Foundation Trust v James* [2013],³⁵ rejected the suggestion that the best interests test (the applicable statutory test in that case under the Mental Capacity Act (MCA) 2005) is objective only, based on the ‘reasonable patient’. Rather, the Court emphasised the importance of the patient’s own views, suggesting that decisions should be made through the prism of his or her likely or actual wishes: “insofar as it is possible to ascertain the patient’s wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.”³⁶ The Court of Protection has previously accepted that under the MCA an individual’s wishes and feelings are a significant factor to which the court has to pay close regard.³⁷ A similar point was made by the House of Lords Select Committee on the Mental Capacity Act 2005³⁸ considering the MCA, referring to the will, rights and preferences of the individual needing to be “the starting point for any kind of determination of what is best for an individual”.³⁹

22. More recently, the Australian Law Reform Commission conducted an inquiry into laws and legal frameworks which deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity, and produced a 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*.⁴⁰ The report examines in detail the move from a best interests model to a supported decision-making approach. It makes clear the important distinction between ‘substituted’ and ‘supported’ decision-making.⁴¹ The report states that the CRPD has “set a new benchmark of expectation, not only in

²⁹ Ibid, para 20.

³⁰ Ibid, para 22.

³¹ Ibid, para 21.

³² Anna Nilsson, CommDH/IssuePaper (2012)2.

³³ Anna Nilsson, CommDH/IssuePaper (2012)2, para 4.1.

³⁴ *Report on Incapable Adults*, Scottish Law Commission Report No. 151 (1995).

³⁵ *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] 1 All ER 573.

³⁶ Ibid, Per Lady Hale at para. 46.

³⁷ *ITW v Z* [2011] 1 WLR 344; [2009] EWHC 2525 (Fam), para. 35(i).

³⁸ The House of Lords Select Committee on the MCA 2005 was set up by the House of Lords in 2013 with the aim of conducting a post-legislative scrutiny of the Act and examining its implementation.

³⁹ House of Lords Select Committee on the MCA 2005, Report of Session 2013-14, *Mental Capacity Act 2005: Post-Legislative scrutiny*, HL Paper 139 (13 March 2014), para. 99 (citing Kirsty Keywood, University of Manchester), available at <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf> (last accessed 5 February 2016).

⁴⁰ ALRC Report 124 (DP 81) (24th November 2014), available at <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124> (last accessed 5 February 2016).

⁴¹ See paras 2.51 – 2.56.

terms of law but also practice⁴² and puts forward a proposed new model to reflect this, providing for supported decision-making respectful of the autonomy and capacity of the individual.

Article 8 of the Convention

23. The Court has consistently held that it is neither possible nor necessary to attempt an exhaustive definition of the notion of ‘private life’ in Article 8(1), but the concept should be construed broadly.⁴³ The overarching concern of Article 8 is to protect, “rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others, and a settled and secure place in the community.”⁴⁴ Laws LJ in the English case of *Wood v Commissioner of Police for the Metropolis*⁴⁵ described the heart of Article 8(1) as follows,

“The phrase ‘physical and psychological integrity’ of a person... is with respect helpful. So is the person’s ‘physical and social identity’... These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual...”

The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to [qualifications], an individual’s personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the “zone of interaction”... between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual’s liberty, is a defining characteristic of a free society.”⁴⁶

24. These aspects of Article 8(1) – physical and psychological integrity, autonomy, self-determination, dignity – are engaged by guardianship systems which override the will and preferences of an adult. Decisions taken under such a regime which impact profoundly upon an individual’s day-to-day living and his interaction with the world – such as by overriding his wishes regarding where he lives, or by restricting his ability to see those with whom he has a close emotional connection – plainly fall within Article 8(1). The Court has on a number of occasions held that guardianship systems constitute a very serious interference with Article 8 rights.⁴⁷ In *Shtukurov v Russia*, for example, the Court noted that “as a result of his incapacitation the applicant became fully dependent on his official guardian in almost all areas of life”⁴⁸ and found full incapacitation to be disproportionate and in breach of Article 8.⁴⁹ This conclusion is reinforced when the CRPD and other relevant disability-specific international standards properly inform the interpretation of Article 8.

25. Article 8(1) being engaged, it then falls to the State to justify the interference in accordance with Article 8(2). It will only be justified if it is (a) in accordance with law; (b) pursues a legitimate aim and (c) is ‘necessary in a democratic society’ – which in turn requires the State to show that the measure pursues a ‘pressing social need’ and is proportionate.⁵⁰ When considering limbs (b) and (c) of this test in particular,

⁴² Ibid, para. 2.94.

⁴³ *Niemitz v Germany* Application No. 13710/88, judgment of 16 December 1992 at para. 29; *Halford v UK* Application No. 20605/92, judgment of 25 June 1997; *Botta v Italy*, Application No. 21439/93, judgment of 24 February 1998; *S and Marper v U*, Application No. 30562/04, judgment of 4 December 2008, at para. 66.

⁴⁴ *Connors v UK*, Application No. 66746/01, judgment of 27 May 2004, at para. 82.

⁴⁵ *Wood v Commissioner of Police for the Metropolis* [2010] 1 WLR 123, paras 20-22.

⁴⁶ Ibid.

⁴⁷ See amongst others *X and Y v Croatia*, Application No. 5193/09, judgment of 3 November 2011 at para. 102.

⁴⁸ *Shtukurov v Russia*, Application No. 4009/05, judgment of 27 March 2008, at para 90.

⁴⁹ Ibid, para 96. See also *Sýkora v Czech Republic*, Application No. 23419/07, judgment of 22 November 2012.

⁵⁰ See e.g. *Sunday Times v United Kingdom*, Application No. 6538/74, judgment of 6 November 1980 at para 59; *Handyside v United Kingdom*, Application No. 5493/72, judgment of 7 December 1976; *Kokkinakis v Greece*, Application No. 14307/88,

the CRPD and other international standards are highly relevant: the broad headings in Article 8(2) (protection of morals, health) must be interpreted in a manner consistent with these standards; and when considering proportionality, the international recognition of the importance of autonomy and supported decision-making for individuals with disabilities must be taken into account. Indeed, considering the fact that the deprivation of legal capacity may strip the essence of a person's autonomy and identity, in *M.S. v Croatia* the Court, acknowledging the seriousness of such interference, stated that "*strict scrutiny is called for where measures that have such adverse effect on a person's personal autonomy are at stake*".⁵¹ In *Ivinović v Croatia*⁵² the Court emphasised the domestic authorities obligation to consider alternative measures to any deprivation of legal capacity which must only be applied as a last resort:

*"even when the national authorities establish with the required degree of certainty that a person has been experiencing difficulties in paying his or her bills, deprivation, even partial, of legal capacity should be a measure of last resort, applied only where the national authorities, after carrying out a careful consideration of possible alternatives, have concluded that no other, less restrictive, measure would serve the purpose or where other, less restrictive measure, have been unsuccessfully attempted."*⁵³

26. A measure which infringes an individual's Convention rights in a profound and far-reaching way, which is not restricted in its application or effect, and is not attended by sufficient safeguards in national law to ensure that the individual is not subject to arbitrary treatment, is unlikely to be considered proportionate.⁵⁴

Article 2 of Protocol No. 4 of the Convention

27. A2P4 protects the right to liberty of movement and freedom to choose one's residence. These rights are closely intertwined with Article 8 (above) and the non-discrimination provisions addressed below.

28. Any interference with the right to choose one's place of residence must be in accordance with law, pursue a legitimate aim and be necessary – again, the State must demonstrate that the interference meets a 'pressing social need' and that it is proportionate. As a matter of general principle, the right to choose one's residence should be given a wide meaning, and the exceptions allowing for an interference with the right should be interpreted narrowly to ensure that the contents of the right are made practical and effective⁵⁵ (this approach has been adopted in respect of the ICCPR where the grounds for interference have been described as "*exceptional*"⁵⁶). A narrow interpretation of the restrictions is particularly important in the context of persons with disabilities in order to preserve the right for those most vulnerable to its restriction, such as people with mental disabilities, where reliance on what is said to be in the 'best interests' of such persons renders them at particular risk of denial of the right.

29. It is clear from the Court's case law that restrictions on freedom of movement and the right to choose one's residence will only be justified in limited circumstances. The Court has recognised that a restriction is capable of being justified in the following narrow situations: a supervision order imposed on a person suspected of Mafia activities;⁵⁷ bail conditions imposed on a person accused of criminal offences;⁵⁸ residence restrictions imposed on a person being investigated for criminal offences;⁵⁹ restrictions imposed to

judgment of 25 May 1993 (concerning Article 10(2), but the same test applies in this context).

⁵¹ *M.S. v. Croatia*, Application No. 36337/10, judgment of 25 April 2013, at para. 97.

⁵² *Ivinović v Croatia*, Application No. 13006/13, judgment of 18 September 2014.

⁵³ *Ibid*, para. 44.

⁵⁴ *M.S. v Sweden*, Application No. 20837/92, judgment of 27 August 1997.

⁵⁵ *Niemietz v Germany*, Application No. 13710/88, judgment of 16 December 1992 at paras 29-30; and *Klass v Germany*, Application No. 5029/71, judgment of 6 September 1978 at para. 42.

⁵⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, at para 11, available at: <http://www.refworld.org/docid/45139c394.html> [accessed 5 February 2016].

⁵⁷ *Labita v Italy*, Application No. 26772/95, judgment of 6 April 2000, at para 195; *Raimondo v Italy*, Application No. 12954/87, judgment of 22 February 1994 at paras 39-40; *Ciancimino v Italy*, Application No. 12541/86, judgment of 27 May 1991.

⁵⁸ *Schmid v Austria*, Application No. 10670/83, judgment of 9 July 1985.

⁵⁹ *Rosengren v Romania*, Application No. 70786/01, judgment of 4 May 2006, at para. 34; *Antonenkov v Ukraine*, Application No. 14183/02, judgment of 22 November 2005, at paras 59-67.

protect national security where it was feared that an individual would disclose State secrets;⁶⁰ and a travel ban imposed on a person who had failed to discharge a debt and pay unpaid tax.⁶¹ The restrictions that are capable of being justified are primarily concerned with protecting society from criminality. Restrictions are not justified by the purported best interests of an individual who poses no risk to society and who has expressed a contrary will and preference. Further, it is significant that in a number of decisions where the Court has recognised that A2P4 is *capable* of being lawfully restricted, the Court has nonetheless found a violation.⁶² This indicates that the circumstances in which an interference will be justified are limited and should be restrictively construed.

30. Where an individual is required to reside in one place for a lengthy period of time, or is prevented from travelling for a significant period, the duration of the restriction alone may result in a violation of A2P4.⁶³ Further, A2P4 requires reviews of restrictions of the right to freedom of movement and residence to ensure continued need.⁶⁴ This again demonstrates the narrow interpretation that should be given to any proposed restriction of the protected right.

31. International Standards: A2P4 should be interpreted consistently with the general principles of international law, including, in particular, the CPRD, as well as the ICCPR and United Nations and CoE material. Two clear themes arise from this international material that are of particular relevance here:

- i. The will and preferences of persons with disabilities should be respected in their exercise of the right to choose their place of residence. Will and preference should not be overridden by the perceived 'best interests' of a person with disabilities, as decided by someone else;
- ii. Persons with disabilities should be subject to no greater restriction of their right to choose a place of residence than anyone else. Any restriction on grounds of disability amounts to unlawful discrimination contrary to international standards.

32. Article 18(1) CRPD (liberty of movement and nationality) provides that, "*States Parties shall recognize the rights of persons with disabilities...to choose their residence...on an equal basis with others...*" Article 19 CRPD (living independently and being included in the community) provides:

"States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; ..."

33. The CRPD Committee in its *General Comment No. 1 on Article 12* has emphasised that the CRPD is premised on principles of non-discrimination, respect for individual autonomy, including the freedom to make one's own choices in accordance with one's will and preferences (rather than what is believed to be in a person's best interest), and the right of persons with disabilities to exercise legal capacity on an equal basis with others.⁶⁵ Under the CRPD, a person's actual or perceived deficits in mental capacity or decision-making cannot justify a denial of legal capacity.⁶⁶ This is particularly important as there exists a close link

⁶⁰ *Bartik v Russia*, Application No. 55565/00, judgment of 21 December 2006, at para. 43.

⁶¹ *Riener v Bulgaria*, Application No. 46343/99, judgment of 23rd May 2006.

⁶² See *Labita v Italy*, Application No. 26772/95 at para. 196; *Rosengren v Romania*, Application No. 70786/01, judgment of 24 April 2008, at para. 40; *Bartik v Russia*, Application No. 55565/00, judgment of 21 December 2006 at para. 52; *Raimondo v Italy*, Application No. 12954/87, judgment of 22 February 1994.

⁶³ *Rosengren v Romania*, Application No. 70786/01, at para. 38; *Riener v Bulgaria*, Application No. 46343/99.

⁶⁴ *Bartik v Russia*, Application No. 55565/00, at para. 48; *Hajlik v Hungary*, Application No. 41463/02, judgment of 31 October 2006, at para. 36.

⁶⁵ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), paras 1, 4, 7, 8, 17, 21, 24, 26, 27.

⁶⁶ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), para. 13; see also UN Human Rights Council, Resolution 28/4, *The right of persons with disabilities to live independently and be included in the community on an*

between deprivation of legal capacity and institutionalisation. The preservation and exercise of legal capacity is crucial to ensuring that Article 19 CRPD is made real and effective. The deprivation of legal capacity takes away a person's right to make decisions about where and with whom to live, and thus makes it possible for a guardian to place a person in an institution – be it a large residential institution or a smaller one, situated within the community –⁶⁷ nullifying the content of Article 19.⁶⁸

34. These principles apply to the right of persons with disabilities to exercise their right to legal capacity in choosing a place of residence, and are closely linked to the non-discrimination principles set out below (see paras 32-33). Persons with disabilities must be able to choose where and with whom to live, and must be given the opportunity to live independently in the community based on their own choices, on an equal basis with others.⁶⁹ This requirement to respect the will and preference of persons with disabilities, rather than permitting others to decide what is in their 'best interests', represents a normative shift and protects and upholds the rights, autonomy and inherent dignity of persons with disabilities. Through its reviews of State Party reports, the CRPD Committee has echoed these points; the Committee has noted that Article 19 CRPD requires States to respect the rights of persons with disabilities to live in the community in a manner of their choosing, and to choose freely with whom, where and under which living arrangements they will live, on an equal basis with others.⁷⁰

35. The importance for persons with disabilities of choosing one's residence and living independently within the community, based on their own will and preference on an equal basis with others, has been repeatedly emphasised at the European and international levels.⁷¹

Equal Treatment and Non-Discrimination in Exercising the Freedom to Choose One's Place of Residence

36. Both Article 14 and A1P12 prohibit discrimination on a wide range of grounds, including disability, and require that Convention rights are secured without discrimination.⁷² International standards reinforce the requirement to prohibit discrimination on grounds of disability. Article 5 CRPD prohibits all discrimination on grounds of disability, and the CRPD Committee has recognised that persons with disabilities must be able to choose where and with whom to live on an equal basis with others.⁷³ The UN Human Rights Committee has stated that Article 12 of the ICCPR – which protects the freedom to choose one's residence – must be interpreted consistently with principles of equality and non-discrimination. If the right to choose one's residence is restricted on grounds of, *inter alia*, race, colour, sex, religion or "other status" (which includes disability), there will be a clear violation of the ICCPR.⁷⁴

37. It follows from the above that it is inherently discriminatory to deprive a person with disabilities of his or her legal capacity. Guardianship regimes create structures for discrimination: they are premised on

equal basis with others, 8 April 2015.

⁶⁷ The term institution does not refer solely to large residential social care homes or psychiatric units; but any place where persons who are labelled as disabled "are isolated, segregated and/or congregated in which people do not have, or are not allowed to exercise control over their lives and day to day decisions". This definition of an institution is commonly used by disabled people's organisations including Inclusion Europe and the Canadian Association for Community Living, <http://www.cacl.ca/english/index.asp> (last accessed 5 February 2016).

⁶⁸ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), para. 46.

⁶⁹ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), paras 44, 46.

⁷⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Belgium* (2014), para. 33; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Czech Republic* (2015), para. 39; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Denmark* (2014), paras 42-43; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Spain* (2011), para. 40; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Ukraine* (2015), para. 37.

⁷¹ UN Human Rights Council, Resolution 28/4, *The right of persons with disabilities to live independently and be included in the community on an equal basis with others*, 8 April 2015; OHCHR, *Thematic study on the right of persons with disabilities to live independently and to be included in the community*, 12 December 2014, paras 4, 6, 7, 13, 15; UN Special Rapporteur on the Rights of Persons with Disabilities, *Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar*, 2 February 2015, para. 33(a); Fundamental Rights Agency of the European Union, *Choice and Control: the right to independent living*; Issue Paper of the Council of Europe Commissioner for Human Rights, *The right of people with disabilities to live independently and be included in the community*, June 2012.

⁷² *Malone v United Kingdom*, Application no. 8691/79, judgment of 2 August 1984.

⁷³ Committee on Rights of Persons with Disabilities, *General Comment No. 1 on Article 12* (2014), paras 44, 46.

⁷⁴ UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 18.



the deprivation of legal capacity of persons with disabilities, thus preventing persons with disabilities from making decisions affecting their daily lives – amongst others, the decision about their place of residence.

Conclusion

38. The European and international recognition of the human rights of people with disabilities, and an established consensus on the rights of people with disabilities not be subjected to discriminatory treatment, form a vital part of the backdrop to these submissions. The key international standard concerning the rights of persons with disabilities is the CRPD, and MDAC submits that when considering this case the CRPD is of vital importance.

39. We have noted above two central themes within the current international and European standards on the rights of people with disabilities in the context of the twin and overlapping rights to respect for private and family life and the freedom to choose one's place of residence – namely, first, that persons with disabilities are entitled to exercise their legal capacity equally with others, are enabled to do so without suffering discrimination on grounds of disability, and are not deprived of the right to make their own choices simply because of a disability; and second, that States Parties must ensure that persons with disabilities are enabled to exercise legal capacity such that their will and preferences are respected, protected and upheld, and are not ignored or overridden by reference to their perceived 'best interests', as decided upon by others.

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