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LEGAL CAPACITY AND PARTICIPATION IN LITIGATION: RECENT DEVELOPMENTS IN THE EUROPEAN COURT OF HUMAN RIGHTS

Lucy Series¹

ABSTRACT

The right to equal recognition before the law lies at the core of the UN Convention on the Rights of Persons with Disabilities (CRPD). The right to litigate in order to claim and defend one's rights is vital if they are to have any enforceable application. Yet people who are deprived of their legal capacity often experience multiple barriers to litigating in defense of their rights. These barriers range from formal bars against making applications to the courts or instructing their own legal representative, to judicial practices which exclude people with disabilities from proceedings which concern their own lives and affairs. Legal capacity, as protected by Article 12 CRPD, thus intersects in important ways with Article 13 CRPD on access to justice. There is, furthermore, a need to consider what kinds of supports and accommodations people with disabilities – especially intellectual, cognitive and psychosocial disabilities, which I will refer to collectively as 'mental disabilities'² – would need to enable them to participate in litigation effectively and fairly. In recent years, the European Court of Human Rights has heard a succession of cases that have significantly developed its interpretation of Articles 5(4), 6, 8 and 13 of the European Convention (ECHR) on Human Rights in relation to legal capacity. This article reviews how far we have come, and how far we have yet to go, for the Strasbourg court to develop a jurisprudence that reflects the spirit and purpose of Articles 12 and 13 CRPD in connection with procedural justice.

1. INTRODUCTION

As the European Court of Human Rights noted in *Golder v UK*³ one can 'scarcely conceive of the rule of law without there being a possibility of having access to the courts'. The Court's insight in *Golder v UK* has profound

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² As the European Union Agency for Fundamental Rights commented in its recent report on legal capacity, there is a lack of consensus about preferred terminology – particularly in relation to 'psychosocial disabilities', as some prefer the term 'mental health problems' and prefer not to identify as disabled. This article refers to 'disabilities', however, to orient readers towards barriers and supports within the legal system, and to highlight the engagement of the CRPD. European Union Agency for Fundamental Rights (FRA) (2013) *Legal capacity of persons with intellectual disabilities and persons with mental health problems*. Brussels.

³ Application No. 4451/70, judgment 21 February 1975, (1975) ECHR 1; 1 EHRR 524, §34.

implications: those who do not have access to a court exist in a realm beyond the rule of law; a world with few effective brakes against unprincipled and unlawful incursions into one's rights. Yet for many people across the Member States of the Council of Europe, access to the courts is nigh on impossible as a result of their being deprived of their legal capacity on disability-related grounds. The ability to exercise one's legal capacity – backed up by the ability to litigate if need be – is central to the exercise of all other legal rights. It is for this reason that Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) – the right to equal recognition before the law – is said to lie at the 'core' of the Convention.⁴ As the European Court of Human Rights itself observed in the landmark legal capacity case *Stanev v Bulgaria*,⁵ loss of legal capacity will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity.

The right to equal recognition before the law provoked intense debate during the drafting of the CRPD,⁶ and is said to have caused the most problems for States in ratifying it.⁷ At root, these debates concerned whether or not it is ever acceptable to impose a substituted decision for a person's own will and preferences on disability related grounds. The text of Article 12 does retain some language which might appear to permit substituted decision making,⁸ but the United Nations Committee for the Rights of Persons with Disabilities (CPRD Committee) has consistently interpreted Article 12 as requiring States to 'take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making'.⁹

⁴ Centre for Disability Law & Policy, 'Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality', (NUI Galway, 2011), 5. See also: A. Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?', 563 *Syracuse Journal of International Law and Commerce* (2006-7), 596.

⁵ *Stanev v Bulgaria*, Application No. 36760/06, judgment 17 January 2012, (2012) 55 EHRR 22, § 241.

⁶ Lawson, 563 *Syracuse Journal of International Law and Commerce* (2006-7); A. Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future', 34 *Syracuse Journal of International Law and Commerce* (2006-7), 429; T. Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non consensual psychiatric interventions', 34 *Syracuse Journal of International Law and Commerce* (2006-7), 405.

⁷ Equal Rights Trust, 'Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol', 2 *The Equal Rights Review* (2008), 83.

⁸ A. Dhanda, 34 *Syracuse Journal of International Law and Commerce* (2006-7); D. Lush, 'Article 12 of the United Nations Convention on the Rights of Persons with Disabilities', 1 *Elder Law Journal* (2011), 61.

⁹ United Nations Committee for the Rights of Persons with Disabilities, Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia, Fifth Session: 11-15 April 2011, (Geneva, 2011). CRPD/C/ESP/CO/1. See also reports on Spain (CRPD/C/ESP/CO/1), Hungary (CRPD/C/HUN/CO/1), Peru (CRPD/C/PER/CO/1), Argentina (CRPD/C/ARG/CO/1), China (CRPD/C/CHN/CO/1), Paraguay (CRPD/C/PRY/CO/1) and Austria (CRPD/C/AUT/CO/1).

Article 12(3) CRPD requires States to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. A growing literature considers what such supports might look like.¹⁰ Questions remain about what the 'support paradigm' might look like in situations of crisis or emergencies,¹¹ and models of supported decision-making are lacking in many fields.¹² Yet the need for further development of a support paradigm does not diminish the importance of the CRPD's loud and clear call for a new approach to the rights of persons with disabilities.

Article 12 CRPD is bolstered by Article 13 CRPD, which requires that States ensure that people with disabilities enjoy equal access to justice with others through provision of appropriate accommodations in order to 'facilitate their effective role as direct and indirect participants'. Article 13 also requires States to promote appropriate training for those working in the administration of justice.

Until recently, the European Court of Human Rights' jurisprudence on legal capacity was deeply underdeveloped. This is mostly likely to be due to the well known difficulties that people with disabilities experience in accessing justice in general – especially those who are formally barred from litigation as a result of deprivation of their legal capacity.¹³ The Court's former President,

¹⁰ Advocacy for Inclusion, 'Supported Decision Making, Legal Capacity and Guardianship: Implementing Article 12 of the Convention on the Rights of Persons with Disabilities in the Australian Capital Territory', (Canberra City, 2012); M. Bach, & L. Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Prepared for the Law Commission of Ontario', (Ontario, 2010); Centre for Disability Law & Policy, *Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality*; R.D. Dinerstein, 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making', 19 *Human rights Brief* (2012), 8; European Disability Forum, 'Equal recognition before the law and equal capacity to act: understanding and implementing Article 12 of the UN Convention on the Rights of Persons with Disabilities', (EDF Position paper – Brussels, 2009); P. Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law', 20(3) *Psychiatry, Psychology and Law* (2012), 431; Inclusion Europe, 'Key Elements of a System for Supported Decision-Making', (Position Paper of Inclusion Europe, Adopted at the General Assembly 2008).

¹¹ P. Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', 75 *Medical Law Review* (2012), 752; P. Gooding, *Psychiatry, Psychology and Law* (2012); G. Richardson, 'Mental capacity in the shadow of suicide: What can the law do?', 9 *International Journal of Law in Context* (2013), 87.

¹² S. Werner, 'Individuals with Intellectual Disabilities: A Review of the Literature on Decision-Making since the Convention on the Rights of People with Disabilities (CRPD)', 34 *Public Health Reviews* (2012), 1.

¹³ See, for example, P. Bartlett, O. Lewis, & O. Therold, *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2007), 153; Equality and Human Rights Commission, *Promoting the Safety and Security of Disabled People*, (London, 2010); S. Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System Disability-Inclusive Development', 17 *ILSA Journal of International and Comparative Law* (2010-11), 281.

Sir Nicolas Bratza, has lamented that he had hoped the ruling in *Winterwerp v the Netherlands*,¹⁴ 'would lead to a flowering of the Court's case-law on the Convention rights of persons with mental disabilities, the contrary proved to be the case: the jurisprudence of the Court in the succeeding twenty years is notable for the almost complete dearth of judicial decisions in this vitally important area'.¹⁵ Happily, the last five years have begun to show signs of a delayed flowering of legal capacity jurisprudence in the European Court of Human Rights, in part as a result of the concerted efforts of European NGOs.¹⁶ However, although there have been several important developments, the case law discussed below still falls far short of the substantive rights contained within Article 12 CRPD – and elements of the European Convention on Human Rights (ECHR) itself, cannot in any case be reconciled to the CRPD.¹⁷

The topic of legal capacity is broad and intersects in complex ways with almost all legal rights and processes. This article limits its ambitions to review recent developments from the European Court of Human Rights in the area of legal capacity and *procedural justice*. It considers how recent rulings under the ECHR have a bearing on such fundamental procedural matters as a person's standing to apply to a court, to instruct their own lawyer, to be notified of legal proceedings which are about them, to appear in person and meet the judge deciding their case, and to be informed of the outcome of the court's decision. These technical procedural issues lurk in the background of highly charged debates about rights to exercise one's legal capacity in relation to more substantive matter – such as rights to refuse medical treatments, to decide where one lives, to marry, to vote, etc. Yet they cannot be neglected, as without the ability to litigate effectively, the rights and protections afforded by legal capacity will be weak.

This paper starts by briefly reviewing the diversity of ways in which a person's procedural rights might be impacted upon by a denial of legal capacity, and some of the justifications given for this. It explains how these issues can arise not only in connection with traditional guardianship regimes, but also in jurisdictions which purport to have more 'empowering' capacity regimes. Part three considers the Strasbourg Court's jurisprudence regarding the right of access to a court. Part four considers the Court's jurisprudence on the participation of persons deprived of their legal capacity in the proceedings

¹⁴ Application No. 6301/73, judgment 24 October 1979, (1979) 2 EHRR 387.

¹⁵ Foreword to Bartlett, Lewis and Thorold's book *Mental disability and the European Convention on Human Rights* (2007).

¹⁶ In particular: the Mental Disability Advocacy Center, the International Centre for Legal Protection of Human Rights (Interights) and regional Helsinki Committees.

¹⁷ P. Fennell & U. Khaliq, 'Conflicting or complementary obligations? The UN Disability Rights Convention on Human Rights and English law' 6 *European Human Rights Law Review* (2011) 662.

themselves. Part five considers a very underdeveloped area of Strasbourg case law – an area ripe for creative litigation – the right to support in the exercise of legal capacity during litigation. This article closes with a discussion of how these procedural matters might impact on wider reforms relating to deprivation of legal capacity.

2. DEPRIVATION OF CAPACITY AND PROCEDURAL RIGHTS

Many jurisdictions operate systems of plenary or partial guardianship where all, or some, of a person's ordinary legal rights to self-determination are vested in a third party – their guardian. Research by NGOs and intergovernmental organizations has revealed the inner workings of such regimes for a number of Central and Eastern European states.¹⁸ This research shows that in many States a person who is formally deprived of their legal capacity will be legally barred from making applications to the courts, even for the purpose of restoring their legal capacity. The Strasbourg court has increasingly found that this state of affairs violates fundamental ECHR rights, discussed in more detail below.

Earlier international human rights standards, now supplanted by the CRPD, had called for States to take a more tailored approach to deprivation of legal

¹⁸ Please note that some of these jurisdictions may have undergone law reform since these reports were published: Mental Disability Advocacy Centre, 'Guardianship and Human Rights in Serbia: Analysis of Guardianship Law and Policy', (Budapest, 2006); Mental Disability Advocacy Centre, 'Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice', (Budapest, 2007); Mental Disability Advocacy Centre, 'Guardianship and Human Rights in Russia: Analysis of Law, Policy and Practice', (Budapest, 2007); Mental Disability Advocacy Centre, 'Guardianship and Human Rights in Hungary: Analysis of Law, Policy and Practice', (Budapest, 2007); Mental Disability Advocacy Centre, 'Guardianship and Human Rights in the Czech Republic: Analysis of Law, Policy and Practice', (Budapest, 2007); Mental Disability Advocacy Centre, 'Guardianship and Human Rights in Kyrgyzstan: Analysis of Law, Policy and Practice', (Budapest, 2007). For more recent, but less detailed, analyses of guardianship laws see also: Mental Disability Advocacy Center & SHINE, 'Out of Sight: Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia', (Hungary and Zagreb, 2011); L. Šlmokovic, S. Cano, D. Halugic, N. Nadarevic, A. Biberkic, V. Zaimovic, V. Behluli, Z. Hyseni-Duraku, S.A. Lazarevic, & D.C. Milovanovic, 'Practicing Universality of Rights: Analysis of the implementation of the UN Convention on the Rights of Persons with Disabilities in view of Persons with intellectual Disabilities in Bosnia and Herzegovina, Kosovo, Serbia', (People in Need, 2012); L. Ciocan, 'Study: The System of Guardianship in Practice in the Republic of Moldova: Human Rights and Vulnerability of Persons Declared Incapacitated', (United Nations Office of the High Commissioner for Human Rights, 2013); Mental Disability Advocacy Center, 'Written Comments to the Human Rights Committee on the List of Issues Bulgaria Review', (Budapest, 2011); Mental Disability Advocacy Center, 'Additional information about Hungary's compliance with the UN Convention on the Rights of Persons with Disabilities, with respect to the List of Issues and Replies from the Government of Hungary to the List of issues', (Budapest, 2012). For recent changes in the Czech Republic see: Mental Disability Advocacy Center, 'Czech Republic enacts legal capacity law reform', (Budapest, 2012), available at: <<http://mdac.info/en/news/czech-republic-enacts-legal-capacity-law-reform>> (accessed 25 October 2013).

capacity.¹⁹ Accordingly, some more modern guardianship regimes adopt a 'functional' approach, whereby a person's legal capacity is coupled to their 'mental capacity' – as defined under a 'functional' test. One such regime is the Mental Capacity Act 2005 of England and Wales (MCA).²⁰ Typically, functional approaches like the MCA assess how well a person understands the information relevant to a particular decision, evaluates that information, retains it and communicates their decision.²¹ Because a person's performance in relation to the functional test will vary according to the decision in question, a person's legal capacity is said to be 'decision specific' – this is supposed to tailor any deprivation of legal capacity to the minimum a person is said to need. Although it is beyond the scope of this article, there are many compelling critiques of 'functional approaches' to legal capacity,²² and it is unlikely to accord with the most recent jurisprudence of the CRPD Committee²³ as it still permits substituted decision making.

Of particular significance for this discussion, functional approaches like the MCA may still impact upon a person's procedural rights in litigation, but they may do so in a slightly different way to plenary or partial guardianship. Because a person's legal capacity will depend upon their 'functional capacity' in relation to a particular matter, in theory a person with a 'guardian'²⁴ might

¹⁹ United Nations, 'The protection of persons with mental illness and the improvement of mental health care', signed at the 75th plenary meeting of the UN General assembly, A/RES/46/119 (MI Principles); Council of Europe, Recommendation (99) 4E on principles concerning the legal protection of incapable adults, adopted by the Committee of Ministers on 23 February 1999.

²⁰ This example is among the best known, but see also: Adults with Incapacity (Scotland) Act 2000; Guardianship and Administration Act 2000 (Queensland, Australia); Adult Guardianship and Trusteeship Act 2008 (Alberta, Canada); Substitute Decisions Act 1992 (Ontario, Canada). Some jurisdictions have specific functional tests for particular decisions, for example the Guardianship and Administration Act 1986 (Victoria, Australia) has a specific test for making medical decisions. In British Columbia, Canada, there are different tests for the capacity to make a Representation Agreement (Representation Agreement Act (British Columbia) 1996) to the capacity to make a Power of Attorney (Power of Attorney Act 1996 (British Columbia)).

²¹ See Sections 1-3 Mental Capacity Act 2005 for details of this functional test.

²² O. Lewis, *European Human Rights Law Review* (2011), 700; A. Dhanda, 34 *Syracuse Journal of International Law and Commerce* (2006-7), 429; S. Stefan, 'Silencing the Different Voice: Competence, Feminist Theory and Law', 47 *Miami Law Review* (1992-1993), 763; D. Morgan, D. & K. Veitch, 'Being Ms B: B, Autonomy and the Nature of Legal Regulation', 26 *Sydney Law Review* (2004), 107; F. Freyenhagen, & T. O'Shea, 'Hidden Substance: Mental disorder as a challenge to normatively neutral accounts of autonomy', 9 *International Journal of Law in Context* (2013), 53.

²³ See footnote 9, above, and United Nations Committee on the Rights of Persons with Disabilities (2013) *Draft General comment on Article 12 of the Convention-Equal Recognition before the Law*. (Adopted by the Committee at its tenth session, 2 – 13 September 2013). Geneva.

²⁴ I use the term 'guardian' here to signify a third party who is appointed to make decisions on behalf of a person who lacks legal capacity. However, the term has a different significance in England and Wales, where 'guardianship' is a little used relic of a much older regime under ss6-7 Mental Health Act 1983 which gives them extremely limited powers. More commonly,

retain their legal capacity to litigate independently of their guardian's consent if it is felt that they have the 'mental capacity' to do so.²⁵ Conversely, a person without any formally appointed 'guardian' might be deprived of the legal capacity to conduct proceedings if the Court finds that they lack the 'mental capacity' to conduct the litigation.²⁶ Under functional approaches, the capacity to litigate is therefore distinct from a person's legal capacity in relation to other areas, but it may still have a profound impact on the way they can conduct litigation to enforce their rights.

2.1. RATIONALE FOR RESTRICTIONS ON LITIGATION CAPACITY

The European Court of Human Rights has delineated a threefold rationale for restrictions on a person's capacity to litigate: to protect the person themselves, to protect the courts and to protect other litigants. In *Salontaji-Drobnjak v Serbia* the Court stated that 'a legal system must be allowed to protect itself from vexatious litigants'.²⁷ In *Mikheylenko v Ukraine* the European Court acknowledged 'that restrictions on the procedural rights of a person who has been deprived of legal capacity may be justified for that person's own protection, the protection of the interests of others and the proper administration of justice'.²⁸ In relation to protecting the person themselves, in *Zehentner v Austria* the European Court did distinguish between procedural restrictions that 'protect the person concerned from disposing of his or her rights or assets to their own disadvantage' and proceedings under the European Convention where 'the need for a person lacking legal capacity to be represented by a guardian is less obvious'.²⁹ This suggests that when it comes to conducting litigation concerning fundamental rights, which does not have the potential for the disadvantageous disposal of a person's property, it may be harder for States to justify restrictions on legal capacity under the ECHR.

From the perspective of equal recognition before the law under the CRPD, it is questionable why people with disabilities should be subject to specific restrictions on access to a court, when most legal systems also operate general protective mechanisms against vexatious litigants. In the domestic

the Court of Protection might appoint a 'deputy' to make decisions on behalf of a person in accordance with their 'mental capacity' and 'best interests', who play a role comparable to partial guardians in other jurisdictions.

²⁵ See, for example, the UK case *V v R* [2011] EWHC 822 (QB).

²⁶ For example, see the UK case *RP v Nottingham City Council & Anor* [2008] EWCA Civ 462, discussed below.

²⁷ Application No. 36500/05, judgment 13 October 2009, (2009) ECHR 1526, § 143.

²⁸ *Mikheylenko v Ukraine*, Application No. 49069/11, judgment 30 May 2013, (2013) ECHR 484, § 35.

²⁹ *Zehentner v Austria*, Application No. 20082/02, judgment 16 July 2009, (2009) ECHR 1119, §39.

hearing of the ECHR case *Seal v UK*,³⁰ Lady Hale emphasized that there is no necessary relationship between mental disability and bringing vexatious claims. Disappointingly in *Seal v UK*, the European Court never grappled with the *discriminatory* nature of imposing additional procedural bars on access to a court for people with mental disabilities, because the discrimination arguments had not been raised in domestic proceedings.³¹

3. ACCESS TO A COURT

Where persons who have been deprived of their legal capacity have no standing to initiate litigation independently of their guardian, courts may refuse to even examine their application.³² In *Golder v UK* the Strasbourg Court held that the right of access to a court 'constitutes an element which is inherent in the right stated by Article 6' ECHR.³³ However, subsequent cases have confirmed that the right of access to a court guaranteed by Article 6 (on the right to a fair trial) is not absolute, especially for people with mental disabilities.

General jurisprudence on rights of access to a court

Article 6 does not require a judicial remedy to exist for any human rights claim – this requirement would fall to other articles of the ECHR, in conjunction with Article 13 – the right to an effective remedy. This means that Article 6 guarantees access to a court only where a person already has an arguable case under domestic law. In *Fayed v the United Kingdom*³⁴ the Court distinguished between substantive and procedural limitations on the right of access to a court. Where domestic law provided no substantive legal right to be asserted before a court the Article 6 right of access was not engaged, but it would be where the bar on access to a court was *procedural*. The Court highlighted the difficulty that it is 'not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law'.³⁵ Generally speaking, a lack of standing to bring a case resulting from restrictions on legal capacity has been treated as a procedural bar, and so falls within the remit of Article 6 protections.

³⁰ *Seal v United Kingdom*, Application no 50330/07, judgment 07 December 2010, (2012) 54 EHRR 6, § 26.

³¹ K. Gledhill, 'Seal v UK: The end of the story or time for a fresh beginning?', 21 *Journal of Mental Health Law* (2011), 93.

³² See, e.g. *Shtukaturov v Russia*; *Salontaji-Drobnjak v Serbia*; *Stanev v Bulgaria*; *D.D. v Lithuania*; *Kędzior v Poland*.

³³ *Golder v UK*, §34 and 36.

³⁴ Application No. 17101/90, judgment 21 September 1994, (1994) 18 EHRR 393.

³⁵ §67; for further discussion of this issue see *Z and Others v United Kingdom*, Application No. 29392/95, judgment 10 May 2001, (2002) 34 EHRR 3, §100-103; *Roche v The United Kingdom*, Application No. 32555/96, judgment 19 October 2005, (2005) 42 EHRR 30, §118-120.

Nevertheless, the procedural rights of access to a court under Article 6 for those whom the European Court refers to as persons 'of unsound mind'³⁶ are subject to limitations that have been endorsed by the European Court.

Limitations on rights of access to a court for persons 'of unsound mind'

In *Golder v UK* the Court had hesitated to rule *in abstracto* on whether restrictions on access to the court for people 'of unsound mind' were compatible with Article 6.³⁷ In *Winterwerp v The Netherlands* it concluded that whilst 'mental illness may render legitimate certain limitations upon the exercise of the "right to a court", it cannot warrant the total absence of that right'.³⁸ In *Ashingdane v United Kingdom*³⁹ the Court considered the requirement that patients detained under the Mental Health Act⁴⁰ must first seek the permission of a court before bringing proceedings connected with their detention. The Strasbourg Court found that access to a court to seek permission to bring proceedings was adequate access for the purposes of Article 6 ECHR.⁴¹

A large body of ECHR case law has accepted that rights of access to a court may be subject to limitations for person 'of unsound mind' so long as these did not impair the very 'essence' of the right.⁴² The Court stated that such limitations must be in pursuit of a legitimate aim and there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.⁴³ The Court has held that in assessing whether a particular measure restricting access to court is necessary, all relevant factors must be considered.⁴⁴ States are afforded a reasonable margin of appreciation to determine procedures limiting rights of access to a court⁴⁵ although, 'if the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism'.⁴⁶ In more recent cases, the Court has held that the margin of appreciation was

³⁶ Being of 'unsound mind' is an explicit limitation on the right to liberty under Article 5(1)(e) ECHR, but it is also sometimes used in the Court's jurisprudence in relation to other ECHR Articles such as Article 6, e.g. *Golder v UK*, paragraph 39.

³⁷ §39.

³⁸ §74-75.

³⁹ Application No. 8225/78, judgment 28 May 1985, (1985) 7 EHRR 528.

⁴⁰ Section 141, Mental Health Act (1959), England and Wales.

⁴¹ §56.

⁴² *Z and Others v United Kingdom*, Application No. 29392/95, judgment 10 May 2001, (2002) 34 EHRR 3, §93; *Shtukurov v Russia*, Application No. 44009/05, judgment 27 March 2008, (2012) 54 EHRR 27, §68; *Salontaji-Drobnjak v Serbia*, §133; *Seal v United Kingdom*, Application No. 50330/07, judgment 7 December 2010, (2012) 54 EHRR 6, §75; *Stanev v Bulgaria*, §229.

⁴³ *Seal v UK*, §75.

⁴⁴ *Shtukurov v Russia*, §68.

⁴⁵ *Ashingdane v UK*, §57; *Seal v UK*, §75; *Stanev v Bulgaria*, §229, 241; *RP v UK*, §65.

⁴⁶ *Salontaji-Drobnjak v Serbia*, §143.

significantly narrowed 'where the measure under examination has such a drastic effect on the applicant's personal autonomy' as to constitute a deprivation of legal capacity.⁴⁷

Essential rights of direct access to a court for persons deprived of their legal capacity

The Court has now elaborated at least three circumstances where a person who is deprived of their legal capacity *must* have direct access to a court, without limitation. In *Shtukaturv v Russia*,⁴⁸ *Sýkora v The Czech Republic*,⁴⁹ *Kędzior v Poland*⁵⁰ and *Mihailovs v Latvia*⁵¹ the Court has confirmed that a person must have standing to apply to a court to appeal against a deprivation of their liberty, regardless of whether their guardian consents to such an action. In *Shtukaturv v Russia* the Court asserted that deprivation of legal capacity is as important an issue under the ECHR as deprivation of liberty,⁵² and in *Stanev v Bulgaria*⁵³, *Kędzior v Poland*⁵⁴ and *Mikheylenko v Ukraine*⁵⁵ the Court held that Article 6 ECHR must be interpreted as 'guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity'.⁵⁶ In *Berková v Slovakia*⁵⁷ the Court held that a restriction on a person's right to apply for restoration of their legal capacity of three years in duration was disproportionate and violated Article 8 ECHR (on right to respect for private and family life).⁵⁸ The Court has also held that where a person is in conflict with their guardian, and 'when the conflict potential has a major impact on the person's legal situation' it is *essential* that the person concerned must have access to the court.⁵⁹

Developing frontiers in direct rights of access to a court for persons deprived of their legal capacity

One developing frontier is the right to ask a court to review the lawfulness of an involuntary placement in an institution. For the millions of people with

⁴⁷ *Lashin v Russia*, Application no. 33117/02, judgment 22 January 2013, [2012] ECHR 63, §81. See also: *MS v Croatia*, Application no 36337/10, judgment 25 April 2013, [2013] ECHR 378, §97.

⁴⁸ §71, citing *Winterwerp v The Netherlands*.

⁴⁹ Application No. 23419/07, judgment 22 November 2012, (2012) ECHR 1960.

⁵⁰ Application No. 45026/07, judgment 16 October 2012, (2012) ECHR 1809.

⁵¹ Application No. 35939/10, judgment 22 January 2013, (2013) ECHR 65.

⁵² §71 and 90.

⁵³ *Stanev v Bulgaria*, Application No. 36760/06, judgment 17 January 2012, (2012) 55 EHRR 22.

⁵⁴ Application No. 45026/07, judgment 16 October 2012, (2012) ECHR 1809.

⁵⁵ §37, §40.

⁵⁶ *Kędzior v Poland*, §85.

⁵⁷ Application No. 67149/01, judgment ,24 March 2009, (2009) ECHR 514.

⁵⁸ §175.

⁵⁹ *DD v Lithuania*, Application No. 13469/06, judgment 14 February 2012, [2012] ECHR 254, §118. See also *MS v Croatia*, Application No. 36337/10, judgment 25 April 2013, (2013) ECHR 378, §80 and 107.

disabilities living in Europe's residential institutions,⁶⁰ this would be a very significant and important right. Increasingly, institutional placement is considered to be an unacceptable response to disability,⁶¹ in contravention of Article 19 CRPD – the right to independent living. Ensuring that people have the legal means to challenge institutional placement against their will is essential to helping to row back the tide of involuntary institutionalization of persons with disabilities. In *Stanev v Bulgaria* the Court held that it was not sufficient for Mr Stanev to have a theoretical opportunity to challenge his placement in a care facility if he could first restore his legal capacity, holding that there should have been a 'direct review of the lawfulness of the applicant's placement'.⁶² In essence, a person should be able to dislodge the placement decision of their guardian directly, without first having to dislodge the guardian themselves.

Guardians, and informal substitute decision makers,⁶³ can often consent to medical treatment. Although the Court's recent ruling in *X v Finland*⁶⁴ did not consider questions of legal capacity directly, it did find that forced administration of medication violated a person's Article 8 rights where the decision making was 'solely in the hands of the treating doctors', was free of any kind of immediate judicial scrutiny and there was no available remedy where a court could be required to rule on the lawfulness and proportionality of such forced treatments and have it discontinued.⁶⁵ It seems only a small step from this ruling to argue that people must have direct access to a court to rule on the lawfulness of medical treatments which are administered against their will, even where their guardian consents or medical practitioners might have a defence for such acts on the basis that the person 'lacks capacity'. Of course, these procedural rights are insufficient to bring the European Convention jurisprudence into compliance with Article 17 CRPD (protecting the integrity of the person), as the CRPD Committee has interpreted it as prohibiting forced treatment altogether.⁶⁶

⁶⁰ J. Mansell, M. Knapp, J. Beadle-Brown, & J. Beecham, 'Deinstitutionalisation and community living – outcomes and costs: Report of a European Study. Volume 2: Main Report, Report commissioned by the European Commission', (University of Kent, 2007).

⁶¹ European Union Agency for Fundamental Rights (FRA), 'Involuntary placement and involuntary treatment of persons with mental health problems', (Vienna, 2012); C. Parker, 'Forgotten Europeans, Forgotten Rights: The Human Rights of Persons Placed in Institutions', (United Nations Office of the High Commissioner for Human Rights, Brussels, 2011).

⁶² §177, see also §173.

⁶³ For example, under s5-6 Mental Capacity Act 2005 of England and Wales, a doctor may treat a person whom they regard as lacking 'mental capacity' to give or refuse consent to a particular treatment, provided it is in their 'best interests'.

⁶⁴ Application No. 34806/04, judgment 3 July 2012, (2012) ECHR 1371.

⁶⁵ §220.

⁶⁶ See the CRPD Committee's reports on Tunisia, Spain and Peru. See also: J. E. Méndez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment

In relation to other kinds of claims, the European Court has been content to find that access to a court that is conditional on the consent of a person's guardian complies with Article 6, where there was no evidence of a conflict of interests between the person and their guardian.⁶⁷ However, in relation to these core rights of access – to challenge deprivation of liberty, deprivation of legal capacity or where there is a dispute between a person and their guardian - the Court has held that the ability to enlist one's guardian, or a public figure such as a mayor or prosecutor, to apply to court on behalf of people deprived of legal capacity is insufficient.⁶⁸ In *X and Y v Croatia* the Court held that '[r]emedies the use of which depends on the discretionary powers of public officials and which are, as a consequence, not directly accessible to the applicant cannot be considered as effective remedies within the meaning of Article 35 §1 of the Convention'.⁶⁹ More recently in *MH v UK*⁷⁰ the Court affirmed that 'right of access to a court under Article 5 § 4 of the Convention should not depend upon the goodwill or initiative of a third party'.

4. PARTICIPATION IN COURT PROCEEDINGS

People who are deprived of legal capacity may face procedural obstacles in participating in litigation which concerns them. This is often linked to prejudice against people with mental disabilities, as this telling quotation from a Moldovan judge reveals:

I think that the person's participation is neither necessary nor useful because we speak about people who are mentally inadequate. They just would hinder the proper conduct of the trial. Do you think they might behave in a civilized manner in the courtroom? Their presence in the courtroom is not necessary; the relatives talk for them, while the conclusion is based on the report of the psychiatric expertise.⁷¹

The European Court has found that where a case is not 'highly technical' or 'purely legal', there must be an oral hearing and written proceedings will not suffice⁷² unless there are 'exceptional circumstances'⁷³. Where a person

or punishment', 22nd session of the Human Rights Council, 4th March 2013, Geneva, (A/HRC/22/53).

⁶⁷ *Branka Bajcetic v Croatia*, Application No. 4446/10, judgment 11 October 2011, (2011) ECHR 1797.

⁶⁸ *Stanev v Bulgaria*, §174-6.

⁶⁹ §64.

⁷⁰ *MH v UK*, Application no 11577/06, judgment 22 October 2013, [2013] ECHR, §58

⁷¹ L., Ciocan, 'The System of Guardianship in Practice in the Republic of Moldova', (2013), 14.

⁷² *Koottummel v Austria*, Application No. 49616/06, judgment 10 December 2009 (2009) ECHR 2033, §18-21.

waives their right to be present during a hearing, it must be exercised in an unequivocal manner and attended by 'minimum safeguards commensurate to its importance'.⁷⁴ Article 12(2) CRPD implies that these rights to participate personally during proceedings should apply to persons with disabilities on an equal basis with others, and Article 13 CRPD requires appropriate accommodations be made available to facilitate personal participation. However, in many cases concerning deprivation of legal capacity, people have been prevented from personally participating in the proceedings. The Mental Disability Advocacy Center comments that where reliance is placed on medical opinion that a person should not participate in proceedings, the adult will have no opportunity to oppose such a finding and 'it is all too easy to allege that an adult cannot understand the procedure.'⁷⁵ This section reviews a number of ways in which people with mental disabilities may be excluded from fully participating in proceedings that affect them, or from participating on an equal basis with others, and the European Court's response.

4.1. THE RIGHT TO BE NOTIFIED

Notification of court proceedings is an essential precursor to participation. Without this individuals will not even be aware of their occurrence and will be denied any opportunity to oppose any measures which impact upon their rights. However, procedures for deprivation of legal capacity in many countries permit courts to waive the right of the person in question to be notified of the proceedings.⁷⁶ Even where people are notified of guardianship proceedings, their right to appear and participate in court may not be explained to them.⁷⁷ In some jurisdictions, they may not even be made a

⁷³ *Allan Jacobsson v Sweden (No. 2)*, Application No. 16970/90, judgment 19 February 1998, (1998) ECHR 2.

⁷⁴ *Poitrimol v France*, Application No. 14032/88, judgment 23 November 1993, (1993) ECHR 54, §31.

⁷⁵ Mental Disability Advocacy Center, 'Guardianship and Human Rights in Serbia', (2006);

⁷⁶ Mental Disability Advocacy Center, 'Guardianship and Human Rights in Serbia', (2006); Mental Disability Advocacy Center, 'Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice', (2007); Mental Disability Advocacy Center, 'Guardianship and Human Rights in Russia: Analysis of Law, Policy and Practice', (2007); Mental Disability Advocacy Center, 'Guardianship and Human Rights in Hungary: Analysis of Law, Policy and Practice', (2007); Mental Disability Advocacy Center, 'Guardianship and Human Rights in the Czech Republic: Analysis of Law, Policy and Practice' (2007); Mental Disability Advocacy Center, 'Guardianship and Human Rights in Kyrgyzstan: Analysis of Law, Policy and Practice', (2007). In England and Wales, the Court of Protection Rules 2007, rule 40(3) also permit the Court to direct that 'P' – the person who is alleged to lack mental capacity – may not be notified of a particular matter or document.

⁷⁷ Again, this is also the case in England and Wales, where the Court of Protection Rules 2007 state that whilst 'The court may hear P on the question of whether or not an order should be made, whether or not he is a party to the proceedings', it is not bound to: 'The court may proceed with a hearing in the absence of P if it considers that it would be appropriate to do so' (rule 88).

party to proceedings, even though the case concerns them and their legal capacity.⁷⁸

The European Court has found that failure to notify individuals of deprivation of capacity proceedings violates fair trial guarantees. In *Shtukurov v Russia*, a lack of evidence that Mr Shtukurov was notified that his mother had initiated deprivation of legal capacity proceedings contributed to a finding of a violation of Article 6.⁷⁹ In *X and Y v Croatia* the Strasbourg Court observed that failure to serve a decision divesting the applicant of her legal capacity upon her contributed to a violation of Article 6⁸⁰ as 'she was therefore unable to use any remedies against it'.⁸¹ Notification therefore appears to be a core requirement of Article 6 ECHR in relation to deprivation of legal capacity proceedings.

4.2. THE 'RULE OF PERSONAL PRESENCE'

In its jurisprudence on general fair trial guarantees, the European Court's rule of 'personal presence' requires that a person be present before proceedings whose purpose is to establish questions of fact which relate to that person.⁸² Decisions based on emotional issues,⁸³ and issues relating to a person's health or character⁸⁴, also require the person's presence. Clearly, proceedings concerning deprivation of liberty, deprivation of legal capacity and conflicts with guardians will involve questions of fact concerning that person - yet it is often that case that such proceedings occur in their absence.⁸⁵ In a series of cases, most recently *Lashin v Russia*, the European Court has emphasized that this 'rule of personal presence' also applies for proceedings concerning people deprived of legal capacity.⁸⁶ There is, therefore, a strong presumption in favour of a person physically participating

⁷⁸ In England and Wales, rule 73 states: 'Unless the court orders otherwise' a person who is the subject of proceedings concerning his legal capacity 'shall not be named as a respondent to any proceedings'. Rule 74 of the Court of Protection Rules (2007) permits the court to make an order binding the person who is alleged to lack mental capacity even if he has not been joined as a party to the proceedings.

⁷⁹ See §10, §16 and §69, see also: *MS v Croatia*, §105.

⁸⁰ §94; see also: *Sýkora v The Czech Republic* §109.

⁸¹ §66; see also: *Berková v Slovakia*, Application No. 67149/01, judgment 24 March 2009, (2009) ECHR 514, §141.

⁸² *Ekbatani v Sweden*, Application No. 10563/83, judgment 26 May 1988, (1988) ECHR 6.

⁸³ *Göç v Turkey*, Application no 36590/97, judgment 11 July 2001, [2002] ECHR 589

⁸⁴ *Salomonsson v Sweden*, Application no 38978/97, judgment 12 February 2002, [2002] ECHR

⁸⁵ See the research cited at footnote 18. The situation for 'functional' regimes may be no different: in England and Wales only a small proportion of cases where a deputy is appointed or other matters relating to legal capacity are resolved result in an oral hearing, most will be determined 'on the papers': Judiciary of England and Wales, 'Court of Protection Report, 2010', (London, 2011). It is rare for the person themselves to attend court or meet the judge: *CC v KK and STCC* [2012] EWHC 2136 (COP), §44.

⁸⁶ §82.

in proceedings which concern his legal capacity, or at least having some personal contact with the judge deciding his case.

In *Shtukurov v Russia* the Court derived the rule of personal presence in legal capacity proceedings from the twin role of Mr Shtukurov as both a subject and an 'object' of examination in the proceedings. As an 'object' of proceedings, the Court found that Mr Shtukurov's presence was required to allow the judge to have visual contact, question him and form his personal opinion about the applicant's mental capacity,⁸⁷ especially given that Mr Shtukurov had been 'a relatively autonomous person'. In *X and Y v Croatia* the Court rejected the view, expressed by the Moldovan judge cited above, that it is unnecessary for a judge to meet the person in question as the decision is based on a medical report. The Court noted that it is ultimately for the judge – not a physician or a psychiatrist – to assess the relevant facts and draw conclusions about legal capacity,⁸⁸ and held that:

[. . .] judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.⁸⁹

In several cases the Strasbourg Court itself has shown itself willing to criticize the quality of medical evidence used in domestic legal capacity cases, even though the Court does not ordinarily involve itself in findings of fact from first instance courts.⁹⁰

The rule of personal presence is also derived from a person's role as a contesting subject in proceedings. In *Shtukurov v Russia* the Court concluded that it was in breach of the principle of adversarial proceedings enshrined in Article 6(1) to decide the case on the basis of documentary evidence, without seeing or hearing the applicant;⁹¹ his participation was necessary 'to enable him to present his own case'.⁹² In *Salontaji-Drobnjak v Serbia*, Mr Salontaji-Drobnjak's exclusion from the proceedings meant that he had 'been unable to personally challenge the experts' report recommending the partial deprivation of his legal capacity'.⁹³ The Court criticised the Municipal Court's decision to exclude him from proceedings on the basis that his appearance in person would not have been 'purposeful'; a hypothetical prediction that the Strasbourg Court considered 'arbitrary'.⁹⁴ In *Lashin v*

⁸⁷ §72.

⁸⁸ §85-86.

⁸⁹ §84; see also *Sýkora v The Czech Republic* §107.

⁹⁰ See: *Lashin v Russia*, §119; *X and Y v Croatia*, §113; *MS v Croatia*, §103.

⁹¹ §73.

⁹² *Shtukurov v Russia*, §72.

⁹³ §127.

⁹⁴ §127.

Russia, the domestic court had excluded Mr Lashin from deprivation of legal capacity proceedings on the basis this would be prejudicial to his health, yet without seeking a doctor's opinion on that particular question. The Court commented that 'a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient'.⁹⁵ In *Zagidulina v Russia*,⁹⁶ a case concerning an appeal against deprivation of liberty for medical treatment, the Court found that 'the applicant's clear and undisputed refusal to undergo any treatment' meant that the need to ensure her right to be heard 'was ever more pressing'.⁹⁷

The rule of personal presence is, however, not absolute – even for proceedings concerning deprivation of legal capacity. In *Berková v Slovakia*, the domestic court had refused to hear Mrs Berková in person, in proceedings concerning the restoration of her capacity, and she was not notified of the court's judgment and so could not appeal against it.⁹⁸ The District Court heard evidence from a medical expert in person, the guardian appointed to Mrs Berková and a representative of the local authority, but not Mrs Berková herself. This, the Strasbourg Court concluded, was 'sufficient evidence with a view to reliably establishing the facts and correctly determining the point in issue,' and held that there were appropriate procedural guarantees to protect Mrs Berková's rights and interests.⁹⁹

It is difficult to reconcile the reasoning in *Berková v Slovakia* with the other cases outlined above. In *Shtukaturv v Russia*, *Salontaji-Drobnjak v Serbia*, *X and Y v Croatia*, *Sýkora v the Czech Republic* and *Lashin v Russia* the Court emphasized the importance of the judge having personal contact with the person at the heart of deprivation of legal capacity and deprivation of liberty proceedings to enable them to form their own view. This was regarded as a vital safeguard against over-reliance on medical evidence, which would lead to excessive arbitrariness. It is also unclear why Mrs Berková's treatment, unlike Mr Shtukaturv's, was not unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6 as the decision there was also based on documentary evidence without seeing or hearing the applicant.

One possible basis for distinguishing Mrs Berková's case from that of Mr Lashin and Mr Salontaji-Drobnjak may be that there was medical evidence which advised against serving judgments upon her and her attending court.¹⁰⁰ Yet given that a key reason underpinning the rule of personal presence is the need to reduce the arbitrariness of overreliance on medical evidence, this

⁹⁵ §82.

⁹⁶ Application No. 11737/06, judgment 2 May 2013, (2013) ECHR 398.

⁹⁷ §62.

⁹⁸ §140-141.

⁹⁹ §149.

¹⁰⁰ §144.

seems a problematic basis for departing from it. Another possible distinguishing feature of Mrs Berková's case is that the Prosecutor General did appeal the judgment of the District Court on her behalf¹⁰¹ – but again it is hard to see how this could act as a safeguard against faith in an arbitrary medical opinion, if the appellate court did not hear from Mrs Berková either. Unhappily, the Strasbourg Court does not elaborate, and this idiosyncratic ruling injects an unfortunate element of uncertainty into what otherwise looked like a positive, albeit gradual, progression away from denial of equal rights to participate in legal proceedings concerning the fundamental rights of people with disabilities.

4.3. LEGAL REPRESENTATION

Article 6 ECHR does not merely guarantee access to a court, but a right of *effective* access to a court.¹⁰² In *Airey v Ireland* the European Court noted that effective access to a court could be guaranteed by a range of measures, including through the simplification of the domestic procedure. However, as this case involved complicated points of law, expert evidence, the examination of witnesses and an 'emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court', the court held that the possibility to appear in person 'does not provide the applicant with an effective right of access'.¹⁰³ In circumstances where legal representation is 'indispensable for an effective access to court', the Court held, Article 6 will compel States to provide for the assistance of a lawyer. In *MS v Croatia*, in finding a violation of Article 6 in relation to deprivation of legal capacity proceedings, the Court was 'mindful' that national law did not provide for obligatory legal representation, 'despite the very serious nature of the issues concerned and the possible consequences of such proceedings'.

The Court has held that failure to appoint a lawyer may also violate other ECHR rights. In *AK and L v Croatia*,¹⁰⁴ failure to provide a lawyer to a woman who was 'intellectually incapable of following the court proceedings for divesting her of her parental rights or understanding the true nature of those proceedings, let alone arguing her case' was found to violate her Article 8 rights. In *Megyeri v Germany*¹⁰⁵ the Court found a violation of Article 5(4) when the German courts failed to assign counsel to a man who was appealing against his detention for criminal offences for which 'he could not be held

¹⁰¹ §141-142.

¹⁰² *Airey v. Ireland*, Application no 6289/73, 9 October 1979, (1979) ECHR 3; [1980] 2 EHRR 305; Mikhaylenko v Ukraine, Application no 49069/11, judgment 30 May 2013, (2013) ECHR 484.

¹⁰³ §24.

¹⁰⁴ *AK and L v Croatia*, Application No. 37956/11, judgment 08 January 2013, (2013) ECHR 8.

¹⁰⁵ Application No. 13770/88, judgment 12 May 1992, (1992) ECHR 49; [1993] 15 EHRR 584.

responsible because he was suffering from a schizophrenic psychosis with signs of paranoia'.¹⁰⁶ The Court felt that it was doubtful that Mr Megyeri, acting on his own, would be able 'to marshal and present adequately points in his favour on this issue, involving as it did matters of medical knowledge and expertise', or to address the legal issues around the proportionality of his continued detention.¹⁰⁷ This violated his Article 5(4) rights even though Mr Megyeri had not specifically requested such assistance himself.¹⁰⁸ This principle was affirmed in *Magalhaes Pereira v Portugal*.¹⁰⁹

4.4. THE ROLE OF LITIGATION GUARDIANS

For those deprived of their legal capacity, however, issues may arise as to who should instruct their legal representative – the person themselves, or some kind of a guardian. In *DD v Lithuania*, the Court held that it was inappropriate that DD and her guardian both be represented by the same lawyer in proceedings which DD herself had initiated to request that her current guardian be replaced by her former guardian, who had become her friend. The Court noted that being under guardianship 'does not mean that he is incapable of expressing a view on his situation and thus of coming into conflict with the guardian'.¹¹⁰ The complexity of the legal issues and DD's 'history of psychiatric troubles' meant that it was necessary to provide her with a lawyer,¹¹¹ yet the guardian's own lawyer could not represent DD because her interests conflicted with her guardian's.¹¹² Thus under the ECHR, where the substance of the matter being litigated is the conflict between a person and their guardian, the person should be entitled to independent representation.

The ruling in *DD* focussed on who should represent DD's *interests*; a term that has loaded implications for people deprived of legal capacity. Where representation in legal proceedings focuses on a person's *interests*, a question arises as to who decides what a person's interests are: the person themselves, or some third party? Many jurisdictions provide for some form of representation of the *interests* of people deprived of legal capacity – or in proceedings which will determine their legal capacity – where those interests are to be determined by somebody other than the person themselves.¹¹³ One of the best known forms this kind of representation takes is the use of

¹⁰⁶ §7.

¹⁰⁷ §25.

¹⁰⁸ §27.

¹⁰⁹ Application No. 44872/98, judgment 26 February 2002, (2002) ECHR 161.

¹¹⁰ §118.

¹¹¹ §122.

¹¹² §125.

¹¹³ Mental Disability Advocacy Center, 'Guardianship and Human Rights in Serbia: Analysis of Guardianship Law and Policy', (2006).

guardians ad litem – sometimes known as 'litigation guardians', 'litigation friends' or 'next friends'.¹¹⁴ In what follows, I use the term 'litigation guardian' to refer to a person who is appointed to represent a person's interests in legal proceedings – either directly, or through a lawyer – but who is not necessarily their guardian in relation to other matters. However, other kinds of litigation guardians exist – such as 'temporary guardians' in Serbian guardianship proceedings,¹¹⁵ or the new proposed role of 'Court Friends' in Ireland.¹¹⁶

In many jurisdictions the role of litigation guardians has evolved over time and may not be clearly defined in any statute or rules. Sometimes a family member or a friend may act as a litigation guardian, sometimes there may be provision for a professional of some kind to take on that role where friends or family members are unavailable or inappropriate. For example, in England and Wales the Official Solicitor acts as a 'litigation friend of last resort' for several thousand people in a wide range of litigation – from cases directly concerned with legal capacity, to other kinds of civil litigation such as bankruptcy, divorce, or judicial reviews.¹¹⁷ In some jurisdictions, staff of Social Welfare Centres may act as litigation guardians.¹¹⁸

Litigation guardians have been identified by the European Court as an important protection measure. For example, in *B. v Romania (No. 2)*,¹¹⁹ the failure to appoint a litigation guardian for a woman who had been 'committed' to a psychiatric institution and whose children had been removed from her care, was found to have violated her Article 8 rights. Mirroring this line of reasoning, a series of cases from England and Wales have found that solicitors taking instructions from people who 'lack capacity' to make decisions about litigation, resulting in their settling claims for a lower value than they might have been entitled to, could be negligent.¹²⁰ Importantly, these cases

¹¹⁴ In some jurisdictions there may still be a technical distinction between a *guardian ad litem* who is appointed by the court to represent a *defendant's* interests, and a 'next friend', who represents a *claimant's* interests. See, for example: the Republic of Ireland's Circuit Court Rules, Order 6.8. The term 'litigation friend' was adopted in the England and Wales to replace both *guardian ad litem* and 'next friend' under the Civil Procedure Rules (1998) in accordance with a policy of replacing archaic language with functional terms.

¹¹⁵ See, for example: the role of 'temporary counsellor' or 'temporary guardian' in Serbian deprivation of legal capacity proceedings, as outlined by Mental Disability Advocacy Center, 'Guardianship and Human Rights in Serbia: Analysis of Guardianship Law and Policy', (2006).

¹¹⁶ Under the Irish Assisted Decision-Making (Capacity) Bill 2013, s60.

¹¹⁷ Office of the Official Solicitor and the Public Trustee, 'The Official Solicitor and the Public Trustee: Annual Report 1 April 2011 – 31 March 2012', (London, 2012).

¹¹⁸ See the case *MS v Croatia* for one such example, and the pending case of *Ivinović v Croatia*, Application No. 13006/13, Statement of Facts, lodged 11 January 2013, (2013) ECHR.

¹¹⁹ Application No. 1285/03, Legal Summary 19 February 2013, (2013) ECHR 393.

¹²⁰ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889; see also *Dunhill v Burgin* [2012] EWCA Civ 397, which will go to the UK Supreme Court, which considers whether a settled

have been brought by people with disabilities themselves, arguing that they should have been appointed a litigation guardian to assist them in bringing or defending proceedings, or to prevent them from disadvantageous settlements.

The role of litigation guardian can, however, become problematic where a dispute arises between the litigation guardian and the person they represent regarding what outcome or remedy should be sought, and how and when cases may be settled. In such circumstances, it is possible that a litigation guardian may argue a case that supports a measure which the person themselves opposes, or may at least refuse to oppose a measure. Two examples from England and Wales, one of which went on to be considered by the European Court, illustrate this powerfully.

In the case *Re E (Medical treatment: Anorexia) (Rev 1)*,¹²¹ a woman with anorexia nervosa refused any refeeding treatment and wanted to be allowed to 'die with dignity'. She had made two advance directives (with the assistance of a solicitor, her mother and an advocate) to that effect. Yet her own legal representatives, instructed by a litigation friend, argued that she 'lacked capacity' to make this decision and that it was in her best interests to undergo forcible feeding treatment, which was estimated to give her only a 20% chance of recovery. As barrister Barbara Hewson noted 'the only people arguing for Ms E to be left alone were her parents, who did not have legal representation'.¹²² In many cases – like that of Dr A, an Iranian asylum seeker staging a hunger strike, whom the court ordered be forcibly fed¹²³ – a person may not even have family arguing against any measure they oppose.

In another case, a local authority sought a care order to remove the baby (KP) of a young mother with intellectual disabilities (RP) from her care. RP's solicitor felt that she lacked the 'capacity to litigate', and so the Official Solicitor was appointed as her litigation friend to instruct her solicitor on her behalf. The Official Solicitor did not oppose the making of the care order in light of the evidence, and so there was never a hearing where RP's legal representatives contested this evidence and argued against the order. RP brought a case before the Court of Appeal, where she argued that her Article 6 ECHR rights were infringed – the first time the role of litigation guardians and Article 6 had been considered in the domestic courts.¹²⁴ The Court of

compensation claim might be reopened if the claimant 'lacked capacity' at the time of settling the claim but this was not identified by the court or their lawyer.

¹²¹ [2012] EWHC 1639 (COP).

¹²² B. Hewson, 'Treating adults like children', (*Spiked Magazine*, 20 June 2012).

¹²³ *A NHS Trust v Dr. A* [2013] EWHC 2442 (COP).

¹²⁴ *RP v Nottingham City Council & Anor* [2008] EWCA Civ 462, see: §80-90 for an infamous exchange between the MP and the judge.

Appeal found that her rights had not been infringed, and the case continued to the European Court as *RP v UK*.¹²⁵

The European Court considered RP's claim that her Article 6 and Article 14 rights had been violated because 'she was denied the right to challenge the removal of K.P. from her care on account of her disability'.¹²⁶ The Court accepted the UK government's argument that 'Acting in R.P.'s best interests did not entail advancing whatever case R.P. wanted to advance, however unarguable'.¹²⁷ Somewhat surprisingly the Strasbourg Court invoked Article 13 CRPD (on access to justice) in support of its reasoning:

[. . .] bearing in mind the requirement in the UN Convention that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, the Court considers that it was not only appropriate but also necessary for the United Kingdom to take measures to ensure that R.P.'s best interests were represented in the childcare proceedings. Indeed, in view of its existing case-law the Court considers that a failure to take measures to protect R.P.'s interests might in itself have amounted to a violation of Article 6 § 1 of the Convention.¹²⁸

The Court did, however, hold that 'in order to safeguard R.P.'s rights under Article 6 § 1 of the Convention, it was imperative that a means existed whereby it was possible for her to challenge the Official Solicitor's appointment or the continuing need for his services'.¹²⁹

Despite the European Court's reliance on the CRPD to arrive at this conclusion, it is clearly at odds with the jurisprudence of the CRPD Committee as it endorsed the role of litigation guardians as substituted decision makers for persons deprived of their capacity to litigate. In relation to Article 13 CRPD the Committee has expressed concern about 'patronizing measures . . . such as the designation of public defenders that treat the person concerned as if they lacked legal capacity'. The Court did not consider the distinction between support for litigation and other consensual accommodations, and measures that amount to substituted decision making. Neither did the Court consider the accessibility of the one remedy which remained available to RP – to challenge the appointment of her litigation guardian. If RP did require support to conduct litigation and understand her rights, it is problematic to expect that she, acting upon her own initiative, would have been in a position to initiate litigation or a complaint to displace her litigation guardian - the Official Solicitor. This is

¹²⁵ Application No. 38245/08, judgment 9 October 2012, (2012) ECHR 1796.

¹²⁶ §87.

¹²⁷ §57.

¹²⁸ §67.

¹²⁹ §70.

especially the case when she may not have appreciated the implications of his appointment for opposing the care order.¹³⁰ In short, it is questionable whether this right to appeal against the appointment of a litigation guardian is a 'practical and effective' safeguard for Article 6 rights, and not merely 'theoretical and illusory'.¹³¹

Litigation guardians, the adversarial principle and equality of arms

Even under the ECHR's own jurisprudence, the ruling in *RP v UK* is problematic. At the heart of Article 6 lies the 'adversarial principle' and the principle of equality of arms.¹³² The adversarial principle under Article 6 relates to having the opportunity to know and comment on the evidence and observations of other parties during a trial, whilst equality of arms means that each party must have a reasonable opportunity to present their case in conditions which do not place them at a substantial disadvantage.¹³³ Yet despite RP being able to articulate clearly that her case was that she wished to care for her child, and E being able to articulate clearly that she did not want to be forcibly fed, neither RP nor E had the opportunity to put their case to the Court nor test the evidence against their case. It is true that their legal representatives conveyed their views to the Court, but when they either refused to *advocate* for that case, or even argued for the opposite of their client's view, this scarcely seems capable of delivering the guarantees of adversarial justice and equality of arms. Where the very purpose of the litigation is to determine the question of a person's legal capacity, as in the case of Ms E, or another matter engaging a person's fundamental rights, such as the removal of their child from their care or appealing against a deprivation of liberty, it is inherently problematic that the person's own representative may not contest the evidence and arguments in favour of the measure the person themselves oppose. It is difficult to see how the court can then act as a safeguard against arbitrary decisions reached on the basis of that evidence, or take into account all the arguments in favour of protecting a person from an interference with their rights. Moreover, where a litigation guardian may refuse to bring, or may choose to settle or withdraw without a hearing on the merits, a person's appeal against detention, it is difficult to see how this would not fall afoul of the court's general jurisprudence that access to an Article 5(4) remedy should not depend upon the discretion of third parties.¹³⁴

¹³⁰ §48, §73.

¹³¹ *Airey v Ireland*, §24.

¹³² For a useful elaboration of these principles in ECHR case law, see: D. Vitkauskas, & G. Dikov, 'Protecting the right to a fair trial under the European Convention on Human Rights', (Council of Europe, 2012).

¹³³ *Brandstetter v Austria*, Application Nos. 11170/84; 12876/87; 13468/87), judgment 28 August 1991, (1991) ECHR 39; [1993] 15 EHRR 378.

¹³⁴ *MH v UK*, §58; see also *Winterwerp v the Netherlands*, §64

'Inarguable cases' and fundamental rights

In both the domestic and European Court hearings of *RP v UK* the Government argued that a litigation guardian could not be expected to put forward an unarguable case. Disappointingly the European Court never questioned whether RP might have had an arguable case that her child should not be removed from her care. The existence of an arguable right in domestic law is a precondition for Article 6 ECHR to be engaged,¹³⁵ but there is a logical difference between a case being *arguable* and a case having strong prospects of success. This has been explicitly recognized in English law, where a court observed that there was a difference – albeit that it could be difficult to draw that line – between ‘an argument which can properly be articulated and put forward (but which has little, if any, prospect of success) and an argument which cannot properly be articulated and which is believed to be bound to fail’.¹³⁶ The European Court has not stated this in quite such clear terms. However, in a case concerning the right to an oral hearing to review the lawfulness of detention, the Court emphasized that ‘Article 5(4) is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention – an applicant is not required, as a precondition to enjoying that protection, to show that on the facts of his case he stands any particular chance of success in obtaining his release’.¹³⁷ Arguably similar reasoning should attach to the right to put forward cases which may have slim prospects of success in relation to other fundamental rights, such as deprivation of legal capacity or removal of one’s child from one’s care, as what is at stake is of similar significance to loss of liberty and requires equivalent guarantees of a fair procedure.

Since the ruling in *RP v UK* the Court has briefly revisited the role of litigation guardians. In *MS v Croatia* a *guardian ad litem* was appointed from the staff of the self-same Social Welfare Centre who applied to a court to deprive MS of her legal capacity. The Court commented that ‘given that it was the Centre itself that had instituted the proceedings for divesting the applicant of her legal capacity, it would be difficult to expect an employee of that same Centre to oppose or challenge such a request’.¹³⁸ It is clear that, at minimum, the European Court takes a dim view of the appointment of people with a clear conflict of interest as a potential litigation guardian. The litigation guardian must at least be *capable* of opposing or challenging such a measure as deprivation of legal capacity. What is less clear is when they *must* do so. The listed forthcoming case of *Ivinović v Croatia*, which has a similar fact pattern

¹³⁵ *Fayed v UK*, see discussion above.

¹³⁶ *Buxton v Mills-Owens* [2010] EWCA Civ 122, §43.

¹³⁷ *Waite v The United Kingdom*, Application No. 53236/99, judgment 10 October 2002, (2003) 36 EHRR 54, [2002] ECHR 804, §59.

¹³⁸ §104.

to *MS v Croatia*, may present an opportunity for the Court to revisit the question of whether a person's legal representative must assist them in effectively opposing such a drastic interference with their rights as deprivation of legal capacity.

5. SUPPORT AND ACCOMMODATIONS

Article 12(3) CRPD requires States to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. Clearly, the conduct of litigation is one possible exercise of legal capacity, and many people with disabilities – not solely those with intellectual, cognitive or psychosocial disabilities – may require support or assistance in understanding and making decisions about the litigation, or even navigating practical barriers such as completing paperwork, accessing information or the courtroom itself. Article 13 CRPD requires States to 'ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants'.

The European Court has for some time acknowledged that people with disabilities may require additional supports or accommodations to assist them in the conduct of legal proceedings. In *Winterwerp v the Netherlands*¹³⁹ it held that 'special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves'. This principle has been reiterated in many subsequent cases.¹⁴⁰ As noted earlier, the Court's emphasis on the protection of *interests* has led to a paternalistic approach to the accommodations and supports people with disabilities may need in exercising their legal capacity in litigation and accessing justice. European rulings which have found that persons were not able to access the necessary assistance to understand, and conduct, legal proceedings have seemed to have in view guardians, or litigation guardians, as the only available alternative.¹⁴¹ Yet models of supported decision making being developed in relation to Article 12(3) create the potential for support and assistance to enable people to make effective use of their access to justice without the use of substituted decision makers

¹³⁹ Application No. 6301/73, judgment 24 October 1979, (1979) 2 EHRR 387; see also *Stanev v Bulgaria*, §170.

¹⁴⁰ See: *Stanev v Bulgaria*, §170; *DD v Lithuania*, §118; *Sýkora v Czech Republic*, §82; *Vaudelle v France*, Application No. 35683/97, judgment 30 January 2001, (2001) ECHR 76, §56; *Megyeri v Germany*, §22; *Pereira v Portugal*, §56; *Storck v Germany*, Application No. 61603/00, judgment 16 June 2005, (2005) 43 EHRR 96, §117; *MH v UK*.

¹⁴¹ See: *Vaudelle v France*; *B. v. Romania (No. 2)*; *Zehentner v Austria*, Application No. 20082/02, judgment 16 July 2009, (2009) ECHR 1119.

who may run a person's case in a way which conflicts with their will and preferences.

One example of such supports comes from the Republic of Ireland. Following a settled case¹⁴² where the Irish Human Rights Commission had challenged the refusal of the Legal Aid Board to fund a *guardian ad litem* to support a parent with intellectual disabilities who was involved in child care proceedings, the role of a support person to assist a person with litigation, but who was not a litigation guardian, was conceived. The Irish Human Rights Commission had argued that it was necessary to provide some support to help the parent understand the implications of the litigation and give instructions to their solicitor. However, they had relied upon Article 12 CRPD to argue that the role of *guardians ad litem* should be reconfigured; rather than representing the adult's 'best interests', as they would for a child, they should:

[. . .] bring his or her skills to bear in order to determine the wishes and instructions of the adult party and to relay same to the Court. Thus, the *Guardian ad Litem* must advocate on behalf of the adult in a manner which respects the dignity of the adult and which best vindicates the party's right of effective access to the Court.¹⁴³

It was acknowledged that in some cases it may not be possible to glean instructions from a person with a severe communication difficulty, in which case their role would be limited to informing 'the Court of the steps that have been taken in order to ascertain the views of the person in question and thereafter to indicate what he or she perceives to be in that person's best interests.'¹⁴⁴

In settling the case, the Legal Aid Board adopted a circular,¹⁴⁵ which created a new role of a person to assist 'clients of impaired capacity' in child care proceedings. The role of the assistant would be to:

- to explain to the client the nature of the proceedings and the potential outcomes;
- to relay information from the solicitor to the client and from the client to the solicitor;
- to attend the court with the client when it is considered essential by the solicitor; and

¹⁴² Irish Human Rights Commission, '*Legal Aid Board v District Judge Patrick Brady and the Northern Area Health Board & Others*', (2007).

¹⁴³ Ibid.

¹⁴⁴ Irish Human Rights Commission, '*Second Amicus Submission in Legal Aid Board v District Judge Patrick Brady and the Northern Area Health Board & Others*', (2007).

¹⁴⁵ F.J. Brady, '*Circular 2/2007: Arrangements to appoint persons to assist clients of impaired capacity in child care proceedings*', (Legal Aid Board, Dublin, 2007).

- to discuss with the client the options that might be available and to assist the client give instructions to the solicitor in relation to those options.¹⁴⁶

It envisaged that the person 'would sit in on at least some consultations with the client' in order to perform their functions effectively. This provision did not go so far as to challenge the continuing role of litigation guardians in representing a person's 'interests,' but it does at least provide a useful indication of the direction of travel which Article 12 CRPD could, and should, take us towards fulfilling the procedural legal rights of persons with disabilities. This is an area ripe for creative litigation by disability rights lawyers, and this example from Ireland may represent the beginnings of a new European trend.

In addition to providing supports for a particular person under Article 12(3) CRPD, Article 13 CRPD is an important reminder that the legal system itself should make appropriate accommodations to facilitate effective access to justice for people with disabilities – including by promoting appropriate training for those working in the justice system. The CRPD is founded upon a social model of disability,¹⁴⁷ which recognizes that disability arises 'from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.¹⁴⁸ Difficulties people with disabilities may experience in navigating the justice system, including understanding the litigation and giving instructions to their representatives, should also be understood in terms of the failure of the legal system to adapt to their needs. It is important to consider how adequate the knowledge and skills of legal professionals are for ensuring effective access to justice for people with disabilities, rather than solely relying on the provision of specialist supports or – worse – labelling people as 'incapable' of navigating litigation and appointing litigation guardians to do so on their behalf. To date, the European Court has paid little attention to how far disability occurs because of the failings of the machinery of justice itself. It has not considered the legal system's own 'incapacity' to adapt its rules, procedures and its material incarnation, to accommodate and enable access to justice for citizens with disabilities. This, too, is an important area for future litigation, campaigning and research.

¹⁴⁶ Ibid.

¹⁴⁷ R. Kayess, & P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8(1) *Human Rights Law Review* (2008), 1.

¹⁴⁸ CRPD Preamble, (e).

6. DISCUSSION

Looking to the general trend towards stronger procedural rights for those deprived of their legal capacity, the significance of rulings like *Stanev* is that, slowly, the appointment and acts of substituted decision makers are being brought within the realm of the rule of law. The days of courts appointing guardians, and guardians making decisions, without any realistic prospect of challenge from those affected by them are increasingly numbered. This is by no means sufficient to comply with the CRPD's call for the replacement of regimes of substituted decision making with supported decision making. Yet this overlay of the rule of law for guardianship regimes may pose a much more existential challenge to their existence than at first appears. At its core, guardianship exists as a mechanism to override a person's preferred choices; if we are to take seriously their right to oppose such measures in a court, with full procedural rights, then the volume of litigation could be very large indeed. One can imagine courts becoming overwhelmed, and guardianship regimes effectively grinding to a halt as each decision that conflicts with a person's wishes and preferences must be adjudicated by a court.

In fact, it is not hard to see how this might threaten the entire foundations of guardianship, and why guardianship and a denial of access to the courts have for long so gone hand in hand. Yet the European Convention, as the Strasbourg Court so often proclaims,¹⁴⁹ is built upon the rule of law, and it would be unacceptable to row back this tide and condemn people with disabilities to the despotic world of arbitrary interferences with their fundamental rights. Progress in even this most modest area of legal capacity reform – procedural justice – may yet shake guardianship paradigms to their core.

¹⁴⁹ *Golder v UK*, §34; see also: *The Sunday Times v United Kingdom*, Application No. 6538/74, judgment 26 April 1979, (1979) 2 EHRR 245, §54 and dissenting judgments §8.