



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

**Application No. 47848/08
The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania**

Introduction

1. On 2 September 2011, the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') informed the European Court of Human Rights (hereinafter: 'the Court') of his decision to intervene as a third-party in the Court's proceedings, in accordance with Article 36, paragraph 3 of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations concerning the case of *The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, relating to the treatment of a young man of Roma ethnic origin, suffering from a severe learning disability and infected with the HIV virus, who died at the age of 18 in a psychiatric hospital.
2. According to the Council of Europe Committee of Ministers' Resolution (99)50,¹ the Commissioner is mandated to foster the effective observance of human rights, to assist member states in the implementation of Council of Europe human rights instruments, in particular the Convention, and to provide advice and information regarding the protection of human rights across the region.
3. The protection of the human rights of persons with disabilities is one of the major themes on which the Commissioner's work is currently focused. The Commissioner has repeatedly stressed the importance of guaranteeing participation of persons with disabilities in all decisions affecting their lives and ensuring that persons with disabilities can effectively enjoy their human rights on an equal basis with others, and has addressed a number of relevant recommendations to member states.
4. Section I of the present written submission concerns people with disabilities and their right to access to justice; Section II focuses on major issues concerning supported decision-making by persons with disabilities; and finally, Section III contains observations on requirements of standing before the Court, followed by the Commissioner's conclusions.

I. People with disabilities and their right to access to justice

5. In Europe today, thousands of people with disabilities are still kept in large, segregated and often remote institutions. In a number of cases they live in substandard conditions, suffering neglect and human rights abuses. In too many cases, premature deaths are not investigated or even reported. Through his visits to Council of Europe member states and continuous monitoring, the Commissioner has identified a high number of shortcomings in national law and practice in this area. The Commissioner has had to conclude that persons with disabilities still face widespread discrimination in Europe; that they are still stigmatised and marginalised.
6. Discrimination of persons with disabilities can take many forms. It can be very visible, such as segregated education and denial of employment opportunities, or even hate crimes directed against persons with disabilities. But discrimination can also be very subtle, and operate through physical, psychological and social barriers resulting in social exclusion.
7. The Court thus made the point that persons with mental health problems and persons with intellectual disabilities have in many cases suffered considerable discrimination throughout their lives. In view of the long-standing prejudices against them, the Court stressed that it was particularly important to avoid legislative stereotyping which hinders the evaluation of their capacities and needs on an individual basis, and thus leads to further social exclusion.²

¹ Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

² *Alajos Kiss v. Hungary*, judgment of 20 May 2010, § 42.

8. There is also increased awareness that a person can be discriminated against on multiple grounds. For example, migrants, Roma and older persons with disabilities are particularly vulnerable to discriminatory practices within the social protection and health care systems.³
9. The Commissioner has noted that people with intellectual disabilities tend to be among the most marginalised. They are rarely consulted or even listened to; they are often prevented from making choices about their health, well-being and how and where they want to live. In general, they have limited possibilities to make themselves heard and this has contributed to making their situation a hidden human rights crisis.
10. The Commissioner is concerned that cases concerning human rights violations experienced by people with disabilities are often not brought to courts. In practice there are a number of barriers to accessing justice for people with disabilities, including physical access difficulties.
11. A recent report by the European Union Agency for Fundamental Rights reveals several problems that result in victims being deterred or unable to enforce their rights by taking cases to court, such as excessive length of proceedings, high legal costs including lawyers' fees and court fees, and restrictive rules on who may take a case to court.⁴ In this context, legal standing has been identified as one of the major restrictions regarding the right to access to justice.
12. For people with disabilities, this is coupled with several other factors. For instance, persons with disabilities often experience isolation. This is especially true for people living in institutions: many of the residents have lost all contact with their families, or are orphans. As the Commissioner has highlighted on several occasions, intellectual disabilities carry a strong stigma and many people have been abandoned by their families through shame and lack of alternatives. Moreover, knowledge of the rights of residents is frequently poor, both on the part of the residents themselves and those responsible for their care. Difficulties frequently arise in respect of access to appropriate legal aid. In addition, these persons might have been deprived of their legal capacity, or their legal capacity might have been restricted. At the same time, their legal representation is often inadequate, with no guardian being appointed, or a conflict of interests arising in the designation of this guardian, for example when a staff member of the institution assumes this role. Legal incapacitation is one of the major reasons for which legal proceedings are not always accessible to people with disabilities.⁵
13. A study by the non-governmental organisation *Inclusion Europe* concluded that access to justice for people with intellectual disabilities is by no means guaranteed in many European countries, stressing that "partial or complete legal incapacitation combined with limited access to justice are the ingredients for a degree of social exclusion experienced by only few other groups of people".⁶ This explains the significant discrepancy between the scale of human rights violations perpetrated against persons with disabilities and the relatively low number of court cases tackling these violations.

International and European standards

14. The Commissioner recalls that the right to access to justice is guaranteed in several human rights treaties, including the Convention.

³ See the Issue Paper published by the Commissioner for Human Rights, *Human Rights and Disability: Equal rights for all*, 20 October 2008, p. 13.

⁴ Fundamental Rights Agency, *Access to justice in Europe: an overview of challenges and opportunities*, March 2011.

⁵ See for instance *Shtukaturov v. Russia*, judgment of 27 March 2008, § 124: while the Government claimed that the applicant could have initiated legal proceedings through his mother, the Court considered that the remedy to challenge his admission to the psychiatric hospital was not directly accessible to him, as he fully depended on his mother who had requested his placement in hospital and opposed his release.

⁶ Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability*, 2007.

15. Article 13 (access to justice) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, places an obligation upon states to ensure equal access to justice to persons with disabilities. At the same time, this Convention recognises the reality that some people, because of their impairments or external barriers, are unable by themselves to take important decisions. For them the CRPD requests that governments provide *access to any support* they may require in exercising their legal capacity.
16. This is also reflected in the Council of Europe *2006-2015 Action Plan to promote the rights and full participation of people with disabilities in society*. One of its objectives is to ensure effective access to justice for persons with disabilities on an equal footing with others. The Action Plan noted in particular that access to the legal system is a fundamental right in a democratic society but people with disabilities can often face a number of barriers, requiring a range of measures and positive actions. The Action Plan states that when assistance is needed to exercise legal capacity, member states must ensure that this is appropriately safeguarded by law. A specific action to be taken by member states in this respect is “to encourage non-governmental advocacy networks working in defence of people with disabilities’ human rights.”

II. Supported decision-making by persons with disabilities

17. In the Commissioner’s view, there is a great difference between taking away the right to take decisions about one’s life and providing “access to support”. The former views people with disabilities as objects of treatment, charity and fear. The latter places the person with disabilities at the centre of decision-making and views them as subjects entitled to the full range of human rights. This is different from the actual practice observed by the Commissioner in a majority of countries, including in Europe, where there has been a tendency to declare people with mental health and intellectual disabilities legally incapable and put them under legal guardianship almost routinely.
18. The CRPD is grounded in the premise that public authorities should go further than to just help persons with disabilities to adjust to existing conditions: they should seek to adapt the conditions in order to accommodate everyone, including those with special needs. Article 12 of the CRPD (equal recognition before the law) states that governments shall recognise that persons with disabilities enjoy legal capacity on an equal footing with others in all aspects of life.⁷ It is based on the presumption that all persons enjoy legal capacity and that support or assistance should be provided to enable individuals to make decisions for themselves and expand their capacities to do so.
19. The nature of this support or assistance is a crucial aspect. The CRPD states that there should be appropriate and effective safeguards in order to prevent abuse. The rights, will and preferences of the concerned person should be respected and there should be no conflict of interest and undue influence between those supporting the adult, and the adult him- or herself. Furthermore, the arrangement for the support should apply for the shortest time possible and be subject to regular review by a competent, independent and impartial authority or judicial body.

⁷ See also the Council of Europe *2006-2015 Action Plan to promote the rights and full participation of people with disabilities in society*, which states that “People with disabilities have the right to recognition everywhere as persons before the law.” Moreover, Article 15, paragraph 3 of the Revised European Social Charter obliges states to promote the full social integration and participation in the life of the community of persons with disabilities.

20. These formulations allow for a range of alternatives to guardianship to be provided for adults with disabilities. The starting point is full legal capacity combined with the right of the individual to seek support. The exercise of this support should always be regulated with safeguards to avoid the misuse of trust. Recommendation (99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults offers useful guidance in this regard.
21. The Commissioner also recalls Resolution 46/119 on the protection of persons with mental illness and the improvement of mental health care adopted by the UN General Assembly, which underlined that: "The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest."⁸
22. The Commissioner considers that legislation and practices in several European countries relating to the judicial finding of incapacity and the placement under guardianship give rise to concern. The transfer of civil, political and welfare rights with inadequate or only formal judicial control obviously opens up the possibility of abuse, notably by unscrupulous family members, "professional guardians" and directors of institutions.
23. The Commissioner wishes to reiterate that any restrictions of the rights of an individual must be tailor-made to the individual's needs, be genuinely justified and be the result of human rights-based procedures and combined with effective safeguards.
24. The Commissioner is also of the opinion that the failure of the State to take appropriate measures to provide access for persons with disabilities to the support they may require in exercising their legal capacity raises an issue under Article 8 of the Convention (right to respect for private and family life). A positive obligation on the State to provide persons with intellectual disabilities with support to take important decisions can indeed be inferred from international law, in particular the abovementioned provisions. This entails an obligation to initiate incapacitation procedures if necessary and appoint a legal representative.
25. This is in line with the case-law of the Court, which on several occasions found violations of Article 8, owing to disproportionate limitations of the applicant's legal capacity. The Court also concluded that the failure to assign a counsel as requested by an applicant confined in a psychiatric hospital, in the context of the annual review of his case by the courts, constituted a violation of Article 5, paragraph 4 of the Convention. The Court considered that a person confined in a psychiatric institution should - unless there are special circumstances - receive legal assistance in proceedings relating to the continuation, suspension or termination of his or her detention. The importance of what is at stake - personal liberty - taken together with the very nature of the affliction - diminished mental capacity - compels this conclusion.⁹
26. The Commissioner considers that access to support is of the utmost importance in order to give access to justice to people with intellectual disabilities: without assistance, these persons are often not in a position to make themselves heard.

⁸ UN General Assembly, Resolution 46/119 on the protection of persons with mental illness and the improvement of mental health care, 17 December 1991, Principle 1, § 6.

⁹ *Megyeri v. Germany*, judgment of 12 May 1992, § 23.

III. Requirements of standing before the Court

27. The Commissioner is aware that Article 34 (individual applications) of the Convention requires that an applicant should claim to be a victim of a violation of one of the rights set forth in the Convention, that is, to have been directly affected by the violation alleged. The Court has nevertheless permitted applications by indirect victims in a number of cases, for instance close relatives of a deceased person alleging violations of the right to life.
28. On several occasions, the Court has also accepted to examine cases in which an applicant had died in the course of the proceedings. It has done so because the applicant's heirs or close family members had expressed the wish to pursue the proceedings before the Court, or by application of Article 37 (striking out applications) of the Convention. Under this provision, the Court shall continue the examination of an application "if respect for human rights as defined by the Convention and the Protocols thereto so requires". The Court decided for example to continue the examination of a case despite the death of the applicant and the absence of a formal successor in title, considering that "human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant's death should be continued. All the more so if the main issue raised by the case transcends the person and the interests of the applicant."¹⁰
29. In some instances, the Court examined cases in which the applicant had died before the submission of the application by close relatives. The Court found for example that a wife and a daughter, who complained of procedural unfairness in proceedings which their deceased husband/father had brought in the administrative courts after he was confined to a psychiatric hospital, had a legitimate interest in bringing a case on his behalf.¹¹
30. However the Court has never had the opportunity to examine a case concerning a person who died before the submission of an application, in the absence of any heir or close relative and with no legal representative. This raises the question of the representation of a direct victim by a third party.

International and national experiences

31. Unlike the European Convention, the 1969 American Convention on Human Rights (ACHR) does not provide that only victims of a violation may submit individual applications. Article 44 ACHR provides that: "Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." In 2005, seized by the Commission, the Inter-American Court of Human Rights recognised for instance, in a case concerning the exclusion of indigenous candidates from participating in the municipal elections, that the Center for Justice and International Law and another NGO had presented requests, arguments and evidence in favor of all the alleged victims, even though not all of them had appointed these organisations as their representatives.¹²
32. In particular, the Inter-American Court noted that the individual's access to the Inter-American system for the protection of human rights could not be restricted based on the requirement to have a legal representative, and that the application could be presented by a person other

¹⁰ *Karner v. Austria*, judgment of 24 July 2003, § 25.

¹¹ *Marie-Louise Loyer and Other v. France*, judgment of 5 July 2005, § 29.

¹² Inter-American Court of Human Rights, *YATAMA v. Nicaragua*, judgment of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs). The Inter-American Court took into account the existence of specific problems such as the predominantly oral culture of the alleged victims as well as the problems of access and transport to reach the different communities concerned.

than the alleged victim. The Inter-American Court also stated that “the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights” and concluded that “if an application was not admitted for lack of a representative, this would constitute an unwarranted restriction that would deprive the alleged victim of the possibility of access to justice.”¹³

33. Furthermore, the Commissioner notes a tendency in domestic law to accept that a third person or organisation takes legal action in the name of victims of alleged human rights violations in domestic courts, especially in cases concerning vulnerable groups of people. Research findings show that in many member states of the European Union, NGOs are able to initiate court proceedings either in the name of the victim or on their own behalf, in certain circumstances without the consent of the victim.¹⁴
34. An increasing number of European States have given the power to national human rights structures to bring proceedings in their own name, notably in the field of discrimination. A recent Equinet report noted that the ability of equality bodies to take legal action in their own name may be useful “in situations where it has come to the attention of the equality body that there are identifiable victims of discrimination, but where the victims are reluctant to file a personal complaint.”¹⁵
35. The Commissioner also underlined in several of his reports that psychiatric institutions should be open to independent public scrutiny to prevent human rights violations. He noted that the frequent visiting of psychiatric institutions by independent inspection mechanisms greatly reduces the potential for human rights abuses; he thus encouraged the access to such institutions by appropriate NGOs, user and advocacy groups. Such organisations provide a window into spaces or practices which are not normally seen by the public. As a consequence of the various monitoring systems set up at national level,¹⁶ those conducting such monitoring should also be able to file an application on the applicant’s behalf when the latter is unable to do so.

The principle of effectiveness and the need to adapt standing requirements

36. The Commissioner recalls that the Convention is a law-making treaty the object and purpose of which are the protection of individual human rights. This requires that the Convention’s provisions be interpreted and applied so as to make its safeguards practical and effective.¹⁷ In the words of the Court “it is (...) necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”¹⁸

¹³ *Id.*, § 82 and § 86.

¹⁴ Fundamental Rights Agency, *Access to justice in Europe: an overview of challenges and opportunities*, March 2011, p. 39. Council of Europe member states also took account of the key role played by NGOs when adopting the 1995 Protocol to the European Social Charter providing for a system of collective complaints in giving them the possibility of submitting complaints in specific circumstances.

¹⁵ European Network of Equality Bodies (Equinet), *Influencing the law through legal proceedings - The powers and practices of equality bodies*, September 2010, p. 16. See also European Commission against Racism and Intolerance (ECRI) General Policy Recommendation n°7: National legislation to combat racism and racial discrimination, adopted by ECRI on 13 December 2002, § 25.

¹⁶ The Commissioner refers in particular to the 2002 Optional Protocol to the UN Convention against Torture (OPCAT), which foresees the establishment of a national preventive mechanism, and Article 33 CRPD, which obliges States Parties to “maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation” of the CRPD. Article 33 also states that “civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.”

¹⁷ *Soering v. the United Kingdom*, judgment of 7 July 1989, § 87.

¹⁸ *Wemhoff v. Germany*, judgment of 27 June 1968, section “as to the law”, § 8.

37. The Commissioner is of the view that a strict application of standing requirements to persons with disabilities, and in particular intellectual disabilities, would have the undesired effect of depriving a particularly vulnerable group of any reasonable prospect of seeking and obtaining redress for violations of their human rights and fundamental freedoms set forth in the Convention. It would also run counter to the Convention's objective of preventing the occurrence or recurrence of human rights violations by the States parties.
38. The Commissioner recalls the Council of Europe Committee of Ministers Recommendation (2007)14 on the legal status of non-governmental organisations in Europe where "the invaluable contribution (...) made by NGOs to the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe" was underlined.
39. With a view to safeguarding the Convention's effectiveness at national level, the Commissioner considers that in exceptional circumstances, which the Court may wish to define, NGOs should be able to lodge applications with the Court on behalf of victims. Possible factors to be taken into account in this respect could include:
- when there is an identified victim who has been directly affected by the alleged violation and in a situation of extreme vulnerability, for example persons detained in psychiatric and social care institutions;
 - in the absence of family, when no alternative means of representation are available, notably as a direct consequence of the failure of the authorities to take the necessary and effective supportive measures, or when there is a conflict of interest between the alleged victim and the legal representative;
 - when there is sufficient connection between the person or organisation lodging the complaint and the alleged victim – this includes for instance organisations conducting monitoring visits of closed institutions and which may have witnessed human rights violations;
 - when the issue involves an important question of general interest - abuses perpetrated against people with disabilities inside social care institutions or psychiatric hospitals certainly belong to this category.

Conclusions

40. People turn to the European Court of Human Rights because they feel unable to find justice at home. However, access to justice for persons with intellectual and mental disabilities remains a central concern, particularly, but not exclusively, for those residing in large, remote and impersonal psychiatric institutions.
41. Achieving meaningfully equal rights for persons with disabilities will require removing the barriers that hinder persons with disabilities from accessing courts to claim their human rights, and fighting against their isolation in institutions or in the back-rooms of family homes. Failure to ensure that vulnerable persons have effective access to justice will allow the abuses committed against them to continue.
42. In conclusion, the Commissioner is of the opinion that:
- the Convention's provisions concerning the human rights of persons with disabilities should be interpreted in the light of the CRPD and its main object and purpose: the achievement of equal rights for persons with disabilities;
 - access to justice for persons with disabilities, and in particular intellectual disabilities, remains highly problematic, notably due to inadequate legal incapacitation procedures and restrictive rules on legal standing;

- support should be provided to enable individuals with disabilities to make decisions for themselves;
- failure of the State to provide such support constitutes an interference with the person's private life and may also result in the impossibility for the person concerned to challenge in court the breaches of his or her rights;
- abuses committed against people with disabilities, while frequent, are often not reported to the authorities and ignored; there is an atmosphere of impunity surrounding these violations;
- in order to prevent and put an end to these abuses, the important role played by NGOs in shedding light on the human rights violations experienced by vulnerable persons and facilitating the latter's access to justice must be officially recognised. Allowing NGOs to lodge applications with the Court on behalf of persons with disabilities is fully in line with the principle of effectiveness in which the Convention is grounded.