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Chapter 3: Legal Capacity Guardianship and Supported Decision-Making

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1. Introduction

Most countries have legal mechanisms to respond to situations where an individual needs assistance with making particular decisions. Such assistance may be required when a person has a difficulty with cognitive functioning caused, for example, by intellectual disabilities, some forms of “mental illness”, brain damage or degenerative diseases such as Alzheimer’s disease. This chapter deals mainly with safeguards required during the process of depriving someone of legal capacity, appointing a guardian, contesting decisions made by a guardian, displacing a guardian and reviewing the need for being deprived of decision-making powers. People who have been deprived of their legal capacity are, by definition, deprived of the ability to decide upon certain aspects of their life. These other aspects are considered in different chapters of the book: consenting to or refusing treatment (chapter 4), deciding where to live (chapter 2), having the right to participate in various aspects of community living (chapter 7).

Five examples illustrate different scenarios:

1. Andras, aged 40, has Down's syndrome and lives with his family. His relatives are getting old and are worried about where Andras will live when they cannot care for him, and concerned about how he will manage the money which one day he will inherit.
2. Beata, a woman in her 20s, has been diagnosed with 'bi-polar affective disorder'. Every few months for the past two years her behaviour becomes manic or 'high', during which time she goes out to shops and spends all her money on things which, later, she realises she does not need at all.
3. Charles had a motorcycle accident and sustained a head injury. He is currently in a coma but doctors say he may well regain consciousness in a few weeks.
4. Dora is in her 70s and lives alone without any social support. She has been diagnosed with Alzheimer's disease, and is starting to forget things and is finding it difficult to cook.
5. Edgar has mild learning difficulties. He has a part time job, but cannot do arithmetic, so finds it difficult to manage his personal finances, such as monthly budgeting and arranging bank transactions.

Different legal responses would be appropriate for each of these people. Edgar's difficulties could be solved if someone provided him with occasional assistance in his mathematics. There may be no need to recognise this relationship in law, because Edgar is able to make choices about every aspect of his life – he just needs assistance with sums. Andras is capable of taking many decisions, but does need someone to live with him to look after him. He requires plans to be put into place in the event that his parents can no longer look after him. For Andras perhaps a person could be assigned to have the legal responsibility and authority to make decisions in conjunction with Andras in the event of him being left without carers.

Beata, Charles and Dora had or have the capacity to make all decisions. Beata has a fluctuating mental illness which means that for those periods she may well feel that she needs someone to temporarily have the authority to make

financial decisions for her (pay the bills, limit her credit card, allow her some spending money). She could assign these rights to someone by signing a legal document which is sometimes called an enduring power of attorney or lasting power of attorney. Beata could also consider making a decision about treatment which may detail for example the sorts of treatment options which she likes and does not like when she is in a manic state. Such advance planning of medical treatment in some countries is valid even if the person – at the time of the manic behaviour – refuses treatment.

Dora has a degenerative disease which, unfortunately, will probably get worse with time. She may well want to plan ahead, so she could also appoint a trusted person to make legal decisions for her in the event that she cannot make them herself. She could also think about making a ‘living will’; that is an advance decision about treatment, meaning that a person can make a decision now, about treatment which he or she would not want in future when that person has lost capacity.

Lastly, Charles does not currently have capacity to make any decisions as he is in a coma. For him a different legal mechanism would be appropriate, perhaps one in which a trusted family member or friend who can be appointed to take decisions on his behalf. However Charles may at some point recover, so the legal arrangement would need to be regularly reviewed to ensure that his autonomy is respected when he regains the capacity to express his wishes.

The issue of capacity then, is a complex one. One-size-fits-all legal frameworks are inappropriate, for two main reasons: (1) capacity often fluctuates throughout a person’s life, sometimes in a remarkably short space of time such as days or, sometimes, hours, and (2) capacity is specific to a particular decision. Andras, for example, probably has the capacity to decide on personal welfare issues such as clothes and food, but may not have capacity to understand complex medical procedures or financial transactions.

Capacity issues are dealt with differently by different countries. Some legal systems are designed to ensure that alternative decision-making processes are available for only those decisions an individual is actually incapable of

making.²⁴⁷ Others are less subtle, and some do not allow for partial capacity at all: if the individual is given a guardian, the guardian acquires authority over all the decisions relating to that person. This latter approach is often based on Roman law,²⁴⁸ which deprives such persons of ‘legal personhood’. In law, the person effectively loses all rights: in the eyes of the law, the person becomes a non-person. As the above examples show, such persons may in fact have capacity to make many decisions that affect them, but these legal systems preclude them from doing so. Of particular relevance, these legal systems do not allow people under guardianship to instruct their own lawyer, and commence proceedings (even if they are in fact capable of doing so). In some countries, people under guardianship are not even legally entitled to lodge a case at a domestic court to challenge their guardianship.²⁴⁹ As discussed elsewhere in this volume,²⁵⁰ that restriction does not apply for applications to the European Court of Human Rights: the ECHR provides rights to all people within countries which have ratified the Convention, whether or not they have capacity, and anyone in fact (even if not in law) capable of doing so can apply for the enforcement of those rights.

2. Definitions, and the Meaning of Functional Incapacity

The terms most often used in the context of legal incapacity and guardianship issues are ‘capacity;’ and ‘competence’. The World Health Organization’s definition is that capacity refers specifically to the presence of mental abilities to make decisions or to engage in a course of action, while competence refers to the legal consequences of not having the mental capacity.²⁵¹ In the view of the WHO, the former is determined by (health) professionals, the latter by judges (albeit on the basis of the expert opinions of health and other

²⁴⁷ See, for example, the English and Welsh Mental Capacity Act 2005.

²⁴⁸ See in particular the *cura furiosi* in the Twelve Tables of Justinian, especially I.1.23.3.4.

²⁴⁹ For example, Russia.

²⁵⁰ See below in this chapter, but also chapters 2 (detention) and 9 (representation).

²⁵¹ World Health Organization (2005), *Resource Book on Mental Health, Human Rights and Legislation*, page 39, section 7.1.

professionals). That said, it must be admitted that the terms are sometimes used inter-changeably.

As noted above, individuals may be able to make some decisions and not others. The question of the individual's actual ability actually to make a given decision refers to 'functional' capacity, as distinct from whether he or she is precluded by law from making a decision, which may be termed 'legal' capacity.

Functional incapacity is not the same thing as having a mental disability. Some mental disabilities, be they mental illnesses or intellectual disabilities, will cause such incapacity; others will not. Indeed, empirical studies show that a significant majority of people, even with serious mental illnesses such as schizophrenia and clinical depression, are nonetheless no less competent than the general public to make decisions regarding medical treatment²⁵² Functional capacity instead is about the individual being able to understand the information relevant to the decision, possessing the reasoning ability to reach a decision, and to appreciating both the relevance of the information at issue and the likely results of the various choices that may be made.²⁵³ How these criteria are to be applied will of course depend on the decision in question. Nonetheless, a few comments are appropriate.

As noted, the fact that an individual has a serious mental disability does not necessarily mean that he or she lacks functional capacity to make a decision. The question is how that disability affects their view of the information. If an individual is experiencing an episode of psychosis, for example, he or she may still have functional capacity, as long as the psychosis does not affect the decision in question. The fact that an individual has psychotic beliefs about one medication, for example, does not mean he or she lacks capacity to make treatment decisions regarding medications not affected by the psychosis.

²⁵² T. Grisso and P. Appelbaum, 'The MacArthur Treatment Competence Study III: Abilities of Patients to Consent to Psychiatric and Medical Treatments' (1995), 19:2 *Law and Human Behavior* 149.

²⁵³ The classic paper on standards of capacity is L. Roth, A. Meisel and C. Lidz, 'Tests of Competency to Consent to Treatment' (1977) 134:3 *American Journal of Psychiatry* 279.

Reaching a decision that professional people or family members believe is not in the individual's best interests is not in itself evidence of incapacity. The fact that an individual may spend a lot of money may have serious impact on the family budget, but it does not of itself make the person functionally incapacitous of handling money. Beata's case, above, provides a helpful guide. The fact that she buys things she later decides she did not need does not mean that she lacks functional capacity to make those purchases. The fact that the purchases occur at specific times in her experience of her disability makes it much more likely that she lacks such capacity, however. The question is, at the time she is making the purchases, whether she appreciates what she is doing, or whether the mania she is experiencing has the effect of removing her appreciation of the decisions she is making at the time she is making them.

The need to separate best interests from capacity flows throughout the determination of functional capacity. People with mental disabilities frequently complain that they are found to lack capacity for treatment only when they disagree with the doctor's assessment of their best interests. Disagreeing with a doctor does not in itself imply incapacity, so long as it does not flow directly as a symptom of the disorder or disability with which the individual is affected. Similarly, in decisions regarding institutionalisation, individuals do not lack capacity merely because they are unduly optimistic about whether they can survive outside the institution.

Functional capacity refers to the ability of the individual to understand the information relevant to a decision. This is not the same as requiring the individual to believe the information without question. If an individual does not believe the information the professional or family member believes to be relevant to a decision, the reasons for the non-belief should be examined. In some cases, it may be the direct result of psychosis: an individual may believe, for example, that medication has been poisoned by nurses who have been brainwashed by foreign spies. Such a delusion would obviously be relevant to the individual's functional capacity to consent to the treatment. An individual does not necessarily lack functional capacity just because he or she refuses medication because he or she thinks it does not help, or because he or she has (sometimes for understandable reasons) lost trust in the doctor prescribing it.

3. Positive duty to protect

It could be argued that Article 8 of the ECHR establishes a positive obligation on the State to ensure that the law adequately protects the rights of people who lack the capacity to make decisions. If a person with intellectual disabilities, for example, inherits a large sum of money, she may require assistance to manage that money. If the law does not provide for the person to be assisted in such decision making she may not be able to take advantage of what is rightfully hers. The person may have a claim under the Convention that her Article 8 right to a private life (to manage her own affairs) remains merely ‘theoretical and illusory’²⁵⁴ without such assistance. The argument is particularly strong when one considers the overarching duty under Article 1 of the Convention to secure to everyone the rights and freedoms set out in the Convention. If the ECtHR finds that such a positive obligation exists, the sorts of mechanisms which a State would have to ensure are in place would include a mechanism so that people who are thought to lack capacity can have access to speedy, accurate and independent incapacity evaluations. It would also include provisions that a person judged to lack capacity is able to enjoy the maximum possible respect for private and family life, which may necessitate appointing someone to act on that person’s behalf. To date, there has been no such case on such positive obligations relating to incapacity at the European Court of Human Rights. Indeed there is little case law brought by adults who lack capacity in an area of their life. Similarly there have been few cases brought by children, especially children with disabilities who face dual discrimination of being both a child and a disabled person. The lack of cases may have more to do with access to justice (see conclusion, chapter 10) than providing us with an indication of numbers of people affected.

4. Guardianship as a human rights issue

As noted above, some legal systems are organised to ensure that the person with mental disabilities can continue to make those decisions for which he or

²⁵⁴ *Airey v. Ireland*, Application No. 6289/73, judgment 9 October 1979, (A/32) (1979–80) 2 EHRR 305, para. 24.

she has functional capacity. In other countries, instead of the law providing tailor-made options to fit an individual's needs, people are subject to a one-size-fits-all legal approach, in which they are subjected to restrictions (or complete deprivation) of their legal authority to make decisions. Such an approach is disproportionate to functional incapacity. There is growing evidence that in some countries judges routinely deprive people with mental disabilities of their legal capacity in procedures which do not meet fair trial guarantees.²⁵⁵ Once the person is legally incapacitated, their right to decide on many important issues is taken away and handed over to another person, sometimes called a 'guardian'. The adult who has been legally incapacitated (hereinafter 'the adult')²⁵⁶ may be subject to total guardianship²⁵⁷ in which the individual retains almost none of the areas of decision making capacity. Or, the adult may be placed under 'partial guardianship' where the individual retains the legal ability to make some decisions (e.g. small financial transactions) but not others. Guardianship issues are therefore human rights issues.

The Secretary General of the United Nations has observed:

*The function of guardianship is to protect the individual from any danger which his or her mental conditions may cause. International human rights law requires the adoption of substantial and procedural guarantees to prevent improper recourse to, and use of, guardianship arrangements.*²⁵⁸

Much of this chapter necessarily focuses on problematic aspects of guardianship systems and offers some insights through the lens of the ECHR. There are of course legitimate reasons for establishing systems in which the

²⁵⁵ See Mental Disability Advocacy Center (2006) Human Rights and Guardianship in Bulgaria. See similar reports on Hungary, Russia and Serbia. Available from www.mdac.info.

²⁵⁶ The adult to whom guardianship applies is sometimes referred to as a 'ward', but this term is avoided in this book as unduly condescending. The simple word 'adult' is used to denote the 'person under guardianship'.

²⁵⁷ Sometimes referred to as 'plenary guardianship'

²⁵⁸ Report of the United Nations Secretary-General presented to the Fifty-eighth session of the General Assembly, 24 July 2003, Ref: A/58/181, 'Progress of efforts to ensure the full recognition and enjoyment of the human rights of persons with disabilities'. Report of the United Nations Secretary-General presented to the Fifty-eighth session of the General Assembly, 24 July 2003, Ref: A/58/181.

decision-making powers of a person who lacks capacity to make such decisions is given to someone else. Indeed if there were no systems established to protect the well-being and support decision-making of people who, temporarily or otherwise, lack functional capacity, the State may violate people's right to a private life under Article 8 of the ECHR. This view is supported by a United Nations instrument, the 'Declaration on the Rights of Mentally Retarded Persons', which points out that a person with intellectual disabilities 'has a right to a qualified guardian when this is required to protect his personal well-being and interests'.²⁵⁹

The issue, which we estimate to affect several hundreds of thousands of people within the Council of Europe region²⁶⁰ is the opposite hypothesis, that 'human rights abuses pervade guardianship: from judicial enquiry into incapacity, appointment of the guardian, the guardian's powers, oversight of the guardian and review of necessity of guardianship'.²⁶¹

There is growing concern that guardianship systems which are established with benevolent intentions, are now used intentionally to deprive people of their civil and political as well as economic, social and cultural rights. Guardianship has only recently been considered at the highest political levels. In the report already cited, the UN Secretary General explains:

The right to recognition as a person before the law is often neglected in the context of mental health. The concept of guardianship is frequently used improperly to deprive individuals with an intellectual or psychiatric disability of their legal capacity without any form of procedural safeguards. Thus, persons are deprived of their right to make some of the most important and basic decisions about their life on account of an actual or perceived disability without a fair hearing and/or periodical review by competent judicial authorities. The lack

²⁵⁹ 'Declaration on the Rights of Mentally Retarded Persons', Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.

²⁶⁰ Figures based on Mental Disability Advocacy Center research on legal incapacity in seven Council of Europe Member States: Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Russia and Serbia and Montenegro. Reports on legislation and practice are forthcoming.

²⁶¹ O. Lewis, 'Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise', 8 *Journal of Mental Health Law* (2002) 293.

of due process guarantees may expose the individual whose capacity is at stake to several possible forms of abuse. An individual with a limited disability may be considered completely unable to make life choices independently and placed under “plenary guardianship”. Furthermore, guardianship may be improperly used to circumvent laws governing admission in mental health institutions, and the lack of a procedure for appealing or automatically reviewing decisions concerning legal incapacity could then determine the commitment of a person to an institution for life on the basis of an actual or perceived disability.²⁶²

Professor Paul Hunt, the UN Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health highlighted this concern in his thematic report on the interface between mental disabilities and the right to health. Commenting in a section discussing the concerns of people with intellectual disabilities, Professor Hunt states:

Guardianship has been overused and abused in the medical, as well as other, contexts, including at the most extreme level to place persons with intellectual disabilities in psychiatric institutions. This is inappropriate medically and socially, and is inconsistent with the rights of persons with intellectual disabilities to health, autonomy, participation, non-discrimination and social inclusion.²⁶³

The same words could equally be used in relation to people with mental illness. The stigma and discrimination experienced by people with such disabilities can only be perpetuated by guardianship systems which do not comply with international law and standards.

²⁶² See para. 15 of the UN Secretary-General’s report, cited above.

²⁶³ Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Report to the Sixty- first session of the Commission on Human Rights, 11 February 2005, Ref: E/CN.4/2005/51. Para. 79.

5. Recommendation R(99)4: Principles Concerning the Legal Protection of Incapable Adults

In 1999 the Council of Europe focused its attention on decision making of people who lack capacity by issuing ‘Recommendation No. R(99)4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults’.²⁶⁴

Recommendation No. R(99)4 is the only Council of Europe instrument which sets detailed standards in this area. The Commissioner of Human Rights of the Council of Europe has urged States to implement Recommendation No. R(99)4:

*Legislation and practises in several 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 by unscrupulous family members, “professional guardians” and directors of institutions. The implementation of Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe on Principles concerning the legal protection of incapable adults would greatly reduce such abuses, whilst enabling people to act appropriately on behalf of others in need of assistance.*²⁶⁵

As a human rights document, Recommendation No. R(99)4 is authoritative and useful because it helps to put flesh on the bones of the ECHR in relation to legal incapacity and guardianship law. The ECtHR has already cited Recommendation No. R(99)4 with authority in one guardianship case.²⁶⁶ This section of the chapter will offer guidance on how the Recommendation can be used by litigants, lawyers and judges to support Convention arguments in future cases in domestic courts and at the Strasbourg Court.

²⁶⁴ Adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers’ Deputies.

²⁶⁵ Conclusions of the Commissioner, Seminar organized by the Council of Europe Commissioner for Human Rights and hosted by the World Health Organization Regional Office for Europe, Copenhagen, Denmark 5–7 February 2003, paragraph 11.

²⁶⁶ *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005.

Recommendation No. R(99)4 concerns ‘the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests’.²⁶⁷ The Explanatory Memorandum to Recommendation No. R(99)4 explains that the concept of autonomy ‘is used in a wide sense – based on the idea of the authenticity of decisions in the light of a person’s character, values and life history. An autonomous decision must be free from external coercion and internal compulsion due, for example to such factors as schizophrenic delusions or severe depressive episodes. It should also be based on a sufficient understanding of the importance and consequences of the decision’. The Explanatory Memorandum makes it clear that the concept of rationality has no part in Recommendation No. R(99)4, as it could be easily misinterpreted. As discussed above in this chapter and in chapter 4, capacity must not be allowed to boil down to whether the patient agrees with the doctor. A similar argument can be made in relation to other areas where there is a substitute decision maker. The Explanatory Memorandum goes on to explain that ‘[t]he incapacity may be due to a mental disability, a disease or a similar reason,’ the latter category of which may include accidents or states of coma in which the person is unable to formulate his or her wishes or to communicate them.²⁶⁸

6. The Need for a Flexible Approach

One of the main criticisms of guardianship systems is that they allow for solutions which are not tailor-made to the individual’s needs. In many countries only total (or ‘plenary’) guardianship is available. That is to say, in law the person retains either all or no rights. This makes no logical or legal sense considering that many people can make some but not all decisions on their own or with appropriate support, and given the general principles underlying the Recommendation of maximising autonomy, self-determination

²⁶⁷ Part 1, para. 1.

²⁶⁸ Explanatory Memorandum to Recommendation No. R(99)4, para. 20.

and social inclusion, and the fundamental principle running through the Convention of proportionality.

People with mental health problems raise different sorts of practical problems for systems of guardianship, because their capacity can vary over time. Sometimes such variation will be unpredictable; in other circumstances there may be some warning that changes are occurring. Sometimes the incapacity will be a single occurrence, if caused for example by some forms of psychosis; sometimes it may be recurrent, if caused by bipolar disorder ('manic depression'), for example. In many cases, recurrence may depend on the medical régime prescribed, and whether the individual chooses to continue on the medication. The difficulty from a guardianship perspective is how to create a system that will have sufficient human rights protections, but at the same time will be flexible and sensitive enough that the individual has control over decisions at the time when they have capacity, and have appropriate protection in the form of a guardian when they lose that capacity. The processes taken as standard in determination of a person's rights can be too cumbersome to react swiftly to these situations, and, if repeated for periodic incapacity, can prove expensive.

Recognising the need for a flexible legal approach, Recommendation R(99)4 advises that measures to protect the personal and economic interests of the person in question 'should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations'.²⁶⁹ Further, the Recommendation goes on to say that laws should preserve legal capacity as far as possible:

*The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.*²⁷⁰

²⁶⁹ Recommendation No. R(99)4, Principle 2(1).

²⁷⁰ Recommendation No. R(99)4, Principle 3(1).

The legal measure should be ‘proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned’,²⁷¹ and the ‘measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention’.²⁷²

The Recommendation uses ECHR language of ‘necessity’, warning that a measure of protection should not be pursued ‘unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned’.²⁷³ Anticipating that the national legislation allows for alternatives to guardianship (which in many countries it does not) the Recommendation suggests that, ‘account should be taken of any less formal arrangements which might be made, and of any assistance which might be provided by family members or by others.’²⁷⁴ Later, it emphasises this point by elaborating that it is for ‘national law to determine which juridical acts are of such a highly personal nature that they can not be done by a representative.’²⁷⁵

The Explanatory Memorandum to the Recommendation makes clear that there are some matters which almost everyone would agree are so personal that a guardian should never undertake on behalf of the person under guardianship – these include voting, marrying, and recognising and adopting a child.²⁷⁶

Conversely, national law must ‘determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body’.²⁷⁷ The Explanatory Memorandum explains that such a technique can be used to require a court to give specific approval before

²⁷¹ Recommendation No. R(99)4, Principle 6(1).

²⁷² Recommendation No. R(99)4, Principle 6(2). The World Health Organization emphasises that ‘legislation should contain provisions and procedures for discharge from guardianship when the affected person regains competence in the future’. World Health Organization, Resource Book on Mental Health, Human Rights and Legislation, (Geneva: WHO, 2005), p. 42.

²⁷³ Recommendation No. R(99)4, Principle 5(1). See also ECHR ‘necessity’ language in Article 8 of the Convention and related case law.

²⁷⁴ Recommendation No. R(99)4, Principle 5(2).

²⁷⁵ Recommendation No. R(99)4, Principle 19(1).

²⁷⁶ Explanatory Memorandum to Recommendation No. R(99)4, para. 67.

²⁷⁷ Recommendation No. R(99)4, Principle 19(2).

decisions of a certain nature are made, such as consent to a certain serious or controversial health decision, disposal of certain capital, or incurring a certain type of obligation.²⁷⁸

Recommendation No. R(99)4 makes a series of points urging States to consider reforming their laws so as to reflect the following legal arrangements. Laws could include the legal recognition of advance directives, which are decisions made by a person who has capacity to provide for any subsequent incapacity.²⁷⁹ Laws could regulate measures under which the appointed person acts jointly with the adult concerned, and of measures involving the appointment of more than one representative.²⁸⁰ Finally, laws need ‘to provide expressly that certain decisions, particularly those of a minor or routine nature relating to health or personal welfare, may be taken for an incapable adult by those deriving their powers from the law rather than from a judicial or administrative measure’.²⁸¹

7. Procedural Aspects of Legal Incapacity and Guardianship

It has been emphasised in chapter 2 on detentions for reason of mental disability that the vast majority of mental disability cases brought to the European Court on Human Rights have been about process rather than substance. A similar observation may be made regarding capacity, where the Court has been more forthcoming on matters of process than substance, even in interpreting Articles that on their face appear to be primarily about substance. Thus in a case brought by people with mild intellectual disabilities, the Court held that, ‘whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of

²⁷⁸ Explanatory Memorandum to Recommendation No. R(99)4, para. 67. For a further discussion of right to property in chapter 7 on “participation in society”.

²⁷⁹ Recommendation No. R(99)4, Principle 2(7).

²⁸⁰ Recommendation No. R(99)4, Principle 2(6).

²⁸¹ Recommendation No. R(99)4, Principle 2(8).

interference must be fair and such as to afford due respect to the interests safeguarded by Article 8'.²⁸²

The ECHR Article most relevant in procedural matters is Article 6, the right to a fair trial. Article 6(1) states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Guardianship that affects someone's property rights falls within 'civil rights' and is thus afforded the protection of Article 6. In the earliest mental health case, *Winterwerp v. the Netherlands*,²⁸³ Mr Winterwerp was detained in a psychiatric hospital. As a result of the detention, he was automatically deprived of his legal capacity to administer property. The European Court of Human Rights examined this aspect of the case under Article 6, stating:

*The capacity to deal personally with one's property involves the exercise of private rights and hence affects "civil rights and obligations" within the meaning of Article 6 para. 1 [. . .]. Divesting Mr. Winterwerp of that capacity amounted to a "determination" of such rights and obligations.*²⁸⁴

The Court went on to point out that '[w]hatever the justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6 para. 1 (art. 6-1) must nevertheless be

²⁸² *Kutzner v. Germany*, Application No. 46544/99, judgment 26 February 2002, (2002) 35 EHRR 25, para. 56.

²⁸³ *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979).

²⁸⁴ *Winterwerp v. the Netherlands*, op. cit., para. 73.

respected'.²⁸⁵ In the case of *Matter v. Slovakia*, decided twenty years after *Winterwerp*, the Court re-stated its position:

*The purpose of the proceedings is to determine whether or not legal capacity can be restored to the applicant, i.e. whether or not he is entitled, through his own acts, to acquire rights and undertake obligations set out, inter alia, in the Civil Code. Their outcome is therefore directly decisive for the determination of the applicant's "civil rights and obligations". Accordingly, Article 6 § 1 is applicable.*²⁸⁶

The scope of Article 6 is not restricted to decisions regarding property, however, but applies to the determination of civil rights generally. The right to sick pay at work,²⁸⁷ the right to receive disability living allowance,²⁸⁸ and the right to register an association,²⁸⁹ for example, have been found by the Court to be 'civil rights' and therefore to engage Article 6. The right to liberty has also been held by the ECtHR to be a 'civil right' under Article 6,²⁹⁰ suggesting that the Court may be prepared to ensure a wide reading of the term. In that event, it is likely that the right to consent to treatment and the right to make other personal decisions may well be within the scope of Article 6, and a court hearing would be available to challenge the restriction of any restriction on those rights.

Recommendation No. R(99)4 states that there should be 'fair and efficient procedures for the taking of measures for the protection of incapable adults'.²⁹¹ The Recommendation continues that there 'should be adequate procedural safeguards to protect the human rights of the persons concerned

²⁸⁵ *Winterwerp v. the Netherlands*, op. cit., para. 75.

²⁸⁶ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32, para. 51.

²⁸⁷ *Feldbrugge v. the Netherlands*, Application No. 8562/79, judgment 29 May 1986, (A/99) (1986) 8 EHRR 425.

²⁸⁸ *Salesi v. Italy*, Application No. 13023/87, judgment 26 February 1993, (A/257-E) (1998) 26 EHRR 187.

²⁸⁹ *APEH Üldözötteinek Szövetsége and others v. Hungary*, Application No. 32367/96, judgment 5 October 2000, (2002) 34 EHRR 34.

²⁹⁰ *Aerts v. Belgium*, Application No. 25357/94, judgment 29 June 1998, (1998) 29 EHRR 50, para. 59.

²⁹¹ Recommendation No. R(99)4, Principle 5(1).

and to prevent possible abuses,'²⁹² with the Explanatory Memorandum warning that:

*It is necessary to be on guard against the danger that a change to welfare terminology will conceal the essential nature of what is being done. A measure which is called a measure of protection or assistance may in reality be an infringement of rights and freedoms from the point of view of the adult concerned.*²⁹³

The Court has echoed this approach, although not yet in a guardianship context. In cases concerning paternity, for example, the Court has been careful to articulate that 'particular diligence is required in cases concerning civil status and capacity'.²⁹⁴

In this chapter typical guardianship proceedings will be examined in as near chronological order as is possible, and some suggestions will be made as to how the Court may deal with these issues in future cases. During domestic court proceedings at which a person's legal capacity is in question, a number of issues may arise, namely: notification about the hearing, expert evidence, right to be heard in person, entitlement to test the evidence, legal representation and its quality, access to court and medical file, and appeal rights. These issues will be taken in turn.

Sufficient notice

The person whose capacity is in question must obviously be informed of the proceedings, and be given a reasonable time to prepare a case. Recommendation No. R(99)4 specifies:

The person concerned should be informed promptly in a language, or by other means, which he or she understands of the institution of proceedings which could affect his or her legal capacity, the exercise of his or her rights or his or her interests unless such information

²⁹² Recommendation No. R(99)4, Principle 7(2).

²⁹³ Explanatory Memorandum to Recommendation No. R(99)4, para. 48.

²⁹⁴ *Szarapo v. Poland*, Application No. 40835/98, judgment 23 May 2002, para. 40.

*would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.*²⁹⁵

It is not clear why the ‘manifestly without meaning’ provision was included, as there appears to be no disadvantage to anyone to provide information in all situations. It is difficult to imagine a situation where someone’s health would be put in ‘severe danger’ on being told about an incapacity procedure.

Any procedure in which civil rights are determined without hearing the parties is plainly in violation of Article 6(1). In the criminal law context, the Court has held that a person can waive his or her rights to be present at the court hearing only if sufficient notice has been served, and such a desire not to be present has unequivocally been made.²⁹⁶ Such safeguards are not always provided in guardianship proceedings. In some countries it sometimes happens that the entire proceedings in which a person is deprived of their legal capacity without notifying or involving the person in question.²⁹⁷

Incapacity assessment

If the State is under a positive obligation to provide assistance in decision making where a person lacks capacity to make that particular decision, then it would seem logical that the package of positive obligations should contain a right to have one’s capacity assessed. There has been no case law on this point. Recommendation No. R(99)4 advises that the list of those entitled to institute guardianship proceedings (or other measures) should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary.²⁹⁸ Carers (such as family members) may be in good position to apply for an incapacity assessment in order to instigate legal protection. However, as ECHR cases have illustrated, family members may sometimes

²⁹⁵ Recommendation No. R(99)4, Principle 11(2).

²⁹⁶ See *Poitrimol v. France*, Application No. 14032/88, judgment 26 October 1993, (1993) 6 EHRR 516, (para. 31).

²⁹⁷ The Mental Disability Advocacy Center, to which the authors are connected, is currently litigating cases from Bulgaria, Czech Republic, Estonia and Russia at the European Court of Human Rights where the applicant has been placed under guardianship without having been notified of the proceedings.

²⁹⁸ Recommendation No. R(99)4, Principle 11(1).

have ulterior motives for instigating guardianship proceedings.²⁹⁹ A court therefore needs to carry out a rigorous assessment as to the need for an adult's decision-making rights to be limited or removed altogether, and not make assumptions based on diagnoses. There is an argument that the adult's lawyer or at least an independent person, should be present during the incapacity assessment itself, as an extra safeguard against abuse.

The more common issue is that during the course of incapacity / guardianship the adult's capacity is assessed without that person's consent. In such circumstances there is a tension between respecting the person's right to privacy (and therefore right to assistance if the person lacks capacity), and another aspect of the person's right to privacy (in terms of unnecessary psychiatric and other examinations).

Various aspects of the incapacity assessment may engage the Convention. For example, the expert's independence from the parties could be brought into question if there is any collusion, or if the family member pays for the assessment. The expert must be, in the words of Recommendation No. R(99)4, 'suitably qualified',³⁰⁰ which probably means a psychiatrist or psychologist.³⁰¹ Interestingly, a UN document from 1971 specifies that the incapacity assessment should include an evaluation of the 'social capability' of the person in question.³⁰² The expert must provide a report within a reasonable period of time.³⁰³

In the case of *Bock v. Germany*,³⁰⁴ on the face of it a length of time case, the applicant's wife insisted during protracted divorce proceedings, that he lacked the capacity to conduct legal proceedings. Over a period of six years the applicant underwent a total of five psychiatric examinations resulting in two

²⁹⁹ See, for example, *Bock v. Germany*, Application No. 11118/84, judgment 21 February 1989, (1987) 9 EHRR CD562 [sub nom A. v. Germany].

³⁰⁰ Recommendation No. R(99)4, Principle 12(2).

³⁰¹ This could itself be an area of challenge by a lawyer or the adult him/herself. In some countries there are questions to be asked as to the training which psychiatrists receive in assessing incapacity.

³⁰² 'Declaration on the Rights of Mentally Retarded Persons', Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971, para. 7.

³⁰³ *Martins Moreira v. Portugal*, Application No. 11371/85, judgment 7 October 1988, (1991) EHRR 517.

³⁰⁴ Application No. 11118/84, judgment 21 February 1989. See also the Commission Report, 13 November 1987.

failed attempts by the wife to have the husband placed under guardianship. In examining length of time issues under Article 6 of the Convention, the Court said that, ‘there was not so much a lack of judicial activity as an excessive amount of activity which focused on the petitioner’s mental state.’ The Court went on to say that despite the protracted legal proceedings, ‘doubts still persisted in the national courts as to his soundness of mind, although, by the time of the final divorce judgment, there was a total of five reports attesting Mr Bock’s soundness of mind [. . .] Finally, the Court cannot disregard the personal situation of the applicant who, for some nine years, suffered by reason of the doubts cast on the state of his mental health which subsequently proved unfounded. This represented a serious encroachment on human dignity’.³⁰⁵ The Court (perhaps because it was not raised by the parties) did not consider whether this encroachment constituted a violation of Article 8.

Two Polish cases illustrate the Court’s approach to forced psychiatric evaluations. In the first case, decided in 2002, *Nowicka v. Poland*,³⁰⁶ the applicant had been detained on several occasions for a total period of eighty-three days and was imposed in the context of a private prosecution arising out of a neighbours’ dispute. The Court found that even though the detention was ‘lawful’ under Article 5(1)(b) following a court order, any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. It went on to hold that a balance must be struck between the fulfilment of a court order and a person’s right to liberty. The Court found that the balance had not been struck and found a violation of Article 5.

The case of *Worwa v. Poland*, decided in 2003, was again not a guardianship case, but one in which the district court had, at very short intervals, ordered medical reports on the applicant’s mental state in connection with a number of similar criminal cases pending before it. The ECtHR found that these constituted interference by a public authority in her private life, within the meaning of Article 8(1) of the Convention, and that that interference was in accordance with the law. The Court went on to find a violation of Article 8,

³⁰⁵ *Bock v. Germany*, op. cit., para. 48.

³⁰⁶ Application No. 30218/96, judgment 3 December 2002, [2003] 1 FLR 417.

because the domestic court did not strike a fair balance between the rights of the individual's right to respect for private life, and the concern to ensure the proper administration of justice, and therefore that interference with the applicant's private life was unjustified.³⁰⁷

The Court has recently for the first time referred authoritatively to Recommendation R(99)4 in the case of *H.F. v. Slovakia*.³⁰⁸ In this case the applicant had been deprived of her legal capacity in November 1997 by the Bratislava District Court based on a psychiatric report of July 1996 and statements from the applicant's former husband and witnesses he had called. The applicant was given no opportunity to give evidence to the district court. The European Court of Human Rights considered that the psychiatric report could not be regarded as 'up-to-date' as per Recommendation No. R(99)4, which speaks of 'at least' one qualified expert.³⁰⁹ The Court noted that a second psychiatric expert should have been instructed to report. This was not only in the interests of the applicant, whose mental condition was liable to evolve with treatment, but also in the interests of the truth, which the district court had an obligation to establish. In finding a violation of Article 6 of the Convention, the Court stated that a further report would have enabled the district court to establish more effectively whether the psychiatrist's recommendation in 1996 that it should not hear evidence from the applicant remained valid at the date of its decision.

In summary, forced psychiatric examinations have been found by the Court in different cases to violate Articles 5, 6 and 8 of the Convention. State authorities must carefully balance external interests with the fundamental rights guaranteed in the Convention.

³⁰⁷ Application No. 26624/95, judgment 23 November 2003.

³⁰⁸ Application No. 54797/00, judgment 8 November 2005.

³⁰⁹ Recommendation No. R(99)4, Principle 12(2).

Right to be heard in person

Recommendation No. R(99)4 states that '[t]he person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity'.³¹⁰

Phrased in this way, the person is entitled to be heard not just in the trial itself, but in administrative proceedings leading up to the trial, as well as case management hearings. The Recommendation also advises that the judge should personally see the adult or be satisfied as to the adult's condition.³¹¹ It sometimes happens that the person whose capacity is in question does not attend court because the psychiatrist author of the report on capacity has additionally recommended that the person is 'too mentally ill' to attend court. This situation creates a conflict of interests because the person supporting the application for deprivation of legal capacity is also asking the court not to see the person in question. It is a Convention right under Article 6 to attend proceedings concerning one's civil rights, and the judge is put in the impossible position of relying only on one side of the story, without hearing from the very person whose rights are in question. In these circumstances, it is our view that the judge should hold the court procedure at the hospital or institution in which the person whose capacity in question is being cared for. The judge should insist on seeing and speaking with the person, however 'mentally ill' the person is reported to be.

Adequacy of evidence

Related to the question about the adult attending the court hearing is the quality of evidence of the application. In the *H.F. v. Slovakia* case referred to above,³¹² the district court deprived Mrs H.F. from her legal capacity in a court hearing at which she did not give evidence. Instead, the district court relied on a psychiatric report written one and a half years previous, and on statements by the applicant's former husband and witnesses he had called. These and

³¹⁰ Recommendation No. R(99)4, Principle 13.

³¹¹ Recommendation No. R(99)4, Principle 12(2).

³¹² *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005.

other procedural defects led the European Court of Human Rights to find a violation of Article 6(1) of the Convention. It is to be expected that future cases will challenge flimsy evidence supporting incapacity applications. In such cases the Court may import guarantees now well established under Article 5 into the Article 6 guardianship arena. Such basic safeguards may include fresh medical evidence,³¹³ written by a qualified person,³¹⁴ and the basic fair trial guarantee that evidence should be served on the person enough in advance of the court hearing for that person to instruct alternative experts, if required. It bears repeating that these guarantees are so low to make the ‘rights’ almost meaningless: as was discussed in chapter 2 on detention, the Court must be prepared to set some standards in substantive issues.³¹⁵

Experts’ reports should be in written form,³¹⁶ and the expert should give oral evidence at the incapacity hearing so that the adult in question and his/her lawyer as well as the judge can cross-examine the expert and challenge the opinions put forward. Any reports from experts instructed by or on behalf of the person whose capacity is in question should be considered by the court in the same way as other expert reports.³¹⁷

Disclosure of documents

The person whose capacity is in question and that person’s lawyer must have access to documents held by the other party and by the court, such as the application by the family member or local government, expert psychiatric or psychological opinions and medical records. In civil proceedings a party is entitled to documentation in the possession of the State if this is relevant to the civil claim. This requirement is consistent with the Article 6(1) case-law in which the Court has stated:

³¹³ See *Varbanov v. Bulgaria*, Application No. 31365/96, judgment 5 October 2000, (1998) 25 EHRR CD154.

³¹⁴ *Winterwerp .v the Netherlands*, op. cit.

³¹⁵ The World Health Organization’s International Classification of Functioning, Disability and Health moves away from a reliance on diagnosis and provides a helpful guide to psychologists, psychiatrists, lawyers and judges involved in guardianship proceedings.

³¹⁶ Explanatory Memorandum to Recommendation No. R(99)4, para. 54.

³¹⁷ In an analogous case of *Kutzner v. Germany* (see right to family life section in chapter 7 on participation in society), the Court said that reports could not be disregarded simply because the experts were acting privately.

[T]he principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial. [. . .] The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations led or evidence adduced by the other party.³¹⁸

Courts which hear incapacity and guardianship cases must therefore ensure that the adults in question and their lawyers are given full disclosure of all documentation upon which the application is based.

Legal representation

There have been no cases directly concerning legal representation during incapacity procedures, but as was discussed in chapter 2 above, in the context of detention hearings the Court has stated that ‘[s]pecial 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’.³¹⁹ The same must be true of incapacity and guardianship procedures.

During incapacity court hearings, if the very allegation made by the opposing party is that the adult in question cannot manage his or her affairs to the extent that the adult’s very legal capacity is in doubt, then it follows, given the gravity of issues to be decided, that such a person be represented by a qualified lawyer. The necessity of good quality legal representation is even more strong when one considers (a) that in every such case there are expert witnesses, (b) that such a case will often have serious consequences for the person affecting many aspects of the person’s civil, political, economic, social and cultural rights, and (c) that the person’s mental health will undoubtedly be centre stage. It would be difficult for a government to muster arguments to suggest that Article 6 does not mandate legal representation in court

³¹⁸ *Ruiz-Mateos v. Spain*, Application No. 12952/87, judgment 23 June 1993, (A/262) (1993) 16 EHRR 505, para. 63.

³¹⁹ *Megyeri v. Germany*, Application No. 13770/88, judgment 10 November 1992, (1992) 15 EHRR 584, para. 22.

proceedings concerning legal capacity. The arguments discussed regarding representation in challenges to deprivation of liberty under Article 5(4) apply *mutatis mutandis*.³²⁰

This position is enshrined in international law via Principle 6 of the UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care:

*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.*³²¹

The one ECHR case which touches on legal representation is again *H.F. v. Slovakia*, in which the European Court of Human Rights noted that the Slovak Code of Civil Procedure required the courts to appoint a guardian to act on behalf of those whose legal capacity was at issue, even if the person was assisted by a lawyer. In this case it appeared that the applicant had not been represented by a guardian in the district court and had only been represented in a formal way on appeal. Referring to Recommendation R(99)4, the ECtHR accepted the applicant's submission that the purpose of the appointment of a guardian had not been fulfilled in her case.³²²

³²⁰ See further chapters 2 and 9.

³²¹ See Principle 6 of the MI Principles, adopted by the General Assembly on 17 December 1991. Similarly, the World Health Organization adopts this position: '[i]deally, a legal counsel should routinely be made available to a person whose competence is in question. Where a person is unable to afford a counsel, legislation may require that counsel be provided to the beneficiary free of charge'. The WHO adds that '[l]egislation should ensure there is no conflict of interest for the counsel. That is, the counsel representing the concerned person should not also be representing other interested parties, such as the clinical services involved in the care of the concerned person and/or the family members of the concerned person.'

³²² See also a curious admissibility decision by the (now defunct) European Commission of Human Rights in the case of *Bocsi v. Hungary*, Application No. 24240/94,

Where legal representation is provided, where does the State's responsibility end? In general, where the State provides for legal representation, it must of course be adequate because the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.³²³ In the chapter on detention (chapter 2 above), we discussed adequacy of counsel issues and made the point that Article 6 guarantees have been drawn by the Court into Article 5(4) jurisprudence. In the context of incapacity hearings of course, Article 6 is directly applicable.

In criminal cases, the Court has said in the context of Article 6 that the State has an ongoing duty to ensure adequate representation:

*Mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.*³²⁴

As a matter of logic, if the State could meet Article 6 guarantees merely by nominating or appointing a lawyer, in many instances free legal assistance would prove to be worthless.³²⁵ For a practical guide to representing people with mental disabilities, including in guardianship proceedings, see appendix 7 of this volume.

admissibility decision 21 May 1998. In this case the Commission considered an application by a woman who was deprived of her legal capacity and who complained about the lack of legal representation at the Supreme Court relating to her incapacity case. Recalling the general right to legal representation for people who do not have the capacity to conduct litigation themselves, the Commission stated that 'a refusal to appoint a guardian to a person not able to litigate in connection with a case which has no prospect of success does not interfere with the right, in civil cases, of access to court'. In its decision the Commission went on to explain that the applicant, 'whose action had been based on the very claim that her mental state no longer required her to be placed under guardianship, could reasonably be expected to arrange for her representation before the Supreme Court. Her submissions do not, therefore, disclose any appearance of a breach of her right of access to court, as enshrined in Article 6 para. 1 [. . .] of the Convention'.

³²³ Belgian Linguistic case, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, judgment 23 July 1968, para. 31.

³²⁴ *Artico v. Italy*, Application No. 6694/74, judgment 13 May 1980, (A/37) (1981) 3 EHRR 1, para. 33.

³²⁵ See chapter 2 above on detention, and chapter 9 on legal representation, as well as appendix 7 of this volume. See also Mental Disability Advocacy Centre, *Liberty Denied: Human Rights Violations in Criminal Psychiatric Detention Reviews in Hungary*, (Budapest: MDAC, 2004).

Appeal rights

Article 6(1) does not guarantee appeals from a court of first instance. However, where domestic law allows for an appeal, the appeal process is subject to the guarantees of Article 6. Recommendation No. R(99)4 states that there should be a right to an adequate appeal.³²⁶ The UN Resolution on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care goes further by specifying who should have the standing to appeal: ‘The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision’.³²⁷

The fact that there may be no appeals available in domestic law should not prevent a thorough examination of the proceedings for any aspects that may not comply with the Convention. In these circumstances of course, the person affected has a right to remedies under Article 13 of the European Convention on Human Rights, and such complaints should be lodged with the relevant domestic authorities and courts and a case lodged at the European Court of Human Rights (see chapter 8 below on applying to the ECtHR). In the case of *Delcourt v. Belgium* the Court re-stated that Article 6(1) of the Convention does not compel countries to set up courts of appeal, but went on to say that ‘[n]evertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6’.³²⁸

Such guarantees are important because in some countries the person under guardianship lacks legal standing (legal ability) to appeal the court decision depriving him or her of legal capacity. It would not meet the spirit of *Delcourt v. Belgium* if an individual was denied access to legal remedies, precisely

³²⁶ Recommendation No. R(99)4, Principle 14(3). See also ‘Declaration on the Rights of Mentally Retarded Persons, Proclaimed by the UN General Assembly resolution 2856 (XXVI) of 20 December 1971, para. 7.

³²⁷ Principle 1(6) UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on 17 December 1991.

³²⁸ *Delcourt v. Belgium*, Application No. 2689/65, judgment 17 January 1970, (1979–80) 1 EHRR 355 para. 25.

because they had been deprived of their rights by the judgment he or she wished to appeal.

It is similarly important that other people are entitled under domestic legislation to challenge a decision to deprive a person of legal capacity, because the adult may not have the capacity to know that there have been procedural or other violations or how to go about challenging the decision.

Length of proceedings

The Court examined length of guardianship proceedings in *Matter v. Slovakia*. The proceedings relating to the decision to deprive the applicant of his legal capacity began in 1987 and were still pending at the time of the Court's judgment, over seven years since the former Czech and Slovak Federal Republic ratified the Convention and recognised the right of individual petition in March 1992. The Court noted that the case's complexity did not justify its length, and went on to identify periods of inactivity for which no satisfactory explanation had been provided by the Government. The Court found that the domestic courts had failed to act with the special diligence required by Article 6(1) in cases of this nature. This, 'and having regard to what was at stake for the applicant',³²⁹ the Court found a violation of Article 6 of the Convention.

Choosing a guardian

Recommendation No. R(99)4 suggests that the paramount consideration when choosing a guardian should be the suitability of that person to safeguard and promote the 'interests and welfare' of the adult lacking capacity.³³⁰ The Recommendation says that 'the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as

³²⁹ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32, para. 61.

³³⁰ Recommendation No. R(99)4, Principle 8(2).

far as possible, given due respect'.³³¹ The Explanatory Memorandum to the Recommendation warns wisely, that whilst the invaluable and irreplaceable role of relatives must be recognised and valued, the law must watch out for unscrupulous family members.³³²

It follows that the law needs to have mechanisms for such issues to be dealt with in a manner compliant with the ECHR. It could be argued that there is a right under Article 8 of the Convention that the person whose personal decisions are being made by someone else should have an opportunity in deciding who that person should be.

The case of *J.T. v. the United Kingdom*,³³³ illustrates a similar point. In the case, the applicant had a history of mental disability and had a difficult relationship with her mother, her closest relative. The difficult relationship arose in part to alleged sexual abuse by the applicant's stepfather. Under English law, the mother as the nearest relative had a variety of rights related to her detention in a psychiatric hospital, and the applicant did not want her mother to be given any information about her whereabouts, nor did she want her mother to be involved in any subsequent decisions relating to her care and treatment in hospital. At the level of the European Court of Human Rights the case reached a friendly settlement under Articles 37–39 of the Convention on an undertaking by the British government that the relevant law would be amended to allow a more flexible approach to appointing the nearest relative.³³⁴

Alternatively, a family member may have an argument that they should be the guardian, because of their rights under Article 8 of the Convention (right to private and family life). This remains untested at the European Court of Human Rights, but a coherent argument could be made that family members should be allowed to care for each other, unless there is a strong reason to the

³³¹ Recommendation No. R(99)4, Principle 9(2).

³³² Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

³³³ 26494/95, judgment 30 March 2000, (2000) 30 EHRR CD77, [2000] 1 FLR 909. See also the more detailed decision of the European Commission on Human Rights, (1997) 23 EHRR CD81.

³³⁴ In fact, the English law was not amended with reasonable dispatch, and the English courts ruled the relevant provision in violation of Article 8: *R (M) v. Secretary of State for Health* [2003] E.W.H.C. 1094.

contrary. However, rights under Article 8 are not absolute and evidence that guardianship by a specific family member would put the health or rights of the person with mental disability at risk, for example, would justify the refusal to appoint that person as guardian.

Contesting decisions made by a guardian

Recommendation No. R(99)4 advises that ‘in implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration’.³³⁵ The Recommendation goes on to say that ‘[i]n establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect’.³³⁶ Similar to standards of proxy or supported decision making in the treatment context (see chapter 4), the person representing or assisting an adult should give that person adequate information, whenever this is possible and appropriate so that he or she may express a view.³³⁷ If the adult is unable to give his or her views about the proposed decision,³³⁸ the guardian is obliged ‘so far as reasonable and practicable’ to consult with people who have a close interest in the welfare of the adult concerned.³³⁹

The Explanatory Memorandum to Recommendation No. R(99)4 explains the background debate around these issues. When a person makes a decision on behalf of someone who does not have capacity to make that decision, the decision-maker can either act on the basis of the person’s pre-expressed wishes (if the person had them and they are known) or make a substituted judgment based on knowledge of the person’s wishes, values and beliefs, or as a last resort, make a decision based on the person’s ‘best interests’.

³³⁵ Recommendation No. R(99)4, Principle 8(1).

³³⁶ Recommendation No. R(99)4, Principle 9(1).

³³⁷ Recommendation No. R(99)4, Principle 9(3).

³³⁸ Naturally, whether someone is or is not able to give views about a particular situation may in many cases depend on the skill of the person explaining the different options.

³³⁹ Recommendation No. R(99)4, Principle 10.

When the decision-maker wants to make a decision which runs contrary to the adult's known prior wishes, the question arises as to whose opinion should be respected: the person lacking legal capacity or the person with the legal authority to decide. The Explanatory Memorandum advises that when the choice is between the interests of the adult and the interests of other people and when the adult has no known wishes on the matter, it is reasonable to regard the interests of the adult as the paramount consideration. However, when the choice is between the current interests of the adult and the prior wishes of the adult, the Explanatory Memorandum suggests that it would be acceptable not necessarily to respect the prior wishes of the adult, but rather for the decision-maker to pay 'due respect' to the past and present wishes and feelings of the adult, insofar as they can be ascertained. In human rights terms, this probably means that the decision-maker (guardian) when making these difficult decisions should document the method of how a decision was made, with reasons why a particular option has been preferred.

If any of these recommended procedures have not been followed, the adult may have reason to complain using European Convention on Human Rights arguments. Each case will turn on its own facts, and issues such as the seriousness of the decision in question, or the length of time a person has been legally incapacitated, will have a bearing on the case. In some countries, the greatest hurdle for a person who would like to challenge bad performance by a guardian may be how to get the case to court in the first place – again access to justice issues to which we return in the Conclusion chapter. The situation is complicated even more where clear conflict of interest issues arise from the fact that the guardian is also the director of the residential institution where the person is living. The lack of standing is an issue to which we will return in appendix 7 on representing people with mental disabilities.

A crucial issue relevant in litigating against a guardian's poor performance is whether there are adequate control mechanisms monitoring the acts and omissions of guardians.³⁴⁰ An active guardianship office at the local government may have such a responsibility of supervising and controlling guardians, and will be responsive to letters by (or on behalf of) the person

³⁴⁰ Recommendation No. R(99)4, Principle 16.

under guardianship. Such a body may well displace (remove) the guardian and appoint a more suitable person. However, experience in many countries is that such guardianship offices are in some cases unwilling to intervene, and remain content with a guardian neglecting and abusing the adult in question. Alternatively the guardianship office may have no adequate procedures in place to ensure that a person under guardianship has the means to lodge a complaint. Further, the guardianship office may have established no effective procedure for regular oversight of a guardian's performance.

If the guardianship office becomes aware that the guardian is not doing the job adequately, a new guardian must be appointed. Recommendation No. R(99)4 specifies that there should be a pool of 'suitably qualified persons for the representation and assistance of incapable adults'³⁴¹ who should be adequately trained.³⁴² The guardianship office should also have powers to challenge guardians in court where there are serious allegations of abuse or malpractice. Recommendation No. R(99)4 states that guardians 'should be liable, in accordance with national law, for any loss or damage caused by them to incapable adults while exercising their functions. [. . .] In particular, the laws on liability for wrongful acts, negligence or maltreatment should apply to representatives and others involved in the affairs of incapable adults'.³⁴³ Under the Convention it is still questionable whether such abuse by private guardians can be litigated at the ECtHR because the Convention protects against abuses by State agents. However, the wording of the Recommendation supports an argument that there is a positive duty on the State under Articles 1 and 13 of the Convention to create accessible mechanisms for people to seek remedies for loss or damage caused by guardians.

Delay in appointing guardian

In some countries a person is deprived by a court of his or her legal capacity but there is a delay of several months before a guardian is appointed.³⁴⁴ This

³⁴¹ Recommendation No. R(99)4, Principle 17(1).

³⁴² Recommendation No. R(99)4, Principle 17(2).

³⁴³ Recommendation No. R(99)4, Principle 20.

³⁴⁴ Mental Disability Advocacy Centre, report on Bulgaria, (Budapest: MDAC, forthcoming, 2006).

situation could be challenged under Article 8 of the ECHR, because a court has found that a person needs to be assisted in order to protect the person's rights, but the State (normally a local authority) has not fulfilled its obligations to secure that person such assistance. It could be argued that this constitutes an interference with the person's private life.

Periodic Review of Guardianship

A problematic feature of many guardianship systems in Member States of the Council of Europe is that determinations of legal incapacity are not subject to periodic review. Recommendation No. R(99)4 states in Principle 14:

Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

Measures of protection should be reviewed on a change of circumstances and, in particular, on a change in the adult's condition. They should be terminated if the conditions for them are no longer fulfilled.³⁴⁵

The Explanatory Memorandum to Recommendation No. R(99)4 emphasises that an indefinite incapacity order should be the exception, and this should happen only in cases where the individual has a condition, such as senile dementia or Alzheimer's disease, for which currently there is no cure and, save small periods of lucidity, the person's condition will unfortunately worsen. The wording of Recommendation No. R(99)4 on periodic review is surprisingly weak given other parts of the Recommendation such as Principle 6(2) which speaks of minimal measures of protection consistent with

³⁴⁵ Recommendation No. R(99)4, Principle 14. See also Principle 1(6) of the UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on 17 December 1991: 'Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law.' See also the World Health Organization (2005), Resource Book on Mental Health, Human Rights and Legislation which states at page 41, section 7.3 that '[l]egislation should contain a provision for automatic review, at specified periodic intervals, of the ending of lack of competence'.

achieving the purpose of the intervention. Given that many people's capacity fluctuates throughout the person's lifetime, the logical legal response is one which is proportionate, and therefore the necessity of the legal measure must be regularly reviewed. The Explanatory Memorandum states that the person whose legal capacity has been deprived 'should be entitled to demand a review'.³⁴⁶

The Court agreed with this approach in the case of *Matter v. Slovakia*,³⁴⁷ discussed above, in which the applicant had been deprived of his legal capacity for over seven years, notably described by the Court as 'a serious interference with his rights under Article 8 § 1'.³⁴⁸ In the Court's view, 'it may be appropriate in cases of this kind that the domestic authorities establish after a certain lapse of time whether such a measure continues to be justified. Such a re-examination is particularly justified if the person concerned so requests'.³⁴⁹

Having found that forced examination in a psychiatric hospital engaged Article 8(1) of the Convention in the *Matter* case, the Court examined whether this interference with private life was justified under Article 8(2). In the domestic proceedings the district court – as it had been instructed by the Supreme Court – had sought to obtain an expert opinion on the applicant's mental health. The medical expert tried to examine the applicant on a voluntary basis which the applicant refused. The district court invited the applicant twice to submit to the examination in the psychiatric hospital and warned him that if he did not comply he could be forcibly brought there. The applicant failed to comply again and the district court ordered that the applicant be brought to the hospital. The applicant was indeed brought to the hospital on 19 August 1993 and he was discharged on 2 September 1993, when the examination was concluded. The European Court of Human Rights decided that the interference in question was not disproportionate to the legitimate aims pursued. It was therefore 'necessary in a democratic society'

³⁴⁶ Explanatory Memorandum to Recommendation No. R(99)4, para. 56.

³⁴⁷ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32.

³⁴⁸ *Matter v. Slovakia*, op. cit., para. 68.

³⁴⁹ *Matter v. Slovakia*, op. cit., para. 68.

within the meaning of Article 8(2) of the Convention and therefore found no violation of Article 8.³⁵⁰

This is a strange reasoning. Although the applicant himself had instigated a review of guardianship which probably requires some sort of expert evaluation, the Court could have found an Article 8 violation for at least two reasons. First, the ECtHR could have noted that the domestic court could have better balanced competing rights. The Court could have decided that protecting the applicant's right to liberty (he did not want to be detained in a psychiatric hospital for an evaluation) plus right to privacy (he did not want to undergo an evaluation at all) trumped the restriction of rights which would have resulted from forcing the applicant to go through with his request of reviewing the incapacity. There seems to be no evidence that the domestic authorities explained these options to the applicant. Second, the European Court of Human Rights did not specify any of the grounds under Article 8(2) on which it relied when finding that the interference with the applicant's private life was 'necessary in a democratic society'. Probably the Court had in mind that the interference was justified for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms or others. It is difficult to see any plausible argument under any of these heads. Of additional curiosity is why this case was not examined under Article 5, where the Court could have found that the detention for forced incapacity examination did not meet the standards of detention of Article 5 (see the case of *Nowicka v. Poland*, discussed above in this chapter).

8. Concluding remarks

Legal incapacity and guardianship proceedings in many countries of the Council of Europe are problematic as they do not afford the adult in question procedural safe-guards. Issues under Article 6 ECHR include imprecise legal definitions of incapacity, the appropriateness of a one-size-fits-all legal approach to capacity, and the availability of a range of legal (and non-legal) measures to protect people who lack capacity to make certain decisions at

³⁵⁰ *Matter v. Slovakia*, op. cit., paras. 71–2.

some points in the lives. Further procedural issues involve notice of guardianship proceedings, adequate incapacity examinations which do not equate diagnosis with incapacity, the appropriateness of forced psychiatric evaluations, the right to be heard in person during incapacity proceedings, the right to be represented by a lawyer who takes an active part in representing the adult, the adequacy of evidence presented to the court and the disclosure of documents to the adult and that person's lawyer in order to guarantee a fair trial. The right to appeal findings of incapacity, the right to have an opinion about who will exercise decision-making, and the right to effectively challenge the decisions a substitute decision-maker are also relevant. Further, a regular review of the necessity of the legal measure will also be increasingly relevant, especially for people with fluctuating mental disabilities. The Council of Europe Recommendation No. R(99)4 has started to assist the Court to give relevance to fair trial and privacy rights in the context of substitute decision-making and it is hoped that the Court will continue to cite the Recommendation and other international instruments with authority.

Some countries' civil codes and civil procedural codes will require significant re-writing to bring them in line with the basic guarantees set forth in the Recommendation No. R(99)4 and given legal force by an increasing number of cases to the ECtHR. Ironically, given the extraordinarily huge numbers of people affected across Europe, the Court will not be loaded with applications. This has more to do with practical and legal difficulties by people under guardianship to bring cases in domestic courts and to the European Court. The Court is encouraged to use its pilot judgment procedure in appropriate guardianship cases in order to send clear signals to domestic authorities that legislative revisions are necessary in order to secure Convention compliance.