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Chapter 6: *Stanev v. Bulgaria*: On the Pathway to Freedom

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“I’m not an object, I’m a person. I need my freedom.”

Rusi Stanev, to his attorney Aneta Genova, before the European Court of Human Rights Grand Chamber hearing in his case, February 2011

1. Introduction

In this article, I suggest that the January 2012 judgment of the European Court of Human Rights (ECtHR) in *Stanev v. Bulgaria*⁵⁷¹ takes us a few steps along the path towards freedom. Rather like a Franz Kafka novel, the judgment is a story about an ordinary person who became entangled in a web of antiquated laws and perverse processes, and who ended up in a grotesque situation from which he found it impossible to extricate himself. Rusi Stanev, the applicant, is an extraordinarily tenacious man who faced State absurdity and abuse, and who risked retribution by putting Bulgaria in the dock at the ECtHR in Strasbourg, and won. His life and his case are unique, but his is the voice of millions of others’ that we will never hear. They are – like he was – locked away and silenced.

⁵⁷¹ *Stanev v. Bulgaria*, App. No. 36760/06, Eur. Ct. H.R. (2012). Also see the admissibility decision of June 29, 2010.

On December 10, 2002, when he was 46-years old, an ambulance picked up Rusi Stanev at his home where he lived alone. He was bundled inside and driven 400km to an institution for “adults with mental disorders.” His transfer into the institution was arranged through an agreement by a municipal official acting as Mr Stanev’s guardian (the guardian had never met Mr. Stanev and signed off on the institutional placement a mere six days after becoming his guardian) and the institution’s director. It was arranged on the basis that Mr. Stanev had a diagnosis of schizophrenia and that his relatives did not want to care for him. Mr. Stanev knew nothing about this agreement and did not want to leave his home. No one told him how long he would stay in the institution, or why he was being taken there. Two years earlier, the Ruse Regional Court had restricted his legal capacity. He was not notified about or allowed to participate in the proceedings that led to this determination. Once under guardianship, Mr. Stanev was prohibited by law from making any decisions about his own life.⁵⁷² He had unsuccessfully appealed the court decision a year later. In 2005, the director of the institution was appointed Mr. Stanev’s guardian.⁵⁷³

Mr. Stanev filed his application to the ECtHR with the assistance of the Bulgarian Helsinki Committee and the Mental Disability Advocacy Center, two non-governmental organizations, on September 8, 2006. There was an oral hearing before a seven-judge Chamber on November 10, 2009, and the Chamber issued its admissibility decision on June 29, 2010. On September 14, 2010 the Chamber relinquished the case to the Grand Chamber, which is the ECtHR’s highest body comprised of seventeen judges. On February 9, 2011, an oral hearing took place before the Grand Chamber, and the judgement was issued on January 17, 2012, some six years and four months after Mr Stanev filed his case.

⁵⁷² Mental Disability Advocacy Center, *Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice*, (2007), *available at* http://mdac.info/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Bulgaria.pdf.

⁵⁷³ For more on these situations of conflict of interest, *see* MDAC 2007, comments under indicator 11 at p. 42: “The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.”

The Grand Chamber held that Mr. Stanev had been deprived of his liberty under Article 5 of the European Convention on Human Rights (ECHR) because he was under constant supervision in the institution and was not free to leave without permission. The Court found a violation of Article 5(1) of the ECHR because his detention was not based on his mental health status (which remained largely irrelevant to his placement) and that there was no need to detain him. The Court also found a violation of Article 5(4) of the ECHR (which sets out the right to a court review of detention) because the Bulgarian law allowed Mr. Stanev no opportunity to have the lawfulness of his detention assessed by an independent judicial body; as a person whose legal capacity had been stripped, he had no legal standing to litigate. The Court also found a violation of Article 5(5) of the ECHR (which sets out a right to domestic compensation for a violation of Article 5). Of global jurisprudential significance, the Court found that the conditions of the detention were “degrading,” in violation of Article 3 of the ECHR. Although the Court found a violation of the right to a fair trial under Article 6 of the ECHR because Bulgarian law provided no mechanism for Mr. Stanev to seek restoration of his legal capacity, the Court, by thirteen votes to four, declined to look into the substance of the complaints about the deprivation of legal capacity, argued by the applicant under Article 8 of the ECHR (which sets out the right to respect for private and family life, home and correspondence). The judgment contains two partly dissenting judgments, both of which depart from the majority on the Article 8 point. The Court awarded Mr. Stanev compensation of €15,000.

This article does not address each of these findings in turn, as it is impossible to do justice to the entirety of the 65-page judgment and partly dissenting opinions. Instead, the rest of this article highlights three substantive issues. The first section looks at the Court’s treatment of the living conditions in the institution, the second section examines the Court’s discussion of whether Mr. Stanev was deprived of his liberty, and the third section looks at the Court’s (mis)handling of Mr. Stanev’s legal capacity complaints. I then offer some conclusions.

2. Living conditions were degrading

The social care institution in which Mr. Stanev found himself was “accessible via a dirt track from the village of Pastra, the nearest locality 8km away,”⁵⁷⁴ in a village located in a “secluded mountainous area (some 800 m above sea level), near a hydroelectric power station,”⁵⁷⁵ in southwest Bulgaria. Mr. Stanev was placed in Block 3 of the home, which was “reserved for residents with the least serious health problems, who were able to move around the premises.”⁵⁷⁶

A BBC journalist had visited Pastra in December 2002 and found that some of the residents “had no shoes and socks although it’s minus ten degrees [Celsius] outside.” The journalist reported that “[o]ne in ten residents did not survive the past year – and there is no reason to expect it to be any different this year.”⁵⁷⁷

It was not just the BBC that visited the institution. Of huge significance for Mr. Stanev’s international litigation given its documentary credibility, a delegation of the European Committee for the Prevention of Torture (CPT) carried out a periodic visit to Bulgaria in December 2003. Their mission included a trip to the Pastra institution. The CPT found that in Blocks 1 and 2 the temperature at midday at the time of the visit in December was twelve degrees Celsius. In Block 3, where Mr. Stanev was held, the CPT found “somewhat better heating,” although “residents indicated that it had been on all the time since the delegation’s arrival.”⁵⁷⁸

The residents’ clothes were bundled together and handed out randomly to the residents, a situation about which the ECtHR commented “was likely to arouse a feeling of inferiority in the residents.”⁵⁷⁹ The CPT documented that residents had

⁵⁷⁴ *Stanev* at para. 19.

⁵⁷⁵ “Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 22 December 2003,” CPT/Inf (2004) 23, 24 June 2004, para. 22. (hereinafter “CPT report”).

⁵⁷⁶ *Stanev* at para. 20.

⁵⁷⁷ Karen Allen, *Mental health travesty in Bulgaria*, BBC NEWS, December 16, 2002, <http://news.bbc.co.uk/2/hi/health/2579865.stm>.

⁵⁷⁸ CPT report at para. 26.

⁵⁷⁹ *Stanev* at para. 209.

access to the bathroom once a week, and that the bathroom to which Mr. Stanev had access was “rudimentary and dilapidated.”⁵⁸⁰ The CPT also found that:

*The so-called “toilets”, also located in the yards, represented decrepit shelters with holes dug in the ground. The state of these facilities was execrable; further, walking to them on the frozen, slippery ground was potentially dangerous, especially at night. Residents visibly used the surrounding outside area as a toilet.*⁵⁸¹

As well as the BBC and the CPT, Amnesty International also visited the Pastra institution one year earlier. Amnesty’s report is more graphic than the CPT’s. They found that the toilet:

*[...] was some 30 metres away along a snow-covered path in an outhouse. Faeces blocked the hole in the ground and covered the snow around the outhouse. In block number two there were three rooms on the first floor, with one, four and seven beds respectively. Some beds had no mattresses and a few did not even have spring frames but only flat metal bars. When asked how the residents sleep in such beds the orderly replied to an Amnesty International representative that they put their coats across the metal bars and then lie on top. The orderly also explained that lights are centrally controlled and switched off at midnight. The residents were ordered to rise at 4am. When questioned about the rationale for such early awakening he stated: “Just so! Sometimes it can vary. It depends!” This was a clear admission of abuse of power by the staff.*⁵⁸²

The CPT found that there was one TV set owned by one of the residents, but generally that, “[n]o therapeutic activities whatsoever were organised for the residents, whose lives were characterised by passivity and monotony.”⁵⁸³ The

⁵⁸⁰ CPT Report at para. 27.

⁵⁸¹ *Id.*

⁵⁸² Amnesty International, Bulgaria: Far from the eyes of society: Systematic discrimination against people with mental disabilities (2002), available at <http://www.amnesty.org/en/library/info/EUR15/005/2002>.

⁵⁸³ CPT Report at para. 32.

institution's daily budget for food per person was the equivalent of \$0.89.⁵⁸⁴ The CPT delegation was so appalled with the situation that at the end of its mission to Bulgaria it made an immediate observation,⁵⁸⁵ finding that "the conditions witnessed at this establishment could be said to amount to inhuman and degrading treatment." The CPT urged the Bulgarian government to urgently replace the institution with a facility in conformity with modern standards. Responding to this in February 2004, the Bulgarian government promised that the Pastra institution "would be closed as a matter of priority."⁵⁸⁶ This turned out to be entirely vacuous: the Pastra institution remains operational to this day. To highlight the situation, the CPT went back in October 2010, but its report on this mission is not yet public.⁵⁸⁷

In its judgment, the ECtHR relied extensively on the CPT's documentation in finding that the living conditions in which Mr. Stanev was forced to spend approximately seven years amounted to "degrading treatment,"⁵⁸⁸ in violation of Article 3 of the ECHR, which sets out the absolute prohibition against torture, inhuman or degrading treatment or punishment. In the international litigation, the Bulgarian government pleaded a lack of financial resources in justifying its inaction in closing the Pastra institution, an argument that the ECtHR found irrelevant as justification for keeping Mr. Stanev in such conditions.⁵⁸⁹ Stanev is the first case in which the ECtHR has found a violation of Article 3 of the ECHR in any sort of institution for people with disabilities.

⁵⁸⁴ *Id.* at para. 29: "[t]he daily expenditure for food per resident averaged 1.50 BGL and could go up to 2 BGL when there were donations." According to the history section of www.xe.com, in December 2002 1.5 BGL was the equivalent to 0.89 US dollars.

⁵⁸⁵ In doing so, the CPT invoked Article 8(5) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (November, 26 1987) which provides that, "[i]f necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned."

⁵⁸⁶ CPT Report at para. 34.

⁵⁸⁷ The CPT carried out a periodic visit to Bulgaria from October 18-29, 2010 and visited the "Home for men with psychiatric disorders in the village of Pastra, Rila municipality." CPT, *News Flash*, November 3, 2010, www.cpt.coe.int.

⁵⁸⁸ *Stanev* at para. 212.

⁵⁸⁹ *Id.* at para. 210.

3. Liberty was denied

Mr. Stanev alleged that he had been detained for the purposes of Article 5(1)(e) of the ECHR, which sets out an exhaustive set of circumstances when in which the State can legally deprive an individual of their liberty, including for people of “unsound mind.” Case-law has fleshed out what this antiquated phrase means, but the ECtHR has never been asked to decide whether a resident of a social care institution was detained for the purposes of Article 5 of the ECHR. Its previous case-law has largely concerned compulsory detention under mental health legislation in psychiatric wards/hospitals, which the Court has generally found acceptable as long as there are safeguards.⁵⁹⁰ If Mr. Stanev was detained for the purposes of Article 5(1) of the ECHR, then (according to Article 5(4)) he should have been entitled to have the lawfulness of the detention reviewed by an independent court.

The seventeen judges of the Grand Chamber saw the public policy implications clearly. No one knows how many people with disabilities are in social care institutions, but my estimation is that the figure is upwards of 2.5 million in the Council of Europe region.⁵⁹¹ It appears from the judgment that the Grand Chamber judges did not want to open the proverbial floodgates. At the outset of the discussion on Article 5, the judgment goes to pains to state that, “it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a ‘deprivation of liberty’ within the meaning of Article 5(1) [of the ECHR].”⁵⁹² The judgment, we are told, does not “rule on the

⁵⁹⁰ For a review of ECHR case-law on this, see chapter 2 of Peter Bartlett, Oliver Lewis, and Oliver Thorold *Mental Disability and the European Convention on Human Rights*, (2007).

⁵⁹¹ In 2007, an international study estimated that there were nearly 1.2 million people living in residential institutions for people with disabilities in European Union member states (the study included Turkey, but excluded Germany and Greece for which no data was available). See Jim Mansell, Martin Knapp, Julie Beadle-Brown and Jeni Beecham, *Deinstitutionalisation and community living – outcomes and costs: report of a European Study* 26 (2007). My estimate of upwards of 2.5 million is based on the fact that the European Union’s 27 countries constitute around 502 million people, and that the number of people in the Council of Europe (which comprises 47 member states including all EU member states) is around 800 million, and that countries in former Soviet Union have higher rates of institutionalisation than western European countries many of which are undergoing a de-institutionalisation process.

⁵⁹² *Stanev* at para. 121.

obligations that may arise under the Convention for the authorities in such situations.”⁵⁹³

That said, The ECtHR found that Mr. Stanev’s detention was attributable to the national authorities because he was placed in a State-run institution that did not interview him before the placement.⁵⁹⁴ He was not given an opportunity to express his opinion about the guardian’s decision, even though he could have given it.⁵⁹⁵ He was not transferred to the institution on his request,⁵⁹⁶ and the restrictions complained of were the result of the (in)actions of public authorities.⁵⁹⁷ The Court found that in the particular circumstances, with many caveats, without making any policy generalities, and only in this case, Mr. Stanev was deprived of his liberty in Article 5 terms.

The particular circumstances included the following findings of fact. Mr. Stanev needed staff permission before going to the nearest village.⁵⁹⁸ He had three leaves of absence of about ten days each, which were “entirely at the discretion of the home’s management,”⁵⁹⁹ and he needed to travel 400km to get home, making his journey “difficult and expensive [...] in view of his income and his ability to make his own travel arrangements.”⁶⁰⁰ He was returned to the institution without regard to his wishes when he failed to return from a leave of absence in 2006.⁶⁰¹ Furthermore, his identity papers were constantly held by the institution, which, the ECtHR found, placed “significant restrictions on his personal liberty.”⁶⁰²

The Court found that Mr. Stanev was not at any health risk that might have warranted detention, and that he was “under constant supervision and was not free to leave the home without permission whenever he wished.”⁶⁰³ Having lived in the institution for eight years, the Court found that he was

⁵⁹³ *Id.*

⁵⁹⁴ *Id.* at para. 122.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* at para. 122-3.

⁵⁹⁸ *Id.* at para. 124.

⁵⁹⁹ *Id.* at para. 125.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at para. 127.

⁶⁰² *Id.* at para. 126.

⁶⁰³ *Id.* at para. 128.

likely to have felt “the full adverse effects of the restrictions imposed on him.”⁶⁰⁴ In addressing the subjective aspect of Article 5, the Court noted that Mr. Stanev had actively complained of being in the institution and had attempted to leave legally. For all these reasons the Court found that he had been detained. The question remained: was the deprivation of liberty lawful under Article 5(1) of the ECHR?

Answering this question in the affirmative, the Court stated what I think is the most important sentence in the whole judgment:

*It seems clear to the Court that if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty.*⁶⁰⁵

This is the closest the *Stanev* Court comes to a policy analysis. The decoupling of guardianship and other human rights violations is a topic now well-established, and the Court will be presented with more cases in the future which will tease apart the intimate relationship between detention in an institution and deprivation of legal capacity. Because the freshest medical report was two years old when Mr. Stanev was placed into the institution, the Court was convinced that the detention was not “in accordance with a procedure prescribed by law” under Article 5(1)(e) of the ECHR, and it therefore found a violation under this heading.

4. Legal capacity was hardly examined

Mr. Stanev argued that his right to a fair trial (due process rights set out in Article 6 of the ECHR) and his right to respect for private life (Article 8 of the ECHR) were violated as a result of being deprived of legal capacity and being placed under guardianship. As already noted, the ECtHR found a violation of Article 6 on the basis that Bulgarian law did not guarantee with sufficient degree of certainty access for Mr. Stanev to seek restoration of his legal

⁶⁰⁴ *Id.* at para. 129.

⁶⁰⁵ *Id.* at para. 154.

capacity.⁶⁰⁶ This is a welcome finding, as it is predictable and technocratic. Of more jurisprudential interest is the range of human rights that are automatically compromised as a result of the deprivation of legal capacity.

Mr. Stanev argued these points at considerable length under Article 8 of the ECHR. The Court refused to even entertain these arguments, and thirteen out of the seventeen judges found abruptly that “no separate issue arises under Article 8.” One can only speculate as to why the majority decided this way. Perhaps at sixty-one pages, the judges thought that the judgment was lengthy enough, or has covered enough terrain already. Perhaps they simply ran out of steam, or time. Perhaps they were in a rush to clear the backlog of other cases. Alternatively, (although to be clear, they do not put it in these terms), perhaps the Grand Chamber was willing to offer the State a wide “margin of appreciation” and was reluctant to provide broad policy guidance in an area where there is not yet clear common ground amongst the member States (let alone among the judges) on an issue they consider to be a social or moral one, notwithstanding the existence of the UN Convention on the Rights of Persons with Disabilities.⁶⁰⁷

Whatever the reason for the Court’s approach, their handing of the legal capacity claims stands in sharp contrast to its existing body of case law.⁶⁰⁸ In its 2008 judgment in *Shtukurov v. Russia*, the Court established that the “interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life.”⁶⁰⁹ In the *Shtukurov* case, the applicant was placed under guardianship without his knowledge, and was sent by his guardian to a psychiatric hospital for seven months. In the *Stanev* case, the applicant was sent by his guardian to a social care institution for seven years.

The *Stanev* judgment is appended by two separate partly dissenting opinions, the first by the judges from Belgium and Luxembourg (who are both Vice

⁶⁰⁶ *Id.* at paras. 222-248.

⁶⁰⁷ As an analogy see the approach of the Court with regards artificial insemination in *S.H. and Others v. Austria*, Application no. 57813/00, Eur. Ct. H.R. (2011).

⁶⁰⁸ For more on guardianship litigation, see Oliver Lewis, *Advancing legal capacity jurisprudence*, 6 EUR. HUM. RTS. L. REV. 700-714 (2011).

⁶⁰⁹ *Shtukurov v. Russia*, Application No. 44009/05, Eur. Ct. H.R. para. 90 (2008).

Presidents of the Court, i.e. very senior) and Estonia, and the second by Judge Kalaydjieva (who herself is from Bulgaria and used to work as a human rights attorney). Both opinions regret that the Court failed to investigate the Article 8 claims, with Judge Kalaydjieva correctly identifying legal capacity as “the primary issue” in the case. She notes that the government offered no justification for Mr. Stanev’s preferences being ignored, and that “instead of due assistance from his officially appointed guardian, the pursuit of his best interests was made completely dependent on the good will or neglect shown by the guardian.”

Judge Kalaydjieva writes that she would have found a violation of Article 8 of the ECHR, stridently setting out that the Bulgarian law “failed to meet contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing.” This language of contemporary standards is, in my view, code for Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which sets out that everyone with disabilities should have legal capacity on an equal basis with others, and that the State is required to make assistance available to those who need help in exercising their legal capacity. It should be pointed out, however, that Bulgaria had not ratified the CRPD when the violations took place, so Bulgaria was not legally bound by its provisions.

Judge Kalaydjieva further notes the access to justice argument which was missed in the majority judgment; namely that Mr. Stanev had to rely totally on the discretion of the guardian to initiate legal proceedings to restore his legal capacity, and to get out of the institution. Her insight highlights the way in which guardianship and institutionalisation conspire not only to invalidate a person’s will and preferences, but how they segregate people from our societies, exclude them from the political sphere and erase them from our legal consciousness.

5. Conclusions

I would like to make two concluding remarks. First, that the Court should engage with developments in United Nations human rights law. Second, that despite its weaknesses, the *Stanev* judgment is a significant advance in international human rights law.

First, *Stanev* is the latest example of how the ECtHR is unwilling to interpret the ECHR in the light of UN human rights treaties, in this case the CRPD.⁶¹⁰ One frustration is that CRPD provisions do not map neatly onto the ECHR, but the main frustration is that the Court is not even engaging with what the CRPD has to say. The ECHR was written in the late 1940s, and it is likely that none of the drafters had a situation similar to *Stanev* in mind. By contrast, the CRPD is a document adopted in 2006, drafted largely by experts (many of whom were people with disabilities) who knew the features of guardianship and institutionalisation very well. Its provisions – in particular Articles 12 and 19 – speak directly to a *Stanev* scenario.

The ECtHR first cited the CRPD in 2009, three years after its adoption, in the case of *Glor v. Switzerland*.⁶¹¹ The Court stated that the CRPD represents a European and universal consensus on the necessity of addressing the treatment of people with disabilities. Although these are encouraging words, the Court did not rely on the CRPD in finding in that case for the first time that disability constituted a “status” as a protected ground of discrimination under Article 14 of the ECHR; or that people with disabilities constitute a vulnerable group for whom the State’s margin of appreciation to permit differential treatment should be narrow. More surprisingly, in very important judgments concerning the right to legal capacity in 2008,⁶¹² 2009,⁶¹³ and 2011,⁶¹⁴ the Court failed even to mention the CRPD, despite legal capacity being a central concern in each of the cases, and a central feature of the CRPD.

⁶¹⁰ For more on how the ECtHR is unwilling to synthesize UN law into its jurisprudence, see Magnus Killander, *Interpreting Regional Human Rights Treaties*, 7 SUR INT’L J. ON HUM. RTS. 145-169 (Dec. 2010).

⁶¹¹ *Glor v Switzerland*, Application No. 13444/04, Eur. Ct. H.R. (2009).

⁶¹² *Shtukaturov v. Russia*, Application No. 44009/05, Eur. Ct. H.R. (2008).

⁶¹³ *Salontaji-Drobnjak v. Serbia*, Application No. 36500/05, Eur. Ct. H.R. (2009).

⁶¹⁴ *Krušković v. Croatia*, Application No. 46185/08, Eur. Ct. H.R. (2011).

In a 2010 judgment on the right to vote of a person deprived of legal capacity, the Court cited the CRPD in passing but failed to use it in its analysis,⁶¹⁵ and in a case against the UK in the same year the Court mentioned offhand that the amicus curiae brief had cited the CRPD in its submissions.⁶¹⁶

In a 2010 case concerning a deaf man who died in custody, the Court cited the CRPD early in its judgment, but despite the CRPD's strong language about reasonable accommodation in detention,⁶¹⁷ the Court did not rely on it in finding that "[w]here the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability."⁶¹⁸ In a 2011 case about a person with HIV, the Court referenced the CRPD in relation to the prohibition of disability-based discrimination but did not cite it in the main points of the case (for example whether HIV can be considered a disability which, since *Glor v. Switzerland*, is already an established prohibited ground of discrimination under the "other status" provision in Article 14 of the ECHR).⁶¹⁹ It is probably too early to conclude that the Court is being disablist in its approach, and perhaps too early to conclude that it is taking a different approach to that which it took following the 1989 adoption of the Convention on the Rights of the Child (CRC), although a review of the ECHR judgments from the 1990s citing the CRC suggest a Court slightly more willing to weave CRC principles into its judgments than the current bench's treatment of the CRPD.⁶²⁰

Second, the *Stanev* judgment is a significant advancement of European and global case law. Writing in 2007, Sir Nicholas Bratza (the President of the seventeen-judge Grand Chamber that adjudicated the *Stanev* case, and the President of the ECtHR itself) observed that since the first major mental

⁶¹⁵ *Kiss v. Hungary*, Application No. 38832/06, Eur. Ct. H.R. (2010).

⁶¹⁶ *Seal v. United Kingdom*, Application No. 50330/07, Eur. Ct. H.R. (2010).

⁶¹⁷ See Article 14(2) of the CRPD, which states that "if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation."

⁶¹⁸ *Jasinskis v Latvia*, Application No. 45744/08, Eur. Ct. H.R. para. 59 (2010).

⁶¹⁹ *Kyutin v Russia*, Application No. 2700/10, Eur. Ct. H.R. (2011).

⁶²⁰ See, for example, *Costello-Roberts v. the United Kingdom*, Application no. 13134/87, Eur. Ct. H.R. (1993).

health case of *Winterwerp v. the Netherlands* in 1979, “the jurisprudence of the Court in the succeeding twenty years is notable for the almost complete dearth of judicial decisions in this vitally important area.” He goes on to explain that, “This gap is a reflection not of adequate safeguarding by member States of the Convention rights of those with mental disabilities but rather of the acute practical and legal difficulties faced by an especially vulnerable group of persons in asserting those rights and in bringing claims before both the domestic courts and the European Court.”⁶²¹ Exactly so. That Mr. Stanev was able to bring his case to the public attention through the international litigation is due to his tenacity, to non-governmental organisations, and the donors that fund them.⁶²² No civil legal aid is available in Bulgaria for this type of case, so the vast majority of cases go ignored.

The Stanev judgment has been described in the blogosphere as an “exciting decision,” a “huge achievement,”⁶²³ and a “landmark ruling.”⁶²⁴ My colleague Lycette Nelson, who represented Mr. Stanev before the Grand Chamber, describes the judgment as having “enormous significance.”⁶²⁵ The international NGO, Interights, which submitted an excellent amicus brief said on its website that, “there is no mistaking the significance of the *Stanev* judgment, which will benefit tens of thousands of persons with disabilities,”⁶²⁶ although this seems to miscalculate the number of potential beneficiaries by several million.

It is surely a jurisprudential failure that the Court did not directly address the right to legal capacity, and it is frustrating that the Court is not yet willing or able to offer macro comments about societal exclusion of people with

⁶²¹ Foreword by Sir Nicholas Bratza, in Peter Bartlett et al, *supra*.

⁶²² Grants to the Mental Disability Advocacy Center by the Open Society Foundations, the Sigrid Rausing Trust, the Trust for Civil Society in Central and Eastern Europe and Doughty Street Chambers all contributed to MDAC being able to work on the *Stanev* case, among others. MDAC sub-granted part of its funding to the Bulgarian Helsinki Committee.

⁶²³ Nell Munro, *Stanev v. Bulgaria*, January 19, 2012, www.mentalhealthandcapacitylaw.wordpress.com.

⁶²⁴ Lucy Series, *Mr Stanev's fine achievement*, January 20, 2012, www.thesmallerplaces.blogspot.com.

⁶²⁵ Lycette Nelson, *Stanev v. Bulgaria: The Grand Chamber's Cautionary Approach to Expanding Protection of the Rights of Persons with Psycho-social Disabilities*, February 29, 2012, www.strasbourgobservers.com.

⁶²⁶ Interights, *Stanev v. Bulgaria*, on www.interights.org.

disabilities. I share the frustration, but am not yet overly concerned. The Court is not a UN treaty body that comments on government progress and makes recommendations and has a more personable relationship with civil society. Nor is it an international think-tank or an advocacy organization. We are still in the early days of disability litigation: this is a relatively new and unsettled area, in the European legal system, however backward that may seem to we advocates who operate in the CRPD ecosystem. The ECtHR is a judicial body that currently faces a barrage of criticism from governments for overstepping the boundary between national sovereignty and universal human rights. Perhaps these political considerations were at play in the *Stanev* case.

As a judicial body the Court has adjudicated the particular facts of the case. That it has chosen to couch the violations in overly narrow terms does not detract from the significant advances in international law. This is the first case in which the Court has found that a person in a disability institution was unlawfully deprived of liberty. This is the first case that the Court found that the regime and conditions of a disability institution violate the absolute right to be free from torture and inhuman or degrading treatment or punishment.

Franz Kafka once wrote that, “paths are made by walking.” Mr. Stanev’s case clears the path towards freedom, and towards a time when people with disabilities are not objectified by the law, but treated as full and equal subjects of human rights and fundamental freedoms. It is now for others to take action, by carrying out implementation advocacy, raising judicial awareness of disability rights, empowering victims of human rights violations to continue seek justice through the courts, and ensuring the viability of organizations that enable this to happen.