

Creating progressive jurisprudence



**Our Legal
Successes
and Needs**

Photo on cover: our client Lukaš Bureš

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To read Mr Bureš's case, please go to page 13.

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Creating progressive jurisprudence

Our Legal Successes and Needs



Strategic Litigation and the Mental Disability Advocacy Center (MDAC)

*I thank you, MDAC, for helping to regain my freedom and independence in my life.
It is very important that my story was an opportunity to help other people whose rights
are violated because of guardianship and to change the system!*

Pavel Shtukaturov, MDAC client

The Mental Disability Advocacy Center (MDAC) is an international human rights organisation which advances the rights of people with intellectual disabilities and people with psycho-social (mental health) disabilities, including both children and adults. Strategic litigation is one of MDAC's core programmes, using law to promote equality and social inclusion, as well as provoking more systemic change. We operate at the global level as well as regional and domestic levels in Europe and Africa.

MDAC has special consultative status with the United Nations Economic and Social Council, participatory status with the Council of Europe and is a member of the Fundamental Rights Platform of the EU Agency for Fundamental Rights.

Our track record in strategic litigation

The strategic litigation undertaken by MDAC reinforces our work in advancing our key human rights goals. We operate at both domestic and international levels, and are increasingly utilising complaints mechanisms under international human rights conventions in the following areas.

1. **The right to legal capacity** – Developing jurisprudence in this area has been a priority for MDAC since it was founded. A staggering number of people with intellectual disabilities and people with psycho-social (mental health) disabilities find their right to recognition before the law, and thus their right to bear many other rights, restricted or denied. In many cases there isn't even an effective right to challenge such procedures. Many of MDAC's cases are now leading international precedents in this complex area, including *Stanev v. Bulgaria*, and *Shtukaturov v. Russia*, both at the European Court of Human Rights (see full summaries in this brochure).
2. **The right to liberty and the right to live in the community** – It is a reality that many people with disabilities are forced to live in institutions around the world, often without the right to challenge such placements and meaning they are effectively removed from society. MDAC has worked on many cases which has argued that people with disabilities must be given their right to live in the community – as guaranteed under Article 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD) – including *Sýkora* and the case of *Červenka* which is currently before the European Court of Human Rights.
3. **The right to inclusive education** – Unfortunately children with disabilities are frequently denied the right to be educated alongside their peers, often placed in institutions and sometimes entirely denied any form

of education at all. MDAC has been working to place this important issue higher on the public agenda, winning a complaint against Bulgaria under the European Social Charter, and is currently preparing a collective complaint against Belgium's denial of mainstream education for children with disabilities in Flanders.

4. **Access to justice** – Access to remedies and reviews of human rights violations are often denied to people with intellectual disabilities and people with psycho-social (mental health) disabilities, usually as a result of legal and administrative restrictions placed on their right to legal capacity. MDAC deals with barriers to accessing justice throughout our entire docket and has successfully litigated a number of leading cases at European and domestic levels, including *Z.H. v. Hungary* and *Stanev v. Bulgaria* (full summaries in this brochure).

The support we need

As we continue to push for reform, MDAC leads the way in taking cases of strategic importance before domestic and international courts in a way that is designed to create the maximum benefit for all people with intellectual disabilities and people with psycho-social (mental health) disabilities.

Yet, as a small international NGO, we constantly need support from lawyers and attorneys to ensure that we can continue to litigate cases of human rights violations. This brochure provides a snapshot of the cases we have successfully litigated, a summary of our pending case docket, and a description of the practical support we need as we continue creating progressive jurisprudence.

Please get in touch with Lycette Nelson, our Litigation Director if you can support us (lnelson@mdac.info).

Our Pro Bono Needs

MDAC supports lawyers and intervenes in cases to remedy violations of the rights of people with intellectual disabilities and people with psycho-social (mental health) disabilities. We are involved in cases across Europe, and are initiating cases in Africa and India.

We are seeking pro bono services from law firms and in-house counsel to support our expanding docket of cases, as well as other aspects of our advocacy work which has a strong legal angle. If your law firm can help, please email Lyette Nelson, MDAC Litigation Director, at lnelson@mdac.info.

Pro bono representation of clients

MDAC needs the following support:

1. Hungary (domestic) - Representation of clients on the right to live in the community
2. Ukraine (domestic) - Representation of clients in follow-up cases on behalf of people under guardianship to enforce judgments from the European Court of Human Rights
3. Kenya (domestic) - Representation of clients in partnership with domestic disabled people's organisations on areas including the right to informed consent for treatment
4. Serbia and Bosnia and Herzegovina (domestic) - Representation of clients in challenging restrictions of legal capacity, as well as other human rights violations.

Pro bono advice and other assistance on litigation matters

MDAC needs the following support right now:

1. **Writing submissions** to the European Court of Human Rights.
2. **Research and drafting of amicus briefs** for submission to domestic courts, European Court of Human Rights, African Commission on Human and People's Rights, and UN treaty bodies
3. **Legal memo** on the preliminary reference procedure under the Treaty on the Functioning of the EU, specifically where it can be used to advance MDAC's human rights goals
4. **Legal memo** on arguments for reparation where applicants have been unlawfully institutionalised, across EU member states
5. **Legal memo** on evidentiary requirements to make out Article 3 ECHR torture claims in cases of forced psychiatric treatment
6. **Drafting of complaints** to the European Ombudsman in respect of failure by the European Commission to carry out certain actions required as obligations under the UN Convention on the Rights of Persons with Disabilities (CRPD)
7. **Preparation of training materials** for attorneys on litigating torture and ill-treatment cases
8. **Summarising judgments** for MDAC's online database of case law (soon to be launched)
9. **Research and drafting of collective complaints** to be brought to the European Social Committee, before which MDAC has standing to be an applicant

We also also need assistance with corporate matters under European law and domestically within Hungary and the UK, including in the areas of employment law, contracts and insurance matters.

MDAC Case Docket

At 1 October 2013

MDAC has a broad and varied docket of cases pending at the European Court of Human Rights and before domestic courts and tribunals. MDAC seeks to pursue test cases that have a strategic aspect. They aim to provoke full and effective domestic implementation of international human rights law, resulting in changes for many more people than the individual litigants in the cases.

Pending at the European Court of Human Rights

Cases related to the right to life and to be free from torture, inhuman and degrading treatment (Articles 2 and 3 of the ECHR)

1. *Center for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (Application No. 47848/08; third party intervention)

MDAC intervened as a third party in this case, which was heard before the Grand Chamber in September 2013. The case concerns a young man with an intellectual disability and HIV/AIDS who was left to die in the Poina Mare institution due to medical neglect. The threshold issue in the case is whether an NGO can bring an application to the European Court of Human Rights to hold the government accountable for the violations of Mr Câmpeanu's rights. He died without any family or a guardian. Without standing for an NGO or other third party to bring an application on behalf of a person who has died, the State has impunity for the deaths of people in institutions.

2. *Dvořáček v. the Czech Republic* (Application No. 12927/13)

The case claims violations of Article 3 of the ECHR arising from the failure of a psychiatric hospital to provide reasonable accommodations to a forensic detainee with multiple disabilities and for the involuntary and coercive use of anti-androgen medications. The applicant suffers from severe back pain but was denied access to his room during the day, forcing him to lie down on the floor where other detainees had to step over him, a situation which was very humiliating for him. He was not allowed to take exercise outside because he required a staff person to assist him. He was also not given appropriate therapy, resulting in a deterioration of his mental health condition. The case seeks to develop European case law regarding the failure to provide reasonable accommodations to a person in detention as a violation of the right to be free from torture, inhuman and degrading treatment.

3. *Lazarovi v. Bulgaria* (Application No. 26874/08)

This case was brought by the family of a woman who died after leaving a social care institution and challenges the government's failure to investigate the death. The case also raises a claim that the Bulgarian government failed to take measures to prevent the woman's death in the first place.

4. *Vakarelski v. Bulgaria* (application no. 20312/08)

This case is brought by the parents of a young man who died in a psychiatric hospital after being restrained and forcibly medicated, claiming violations of Articles 2 and 3 of the ECHR. No autopsy was performed at the time of his death, and the police later claimed that they could not properly investigate because there had not been an autopsy. The parents have suffered not only from the death of their son but from not having any answers about how he died or any possibility of holding anyone responsible for his death.

Cases related to deprivation of liberty and right to live in the community (Articles 5 and 8 of the ECHR)

5. *Červenka v. the Czech Republic* (Application No. 62507/12)

Mr Červenka was placed in a social care institution following restriction of his legal capacity, a situation which he was unable to challenge under Czech law and constituting a violation of his rights to privacy (Article 8) and liberty (Article 5). The case raises a claim that segregation of a person with a mental disability in an institution constitutes discrimination under Article 14 of the Convention. The US-based Bazelon Center for Mental Health Law and the Center for Disability Law and Policy at NUI-Galway intervened as third parties in the case.

6. *Lashchevskiy v. Russia* (Application No. 18095/11)

Mr Lashchevskiy was placed in a psychiatric hospital solely because he was deprived of his legal capacity and was thus considered incapable of caring for himself in the community. He spent almost three years in detention simply because he did not have a guardian. The case argues that a deprivation of person's legal capacity cannot justify deprivation of liberty and that the government has a responsibility to ensure that people with disabilities have access to services in the community.

7. *Stankov v. Bulgaria* (Application No. 25820/07)

This case concerns the placement of the applicant in a social care institution without his consent and with no way of challenging this decision. The World Network of Users and Survivors of Psychiatry (WNUSP), the European Disability Forum (EDF) and the European Network of (Ex)- Users and Survivors of Psychiatry (ENUSP) intervened as third parties in the case. MDAC and the third party intervenors are urging the Court to find violations not only of Article 5 related to deprivation of liberty (as it did in the case of *Stanev v. Bulgaria*) but also to find violations of Article 8 as the applicant was forced to live in an institution in which many of his rights were restricted.

Cases related to rights to autonomy, private and family life (Article 8)

8. *Delova v. Russia* (Application No. 62679/11)

The case challenges Ms Delova's placement under plenary guardianship despite evidence that she could manage a small pension and other affairs and that she had support in her community. It also claims that the violation of her rights was discriminatory under Article 14 because, under Russian law, only a person with a diagnosed mental disability can be subjected to guardianship proceedings. The case will further develop the Court's jurisprudence on the over-restrictiveness of guardianship regimes which limit rights unnecessarily and in violation of international law.

9. *Ivanova v. Bulgaria* (Application No. 57138/08)

The public prosecutor brought proceedings against Ms Ivanova to have her involuntarily admitted to a psychiatric hospital based on complaints by her neighbours regarding her behaviour. She claims that this was harassment that interfered with her right to privacy under Article 8 and that the way the proceedings were conducted violated her right to a fair trial under Article 6. The case will add to the Court's developing jurisprudence regarding violations of the right to privacy that people with psycho-social disabilities are subjected to based on their disability; the Court has taken notice in recent cases that involuntary hospitalisation may entail other rights violations under Article 8, including the issue of forced medication.

10. *Kocherov v. Russia* (Application No. 16899/13)

Mr Kocherov has a mild intellectual disability. In 2007 he had a child with a woman who also has an intellectual disability while they were both in a social care institution. Because the mother was deprived of her legal capacity and both parents were in an institution, the child was removed from their custody and placed in a children's institution at birth. The application before the European Court of Human Rights was brought on behalf of both Mr Kocherov and his daughter, claiming that removal of their child violated both of their rights to family life under Article 8 of the ECHR. In addition, the claim argues that the domestic court's finding that Mr Kocherov could not be a parent to his daughter based on his disability and placement in an institution constitutes discrimination under Article 14 of the Convention.

11. *Shakulina v. Russia* (Application No. 24688/05)

The applicant was placed under guardianship in proceedings at which she was not present. She claims violations of Article 8 regarding both the substantive aspects of guardianship (under Russian law, a person deprived of legal capacity loses virtually all of their rights, including the right to marry, to be a parent, and to choose their place of residence) and the flawed procedure by which she was placed under guardianship. The applicant also has claims under Article 5 regarding her placement in a psychiatric hospital. This case follows a line of cases such as *Shtukatorov v. Russia*, *Sýkora v. Czech Republic* and *Lashin v. Russia* in which the Court has developed its jurisprudence on the relationship between guardianship and deprivation of liberty.

12. *SL v. Russia* (Application No. 27935/12)

Ms SL was under the guardianship of her mother. Unable to care for her any longer and lacking any alternatives to institutional placement, her mother had her admitted to a social care institution. However, by doing so, she ceased to be the guardian as, under Russian law, the director of an institution automatically becomes the guardian of any person who resides there. Thus the applicant was denied the possibility of having a person she loved and trusted as her guardian. In addition, having the director of an institution acting as the guardian for residents is a conflict of interest because the director has an interest in the applicant remaining in the institution.

Cases related to access to justice/right to compensation (Articles 5(4), 5(5) and 6(1))

13. *Kotenev v. Russia* (Application No. 9139/08)

Mr Kotenev argues that his detention in a psychiatric hospital did not meet the criteria for deprivation of liberty under Article 5(1)(e) of the European Convention on Human Rights and that he was denied the right to challenge his detention. He was brought to a psychiatric hospital by the police who claimed that he had been calling them and making threats. However the medical evidence presented in the detention proceedings did not support the legal requirement that a person be shown to be dangerous to himself or others. The legal aid attorney appointed to the applicant did nothing to challenge the evidence and even supported the position of the hospital rather than advocating for her client's rights.

14. *Nedorostkova v. Russia* (Application No. 44914/09)

This case, which MDAC filed on behalf of Ms Nedorostkova in 2009, concerns the failure of the Russian government to abide with Articles 5(1)(e) and 5(5). Her detention in a psychiatric facility was not justified as she did not meet the criteria for psychiatric detention. Further, although a Russian court had found that her detention was not justified under Russian law, there was no procedure for her to seek compensation for deprivation of her liberty. The case seeks to establish that the right to compensation for violations of Article 5(1)(e) must be guaranteed in domestic law to comply with the ECHR.

15. *Usmanov v. Russia* (Application No. 61124/11)

This application was brought on behalf of a man who was in forensic detention. Although under Russian law a civil detainee in psychiatric detention cannot be excluded from proceedings regarding his detention, this is not true for forensic detainees. The criteria under which they can be excluded from proceedings concerning their rights are vague and arbitrary. In Mr Usmanov's case, he was not allowed to take part in proceedings based solely on the claim of the detaining hospital that he was verbally aggressive. His exclusion from the court limited his ability to present a defence and the ability of the judge to make an independent assessment of whether he met the criteria for continued detention.

Pending at the domestic level

Slovakia

Case name: B.B.

Tribunal: Constitutional Court of Slovakia

Date lodged: 27 April 2013

Human right(s) violated: Right to live in the community

Facts: Ms B.B. is a 59-year-old woman with multiple disabilities who lives in her own home with her family. She was denied an allowance for personal assistance to allow her to receive the services she requires in her home. MDAC has represented her in domestic proceedings to challenge this denial as a violation of Article 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD) and other international law. The refusal to provide an allowance was upheld so she has now brought a claim to the Constitutional Court asking it to find that Slovakia is in violation of its international obligations.

Projected impact: If the case is successful at the domestic level, it will establish that Slovakia is bound by Article 19 of the CRPD to ensure that people with disabilities have the right to live in the community and that it must make accommodations to allow people to remain in their homes rather than face placement in institutions. If it is not successful domestically, MDAC will lodge an individual complaint to the Committee on the Rights of Persons with Disabilities under the Optional Protocol to the CRPD.

Case name: M.L.

Tribunal: Trenčín Regional Court

Date lodged: 8 July 2013

Human right(s) violated: Right to inclusive education

Facts: M.L. is a child with Down syndrome who, until she was in 7th grade, had been educated in a mainstream school. In 2011, the regional educational authority excluded her from the mainstream classroom, segregating her and limiting her future educational and employment opportunities. MDAC is representing her and her parents in

challenging the denial of inclusive education. The current proceeding is an appeal by the Regional Educational Authority against a court ruling quashing the Authority's refusal to allow M.L. to attend a mainstream school.

Projected impact: The case challenges the denial of the rights of children with intellectual disabilities to receive an inclusive education as guaranteed by Article 24 of the UN Convention on the Rights of Persons with Disabilities and the arbitrary nature of the decisions made by the education authorities. Many parents are afraid to fight for the rights of their children to be educated in a mainstream setting, so it is crucial for courts to recognise this right. If the Slovak courts fail to do so, MDAC will bring a claim before the UN Committee on Economic, Social and Cultural Rights (CESCR) under the new Optional Protocol to that Convention, which Slovakia has ratified.

Case name: E.T.

Tribunal: Bratislava V District Court

Date lodged: May 2013

Human right(s) violated: Right to legal capacity

Facts: MDAC won a major victory before the Slovak Constitutional Court in 2012 on behalf of Mr E.T. in a case regarding the deprivation of his legal capacity. The Constitutional Court found violations of his rights under the European Convention on Human Rights, Article 12 of the UN Convention on the Rights of Persons with Disabilities and Slovak law. Following the Constitutional Court decision, the Regional Court quashed the decision depriving Mr E.T. of his legal capacity and remitted the case to the court of first instance for new proceedings.

Projected impact: The new proceedings will allow MDAC to argue that in light of the Constitutional Court judgment, courts must consider Slovakia's international obligations when making decisions that restrict fundamental rights. It will also make the point that the State's obligation is to provide supports for people with psycho-social (mental health) disabilities and people with intellectual disabilities to allow them to exercise their legal capacity on an equal basis with others.

Case name: E.G.

Tribunal: Bratislava Regional Court

Date lodged: 30 August 2013

Human right(s) violated: Right to inclusive education

Facts: E.G. is an 8-year-old girl with Down syndrome who was denied the right to attend a mainstream school. This decision was upheld in an administrative appeal. The family is now challenging the decision in court.

Projected impact: MDAC is working on behalf of several families in Slovakia in proceedings related to the right to inclusive education with a view to having domestic courts recognise this right and articulate what the government's obligations to provide accommodations which mean children with disabilities can be included in mainstream classrooms.

Czech Republic

Case name: K.S.

Tribunal: Constitutional Court of the Czech Republic

Date lodged: 20 March 2012

Human right(s) violated: Right to be free from torture, inhuman and degrading treatment

Facts: Ms K.S. is a woman with a psycho-social disability who was placed in "protective treatment", that is, she was sent to a psychiatric hospital rather than being sent to prison after she was charged with a crime. Under Czech law, an order to place someone in protective treatment allows the hospital to treat them without their consent. Ms K.S. was subjected to forced medication with anti-psychotic drugs.

Projected impact: Recognition by a national court that forced medication constitutes a violation of the right to be free from torture, inhuman and degrading treatment will set an important precedent in relation to future forced treatment cases.

Case name: J.H.

Tribunal: Constitutional Court of the Czech Republic

Date lodged: 10 September 2013

Human right(s) violated: Right to inclusive education

Facts: The case challenges denial of the right to an inclusive education of a boy with autism and an intellectual disability after 18 schools refused him entry, claiming they could not provide reasonable accommodations to him as a child with an intellectual disability and because parents of other children protested against his integration.

Projected impact: The case seeks to establish that inclusive education is a right to which children with disabilities are entitled and not subject to the discretion of educational authorities and individual schools. Despite the Czech Republic's ratification of the UN Convention on the Rights of Persons with Disabilities, segregated education is still the norm for the majority of children with intellectual disabilities.

Case name: E.S.

Tribunal: Brno City Court

Date lodged: 12 July 2012

Human right(s) violated: Right to family life; right to live in the community

Facts: Ms E.S. has an intellectual disability, due to which she is at risk of having her parental rights terminated. Her children, who also have disabilities, were placed in an institution after they were removed from their mother's care.

MDAC filed an action to terminate the proceedings to deprive her of her parental rights. MDAC argues that removal of her parental rights would constitute a violation of Article 23 of the UN Convention on the Rights of Persons with Disabilities (respect for home and family life) and that the children's placement in an institution violates Article 19 (right to live in the community). The Court has consolidated several related cases with this one.

Projected impact: The case seeks to establish the right of parents with intellectual disabilities to have and raise children on an equal basis with others and to end the discriminatory practice of the state challenging the ability of such a parent to raise her own children due her disability. In this case, the resolution of the issue of the mother's parental rights will also determine whether her children can remain in a family setting in the community or remain in institutions.

Case name: E.P.

Tribunal: Supreme Administrative Court

Date lodged: 23 January 2013

Human right(s) violated: Right to inclusive education

Facts: E.P. is a 13-year-old boy with autism. He and his parents are challenging a decision not to provide him with an aide unless the family pays for it. In the Czech system, such decisions are made by a regional office with no appeal process for the parents, but MDAC argued on behalf of the parents that they are parties to the decision and should be able to appeal it. The current proceeding is a cassation complaint against the decision of a lower court which found that the district did not have to provide and finance an assistant for E.P.

Projected impact: The case challenges the inability of children with disabilities and their parents to appeal decisions of the educational authorities that deny the children the right to an inclusive education. Without such appeal rights, children with disabilities and their parents cannot hold the government to its obligation to ensure that children with disabilities are given the supports necessary for them to receive an inclusive education.

Bulgaria

Case name: R.S.

Tribunal: Blagoevgrad Regional Court

Date lodged: 9 September 2013

Human right(s) violated: Right to legal capacity; access to justice

Facts: Rusi Stanev, the applicant in *Stanev v. Bulgaria*, is still under guardianship and has not had access to a court to review the restrictions on his legal capacity. This is despite the Grand Chamber judgment in his case that found the denial of access to legal proceedings violated his right to a fair trial under the European Convention on Human Rights.

Projected impact: The case is an attempt to implement the European Court of Human Rights judgment in domestic courts since the government has failed to amend its laws to implement that judgment, leaving people under guardianship with no avenue to pursue reviews of restrictions on their legal capacity.

Case name: Association Chovecolubie, Z.T., M.T. and V.I .

Tribunal: Commission for Protection Against Discrimination, Sofia

Date lodged: 7 February 2013

Human right(s) violated: Right to freedom from discrimination; right to live in the community

Facts: The claim relates to the failure of the mayor of a town in which the claimants had established a 'supported home' (housing with support services) for people with psycho-social (mental health) disabilities and people with intellectual disabilities. The mayor refused to enter into a contract for the association to continue to operate the home because the owners of the apartments have psycho-social disabilities themselves. As a result of his discriminatory actions, people with psycho-social disabilities have now been left homeless and/or are in danger of institutionalisation.

Projected impact: Discriminatory practices and attitudes are a major barrier to community integration for people with psych-social (mental health) disabilities and intellectual disabilities. This case challenges discrimination by a public official whose actions have resulted in the loss of community housing.

Russia

Case name: I.D.

Tribunal: St. Petersburg City Court

Date lodged: 10 September 2013

Human right(s) violated: Right to legal capacity

Facts: In June 2012, the Russian Constitutional Court ruled that the full deprivation of Ms I.D.'s legal capacity without the possibility of less restrictive measures violates the Russian Constitution in a case brought by MDAC. In February 2013, MDAC submitted a request for reopening of the guardianship proceedings based on the Constitutional Court decision. However the court again restricted Ms. D.'s legal capacity. This decision is now under appeal.

Projected impact: The case seeks to enforce a Constitutional Court decision in Ms I.D.'s favour by asking the court to consider the least restrictive means to provide support to Ms I.D. in making decisions related to financial and other matters.

Please get in touch with Lycette Nelson, MDAC Litigation Director (lnelson@mdac.info) if you would like to discuss how you might be able to support us.

Our Successes at the European Court of Human Rights

Over the following pages you can read about some of the important cases where we have supported people with intellectual disabilities and people with psycho-social disabilities to make claims at the European Court of Human Rights.

You will see that many of our clients have experienced a variety of human rights violations, many of these flowing from the continuing use of guardianship systems and the restriction of their legal capacity. For many of the people, the first time they will have realised that they had even been placed under guardianship was when they were placed in an institution, away from their communities and thereafter restricted to a life they had not chosen.

This would only be the start of the problems that many of our clients face. In many countries, a guardian can either be a civil servant they have never met, or even the directors of the institutions they have been placed in. Without any legal status to challenge the decisions of their guardians, many find that they struggle even getting their basic choices recognised as valid. The majority find it virtually impossible to seek protection through the courts due to discriminatory laws which deny them the opportunity of taking proceedings.

Some of the people we help find themselves subjected to other human rights violations too - forced medication, restraints, even the denial of good food and healthcare.

MDAC can be the last hope for some people with disabilities who have had their human rights denied. We can't possibly take all the cases referred to us. Where we do take on cases we build them in a way which aims not only to positively affect in their lives, but which also challenges systems that systematically deny the human rights of people with intellectual disabilities and people with psycho-social (mental health) disabilities.

Please help us to do more to challenge these often hidden human rights violations.

If you are in the position to help us, then please get in touch with Lycette Nelson, our Litigation Director: lnelson@mdac.info.

Bureš v. the Czech Republic – European Court of Human Rights

Facts

Mr Bureš is a cellist. In 2007 he accidentally overdosed on medication he was taking for a psycho-social disability. He became disorientated and was picked up by the police and taken to a 'sobering-up centre'. At this centre he was strapped to a bed, even though he presented no danger to himself or others. The straps caused injuries to his wrists with the result that his ability to play the cello was impaired.

Following his release, Mr Bureš brought a criminal complaint against the hospital and its staff. Although the police investigation indicated that his injuries had been caused by the straps and there was no medical justification for the use of restraints, the prosecutor failed to initiate criminal proceedings.

Judgment

✓ **Article 3: Substantive violation of the right to freedom from torture, inhuman or degrading treatment**

The Court found the Czech government responsible for the use of restraints by the 'sobering-up center'. Mr Bureš's 'mere restlessness' could not justify the use of restraints on him, or on the basis that he was a person with a psycho-social disability. The Court criticised the use of restraints on Mr Bureš as 'rudimentary' and in violation of Article 3.

✓ **Article 3: Violation of the investigative obligation in respect of torture, inhuman or degrading treatment**

Although there was a prompt investigation upon Mr Bureš's criminal complaint, the public prosecutor failed to act on the findings and therefore failed to initiate criminal proceedings against the hospital. As such, an investigation compliant with the State's obligation under Article 3 had not occurred, further breaching Mr Bureš's rights.

Case comment

In this case, the Court brought into question the doctrine of medical necessity in respect of the use of straps. In doing so it strongly suggested that it will question the opinion of medical professionals who justify such inhuman and degrading treatment as necessary when this is justified as a 'measure of protection'.

Kędzior v. Poland – European Court of Human Rights

Facts

A Polish court removed Mr Kędzior's legal capacity, placing him under the guardianship of his brother. His brother then placed him in an institution, against his will, where he was forced to stay for 10 years. During this time, and because of the removal of his legal capacity, Mr Kędzior had no legal avenue to challenge his placement in the institution. Polish law regarded Mr Kędzior's placement as 'voluntary' due to the decision of his brother, acting as guardian, to place him there. Mr Kędzior asked the Polish courts to quash the order depriving him of his legal capacity, however this request was refused on the grounds that he had no legal standing to bring proceedings as a result of the removal of his legal capacity, trapping him in the institution indeterminately.

Judgment

✓ **Article 5(1): Violation of the right to liberty**

The Court found that the framework which allowed Mr Kędzior's guardian to place him in a social care institution against his will provided no safeguards or opportunity for him to challenge this decision. The Court found that no assessments had been made as to whether Mr Kędzior should continue living in the institution, citing this as further evidence of a violation of his right to liberty.

✓ **Article 5(4): Violation of the right to review of lawfulness of detention**

In finding this violation, the Court criticised the fact that periodic judicial reviews of Mr Kędzior's placement in a social care home never took place. This, combined with the situation that people who have had their legal capacity removed being unable to initiate legal proceedings in Poland, meant that Mr Kędzior had no avenue available to him to have his involuntary placement assessed.

✓ **Article 6(1): Violation of the right to a fair trial**

Due to the fact that Mr Kędzior could not apply to the Polish courts of his own motion to challenge the restriction of his legal capacity and placement under guardianship, the Court found that his right to liberty had been arbitrarily restricted without him having the opportunity to present his case in court.

Case comment

This case developed and broadened the Court's jurisprudence in *Stanev v. Bulgaria* (another case taken by MDAC). In that case, the Court emphasised the State's involvement in violations of Mr Stanev's right because his guardian was also a municipal employee. In this case, the Court found that the State was *responsible*, even though Mr Kędzior's guardian was his brother, because the legal system allowed a guardian to take such actions without any court approval. Unfortunately, the Court also followed the approach taken in *Stanev* in not separately reviewing the applicant's claims under Article 8 related to restrictions on his rights to a private and family life as a result of his his involuntary institutionalisation.

Lashin v. Russia – European Court of Human Rights

Facts

In 2000, Mr Lashin, who has a psycho-social disability, had his legal capacity removed. He was detained in a psychiatric hospital from 2002 until 2003. With the support of family members, including his father who was then his guardian, he made numerous attempts to have his legal capacity restored. In 2002 the applicant's father was removed as guardian and the psychiatric hospital where the applicant was detained became his guardian by operation of law. Later that year the applicant attempted to get married but was not granted a marriage license because of the deprivation of his legal capacity.

Judgment

✓ Article 8: Violation of the right to private and family life

The Court noted that in February 2002 the applicant was entitled to a full review of his status which should have included an assessment of his condition by a non-state employed expert if he requested this. The Court found that the confirmation of the applicant's incapacity in 2002 was a breach of Article 8 because the applicant was not present at the proceedings and there was subsequently no fresh assessment. After December 2002, Mr Lashin was unable to challenge his incapacity status and thus assert his rights under Article 8. The Court did not separately address the issue of his inability to marry but did criticise the Russian system of plenary guardianship as overly restrictive of rights.

✓ Article 5(1): Violation of the right to liberty and security

The Court found that Mr Lashin's detention was not in compliance with domestic law. It was unacceptable, in the Court's view, that the hospital where Mr Lashin was detained was also appointed as his guardian, creating a clear conflict of interest and a breach of Mr Lashin's right to liberty.

✓ Article 5(4): Violation of the right to review of the lawfulness of detention

The Court found that Mr Lashin had no realisable right to challenge the lawfulness of his detention in a court by virtue of the removal of his legal capacity. This meant he had no standing to initiate proceedings in his own name, this right being vested in his guardian, breaching the right to reviews guaranteed under the European Convention on Human Rights.

Case comment

This judgment follows a line of cases such as *Shtukaturov v. Russia* and *Plesó v. Hungary* in which the Court has emphasised the need for greater scrutiny of decisions to place people with psycho-social disabilities in psychiatric detention. Institutions are frequently appointed as guardians by the operation of law in Russia, vesting in them the right to make legal decisions of people living in them. The Court criticised this situation, and, in line with the judgment in *Shtukaturov*, found that the Russian system of plenary guardianship is far too restrictive.

Nataliya Mikhaylenko v. Ukraine – European Court of Human Rights

Facts

Ms Nataliya Mikhaylenko was diagnosed with paranoid schizophrenia and her father applied for deprivation of her legal capacity in Ukraine. The district court granted this application on the grounds of Ms Mikhaylenko's disability. After improvement in her condition, she applied for restoration of her legal capacity herself after her guardian repeatedly failed to attend court. Under domestic law, a person who has had their legal capacity restricted cannot submit their own application for such a procedure and has no way to challenge the numerous restrictions on their rights that deprivation of legal capacity entails. The Court of Appeal dismissed her appeal, applying the domestic legal provisions which remove legal recognition from people under guardianship.

Judgment

✓ Article 6(1): Violation of the right to a fair hearing

The prohibition of direct access to a court for persons who have had their legal capacity restricted in Ukraine has no exception, and there was no provision for judicial review of such a declaration. Such a right of review is essential for all persons who have had their legal capacity restricted, as it is decisive as to whether a person's full rights can be restored.

Relying on the case of *Stanev v Bulgaria* (a leading case taken by MDAC), this case highlighted how such an absolute prohibition of access to a court is not in line with the European trend. The prohibition, combined by the lack of safeguards put in place for reviewing the restriction of legal capacity, and the failure to supervise applicant's guardian, meant that an effective right to a fair hearing had been unlawfully denied.

Case comment

This was the first case against Ukraine in the area of the right to legal capacity. Although the judgment focused narrowly and exclusively on the issue of Ms Mikhaylenko's access to a proceeding to challenge her placement under guardianship, establishing this as a human rights violation in Ukraine is an important first step in challenging the overall guardianship system in the country.

Shtukurov v. Russia – European Court of Human Rights

Facts

In 2004, Mr Shtukurov was declared legally incapable following an application by his mother. The hearing lasted 10 minutes, he was not informed that it was taking place, and his mother was appointed his guardian, authorised to act on his behalf in all matters. In 2005 Mr Shtukurov's mother, had him admitted to a psychiatric hospital. He attempted to contact a lawyer to help him challenge his placement at the hospital, but meetings between him and his lawyer were refused. Through his own efforts, and that of his lawyer, Mr Shtukurov was able to authorise a direct application to the European Court of Human Rights. From December 2005 he was refused contact with the outside world and made several unsuccessful attempts through his lawyer to secure his discharge from hospital.

Judgment

✓ Article 5(1): Violation of the right to liberty

The Government argued that the hospitalisation had been 'voluntary' under domestic law and therefore the claim of deprivation of liberty should be regarded as inadmissible. Considering in particular Mr Shtukurov's attempts to secure his release, the Court found that he could not be regarded as having voluntarily agreed to his detention. The Court went on to find that the Russian government had not 'reliably shown' the applicant to be of unsound mind at the time of his confinement. No explanation as to why his mother requested his hospitalisation was given nor were any medical records provided. There was no evidence to show that his deprivation of liberty was lawful or proportionate, and Mr Shtukurov's right to liberty had therefore been unlawfully restricted.

✓ Article 5(4): Violation of the right to review the lawfulness of detention

The domestic courts were not involved in the decisions to confine the applicant and there was no provision for automatic judicial review in cases such as his. This was because Mr Shtukurov was regarded as a 'voluntary' patient by virtue of his guardian's authority. The removal of Mr Shtukurov's legal capacity prevented any independent challenge and his guardian opposed his release. As such, he had no realisable right to have his detention reviewed.

✓ Article 6(1): Violation of the right to a fair trial

Mr Shtukurov had a double role in the guardianship proceedings, being both an interested party as well as the main object of the court's proceedings. The outcome had the potential to have a substantial impact on his ability to control his own affairs and make his own decisions. The Court noted that Mr Shtukurov's participation in legal proceedings placing him under guardianship was necessary to enable him to present his case and to allow the judge to form a personal opinion about his mental capacity. To decide the case on the basis of documentary evidence, as was done in this case, was unreasonable and breached the principle of adversarial proceedings enshrined in Article 6(1).

✓ Article 8: Violation of the right to a private and family life

The interference with Mr Shtukurov's private life was very serious, resulting in full dependence on his guardian in almost all areas of his life. This interference was for an indefinite period, only challengeable through his guardian who opposed attempts to alter the situation. The Court had already found procedural flaws and undue reliance by the Russian district court on a poorly informed medical report. Further, there was a failure in Russian law to allow for

less restrictive alternatives to plenary guardianship/full deprivation of legal capacity. Thus, the interference had been disproportionate, breaching Mr Shtukaturov's right to a private and family life.

✓ **Article 34 and Rule 39: Violation on the right to issue proceedings at the European Court of Human Rights**

Restricting Mr Shtukaturov's ability to meet with his lawyer and other parties had made it almost impossible for him to pursue his case at the European Court of Human Rights. In this case, the authorities even refused to comply with an interim measure from the Court itself, ordering the Russian government to allow such meetings to take place whilst proceedings at the European Court of Human Rights were on-going. Further, the authorities refused to recognise the binding force of the measures ordered by the European Court of Human Rights, claiming that the applicant could not act without his mother's consent and did not regard his lawyer as his lawful representative. The European Court of Human Rights found this situation contrary to the European Convention. The Court, not domestic courts, determines who an applicant's representative is for the purpose of proceedings before it. An interim measure is binding to the extent that non-compliance could lead to a finding of a violation under Article 34 of the European Convention. Whether it was that State as a whole or any of its particular bodies that refused to implement it was irrelevant. Restricting the applicant's access to his lawyer and failing to comply with the interim measure violated Article 34.

Case comment

The *Shtukaturov* judgment is one of the most influential judgments of the European Court of Human Rights in the area of the rights of people with intellectual disabilities and people with psycho-social (mental health) disabilities. Jurisprudentially, the most significant aspect of this judgment is the Court's holding that plenary guardianship without alternatives is disproportionate to the aim of protecting people with disabilities. In addition, the Court's holding that a person under guardianship must have the same rights to challenge deprivation of liberty as a person who is not under guardianship opened the way to challenging the placement of people under guardianship as a violation of Article 5(1) not only where they have been detained in psychiatric hospitals in Russia, but also in social care institutions.

Some estimates suggest that over 100,000 people with disabilities in Russia may also find themselves detained in institutions for similar reasons, and without any legal avenues to seek redress.

Stanev v. Bulgaria – European Court of Human Rights (Grand Chamber)

Facts

In 2000, Rusi Stanev was placed under partial guardianship by a Bulgarian court and a municipal employee was appointed as his guardian. In 2002, without ever having met Mr Stanev, she had him placed in a social care institution in a remote mountainous area 400km from his home. Once there, the director of the institution became his guardian and controlled all his affairs.

The conditions in the institution, as documented by the Council of Europe Committee for the Prevention of Torture (CPT), were appalling. The amount of food was inadequate, residents had to sleep in their coats in the winter due to a lack of heat, and the sanitary facilities were nothing more than holes in the ground in a wooded area outside the buildings of the institution.

Mr Stanev had no ability to challenge this situation as he could not initiate any type of legal proceedings, including a proceeding to have his guardianship lifted, without his guardian's consent.

Judgment

✓ Article 5(1): Violation of the right to liberty

The Court found that Mr Stanev's placement in the social care institution, against his will and for an indeterminate period of time, on the order of a government employee, meant that Mr Stanev had clearly experienced a deprivation of his liberty.

The Court went on to state that a need for social assistance, such as was clear in Mr Stanev's case, should not automatically lead to measures involving deprivation of liberty. It was the presence of a mental health condition which had led directly to the decision to place Mr Stanev in the home, and this is not a sufficient justification under the European Convention on Human Rights.

✓ Article 3: Violation of the right to freedom from torture, inhuman or degrading treatment

The Court found that the living conditions Mr Stanev had to endure for seven years amounted to degrading treatment, relying on the report of the CPT. There was no suggestion of intent on behalf of the authorities to inflict degrading treatment, but nevertheless, the material conditions of the institution had clearly had a significant impact on resulted in this damage to Mr Stanev's life.

✓ Article 5(4): Violation of the right to review of the lawfulness of detention

The system of guardianship in Bulgaria meant that Mr Stanev had no realisable right to challenge the lawfulness of his detention in the Bulgarian courts. His standing to do so had been removed at the time he had been placed under guardianship, which the Court found to be a breach of his rights under this article.

✓ Article 5(5): Violation of the enforceable right to compensation

Given that Mr Stanev's right to liberty had unlawfully been restricted, the Court went on to assess whether he would be able to have this situation recognised and compensated under Bulgarian law. The Court found that this was not the case, due to Mr Stanev's status as a person under guardianship, and thus the Bulgarian government had breached his right to compensation.

✓ **Article 6(1): Violation of the right to a fair trial**

The Court held that Mr Stanev's inability to access a court to review the restrictions on his legal capacity, which restricted many other rights, violated the right to a fair trial under Article 6(1).

✓ **Article 13 in conjunction with Articles 3 and 6: Violation of the right to a remedy for breach of Convention rights**

The Court found that, in addition to the breach of Mr Stanev's substantive rights under the European Convention, Bulgaria also did not provide a remedy for the degrading treatment he had suffered, or for the unlawful denial of his right to a fair trial.

Article 46: Binding force of the judgment

The Court ordered that Mr Stanev should be asked whether he wished to remain in the home and if not a re-examination of his situation should be carried out. The Bulgarian government should also ensure that Mr Stanev would be provided with the opportunity to apply directly to Bulgarian courts for a review of the restriction of his legal capacity, following its judgment on the Article 6(1) point.

Case Comment

The Grand Chamber's judgment in *Stanev* broke new ground in the jurisprudence of the European Court of Human Rights. Finding for the first time that conditions in a social care institution constituted inhuman and degrading treatment, the Court also found that involuntary placement in a social care institution by a guardian constituted a deprivation of liberty. However, the Court failed to address numerous violations of Mr Stanev's rights directly related to his institutionalisation and placement under guardianship, including his right to a private and family life.

Sýkora v. the Czech Republic – European Court of Human Rights

Facts

Mr Sýkora has a psycho-social disability. His legal capacity was deprived for almost three years, although after a series of legal proceedings he was ultimately found not to require any restrictions on his legal capacity. While he was under guardianship, Mr Sýkora was taken to a psychiatric hospital and his guardian consented to the hospitalisation without even contacting him. He was forced stay in the hospital for twenty days before he was released. His health was negatively affected by the hospitalisation, particularly because he was forced to take neuroleptic medication. He was also denied the right to institute a judicial review of his placement in the institution as his guardian's consent to the placement was considered sufficient.

Judgment

✓ Article 5(1): Violation of the right to liberty and security

The Court found that Mr Sýkora's right to liberty had been arbitrarily restricted as a result of the fact that he had been placed under guardianship and that he had no right to challenge his placement in the psychiatric hospital.

✓ Article 5(4): Violation of the right to a review of the lawfulness of detention

Mr Sýkora's confinement at the psychiatric hospital was regarded as 'voluntary' because his guardian had consented to his placement there. The Court found that the Czech government was unable to point to any procedure where the lawfulness of his detention could have been determined and so Mr Sýkora's right to a review of his detention had been breached.

✓ Article 8: Substantive and procedural violations of the right to a private and family life

The process through which Mr Sýkora had legal capacity removed was found to constitute a disproportionate interference with his right to a private and family life, particularly given his placement, against his will, in a psychiatric hospital.

Case comment

The judgment is significant in holding that even though Mr Sýkora had his legal capacity restored through the domestic courts, the procedures through which he was placed under guardianship in the first place had violated his rights under Article 8. In addition, the finding that he was deprived of his liberty without any possibility of a judicial review reaffirmed the Court's jurisprudence in an earlier MDAC case, *Shtukaturov v. Russia*.

Z.H. v. Hungary – European Court of Human Rights

Facts

The applicant is deaf and has an intellectual disability. He was placed in detention after stolen property from a mugging was found on him. During the police interrogation he was not provided with a lawyer and he could not understand the sign language used by the interpreter. His form of sign language is individual, and only his mother is able to communicate with him. Mr Z.H. was detained in prison from April until July 2011. Six weeks into his detention, prison authorities belatedly took steps to protect him from the general population but still only allowed his mother to visit him every two weeks, despite their knowledge that she was the only person with whom he could communicate.

Judgment

✓ **Article 3: Violation of the right to freedom from torture, inhuman or degrading treatment**

The Court ruled that since Mr Z.H. belonged to a particularly vulnerable group that the government should have taken steps in a timely manner to prevent measures likely to result in inhuman and degrading treatment. Denying him the opportunity to communicate with his mother, and therefore the outside world, meant that Mr Z.H. had suffered degrading treatment.

✓ **Article 5(2): Violation of the right to be informed of charges**

The Court also found that the authorities did not take reasonable steps to inform Mr Z.H. of the reason he was being detained and the charges against him.

Case comment

The Court set a new standard for cases involving torture and ill-treatment of people with disabilities held in detention. In such cases, the Court found that the burden is on the government to show that appropriate accommodations were provided to the person rather than on the applicant to show that he/she was subjected to torture, inhuman, or degrading treatment resulting from the government's failure to provide such accommodations.



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