

Access to Justice for People with Intellectual Disabilities and People with Psycho- Social Disabilities in Russia

Recommendations on legislative and policy measures required to achieve effective enjoyment of the right to access justice by all persons with intellectual disabilities and psycho-social disabilities in Russia

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Recommendations

In its March 2008 judgment in *Shtukaturov v. Russia*, the European Court of Human Rights found that depriving the applicant of legal capacity violated his rights to a fair trial (Article 6 of the European Convention on Human Rights – ECHR) because he did not participate in the court proceedings, and a violation of Article 8 of the ECHR (right to respect for privacy) as guardianship was a very serious, and in this case, unnecessary measure. The Court also found a violation of the applicant’s right of individual application to the European Court (Article 34 of the ECHR) because he had been refused the right to consult a lawyer of his choice in preparing an application to the Court.

Following this judgment, in February 2009 the Constitutional Court of Russia struck down as unconstitutional those provisions of the Code of Civil Procedure which allowed legal capacity cases to proceed in the absence of the person concerned. The Constitutional Court also held that an individual deprived of legal capacity has the right to appoint a lawyer of his or her choice in several categories of proceedings.

The rights recognised in these important judgments are echoed in the UN Convention on the Rights of Persons with Disabilities (UN CRPD) which calls on States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others and promote appropriate training for those working in the field of the administration of justice.¹ In October 2009 the UN Human Rights Committee (the body established to monitor States’ compliance with the International Covenant on Civil and Political Rights) recommended in its concluding observations that Russia ensure that all persons deprived of their legal capacity have prompt access to an effective judicial review of original decisions on legal capacity, and, when applicable, of decisions to subject them to institutionalisation.² The Committee also recommended ensuring that persons with mental disabilities are able to exercise the right to an effective remedy against violations of their rights.³

In line with these provisions of the UN CRPD is the recent decision of the Russian Constitutional Court of 19 January 2011 concerning the procedure of the placement of persons deprived of their legal capacity into social care homes (“psychoneurological internats”). The Court held that placement in a social care institution of a person against their will constitutes a deprivation of liberty and a restriction on the right to freedom of movement. Therefore, a judicial review needs to be carried out before deciding to transfer someone to an institution, and the review must be attended by the same fair trial guarantees as for involuntary hospitalisation.⁴ The Court required the legislature to develop procedures for deciding such cases.

¹ Article 13 of the UN CRPD.

² UN Doc. CCPR/C/RUS/6 of 23 November 2009.

³ *Ibid.*, paragraph 19.

⁴ Decision of the Constitutional Court of the Russian Federation no. 114-O-P of 19 January 2011.



Systemic changes are needed to bring laws, policies and systems in line with the above judgments and recommendations, as well as to prepare the Russian legal landscape for ratification of the UN Convention of the Rights of Persons with Disabilities, which Russia has already signed. MDAC has emphasised in previous policy papers that the essential element of these changes is, first, abolition of the existing system of plenary guardianship and, second, introduction of alternative models to enable people to exercise their self-determination whilst at the same time protecting them against exploitation, violence and abuse, by introducing alternatives to guardianship such as advance directives, enduring powers of attorney and supported decision-making.

In order to secure access to justice on an equal basis with others, MDAC recommends:

To the Russian Parliament:

1. Legislative and policy changes must be discussed at an early stage with people with disabilities, including people in civil society – in particular people with intellectual disabilities, people with psycho-social (mental health) disabilities and their representative organisations, as set out in Article 4(3) of the UN Convention on the Rights of Persons with Disabilities. These people should be involved in the development and implementation of legislation and policies implementing the Convention, including the recommendations described in this paper.
2. Ratification of the UN Convention on the Rights of Persons with Disabilities should be set as a political priority, so that Russia can benefit from the international exchange of good practice, and contribute to developing laws, policies and services which best meet the needs of people with disabilities.
3. Legislation must ensure that every person with a disability has an unconditional and unrestricted right of access to an accessible justice system. Access must be guaranteed on any issue, including complaints against a guardian or the local government. Laws which deprive a person of legal standing (for example those under guardianship) and the right to apply to courts must be amended to allow access for all.
4. The law must include a procedure to allow all persons with disabilities, regardless of their legal capacity status, to exercise the right to legal representation, i.e. to freely appoint a lawyer or another representative of their choice.
5. The law must enable all people with disabilities to access State-funded legal aid to a person whose legal capacity is being questioned.

6. The law must ensure that every person with disabilities placed under guardianship has the authority and opportunity to apply to court directly him- or herself, or through a representative of their choice, to have their legal capacity restored.
7. The recently passed amendments to the Psychiatric Care Act must be implemented so that the safeguards envisaged in respect of involuntary hospitalisation apply to every person in that situation, regardless of his or her legal capacity status, and that people detained (in fact and, or in law) in psychiatric settings have the right to apply to court to assess the lawfulness of their detention on a periodic basis.
8. The law should be clarified to ensure that all patients' rights as set out in the statute, including the right to meet with a lawyer, apply equally to all patients, regardless of their legal capacity status.
9. The right to challenge actions and decisions of the mental hospital or social care home in court must be guaranteed to every patient, regardless of his or her legal capacity status.

To the Russian Federal Bar of Attorneys:

1. Guidelines should be issued for attorneys to ensure that they clearly understand their role in proceedings concerning persons with mental disabilities.
2. In order to enable attorneys to provide a quality service to people with disabilities, the Bar Association should establish an accredited training course so that attorneys have the requisite skills necessary for representing people with disabilities, skills which are not currently taught in law schools or continuing professional development courses.
3. Both these measures should be developed and implemented with the full and effective involvement of people with disabilities and their representative organisations.

To the Supreme Court of the Russian Federation

- Following the legislative amendments, the Supreme Court should issue guidelines for lower courts explaining the procedural independence of persons deprived of legal capacity in criminal proceedings, in civil proceedings concerning mental health law, and concerning determinations of legal capacity.

1. Context

1.1. Interest and expertise of MDAC

This Policy Paper is the third in a series developed by the Mental Disability Advocacy Center (MDAC), an independent, international human rights organisation headquartered in Budapest. The purpose of this series of Policy Papers is to assist Russian policy-makers to undertake legislative and policy reform in areas of the law which affect people with intellectual disabilities and people with psychosocial disabilities. The need for this process of legislative reform is that several provisions of Russian law are not in compliance with its obligations under international and European law. MDAC makes these recommendations on the basis of its advocacy and litigation on access to justice in Central and Eastern Europe and Russia.

MDAC has published a series of reports analysing guardianship laws and practices in several countries in the region, including a 2007 report on Russia. We found that significant barriers to accessing justice are caused by the guardianship system. In 2006-2007, we conducted a number of human rights training sessions for the local guardianship authorities of St. Petersburg which provided us with additional insights into the issues related to access to justice for people with intellectual and psycho-social disabilities in Russia. Furthermore, since 2004, MDAC's contracted attorney has provided legal representation in a number of cases to highlight access to justice barriers on behalf of people with intellectual disabilities and people with psycho-social disabilities in Russia as well as in Bulgaria, Czech Republic, Estonia, Hungary, Poland and the United Kingdom. In 2010 MDAC conducted training for attorneys in St. Petersburg which helped identify the key challenges for people with intellectual and psycho-social disabilities in accessing justice in Russia.

1.2. Constitutional Court of Russia

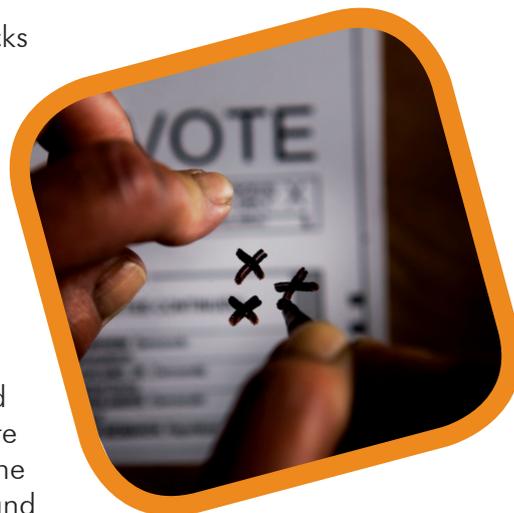
Although the issue of access to justice by people with intellectual disabilities and people with psychosocial disabilities has not been addressed in the judgements of the Constitutional Court of Russia *per se*, the Court has, nevertheless, formulated several important conclusions in this regard which have important implications for Russian lawmakers as well as for the judiciary. These include the Court's recognition that:

1. A person deprived of legal capacity has an autonomous – independent from his or her guardian – right to apply to the Constitutional Court.⁵
2. A person deprived of legal capacity should have the right to appeal against the legal capacity judgment. This includes through extraordinary proceedings, that is, after the legal capacity

⁵ Judgment of 27 February 2009 no. 4-P.

judgment had entered into force and the person lacks general standing in all civil proceedings.⁶

3. In the above situations, a person deprived of legal capacity should have the right to appoint a representative of his or her choice.⁷
4. In psychiatric committal cases, persons deprived of legal capacity shall have access to the same judicial guarantees as people with full legal capacity.
5. A person deprived of legal capacity may be placed in a social care home against his or her will only on the basis of a court order following proceedings attended by the same fair trial guarantees as those which relate to involuntary hospitalisation, including ensuring the personal participation of the individual concerned and legal representation.⁸



In the above judgments, the Constitutional Court has invalidated the very concept of the deprivation of legal capacity and has recognised that people whose legal capacity has been restricted retain the legal authority to access justice. By extension, supports need to be put in place to allow people to exercise their independent wishes, and judicial systems need to ensure individually-tailored reasonable accommodation (as set out in Articles 2 and 5 of the UN Convention on the Rights of Persons with Disabilities) to ensure that this right is meaningful for people with disabilities on an equal basis with others.

Several important questions flow from these findings of the Constitutional Court: How can a person deprived of legal capacity appoint a lawyer, given the prohibition on entering into any contractual relations in accordance with the Civil Code? What role, if any, does the person's guardian (who is the person's representative in *all* spheres of legal relationship) have in proceedings which the adult under guardianship acts independently from the guardian?

Existing legislation is silent on these issues. The legal amendments necessary now present an opportunity to legislators to ensure that people with disabilities are accorded the full range of human rights as set out in the UN Convention on the Rights of Persons with Disabilities. This opportunity includes the development a system which is minimally restrictive, and maximally enabling and supportive as possible, in meeting individual needs. These changes will invariably require replacement of the existing plenary guardianship system with a system which guarantees a universal right to legal capacity, and provides for tailor-made support for people who need assistance. International standards and best practice examples can help Russian policy and law makers as they undertake legal capacity law reform.

⁶ Ibid., para. 3.3.

⁷ Ibid., para 3.2.

⁸ Decision of 19 January 2011 no. 114-O-P, para. 2.2.

1.3. International standards on access to justice

Both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) guarantee the right to a fair trial which is of fundamental importance in a democratic society. This right means that an individual must be able to have a matter brought before a court for determination without any improper legal or practical obstacles being placed in his or her way. However, this right also includes several key components which have derived from the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee. Thus, access to justice is twofold: firstly, it encompasses the right to legal standing to bring cases, and, secondly, it includes the provision of remedies and mechanisms which must be accessible to people with intellectual disabilities and psycho-social disabilities, giving rise to, *inter alia*: the right to take part in proceedings in person or through a representative; the right to choose and appoint a counsel; and the right to appeal judicial decisions. Reasonable accommodations must be ensured in each process to equalise the degree of access to justice for people with disabilities upwards.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD), which Russia has signed, provides specific guarantees regarding access to justice for persons with disabilities. Although Russia has not yet ratified the CRPD, by signing it, Russia took on the obligation to respect the principles of the Convention in its laws and practices. Further, if Russia intends to ratify the Convention in the near future, as it should, the government should be reviewing its laws, regulations, policies, programmes and services to ensure compliance with the CRPD and should also plan reform of those that are not in compliance.

Article 13 of the UN CRPD provides that:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

People subject to guardianship provisions, people in institutions, people labelled with psycho-social disabilities or intellectual disabilities, people with communication difficulties, and children all face barriers to accessing justice. This can be due to legal prohibitions on people complaining or accessing a court. It can also be because there is no legal aid to pay for legal advice and assistance, and if need be, representation. It may be because there is no complaints mechanism in an institution or within a community-based service. It may also be because there is no support or advocacy for people with diminished functional capacity to advocate for themselves. It may be that there is no independent inspectorate of the institution, or of the community-based service, or that the inspectorate is ineffective. It may be that testimonies are not admitted by courts due to

communication difficulties, or that testimonies – as victim, witness, or defendant – are deemed inadmissible or unreliable, based on the person’s diagnosis. Thus, whilst many millions of people are subjected to human rights violations, the barriers to accessing justice mean that, in many cases, there are no accessible structures in place to stop, address, remedy and prevent such violations.

The CRPD acknowledges that people with disabilities may have personal barriers to accessing legal procedures for defending their rights. This especially concerns people with psycho-social or intellectual disabilities who may find it difficult to understand the procedural complexities which judicial proceedings involve. Accordingly, the Convention calls for Member States to implement necessary measures to ensure, firstly, that people with disabilities can participate in judicial proceedings effectively, which may require making appropriate accommodations in the course of proceedings. Article 2 of the CRPD defines **reasonable accommodation** as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. Such accommodations may include additional explanation of the nature of the procedural acts, simplifying language used in the proceedings, or conducting proceedings at the institution if this is mandated by the person’s state of health. Such measures are examples of reasonable accommodation which does not require additional finances or resources from the state. The CRPD makes clear that denying reasonable accommodation constitutes discrimination, contrary to the rights guaranteed by Article 5 of the CRPD.

The Council of Europe’s Commissioner for Human Rights’ paper *Human Rights and Disability: Equal rights for all*, the Council of Europe Commissioner for Human Rights recommended that states should “provide effective remedies for persons who have had their rights violated. This includes making the judicial system accessible and the legal costs involved affordable”.⁹

Providing free legal representation to persons with psycho-social disabilities can also be considered as reasonable and appropriate accommodation, as this is an essential aspect for guaranteeing the right to a fair trial in those cases where people have difficulties in understanding the complexities of the proceedings. Of relevance here is that the European Court of Human Rights recently found a violation of Article 6 of the European Convention on Human Rights in the case of *Nenov v. Bulgaria*.¹⁰ In this case, the applicant, who had a mental illness which resulted in his ex-wife applying to have his right of contact with their children modified, had not been assigned an attorney to defend his case effectively. In this regard MDAC notes with concern that only a few regions in Russia have implemented schemes for providing people with disabilities with access to quality free legal aid.¹¹

Secondly, the CRPD encourages States to provide necessary training to those working with people with disabilities, including judges and other legal professionals. Such training may include training for judges and attorneys on how a particular disability affects procedural capacity and what measures are required to ensure the observance of procedural and substantive fairness in proceedings involving

⁹ CommDH/IssuePaper(2008)2. Recommendation no. 4.

¹⁰ *Nenov v. Bulgaria*, Judgment of 16 July 2009, application no. 33738/02.

¹¹ The most effective in this regard is the St. Petersburg City Government program implemented by the St. Petersburg Bar of Attorneys.

persons with disabilities. The active role of attorneys is crucial in ensuring that proceedings involving people with disabilities are attended by necessary accommodations.

1.4. Other European jurisdictions

In a United Kingdom case involving the right to a public hearing, the Upper Tribunal recently issued a decision in which it referred to Article 13 of the CRPD regarding the right of people with mental disabilities to have access to justice on an equal basis with others. The Court stated that,

The CRPD provides the framework for Member States to address the rights of persons with disabilities. It is a legally-binding international treaty that comprehensively clarifies the human rights of persons with disabilities as well as the corresponding obligations on state parties. By ratifying a Convention a state undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines... Under Article 13(1) of the Convention a ratifying state agrees to ensure “effective access to justice for persons with disabilities on an equal basis with others”. Under Article 14 a ratifying state also agrees to ensure that if persons with disabilities are deprived of liberty through any process “they shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation”.¹²

¹² *AH v. WLMHT and SoS* [2011] UKUT 74 (ACC).

2. Specific situations

2.1. Civil proceedings in general and proceedings on the determination of legal capacity

According to current Russian legislation, the purpose of the legal capacity system is to protect vulnerable adults who do not have the capacity to manage their own affairs because of an impairment in cognitive functioning. However, mental health and people’s ability change over time. They can fluctuate, improve or decline. Therefore every person should have the opportunity to apply to the courts with a request to restore her/his legal capacity as they like. This is set out clearly in Principle 14 of the Council of Europe Committee of Ministers’ Incapacity Principles: “[m]easures of protection should be reviewed on a change of circumstances and, in particular, on a change in the adult’s condition.” The European Court of Human Rights has also held that in cases of restriction of legal capacity, “it may be appropriate [...] 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”.¹³

In any proceedings determining a person’s legal capacity, he/she is both the main object and subject of the trial. Under the existing legislative framework in proceedings initiated to deprive a person of his or her legal capacity, where this person has a mental or psycho-social disability – but where his or her full legal capacity is still intact – has the right to take part in the proceedings and to appoint a lawyer. However, the state has no express duty to provide access to free legal representation despite the fact that the person concerned is considered to be incapable of exercising his rights, including the right to defend his or her position in the proceedings. This makes the right to take part in the proceedings rather illusory.

Under the Russian Code of Civil Procedure, persons deprived of their legal capacity are also deprived of their legal standing to bring cases before courts in all matters, including those related to their rights. This restriction is not limited to civil-law rights only but extends to complaints against abuses committed by public authorities. When institutionalised, people can be wholly prevented by the institution from accessing any form of communication and, therefore, are rendered unable to report abuse to any third party. The fact that any person deprived of legal capacity lacks standing before all courts under the law, and therefore cannot take any legal measures to protect his or her rights if the



¹³ *Matter v. Slovakia*, application no. 31534/96, judgment of 5 July 1999, para. 68.

guardian fails to act, or if the guardian is the perpetrator of the violations, is a discriminatory and disproportionate limitation of the right to access justice.

Deprivation of legal capacity often lasts for the remainder of a person's life. Judicial decisions depriving someone of their legal capacity are made for an indefinite period of time and are not subject to periodic review, in contravention of international human rights law.¹⁴ Legal capacity can only be restored by means of a court decision declaring the restoration of legal capacity. Until recently, once a person had been deprived of their legal capacity, they had been also deprived of any independent legal means of having their legal capacity restored at a later stage. In accordance with recent amendments to the Code of Civil Procedure, a person deprived of legal capacity in future will have the right to initiate a judicial review of his or her incapacity status.¹⁵ This is a very important development which is, however, undermined by the lack of any obligation of the state to provide free legal representation in such cases, and representing a further barrier to accessing justice for people with intellectual or psycho-social disabilities. For obvious reasons it is difficult for a person with disability lacking legal capacity to exercise his right to access justice effectively without proper aid while the same incapacity status prohibits that person from contracting an attorney.

In accordance with the above amendments to the Code of Civil Procedure, courts will also be required to guarantee the right to "involve in the case individuals deprived of legal capacity".¹⁶ However, despite the progressive nature of this amendment it remains unclear how the courts will treat procedural capacity of persons under guardianship, and what their role will be viz their guardians who will remain their representatives in all spheres of life. This is particularly important in cases where positions of the person concerned and his or her guardian are in conflict, and by virtue of the inherent imbalance of power between them and in favour of the guardian. Moreover, this provision does not give a legally incapable person the right of independent standing.

Thus, it is obvious that the civil procedure must change in order to comply with international human rights law, and to create an equal playing field for all Russians.

2.2. Psychiatric committal

On 27 February 2009 the Russian Constitutional Court invalidated the provisions of the 1992 Law on Psychiatric Care which had allowed psychiatric confinement of an individual deprived of legal capacity solely at the request of his or her guardian. In particular, the Constitutional Court found that the provisions contained in Article 28 of the Law on Psychiatric Care were unconstitutional insofar as they did not require a judicial review of the validity of involuntary detention dependent upon the individual circumstances of the person subject to such measures.

¹⁴ See Recommendation of the Committee of Ministers of the Council of Europe Rec(99)4E on principles concerning the legal protection of incapable adults.

¹⁵ See Federal Law of 6 April 2011 "On amending the Law of the Russian Federation "On Psychiatric Care and Citizens' Rights in its Provision" and the Code of Civil Procedure of the Russian Federation".

¹⁶ Ibid.

The Constitutional Court held that persons deprived of legal capacity should benefit from the same judicial guarantees as people with full legal capacity. This includes the right to take part in proceedings reviewing the necessity of detention, in person, and also includes the right to appoint an attorney. Although the right to choose an attorney to represent a person deprived of legal capacity implicitly derives from the judgment of the Constitutional Court, it can only be realised in practice if a third party contracts an attorney for the person concerned who – in accordance with the Civil Code governing contractual relations – is legally prohibited from instructing an attorney.

The above amendments to the Psychiatric Care Act have given effect to the decisions of the Constitutional Court and unequivocally recognise the requirement of judicial review of psychiatric committal cases involving people lacking legal capacity and their rights¹⁷. However, these amendments have not provided for the right of such persons to take part in the committal proceedings themselves, which may cause an alternative interpretation of the right to access justice in practice. Moreover, the law does not allow a person lacking legal capacity to appoint a lawyer of his or her choice in such cases.

2.3. Criminal proceedings

The Code of Criminal Procedure contains no specific procedural rules related to the treatment of persons with disabilities, including those deprived of their legal capacity. The result of this is that, in accordance with the principle of personal criminal liability, any person has the right to defend him- or herself. It should be noted that until 2007 any person (including those deprived of legal capacity) had no standing in criminal cases immediately after a forensic report concluded that the person was “criminally insane”. All defence rights were vested to the person’s legal representative who was appointed by the investigating authority at their own discretion and without consulting the defendant.

In December 2007 the Constitutional Court of Russia invalidated these provisions of the Code of Criminal Procedure. In doing so it noted that the legislature could introduce different procedural rules for persons with mental disabilities depending on their actual capacity to take part in the proceedings.¹⁸ This regulation came into effect in November 2010 with amendments to the Code of Criminal Procedure.¹⁹ The amendments allow a court to decide whether a person can take part in the proceedings in accordance with the state of his or her mental health and on the basis of a report of the psychiatric hospital where the person is detained.

MDAC is concerned about the quality of this new regulation as it gives unlimited discretion to the courts in deciding whether the person undergoing criminal treatment can take part in criminal proceedings. Under international law, participation in one’s own criminal proceedings is not dependent on a person’s mental health; the criminal justice system must make all reasonable adjustments to enable the person to take part.

¹⁷ See Federal Law of 6 April 2011 “On amending the Law of the Russian Federation “On Psychiatric Care and Citizens’ Rights in its Provision” and the Code of Civil Procedure of the Russian Federation”.

¹⁸ Judgment no. 13-P of 20 November 2007.

¹⁹ Federal Law no. 323-FZ of 29 November 2010.

Of further concern is the limitation of legal representation in criminal proceedings for people who lack full legal capacity, as people in this position have no legal authority to instruct an attorney, having been deprived of their legal capacity to enter into any legally recognised agreement. Only the person's guardian can decide to contract an attorney, and the guardian may have a significant conflict of interest in such a decision. At present, the law has no checks and balances to prevent exploitation and abuse of the person subject to guardianship.

The Russian Federal Bar of Attorneys and regional bars should issue guidelines for lawyers on the right to legal representation of persons deprived of their legal capacity. These guidelines should address the duties of lawyers in criminal proceedings on compulsory psychiatric treatment and explain possible procedures for appointing a lawyer under the existing legal framework. MDAC is able to provide technical assistance to the Federal Bar of Attorneys in developing guidelines for lawyers on how to represent clients whose legal capacity is restricted.

2.4. People in institutions

Section 47 of the 1992 Psychiatric Care Act provides for the right of a person in a psychiatric hospital to appeal against decisions made by mental healthcare professionals to the court. In accordance with this provision, appeals require the patient to be represented but legislation does not currently make it clear whether this means legal representation by a professional attorney. Another barrier to accessing justice is the fact that there are no communication procedures or request forms which would enable people in psychiatric settings to initiate court proceedings and exercise this right effectively and independently of their guardians.

According to section 38 of the statute the state must set up an independent patients' advocacy service. This has not been done. Such an advocacy service itself is a procedure for facilitating access to justice, and by continually denying this service to people in institutions the government is failing in its obligations under the rule of law.

Not only does Russian legislation mandate the establishment of advocacy services, but the Council of Europe Commissioner for Human Rights has noted that States are required to establish an "independent Ombudsman or other equality body with a view to ensuring that persons with disabilities are able to fully enjoy their rights [and] mandate such bodies to receive complaints, act as mediators and provide legal assistance to victims".²⁰

In theory each person has the right to take cases against healthcare authorities, including psychiatric hospitals. However, access to court is regulated by the Code of Civil Procedure and the general prohibition on people without full legal capacity initiating civil cases applies. Thus, exploitation, violence, abuse and other forms of ill-treatment can take place inside psychiatric settings and social care institutions against people deprived of their legal capacity with impunity. In many cases violations

²⁰ CommDH/IssuePaper(2008)2. Recommendation no. 6.

of the rights of people deprived of their legal capacity are committed by the very institutions which act as the person's guardian: resulting in the situation whereby the only person who can initiate proceedings on behalf of a person being abused is that person's alleged abuser.

MDAC recommends that the Psychiatric Care Act be amended to ensure that psychiatric patients and residents of social care homes, regardless of their legal capacity status, have the right to apply to court in order to initiate a judicial review of the lawfulness of their detention on a periodical basis, as well as the right to challenge actions and decisions of the institution in which they are detained, in court. This also requires that the core patients' rights formulated in Article 37 of the Law, including the right to meet with a lawyer, applies to all patients regardless of their legal capacity status.



3. Conclusion

The right to access to justice is a tool for people with intellectual disabilities and people with psycho-social disabilities to be increasingly visible citizens of the society.

The Council of Europe's Disability Action Plan 2006-2015 – which has the status of a Committee of Ministers Recommendation – obliges Member States to “[e]nsure effective access to justice for persons with disabilities on an equal basis with others”.²¹ The Disability Action Plan lists specific actions which should be taken by Council of Europe member states to achieve this objective. Member states, for example, shall “[p]rovide appropriate assistance to those people who experience difficulty in exercising their legal capacity and ensure that it is commensurate with the required level of support”.²² Russian law regarding both civil and criminal proceedings are neither commensurate with this Recommendation, nor with the provisions of the CRPD by violating the right to access to justice of people with intellectual disabilities and psycho-social disabilities.

In this Policy Paper MDAC has analysed the provisions of Russian law, the decisions of the Russian Constitutional Court and relevant international standards regarding the right to access to justice for people with intellectual disabilities and people with psycho-social disabilities. We found that Russian law and practice do not meet the requirements of international norms.

Since Russia aims to ratify the CRPD in 2012 it should bring its national legislation in line with the CRPD which, accordingly, requires States to ensure effective access to justice for all persons with disabilities. In the development and implementation of legislation and policies implementing Article 13 of the CRPD, and in other decision-making processes concerning issues relating to the right to access to justice for persons with disabilities, and as required by Article 4(3) of the CRPD, States shall closely consult with and actively involve persons with disabilities through their representative organizations.

²¹ Council of Europe Recommendation R(2006)5 of the Committee of Ministers to Member States on the “Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015”, 5 April 2006, para. 3.12.2 (i).

²² Para. 3.12.3 (vi).

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