

Application No. 36760/06
Grand Chamber judgment 12 January 2012

**BEFORE THE COMMITTEE OF MINISTERS
OF THE COUNCIL OF EUROPE**

IN THE MATTER OF:

STANEV

Applicant

v.

BULGARIA

Defendant

INFORMATION SHEET

Submitted by the Mental Disability Advocacy Centre (legal representatives of the applicant) to supplement the oral presentation by Oliver Lewis, MDAC's Executive Director, at the Open Society Justice Initiative and the European Implementation Network joint civil society briefing in advance of the forthcoming CM-DH.

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1. Background

1. This information sheet is written by the Mental Disability Advocacy Centre (MDAC), an international human rights organisation which uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. MDAC has participatory status at the Council of Europe, is entitled to lodge complaints under the European Social Charter and has observer status at the UN Economic and Social Council. MDAC lawyers represented Rusi Stanev, the Applicant.
2. In its January 2012 judgment, the Grand Chamber found that Bulgaria had violated Article 6(1) of the European Convention on Human Rights (ECHR) because the applicant, a person who had been placed under guardianship, was prohibited in law from accessing a court to ask for his legal capacity to be restored. The Court recommended that Bulgaria reform its laws to provide effective access to a domestic court in such access.¹ The Court repeated this recommendation in the similar case of *Stankov v. Bulgaria* in March 2015.²
3. In *Stanev*, the Court also found that the applicant had been arbitrarily and unlawfully deprived of his liberty (in violation of Article 5(1) of the ECHR) for more than seven years in a residential institution that amounted to degrading treatment (in violation of Article 3 of the ECHR). The residential institution has since been shut. Because Mr Stanev was prohibited in law from initiating a review of his detention, the Court found a violation of Article 5(4) of the ECHR, and because he was denied the opportunity to ask for compensation for the damages that he suffered during the unlawful deprivation of liberty the Court found a violation of Article 5(5) of the ECHR.
4. The reason he was placed in this institution is because – unbeknownst to him – he had been deprived of his legal capacity and placed under guardianship in proceedings that took place behind his back and therefore in which he was given no opportunity to participate directly or through counsel. His guardian arranged as a matter of private law for Mr Stanev to be taken involuntarily from his home, and driven 400km to a village called Pastra where the institution was located. The conditions in the Pastra institution amounted to degrading treatment (in violation of Article 3) for which he had no access to any form of effective domestic remedy (in violation of Article 13 in conjunction with Article 3).
5. Last year MDAC made representations to the Committee of Ministers about compliance with individual measures ordered by the Court.³ This information sheet focuses on the

¹ Para. 258 of the *Stanev* judgment

² Para. 186 of *Stankov v Bulgaria*.

³ MDAC, “Communication from the Mental Disability Advocacy Centre in the case of *Stanev v. Bulgaria* under Rule 9.1 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements”, 15 March 2015.

general measures ordered by the Court, namely those to ensure effective direct access to a court for a person deprived of legal capacity with a view to seeking its restoration.⁴

2. General Measures ordered by the Court

6. In its judgment, the Court reviewed Article 46 of the ECHR, reminding the parties, “that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects”.⁵ It went on to note that, “it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention”.⁶
7. With regard to Article 6 of the ECHR, the Court recommended that the Bulgarian government “envisage the necessary general measures to ensure the effective possibility” of accessing a court for a person who has been partially deprived of legal capacity with a view to seeking its restoration.⁷
8. People under guardianship are denied access to courts, and this meant that the applicant tried hard to challenge his detention in the disability institution, or to challenge the deprivation of his legal capacity, but his efforts were in vain as the law provided no effective way for him to do this.⁸ A domestic judicial finding that he was detained in the institution unlawfully may well have prevented Mr Stanev from having to spend seven subsequent years in cold and dirty conditions in an establishment that the Council of Europe’s Committee for the Prevention of Torture insisted the government shut down as it was unfit for human habitation. Moreover, Mr Stanev could not obtain compensation for the violations of his rights owing to the fact that as a person deprived of legal capacity, he was legally prohibited from accessing the justice system. In this respect, the general measures ordered by the Strasbourg Court are of great significance.
9. The *Stanev* judgment has attracted wide attention by legal scholars across Europe, as it is the first time that the Court has found a violation of Article 3 in a disability case, and of Article 5 in a social care case. It has the potential to change social care systems not just for the 7,000 people with disabilities under guardianship in Bulgaria, who are

⁴ Para. 258 of the *Stanev* judgment.

⁵ Para. 254 of the *Stanev* judgment.

⁶ Para. 254 of the *Stanev* judgment.

⁷ Para. 258 of the *Stanev* judgment.

⁸ See MDAC submission to the Committee of Ministers on Individual Measures, op cit.

routinely denied access to justice,⁹ but also many hundreds of thousands of people with mental health issues or intellectual disabilities in Bulgaria, and across Council of Europe terrain.¹⁰

3. The Government's Action Plan

10. On 30 June 2015 the Bulgarian Government reported in its "Action Plan" to the Council of Europe that it had taken a number of steps to comply with the ordered general measures.¹¹ The Ministry of Justice has published the *Stanev* judgment on its website.¹² It has disseminated it through the Association of Bulgarian Lawyers for Human Rights. MDAC welcomes this step, along with the Government's publication of the General Comment No. 1 of the UN Committee on the Rights of Persons with Disabilities,¹³ which sets out recommendations by the treaty body with respect to the right to legal capacity.
11. The Government conceded the failings of its guardianship system and undertook to amend legislation in order to implement the general measures indicated by the Court, namely to ensure that a person deprived of legal capacity has direct access to a court to seek a restoration of legal capacity.¹⁴ In 2012 the Government established a working group to draft new legislation called the "Law on Natural Persons and Support Measures".¹⁵ This law would abolish the 1949 Law on Persons and Family, and update the country's legal framework to introduce the notion that people with disabilities have equal recognition before the law. The government also promised to amend the Code of Civil Procedure, the Law on Social Assistance and a range of other relevant laws.
12. In its Action Plan, the Government explained that the "Law on Natural Persons and Support Measures" would ensure that people with disabilities would retain their legal capacity, thereby removing the access to courts barrier highlighted in *Stanev*. Under the new law, people with disabilities would be able to access court-authorized "support

⁹ In Bulgaria there are 7,040 people placed under guardianship (data used by the government in its "Draft Concept Note for changes in national legislation relating to the standards of Article 12 of the UN Convention on the Rights of Persons with Disabilities" published on the website of the Ministry of Justice on 10 November 2012 (page 3), available in Bulgarian at <http://www.strategy.bg/Publications/View.aspx?lang=bg-BG&id=138>.

¹⁰ See among others, Oliver Lewis, "*Stanev v. Bulgaria: On the Pathway to Freedom*", *Human Rights Brief*, Winter 2012, 2-7; Lycette Nelson, "*Stanev v. Bulgaria: The Grand Chamber's Cautionary Approach to Expanding Protection of the Rights of Persons with Psycho-social Disabilities*", Strasbourg Observers website 29 February 2012, available at <http://strasbourgothers.com/2012/02/29/stanev-v-bulgaria-the-grand-chambers-cautionary-approach-to-expanding-protection-of-the-rights-of-persons-with-psycho-social-disabilities>; and Lucy Series, "Mr Stanev's Fine Achievement", available at <http://thesmallplaces.blogspot.co.uk/2012/01/mr-stanevs-fine-achievement.html>.

¹¹ Government of Bulgaria, "Updated action plan concerning the case of Stanev against Bulgaria" (Application No. 36760/06), DH-DD(2015), 30 June 2015.

¹² Available at <http://www.justice.government.bg/47/233/>.

¹³ Government of Bulgaria, "Action Plan", op cit, p. 4.

¹⁴ Ibid.

¹⁵ Available in Bulgarian on the website of the Ministry of Justice at <http://www.justice.government.bg/15/>.

measures” for up to two years. The Government emphasised that respecting the rights, will and preferences of the person concerned was central in the proposed legislation.¹⁶

4. MDAC’s View on the Draft Law

13. The draft law is very good, and MDAC welcomes it. It would remove the legal obstacles that currently impede people placed under guardianship from directly accessing courts. People in a similar situation to Mr Stanev would no longer be under guardianship and therefore would be permitted, in law, to ask request review of their placement in alternative living settings, such as social care institutions. Where they suffer damage, the proposed legislation would enable them to apply directly to court for a determination along with the ability to apply for remedies and compensation. At the same time, the draft law ensures that people with disabilities who may be vulnerable to exploitation, violence and abuse, get the support and protection they need to make decisions about their own lives, and to have a package of safeguards to prevent wrongdoing.
14. The draft law would pick up on much of the good elements of Recommendation No. (99) 4 of the Committee of Ministers to Member States on “incapable adults” (even though the title of that Recommendation now seems outdated and uses derogatory language) and would enhance Bulgaria’s compliance with the UN Convention on the Rights of Persons with Disabilities, which it ratified several weeks after the *Stanev* judgment in March 2012. MDAC is in close touch with several key NGOs in Bulgaria working on the rights of persons with disabilities and they also welcome the draft law.

5. Delay in Adopting the Draft Law

15. MDAC commends the Ministry of Justice and its current Deputy Minister in particular for the transparent and coherent process through which they have developed the Draft Law. The process involved a range of stakeholders including people with disabilities and their representative organisations, human rights experts and international experts such as Dr Michael Bach from the Canadian Association for Community Living. Through Aneta Genova (the Bulgarian human rights attorney who represented Mr Stanev domestically and jointly with MDAC at Strasbourg) MDAC has also consulted on the draft law.
16. Despite these efforts the Cabinet has not agreed on the Draft Law and has not transmitted to Parliament for debate and adoption, despite the draft law having been published in July 2015. Until this happens, the general measures in *Stanev* remain unfulfilled.

¹⁶ Ibid, at p. 5.

6. The Government's "Judicial Practice" Myth

17. In its Action Plan the Government argues that irrespective of the Draft Law having stalled, the situation in the country has improved through judicial practice.¹⁷ This is incorrect.
18. The Government cites two cases to justify its argument.¹⁸ The first case was a guardianship application that came before the Sofia City Court in 2013.¹⁹ In that case, the judge refused the application, instead ordering that the person concerned receives support to exercise their legal capacity, as necessary in making decisions and without the need of a third party (such as a guardian) to take substitute decisions. The legal basis for such a decision was, according to the Government, international law which has direct applicability in Bulgaria.²⁰ The judge applied Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which sets out the right to legal capacity, and the obligation on the State to ensure access to supports for people with disabilities who may need such supports in order to exercise their legal capacity.
19. While this constitutes an interesting example of an individual judge (who is now, incidentally, the Deputy Minister of Justice, responsible for the Draft Law on behalf of the Government) taking a creative approach by not rubber-stamping guardianship applications, there are two problematic aspects. Firstly, judges can be creating in refusing to grant a guardianship order, but can rely on no legislative framework where the person with a disability requires some support (a situation envisioned in the Draft Law). Until the Draft Law is passed, there is no actual system for local authorities to work within. The second problematic aspect of the government's assertions with regard to the Sofia case is that there is no evidence that this case is anything other than a one-off. To illustrate the point, Mr Stanev remains under guardianship four years after the Grand Chamber judgment, and his lawyer Aneta Genova has attempted to invoke the direct applicability of international law provisions in the proceedings initiated in an attempt to have his legal capacity restored. However, and despite the decision in *Stanev v. Bulgaria*, in November 2015 a judge decided that placement under guardianship did not amount to a breach of international law in Mr Stanev's case.
20. The Government asserts a changed practice, based on one judge in one case three years ago. This is no replacement for law reform in order to plug the gap that the Grand Chamber identified, and more widely to transform the current system that causes so many human rights violations.

¹⁷ Government of Bulgaria, "Action Plan", op cit, p. 5.

¹⁸ Ibid.

¹⁹ Op cit, citing the case of 04/11/2013 бр. д. № 16532/2012 г.

²⁰ Article 5(4) of the Bulgarian Constitution.

21. The Government relies on a second case which is also a red herring. It concerns a decision by the Vidin District Court which restored a woman's legal capacity.²¹ The Committee of Ministers should be wary of this example for two reasons. Firstly, the guardian consented to the legal capacity being restored. In *Stanev*, the Grand Chamber's general measure recommendations were directed at the situation faced by Mr Stanev which was that his guardian did not consent. This case is therefore off point. The second problematic aspect about this case is that (the guardian's consent notwithstanding) restoration of legal capacity in Bulgaria is exceedingly rare. Of the approximately 7,000 people under guardianship living in the country, only 16 people had their legal capacity restored within the 2011-15 period. This is around 5 per year, which is an annual restoration rate of 0.07%.²²
22. The current Bulgarian legal framework provides an opportunity to people under guardianship to access to courts to restore their legal capacity only in three situations. (1) if their guardian consents. If the guardian refuses, the person under guardianship must (2) request the guardianship authority to make the application or hope (3) a prosecutor will submit such request on their behalf.²³ The lack of direct access to a court to restore legal capacity is made worse by the fact that the current law fails to require the periodic review of guardianship. In practice, placement under guardianship in Bulgaria is life-long, as MDAC's research illustrates.²⁴ There is no legal aid for lawyers to take up these cases, and people under guardianship technically lack the legal standing to instruct counsel.

6. Recommendations

23. After the *Stanev* judgment, the Government established a consultative process which led to a Draft Law, which is largely supported by civil society and would solve the problems identified by the *Stanev* bench. The Draft Law has stalled within the Government, and therefore the situation of people deprived of legal capacity and placed

²¹ Decision No. 197 from 13/1/2014 of the Vidin first instance court, cited in the Government's "Action Plan", op cit, p. 5.

²² MDAC undertook desk research using "CIELA", the official Bulgarian website containing information on decisions issued by all courts in the country, and searched for any judgments where legal capacity had been restored between 1 January 2011 and 31 December 2015. MDAC's research shows that within the five years investigated, 29 people under guardianship in Bulgaria applied to courts to have their legal capacity restored. In 27 of these cases the guardian consented to the application. In the same period, only two cases were identified of persons with disability under guardianship attempting to access the courts without their guardian's consent. One case was immediately dismissed by the court concerned for lack of standing. The second case was Rusi Stanev's. The court accept his request without requiring the consent of the guardian but the procedural obstacles encountered were so significant that Mr Stanev's lawyer requested the guardian's support and involvement during the trial.

²³ Mental Disability Advocacy Centre, "Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice", 2007, p. 44, available at http://www.mdac.org/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Bulgaria.pdf.

²⁴ Op cit.

in institutions has not changed since the Grand Chamber's *Stanev* judgment almost four years ago.

24. MDAC respectfully submits that the Committee of Ministers undertake a formal review of the execution of the general measures indicated in *Stanev v. Bulgaria* by issuing recommendations to the Government urging it to:
- a. Adopt the "Law on Natural Persons and Support Measures" which is indicated in its most recent (June 2015) "Plan of Action" to the Committee of Ministers;
 - b. Publish a timeframe to transmit the legislative package to Parliament;
 - c. Roll out training for judges and members of the bar on the Draft Law, to ensure full respect for ECHR rights of people with mental disabilities and to prevent further repetitive applications such as *Stankov v. Bulgaria* from needlessly reaching the European Court of Human Rights; and
 - d. Collate and publish comprehensive and disaggregated data on numbers of people deprived or restricted of legal capacity, and those seeking restoration of legal capacity, so as to monitor access to justice for people with disabilities.