



Shtukaturov v. Russia

Recommendations on
legislative measures required to
achieve full implementation of
the judgment of the European
Court of Human Rights

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Summary of recommendations

In March 2008, the European Court of Human Rights made a decision in the case of *Shtukaturov v. Russia*. The Court found that the legal incapacitation of the applicant violated his rights to a fair trial (Article 6) and respect for his private life (Article 8). The Court also found that the subsequent involuntary placement of the applicant in a psychiatric hospital without court review violated his right to liberty (paragraphs 1 and 4 of Article 5). The applicant's right to petition to the European Court (Article 34) was also found to have been breached.

The above violations were lawful as provided for by domestic Russian law. As a result, the decision of the European Court can only be given full effect if certain general measures are adopted by the Russian authorities. This policy paper recommends the following measures:

1. The Code of Civil Procedure should be amended to ensure that:
 - issues relating to legal capacity are always heard in court in person and that, when necessary, legal aid is provided to any person subject to such an application;
 - it spells out substantive criteria for capacity assessments conducted by court-appointed experts;
 - a person who is declared legally incapable has the right to apply to court directly or through a representative of their choice in order to have their capacity restored.
2. The Law on Psychiatric Care should be amended to ensure that:
 - the existing substantive and procedural safeguards envisaged for involuntary hospitalisation also apply to persons who do not have full legal capacity;
 - psychiatric patients without legal capacity have the right to initiate a judicial review of the lawfulness of their detention, in their own capacity;
 - the core patients' rights formulated in Article 37 of the Law, including the right to meet with a lawyer, apply to all patients on an equal basis, including patients who do not have legal capacity.
3. The Civil Code should be amended to introduce partial guardianship for adults with mental disabilities which can be tailored to the individual needs of every such person and restrict their legal capacity only to the degree absolutely necessary.

Introduction

These recommendations have been developed by the Mental Disability Advocacy Center (MDAC) with a view to assisting Russian policy-makers to fully implement the decision of the European Court of Human Rights in *Shtukaturv v. Russia*. The Shtukaturv judgment constitutes a milestone in the evolution of European human rights standards in relation to persons with mental disabilities, as it clarifies the relevance of the European Convention on Human Rights to several key aspects of the system of legal incapacity and guardianship. It requires the Russian Government to go well beyond individual measures, such as the restoration of Mr Shtukaturv's legal capacity and payment of damages (once they have been awarded by the European Court¹), and necessitates amendments to Russia's legal capacity legislation, including the Civil Code and the Code of Civil Procedure. We recognise that the issues raised by the Shtukaturv case are technically complex and new to Russian law-makers. Therefore, the present paper is designed to help formulate new legislation that would meet the requirements of the European Convention and ensure adequate protection of the rights of persons who need support in exercising their legal capacity. MDAC's expertise in the matter derives from its extensive advocacy and litigation work promoting the reform of legal capacity and guardianship laws in Eastern Europe and Russia. Our organisation has published a series of reports analysing guardianship laws and practices in several countries of the region, including a 2007 report on Russia. In 2006-2007, we conducted a number of human rights training sessions for the local guardianship authorities of St Petersburg and the St Petersburg region which provided us with an additional insight into the shortcomings of the existing guardianship system in Russia. Furthermore, since 2004 MDAC has provided legal representation in a substantial number of legal capacity cases in Russia as well as Bulgaria, Estonia, Hungary and the Czech Republic. In particular, our organisation represented Mr Shtukaturv both before the European Court and the Russian Constitutional Court (the latter of which subsequently annulled some of the legislative provisions criticised by the European Court).

The European Court passed its landmark decision in *Shtukaturv v. Russia* in March 2008. The applicant was a young man who had been stripped of his legal capacity in domestic judicial proceedings of which he had not been notified. Shtukaturv learned about the district court decision, which declared him legally incapable, after it had already come into force; therefore, he could no longer appeal it. Later, despite his unequivocal objections, he was detained in a psychiatric hospital without court review. The ECtHR found a violation of the applicant's rights in relation to both of these issues.

Firstly, the Court held that judicial proceedings cannot be regarded as fair in terms of Article 6 if a person whose legal capacity is being decided upon is completely excluded from them. Secondly, the Court found that Mr Shtukaturv's hospitalisation violated the right to liberty guaranteed in

¹ In the decision discussed in this paper, the European Court did not address the issue of damages. A separate decision on compensation is still awaited.

Article 5 as it was based only on his guardian's decision and the usual safeguards in respect of involuntary hospitalisation (e.g. court review) were not in place. Thirdly, the Court held that full legal incapacitation as such was a disproportionate measure and, therefore, violated the applicant's right to respect for his private life under Article 8. As Mr Shtukaturvov was denied the right to appeal against the incapacitation decision once it had come into force, and to apply to court to have his legal capacity restored, this was held to constitute as a disproportionate interference with his rights under Article 8.

These human rights violations were allowed to happen due to flawed legislation, which were relied upon by both the district court's decision to deprive Mr Shtukaturvov of his legal capacity, as well as his subsequent hospitalisation, where both of these decisions were largely in conformity with Russian law. Consequently, the full implementation of the ECHR judgment requires general measures such as amending the Civil Code, the Code of Civil Procedure and the Law on Psychiatric Help. The need for such general legislative measures was confirmed by the Committee of Ministers of the Council of Europe who, by virtue of Article 46 of the Convention, are responsible for supervising the execution of decisions of the European Court. The Committee of Ministers have stated that they are awaiting information on "additional measures to bring the Russian legislative framework governing the incapacitation of adults and their confinement to medical institutions in line with the Convention's requirements." In particular, the Committee of Ministers asks Russian authorities to "initiate, without delay, the reform of the provisions of the Civil Code criticised by the European Court".²



It should be mentioned that in February 2009 the Russian Constitutional Court annulled some of the provisions of Russian legislation that had been criticised in *Shtukaturvov*. In particular, the Constitutional Court struck down the provision of the Code of Civil Procedure which allowed courts to conduct incapacitation proceedings without hearing persons whose legal capacity was being decided upon. The Constitutional Court also held that the constitutional right to judicial protection (which is analogous to the right to a fair trial under the ECHR) was violated by the failure of the Law on Psychiatric Care to extend the substantive and procedural safeguards envisaged for involuntary hospitalisation to legally incapacitated patients who object to hospitalisation (even though their guardians may agree to it). While this decision of the Constitutional Court was an important

² The Council of Europe's Committee of Ministers is waiting for the Russian Government to provide information "on additional measures to bring the Russian legislative framework governing the incapacitation of adults and their confinement to medical institutions in line with the Convention's requirements". In particular, the Committee of Ministers refers to the principles contained in Recommendation R(99)4. The Committee of Ministers asks the Russian authorities "to initiate without delay, the reform of the provisions of the Civil Code criticised by the European Court with a view to ensure their compliance with the Convention's requirements". See the Committee of Ministers' memorandum available at http://www.coe.int/t/e/human_rights/execution/03_cases/Russian_Federation_en.pdf



step towards achieving the compliance of Russia's mental health legislation envisaged by the *Shtukaturov* judgment – including by ensuring the conformity of practice with the provisions of the European Convention on Human Rights – new legislation has not yet been developed to replace the annulled provisions. The actual contents of the legislative regulation of the relevant aspects (e.g. procedural rights of a person whose legal capacity is at issue in incapacitation proceedings) remain unresolved. Moreover, the ECtHR judgment deals with a broader scope of issues compared to the decision of the Constitutional Case and requires changes not only in procedural legislation but also in substantive aspects of the law relating to legal incapacitation, such as a clear definition of the extent of rights that may be deprived in cases relating to legal incapacitation.

1. Facts of the case

The case reflects the established practice of legal incapacitation proceedings in Russia and involves typical human rights violations faced by persons whose legal capacity is reviewed by the court as well as those who have already been deprived of their legal capacity.

The applicant, Mr Pavel Shtukaturov, has a mental disorder. In December 2004, a district court declared him legally incapable on the basis of an application filed by his mother (who lived with him in the same flat). Mr Shtukaturov was not notified about the hearing and, therefore, was completely unaware of the proceedings. The case was heard by the district court in the absence of Mr Shtukaturov on the basis of Article 284 of the Code of Civil Procedure. This provision required the summoning of a person whose capacity was at issue only when the state of their health “allowed” it.

Mr Shtukaturov found out about the district court decision by accident. By this time the decision had already come into force and his mother had been appointed as his guardian. When Mr Shtukaturov tried to appeal the decision, his application was “left without consideration” on account of his lack of legal capacity. His other attempts to use normally available legal avenues to reverse the decision were equally unsuccessful.

In the meantime, on his guardian’s request, Mr Shtukaturov was placed in a psychiatric hospital. Mr Shtukaturov himself objected to the confinement and repeatedly requested that the hospital apply to court to review the lawfulness of his detention in conformity with the involuntary hospitalisation procedure provided for in the Code of Civil Procedure and also in the Law on Psychiatric Care. Furthermore, throughout his confinement Mr Shtukaturov complained to the hospital authorities in connection with various limitations of his rights, such as banning him from being visited by his lawyer and his friends, not allowing him to take walks outdoors, taking away his personal belongings, and refusing to provide information about the reasons for his hospitalisation. The hospital failed to respond officially to any of these complaints.

At the time of applying to the ECtHR, Mr Shtukaturov was still detained at the hospital (which prompted the Court to grant the case priority treatment). Nevertheless, the hospital management prevented Mr Shtukaturov from any form of communication with the lawyer who represented him in the ECtHR proceedings. The hospital justified its actions by arguing that, as a legally incapacitated person, all questions related to his legal representation and other legal affairs were to be decided by his guardian.

2. Procedural safeguards in incapacitation cases: fairness of judicial proceedings and the right of a person whose capacity is at issue to be heard in court

2.1. The right to be heard in court

According to the Russian Code of Civil Procedure, as it was in effect at the time of the ECtHR judgement, a person whose legal capacity was decided on had to be summonsed to the court if “the state of their health” permitted it. While it can be presumed that this provision was meant to allow for a case to be heard without the person concerned only in rather exceptional circumstances, in practice the exception became the rule. Often, people whose capacity was reviewed in court were not even notified of the proceedings or the subsequent decision depriving them of their legal capacity. Although the relevant provision of the Code of Civil Procedure is no longer in effect (it was repealed by the Russian Constitutional Court in its judgment of 27 February 2009), a new procedure which would comply with the Convention and the Russian Constitution is yet to be adopted by the Russian parliament.

The European Court held that the applicant’s right to a fair trial under Article 6(1) of the Convention was violated by the incapacitation proceedings in which he was not given an opportunity to participate in person or through a representative. The Court referred to its past case-law which dealt with compulsory psychiatric confinement, and particularly, its judgment in the case of *Winterwerp*. Although those cases related to the deprivation of liberty, the Court pointed out that “in the present case the outcome of the proceedings was at least equally important for the applicant: his personal autonomy in almost all areas of life was at issue, including the eventual limitation of his liberty” (at para. 71).

The judgment pointed to two reasons why the direct involvement of a person whose capacity is at issue is essential to the fairness of incapacitation proceedings. First, the principle of the ‘equality of arms’ mandates that such a person is given an opportunity to present their case in person or through a representative of their choice, including the right to submit new evidence, challenge the conclusions of experts, request a second expert opinion, and so on. Second, direct participation is required to “to allow the judge to form his personal opinion about the [person]’s mental capacity”; the reasoning for this being that the person concerned is not only an interested party but also the main object of the court’s examination (see para. 72). The Court emphasised that, in the applicant’s case, “it was indispensable for the judge to have at least a brief visual contact with the applicant, and preferably to question him” (para. 73). The principle of adversarial proceedings embodied in Article 6 was violated because the judge decided the case on the basis of written evidence only, without having heard or seen the applicant himself.

While the flawed nature of the previous legislative regulation of incapacitation proceedings has been made clear by the ECtHR judgment and the subsequent decision of the Constitutional Court, it is less obvious how exactly the right to be heard in person should be guaranteed in the new version of Article 284 of the Code of Civil Procedure. The possibility of different solutions is demonstrated by the version of the draft amendment to this provision which is currently under consideration in the lower chamber of the Russian Parliament. This legislative proposal requires only that the individual concerned be “duly notified of the time and place of the court hearing” while adding that the “examination of the case in the absence of the person concerned is allowed when it is established by the court that there is no valid reason for non-appearance.” This approach does not comply with the principles outlined in the ECtHR judgment and, therefore, cannot provide an adequate level of protection of the rights of persons whose legal capacity is called into question. The implementation of the former version of Article 284 demonstrates how easily any exception allowing for the exclusion of a person with mental disability from incapacity proceedings can become the rule with respect to the practice of the courts. Thus, the current draft version of this provision, which still enables the court to decide incapacity cases without hearing the person concerned, is unlikely to give full effect to the *Shtukurov*. This draft limits the court’s duty of involving the person concerned in the proceedings to the extent of simply issuing a notification. However, due to the specific nature of incapacity cases, it is very likely that such a notification will not reach the person concerned, as applications for legal incapacitation are most often filed by parties who already have significant control over the lives of such persons, including their correspondence (such as a family member with whom the person concerned lives, or a psychiatric institution where he or she is confined). Furthermore, the court is likely to determine if there are valid reasons for the person’s non-appearance on the basis of information supplied by those who have filed or support the incapacitation application and might have a vested interest in preventing the person concerned from being heard in court.

The *Shtukurov* decision requires Russia to adopt the strongest possible safeguards to ensure that persons whose legal capacity is at issue is heard in court. As was mentioned above, the Court reasoned that incapacity proceedings warrant the same procedural guarantees as involuntary hospitalisation cases. Since Russian legislation (article 304 of the Code of Civil Procedure) does not allow the court to decide on a person’s involuntary hospitalisation without giving that person a hearing, Russian legislators are advised to apply the same approach to legal incapacitation.

It is recommended that, in order to ensure the fairness of incapacity proceedings, and compliance with the ECtHR judgment in *Shtukurov*, the new version of Article 284 of the Code of Civil Procedure should give effect to the following principles:

- the court has a duty to ensure the right of a person whose legal capacity is at issue to participate in the proceedings in person;
- if the state of a person’s mental health is such that it prevents them from realising their procedural right of appearance in court directly, the court must appoint a legal representative;
- the court is always required to hear a person whose legal capacity is decided on. If, for health reasons, the person cannot appear in court, the judge must take necessary steps to hear them in a location other than the court premises (for example, if a person is placed in a psychiatric hospital, the court may conduct a hearing in the hospital).

2.2. Criteria for mental capacity assessments: the quality and contents of psychiatric reports

One of the key factors contributing to the fairness of legal incapacitation proceedings is the quality of evidence on which the courts rely when assessing a person's mental capacity. While, in theory, such evidence should not be decisive to the outcome of the hearing, psychiatric experts' reports carry considerable weight, in practice, with judges and the conclusions are rarely called into question. The European Court has issued binding guidelines regarding the quality of such reports.

Although Article 283 of the Code of Civil Procedure requires a mandatory capacity assessment by psychiatric experts, the parameters of such an assessment (i.e. what questions should be addressed and to what degree of detail) are not defined. In practice, expert reports often go no further than repeating the legal formula used in the Civil Code, by using wording such as, for example: "X. does not understand the meaning of his actions and cannot control them". Whereas expert reports may provide quite detailed descriptions of a person's mental disorder per se (including the history of any such disorder), *analysis* of the extent to which the person's mental condition specifically affects their ability to understand and manage their actions (i.e. their capacity for making independent decisions and realizing their rights) is usually missing. As such, inability is implied rather than given proper consideration. However, the mere presence of a mental disorder, no matter how serious, does not mean that the person has lost their ability to make conscious choices and realise their legal capacity.

The psychiatric report used in the domestic proceedings against Mr Shtukaturv exemplifies the faulty approach described above. While pointing out that the report was the only evidence relied on by the Russian court in the case, the ECtHR judgment criticised the lack of an explanation as to "what kind of actions the applicant was unable of understanding and controlling". The report was further criticised for the manner in which it lacked clarity as to "the possible consequences of the applicant's illness for his social life, health, pecuniary interests, etc." (see paras. 93-94).

The European Court did not question the professional credentials of the experts, nor the validity of their conclusion that Mr Shtukaturv had a serious mental illness. However, it emphasised that "the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation." By analogy with cases of involuntary hospitalisation, the Court applied the same principle it had first formulated in *Winterwerp*: "in order to justify full incapacitation the mental disorder must be 'of a kind or degree' warranting such a measure". It concluded that the report in that case "did not analyse the degree of the applicant's incapacity in sufficient detail" (see para. 94).

The deficiencies of the capacity assessment in *Shtukaturv* highlighted in the ECtHR judgment are the consequence of the inadequate legal regulation of this category of experts' opinions together with the vagueness of the applicable legal criteria for establishing incapacity. Therefore, legislative measures are required to the degree of improvement necessary to ensure the quality of medical evidence used in incapacitation cases is of a sufficient standard.

The Ministry of Health and Social Development should develop detailed guidelines on the methodology of capacity assessments as envisaged in Article 283 of the Code of Civil Procedure. Such guidelines should ensure that capacity assessments establish the following criteria:

- the manner and degree to which a person's psychiatric condition affects their capacity to make independent decisions and realise their rights in various specific areas of life;
- the existence of a causal link between the person's mental disorder and the established limitations to their decision-making capacity must be made explicit: this is required to distinguish cases of social neglect and lack of education;
- the estimated duration of the person's lack of functional capacity and the prospects of improvement;
- the existence and efficacy of other forms of formal or informal support which would avoid the restriction of legal capacity.

The legislature should outline the principles of capacity assessment in Chapter 31 of the Code of Civil Procedure and define of the scope of questions such assessment should address. The underlying principles should be, *inter alia*:

- a **presumption of capacity**: the mere existence of a mental disorder, however serious, does not imply a lack of decision-making capacity; moreover, even if mental capacity is de facto restricted in relation to certain issues (e.g., financial and property-related matters), it can remain intact in other areas of decision-making (e.g. medical treatment);
- a **causal link** between an established mental disorder and limitations to decision-making capacity must be made explicit;
- the **functional approach to capacity**: experts should be required to conduct a detailed assessment of the "kind and degree" of the impact of a metal disorder on the decision-making capacity of a person in specific areas of their lives;
- **duration**: de facto mental capacity may change and improve over time; therefore, experts should be required to estimate how temporary or permanent the established lack of capacity is likely to be and whether improvement and restoration of capacity can be achieved through certain types of care and support.

3. Substantive limits to incapacitation: proportionality of measures restricting legal capacity and the introduction of alternatives to full incapacitation

Russian legislation envisages only one measure of “protection” for adults whose mental capacity is restricted due to mental disability. This measure is full legal incapacitation. Thus there is no possibility for a more flexible and nuanced approach which would involve restricting legal capacity only in relation to certain areas of decision-making (e.g. financial transactions exceeding a certain value). The European Court emphasised that full incapacitation was a “very serious” interference with a person’s private life. It pointed out that, as a result of his incapacitation, Mr Shtukaturov “became fully dependant on his official guardian in almost all areas of life.” The Court further stressed that the measure “was applied for an indefinite period and could not, as the applicant’s case shows, be challenged otherwise than through the guardian, who opposed any attempts to discontinue the measure” (para. 90). The Court held that the withdrawal of Mr Shtukaturov’s legal capacity was disproportionate and, therefore, violated his right to respect for his private life under Article 8 of the Convention.

As was mentioned above, the ECtHR judgment criticises the Russian court’s failure to conduct a thorough assessment of the manner and degree to which the applicant’s mental disability affected his mental capacity. In section 2.2 above, we identified specific issues that should be examined when deciding on a person’s legal capacity. Let us assume, however, that a properly conducted assessment has established that a person is indeed lacking the capacity for making serious decisions about her property.

She still has the ability to carry out small transactions, manage her household and everyday domestic issues, decide on her treatment, and look after her children. Russian legislation simply does not offer a flexible legal solution which would be proportionate to the needs of this person without unnecessarily and unduly restricting her rights.

The European Court took issue with this simplistic “all-or-nothing” approach. It pointed out that the Civil Code “distinguishes between full capacity and full incapacity, but it does not provide for any “borderline’ situation” (see para. 95). The Court stressed that Russian legislation did not provide for a response tailored to the individual needs of a given person.



The ECtHR judgment refers expressly to Recommendation R(99)4 adopted by the Committee of Ministers of the Council of Europe on 23 February 1999. Principles formulated in this document recommend that legislation ensure:

- the existence of **alternatives** to guardianship and measures involving the restriction of a person's legal capacity (Principle 2 – Flexibility in legal response);
- the **proportionality** of any limitations placed on a person's legal capacity; and any measures employed should correspond to the needs and condition of the person concerned, while their rights must be limited to the least degree possible, if at all (Principle 6 – Proportionality);
- the **maximum degree of preservation** of a person's legal capacity: any measures used to restrict legal capacity should not lead to the automatic withdrawal of a person's legal capacity entirely or lead to any automatic restrictions in relation to certain rights such as the right to vote or the right to make decisions about medical treatment (Principle 3);
- the **limited duration** of any restrictive measures including the possibility for the **review** of any measures used to restrict legal capacity, including periodic reviews (Principle 14).

The improvements described above will not be achieved by simply extending the so-called “limited capacity” mechanism proscribed in the Russian Civil Code, which currently apply to drug and alcohol addicts. In its current form, “limited capacity” cannot ensure the flexible, proportionate and efficient usage of measures restricting legal capacity. The laws of many countries contains lists of areas of decision-making in which guardianship may be employed, as well as rights which cannot be restricted under any circumstances (e.g. people under guardianship must always retain their right to access justice). Furthermore, legislation in some countries provide additional guarantees (for example, a periodical review of guardianship decisions or mandatory judicial authorisation in cases of hospitalisation of persons with restricted legal capacity).

The issues related to limited/partial capacity, as well as alternatives to guardianship which do not involve the restriction of legal capacity are complex and require further analysis. MDAC will therefore revisit these issue in one of our upcoming policy papers.

4. Review of capacity decisions and the right of a person deprived of their legal capacity to apply to court to have their capacity restored

The applicant in the *Shtukaturov* case also asked the European Court to find a violation of his right to an effective remedy under Article 13 of the Convention in that he was unable to apply to a national court in order to have his legal capacity restored. (It should be recalled that, according to Article 286 of the Code of Civil Procedure, restoration proceedings can be initiated only by the guardian or a family member of the person concerned, a psychiatric institution or a guardianship authority.) The European Court did not deem it necessary to consider this aspect of the applicant's claim independently in the context of Article 13. This does not mean, however, that Russian legislation meets accepted human rights requirements. The Court explained that this particular aspect of the applicant's status was already taken into account when a violation of Article 8 was found. In other words, the Court judged that the indeterminate measure used to restrict Mr. Shukaturov's legal capacity, and the fact that he was unable to challenge this measure independently of the guardian or any other third party, resulted in the Court finding the measure to be disproportionate and, therefore, violated the right to respect for his private life.

The principles of proportionality and flexibility require that any measures involving the restriction of a person's legal capacity are applied only as long as justified by the condition of the person concerned. Principle 14 of Recommendation R(99)4 expressly provides that such measures must be terminated if the conditions for them are no longer fulfilled. While a similar principle can be found in Article 29(3) of the Civil Code, Russian legislation does not contain any effective mechanism to ensure its practical implementation. A person can only have their legal capacity restored by means of being "declared legally capable" under Article 286 of the Code of Civil Procedure. As has already been pointed out, only a limited class of parties can initiate such proceedings and this does not include legally incapacitated persons themselves (i.e. the person to whom restrictions on legal capacity apply). At the same time, the law simply *enables* this class of parties to apply to court but does not *oblige* them to do so. As a result, the initiation of such proceedings is entirely at the discretion of a limited class of parties, with no effective leverage granted to the person concerned to influence the decisions of, for example, guardians. Nor does legislation provide for periodic reviews of incapacitation decisions. The practical implications of the existing system are such that if a person's guardian insists on the continuation of guardianship regardless of the person's actual condition, the person subject to measures restricting their legal capacity does not have a realistic chance of having their legal capacity restored.

We recommend that the Russian legislature amend Article 286 of the Code of Civil Procedure to enable persons deprived of legal capacity to apply to court directly or via a representative of their choice (e.g. disability NGOs could also be allowed to lodge these types of applications). Moreover, legislators should consider the possibility of establishing time limits for legal incapacitation decisions and/or requiring mandatory periodic reviews of such decisions.

5. Safeguards related to hospitalisation of legally incapacitated persons

5.1. Involuntary hospitalisation: criteria and procedure

Under the Russian Law on Psychiatric Care (Article 28) as it was in effect at the time of the ECtHR judgment, the placement of a legally incapable person in a psychiatric hospital was subject to their guardian's consent only. When the guardian consented, hospitalisation was not considered as involuntary even if the person concerned objected to it expressly. Consequently, there was no need to establish one of the grounds for involuntary hospitalisation envisaged by Article 29 of this Law or apply the usual procedural safeguards (particularly, judicial review) contained in Articles 32-36. In other words, in such cases, hospitalisation was "voluntary" from a legal perspective. As a result, persons deprived of their legal capacity were further deprived of the ability of protecting their liberty and personal freedom.

Article 5 of the European Convention provides rigorous safeguards in connection with any form of deprivation of liberty. In particular, it contains an exhaustive list of grounds for detention. Article 5(1)(e) allows for the "lawful detention" of "persons of unsound mind" in accordance with "a procedure prescribed by law". According to the well-established jurisprudence of the European Court of Human Rights, the notion of "lawfulness" requires not only the conformity of domestic legislation but also adherence to the meaning of the Convention itself.



General principles of lawful detention under subparagraph (e) of Article 5(1) were first articulated by the European Court in *Winterwerp*. That case enunciated three necessary requirements: the existence of a mental disorder must be established; the disorder must be of a kind or degree warranting involuntary hospitalisation; and the validity of continuous confinement depends on the presence of the disorder. The question of what kinds and degrees of mental disorders that warrant compulsory confinement are elaborated in Article 29 of the Russian Law on Psychiatric Care which allows for only three, relatively narrowly-defined grounds for involuntary hospitalisation. The Russian government argued in the *Shtukatur* case that the above requirements should not be applied because, according to Russian law, the applicant's hospitalisation was "voluntary".

Naturally, the Court did not accept this argument. Firstly, the Court pointed out that "in order to determine whether there has been a deprivation of liberty, the starting point must be the concrete situation of the individual concerned" (para. 105). The Court also stressed the relevance of the subjective element of the *Winterwerp* criteria, that is, the lack of properly expressed consent (see para. 106). In the



light of the facts of the case, the Court emphasised that while the applicant did not have *de jure* capacity to decide for himself it did not mean he was *de facto* unable to understand the situation (see para. 108). The Court pointed to the applicant's actions which demonstrated that he objected to hospitalisation (in particular, on several occasions he addressed his requests for release to the hospital's administration). Thus, the decisive point for the Court was the applicant's attitude to his confinement rather than his formal status as a legally incapable person. In consequence, Mr Shtukaturov was an involuntary patient and thus deprived of his liberty in the sense of Article 5. Since the above-mentioned criteria for detention on the grounds of mental disorder were not assessed and therefore could not be established by the Russian authorities, the Court found a violation of Article 5(1).

The approach of the European Court is in line with the principles formulated in Committee of Ministers Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorders. Article 16 of the recommendation makes it clear that the application of the *Winterwerp* criteria and the procedure on involuntary hospitalisation extends to legally incapable patients who object to their hospitalisation.

As has already been mentioned, the relevant provision of the Law on Psychiatric Care was repealed by the Constitutional Court who, similarly to the European Court, considered Mr Shtukaturov's hospitalisation as deprivation of liberty. Now it is for the legislature to determine a mechanism of institutionalisation of persons who do not have legal capacity that comply with the jurisprudence of the ECtHR. One of the key questions to be addressed in this regard is what criterion should be employed to trigger the safeguards envisaged for persons who are involuntary hospitalised? Should the existence of objections on the part of a legally incapable person be enough, or is it simply that the absence of a person's expressed free and informed consent is sufficient?

To begin with it should be stressed once again that the fact that a person is legally "incapable" does not necessarily mean that, in concrete circumstances, they are unable to make an independent and conscious decision about whether they wish to be hospitalised. Various scenarios require consideration:

- a. a legally incapable person who is protesting against their hospitalisation;
- b. a legally incapable person who is neither protesting nor expressing their consent: they truly lack the *functional* capacity to make this kind of decision;
- c. a legally incapable person who "consents" to hospitalisation but, in reality, does not have the *functional* capacity to decide on this issue;
- d. a legally incapable person who has *de facto* capacity to decide and expresses their consent to hospitalisation.

Can scenarios (b) and (c) be regarded as truly voluntary hospitalisation?

On the one hand, as an especially vulnerable category, legally incapable persons need additional safeguards to prevent abuse of their rights in the context of hospitalisation, even when they do not object to it expressly. On the other hand, a legislative solution which would require the application of the substantive criteria of involuntary hospitalisation (i.e., those articulated in Article 29 of the Law on Psychiatric Care) is not adequate, as it does not take into account legally incapable persons who may still need in-patient care (and even desire it) but whose condition does not reach the degree of severity required by Article 29.

It is the latter, over-simplified approach that is proposed in the draft amendment of the Law on Psychiatric Care which is currently under consideration in the Health Care Committee of the Duma (draft law no. 189334-5). At the time of writing, the proposed version of paragraph 4 of Article 28 of the Law on Psychiatric Care reads:

A person, who is declared legally incapable in accordance with the procedure established in the Code of Civil Procedure, is placed in a psychiatric hospital on the basis of a court decision which verifies the existence of grounds for involuntary hospitalisation.

This wording can only result in two equally unsatisfactory situations: it will either make it impossible to provide in-patient care to legally incapable persons whose condition does not meet the requirements of Article 29 (even if they can clearly benefit from this type of care and do not object to it), or could lead to the trivialisation of those requirements. The latter outcome is highly probable due to the likely tendency of the courts to ensure that legally incapable persons receive in-patient treatment even when none of the criteria stipulated in Article 29 are actually present. The likely ensuing “liberal” judicial interpretation of Article 29 will undermine the overall purpose of the very provision which it is envisaged to guarantee that involuntary hospitalisation can only take place in very exceptional circumstances. At the same time, it is evident that the ECtHR judgment (as well as the judgment of the Constitutional Court) requires the application of the procedure established for involuntary hospitalisation only when a person *objects* to it. As was pointed out the same approach is adopted by Recommendation Rec(2004)10. Still, the legislation of other countries often provides for additional safeguards in cases of the institutionalisation of non-protesting persons with restricted capacity that are different from those applied to persons subject to compulsory confinement.³

Accordingly, we recommend that paragraph 4 of Article 28 of the Law of Psychiatric Care is amended to the following effect:

When objections are raised by a person declared legally incapable, his or her placement in a psychiatric hospital can be carried out only on the grounds and according to the procedure established for involuntary hospitalisation in Articles 29, 32-36 of this Law.

Legislators are also advised to consider additional safeguards, such as judicial review, to apply in cases of the institutionalisation of non-objecting legally incapable persons.

³ WHO Resource Book on Mental Health: Human Rights and Legislation (World Health Organisation, 2005), pp. 45-46.

5.2. The right to apply to court for a review of continuous hospitalisation

Mr Shtukaturvov also complained about the fact that he was unable to have the legality of his ongoing hospitalisation reviewed in Russian courts. The European Court of Human Rights held that this lack of access to judicial review constituted a violation Article 5(4) of the Convention which specifically provides for the right of everyone deprived of their liberty to “take proceedings by which the lawfulness of [their] detention shall be decided speedily by a court”. In the context of compulsory confinement in a psychiatric hospital, the Court held that the above provision guarantees that an patient detained involuntarily for a continuous or indefinite period has the right to apply for their detention to be reviewed by a court at “reasonable intervals”. It should be pointed out that this right to subsequent judicial review exists independently of the lawfulness of the initial (judicial) decision which served as a basis for the patient’s involuntary hospitalisation.

The European Court stated that it was not sufficient that the applicant’s mother could apply for his detention to be reviewed by a court on his behalf to discharge the requirements of Article 5(4). The Court stressed that the “tremedy was not directly accessible to him: the applicant fully depended on his mother who had requested his placement in hospital and opposed his release” (para. 124). Consequently, the judgment requires that a person subject to a period of continuous involuntary hospitalisation must be able to apply directly to court for a judicial review of the lawfulness of their detention in their own capacity.

We recommend that the Law on Psychiatric Care should be amended to introduce a special procedure allowing a patient to initiate a judicial review of their ongoing involuntary psychiatric confinement. The amendment must also ensure that the right to initiate a judicial review is expressly extended to patients who do not have legal capacity. It should be recalled that the failure of Russian legislation (in particular, the Law on Psychiatric Care) to expressly provide has previously been criticised by the European Court in an earlier judgment, namely, *Rakevich v. Russia* (application no. 58973/00, judgment of 28 October 2003).

5.3. The right of a legally incapacitated patient to meet and communicate with a lawyer of their choice

The European Court also found that Article 34 of the Convention (the right to petition the European Court) was breached in *Shtukaturvov*, in respect of the refusal of the hospital in which Mr Shtukaturvov had been detained to allow him to meet with his lawyer. It should be mentioned that the Russian authorities continued to refuse to facilitate Mr Shtukaturvov’s access to legal counsel even after the European Court adopted an interim measure which expressly requested the Russian government to allow him to meet his lawyer on the premises of the hospital (see, in particular, paras. 141-142 of the judgment).

The European Court stressed that it was “of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints” (see para. 138). The Court found that preventing Mr Shtukaturov from having contact with his lawyer throughout the entire period of his hospitalisation (i.e. for more than six months) made it virtually impossible for him to pursue his case. The European Court did not accept the Russian government’s argument that Mr Shtukaturov could realise his right to apply to the European Court through his official guardian and, since the lawyer chosen by Mr Shtukaturov to represent him in the ECtHR proceedings had not been approved by his guardian, that lawyer could not be regarded as his lawful legal representative. The European Court pointed out that “it was not for the domestic courts to determine whether or not [Mr Bartenev] was the applicant’s representative for the purposes of the proceedings before the Court – it sufficed that the Court regarded him as such” (para. 143).

This particular violation suffered by Mr Shtukaturov highlights how particularly vulnerable a person deprived of their legal capacity can become when placed in a mental health institution. Indeed, they are completely powerless in the face of any abuse of their rights committed by the staff of the institution when the latter itself becomes the guardian of the person detained. In such a situation, the institution enjoys total control over every aspect of the patient’s life, including their ability to have visitors, communicate with the outside world, leave the institution (even if only for a short period) and even to complain to the authorities. It is therefore paramount that patients deprived of their legal capacity are guaranteed the core patients’ rights provided in Article 37 of the Law on Psychiatric Care which include, *inter alia*, the right of a patient to meet with their lawyer in private. While there is no explicit indication in the law that these rights should not apply to patients without legal capacity, this category of patients is prevented from exercising these rights in practice. As a result, they are deprived of any recourse against the actions of an institution they are confined to.

We recommend that an amendment to the Law on Psychiatric care is introduced that will clarify that the rights listed in Article 37 of the Law also apply to patients have their legal capacity restricted.

Conclusion

The existing system of legal incapacitation in Russia leads to unprecedented levels of arbitrary restrictions of the human rights of persons with mental disabilities. While often failing to deliver its ostensible goals of protection and support to persons with mental disabilities, it also marginalises those who are stripped of their legal capacity and makes them particularly vulnerable to serious human rights abuses. There is growing recognition that full legal incapacitation is incompatible with human rights norms. This is evidenced by the UN Convention on the Rights of Persons with Disabilities which Russia has signed and is committed to ratify. Article 12 of the Convention provides that all persons with disabilities are entitled to enjoy legal capacity on an equal basis with others in all aspects of life, and that support should be provided to people to avail of this fundamental right. The most recent criticism of the Russian system comes from the Human Rights Committee who expressed concern about the lack of adequate safeguards, the disproportionate nature of restrictions on human rights caused by the deprivation of legal capacity, and the significant number of persons who are subjected to this measure in Russia. As the decision of the European Court in *Shtukatur* demonstrates, Russia's laws on legal capacity and guardianship also fall foul of rights guaranteed in the European Convention on Human Rights, and the obligations on Russia to ensure these are not arbitrarily restricted. It should be pointed out that unless the relevant legislation is rectified the Russian authorities risk an avalanche of similar cases lodged before the European Court, as there are thousands of people in Russia who are currently deprived of their legal capacity in violation of their rights to a fair trial and to respect for their private lives.

While the implementation of the recommendations formulated in this paper should help improve the existing legislation significantly, it would not be enough to ensure full respect for the dignity and human rights of persons who, due to their mental disability, may need support in exercising their legal capacity. Further measures, such as the enactment of and provision for supported decision-making practices and advanced directives, will also be required. MDAC is planning to produce further policy papers which will assist Russian policy-makers and civil society actors in their work towards reforming the country's mental health legislation. The upcoming policy papers will focus on issues such as partial guardianship; safeguards for the institutionalisation of persons whose legal capacity is restricted; and alternatives to guardianship that do not restrict a person's legal capacity. Russian civil society and, in particular, disability NGOs have an important role to play in the process of guardianship reform through sharing their firsthand knowledge of the needs and problems faced by people subject to legal incapacitation. We hope, therefore, that the Russian authorities responsible for mental health legislation and policies will open avenues for regular, ongoing and effective cooperation with human rights and disability activists.

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This policy paper has been prepared by MDAC as part of its two year project aimed at promoting legal capacity/guardianship reform in the Russian Federation. The project is supported by a grant from the Civil Rights Defenders (formerly Swedish Helsinki Committee) and by a grant from the UK Government's Strategic Programme Fund

