THE EUROPEAN COURT OF HUMAN RIGHTS Application No. 60157/15

FIRST SECTION

WRITTEN SUBMISSIONS OF MENTAL DISABILITY ADVOCACY CENTRE

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1. These written comments are submitted by Mental Disability Advocacy Centre ("MDAC") pursuant to leave granted by the President of the Court under Rule 44(3), Rules of Court on 12 September 2017.

2. Founded in 2002, MDAC is an international human rights NGO which is independent of all governments. It has participatory status with the Council of Europe, special consultative status with the United Nations Economic and Social Council, and it has standing to lodge collective complaints under the European Social Charter. MDAC seeks to use the law to secure equality, inclusion and justice for people with intellectual and psycho-social disabilities worldwide. MDAC operates at the global level as well as regional and domestic levels in Europe and Africa.

3. MDAC has previously served as a third party intervener in a number of cases before the European Court of Human Rights ('the Court'), including *Kędzior v Poland* (Application no. 45026/07), *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* (Application no. 47848/08), *Blokhin v Russia* (Application no. 47152/06) *Usmanov v Russia* (Application no. 17731/11, judgment of 27 September 2016) and *V.K. v Russia* (Application no. 9139/08, judgment of 4 April 2017). MDAC has carried out human rights monitoring in closed psychiatric and social care institutions in more than ten countries. It seeks in this intervention to assist the Court in accordance with the Rules of Court and the terms of the letter of the Section Registrar of the First Section dated 12 September 2017.

The context of this application

4. The rights set out in the European Convention on Human Rights ("the Convention") are to be guaranteed to "*everyone*" (article 1). This includes people with disabilities who have the same human rights as the rest of humanity. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings. Far from a disability entitling the state to deny a person their human rights, rather it places upon the state the duty to make reasonable accommodation to ensure the enjoyment or exercise of their rights on an equal basis with others.[1]

5. These findings of the UK Supreme Court reflect international law[2] and the approach of this Court, which treats disability as a protected ground against discrimination and people with mental disabilities as part of a vulnerable group for the purposes of the Convention.[3] Reasonable accommodation is also a clear feature of the Court's jurisprudence to the extent that it upholds the right of individuals to

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[1] *P v Cheshire West and others* [2014] UKSC 19 [2014] 1 AC 896, per Lady Hale JSC at para 45.

[2] See, amongst other international standards, Article 2 of the United Nations Convention on the Rights of People with Disabilities ("CRPD").

[3] *Alajos Kiss v Hungary,* Application No. 38832/06, judgment of 20 August 2010, para. 43.

non-discrimination and other rights by treating individuals in different circumstances differently.[4] The result has been the finding of violations of the rights of people with disabilities for failures by the state to take steps to provide alternatives or to adapt to an individual's circumstances and needs.[5]

6. The principles of non-discrimination and reasonable accommodation apply with full force in the context of deprivation of liberty. Liberty and security of the person is one of the most precious rights to which everyone is entitled,[6] as reflected by the paramount importance of Article 5 to the Convention framework.[7] The restriction or removal of liberty can have devastating effects. Involuntary placement and treatment can affect the most fundamental rights.[8] Individuals deprived of their liberty in psychiatric facilities are commonly subjected to non-consensual psychiatric treatment, including highly intrusive drug treatments and therapies. The UN Special Rapporteur on torture has highlighted that the healthcare choices of people with disabilities are often overridden based on their perceived "*best interests*", and that inappropriate or unnecessary non-consensual institutionalisation of individuals may amount to torture or ill-treatment as use of force beyond that which is strictly necessary.[9] They can be deprived of educational possibilities and social environments that allow for personal development. When individuals are in these environments for a long period of time, their development of self is substantially stunted. They face a sense of disempowerment and stigma.[10]

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[4] *Thlimmenos v Greece,* Application No. 34369/97, judgment of 6 April 2000, para. 44.

[5] See, amongst other authorities, *Price v UK,* Application No. 33394/96, judgment of 10 July 2001; *Vincent v France*, Application No. 6253/03, judgment of 24 October 2006; *Mouisel v France,* Application No. 67263/01, judgment of 14 November 2002; *Khudobin v Russia,* Application No. 59696/00, judgment of 26 October 2006; *Xiros v Greece,* Application No. 1033/07, judgment of 9 September 2010; *Kupczak v Poland,* Application No. 2627/09, judgment of 25 January 2011; *Grori v Albania,* Application No. 25336/04, judgment of 7 July 2009; *Logvinenko v Ukraine,* Application No. 13448/07, judgment of 14 October 2010; *Raffray Taddei v France,* Application No. 36435/07, judgment of 21 December 2010; *Vasyukov v Russia,* Application No. 2974/05, judgment of 5 April 2011; *Vladimir Vasilyev v Russia,* Application No. 28370/05, judgment of 10 January 2012; *Artyunyan v Russia,* Application No. 48977/09, judgment of 10 January 2012; *Grzywaczewski v Poland,* Application No. 18364/06, judgment of 31 May 2012; *DG v Poland,* Application No. 45705/07, judgment of 12 February 2013. In each of these instances, the Court conducted a review of the measures taken by the authorities with respect to the specific circumstances and needs of the individual prisoners, persons with disabilities and/or persons with chronic illnesses. The Court concluded that the authorities failed to take measures to ensure they were accommodated in terms of accessible or adapted facilities nor did they have access to adequate medical care during their detention (in police custody or prison, or secure and adapted measures during prison transport) thereby leading the Court to find that the treatment surpassed the minimum severity necessary for a finding of Article 3 violations. These cases point to the fact that prisoners with disabilities were disadvantaged in comparison to non-disabled inmates and the appropriate steps were not taken to remove that disadvantage which caused them suffering and distress beyond that associated with detention. In other words, the failure to provide reasonable accommodation to prisoners with disabilities resulted in them being subjected to inhuman and degrading treatment.

[6] UN, Committee on the Rights of Persons with Disabilities, "*Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities,* September 2015, para. 3.

[7] See, amongst other authorites, *Storck v Germany,* Application No. 61603/00, judgment of 16 June 2005, para. 102, *McKay v United Kingdom,* Application No. 543/03, judgment of 3 October 2006, para. 30, and *Rudenko v Ukraine,* Application No. 50264/08, judgment of 17 April 2014, para. 98.

[8] European Union Agency for Fundamental Rights, "Involuntary placement and involuntary treatment of persons with mental health problems", foreword.

[9] UN, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Me□ndez, 1 February 2013, A/HRC/22/53, paras. 20, 61 and 70.

[10] Peter Bartlett, "*A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention", The International Journal of Human Rights*, Vol. 16, No.6, 831-844, at 832.

7. Given the internationally recognised significance of depriving an individual of their liberty, and the position of inferiority and powerlessness experienced by people confined in psychiatric hospitals, there is a need for increased vigilance in reviewing whether the state has complied with the Convention.[11] It is also a context in which the Court has held that there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.[12]

8. The principles articulated above are central to the arguments in this application. The purpose of this written intervention is to draw attention to relevant international safeguards and the extent of State obligations to address the provision of psychiatric treatment based on consent, the use of the least severe measures, and in the least restrictive environment in community-based settings.

Article 5(1) of the Convention

9. Article 5 of the Convention provides, so far as is relevant for this written intervention:

> *"1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
> *…*
> *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants …"*

10. The Court's jurisprudence has established that the key purpose of this article is to prevent arbitrary or unjustified deprivations of liberty.[13] Article 5(1) sets out an exhaustive list of exceptions to be interpreted narrowly.[14]

11. In respect of article 5(1)(e), the Court has constantly held that an individual cannot be considered to be of "*unsound mind*" and deprived of her liberty unless the following three minimum conditions are satisfied: firstly, she must reliably be shown by objective medical expertise to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends on the persistence of such a disorder.[15]

12. Importantly in the context of this application the Court has observed that:

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[11] *Herczegfalvy v Austria,* Application No. 10533/83, judgment of 24 September 1992, para. 82.; *MS v Croatia (No. 2),* Application No. 75450/12, judgment of 19 February 2015, para. 98., *VK v Russia,* Application No. 9139/08, judgment of 4 April 2017, para. 30.

[12] *Glor v Switzerland*, Application No. 13444/04, judgment of 30 April 2009, para. 53. See also the recent report of the UN Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court - Report of the Working Group on Arbitrary Detention, A/HRC/30/37, particularly at Principle 5.

[13] McKay v U.K. [GC], Application No. 543/03, judgment of 3 October 2006.

[14] *Winterwerp v the Netherlands,* Application No. 6301/73, judgment of 24 October 1979, para. 37, *Bergmann v Germany,* Application No. 23279/14, judgment of 7 January 2016, paras. 95-102. The Court has stressed that the circumstances in which individuals may be lawfully deprived of their liberty as set out in Article 5§(1) "must be given a narrow interpretation having regard to the fact that they constitute exceptions to the most basic guarantee of individual freedom." See Kurt v Turkey, Application No. 24276/94, judgment of 25 May 1998, para. 122.

[15] *Winterwerp v the Netherlands,* Application No. 6301/73, judgment of 24 October 1979, para. 39.; *Stanev v Bulgaria,* Application No. 36760/06, judgment of 17 January 2012, para. 145.

a. The relevant time at which a person must reliably be shown to be of unsound mind is the date of adoption of the measure depriving that person of his liberty,
b. Those suffering from mental illness are a "particularly vulnerable group", interference with whose rights must be subject to strict scrutiny. A restriction of their rights can only be justified by "very weighty reasons." Detention is "such a serious measure that it is only justified when other, less severe measures have been considered and found insufficient to protect the individual or public interest".[17]

13. When assessing a potential violation of Article 5(1), the Court must interpret and apply these concepts consistently with the general principles of international human rights law. The Convention cannot be interpreted in a vacuum and the Court has repeatedly reiterated that the Convention must be interpreted in the light of present-day conditions and relevant international standards.[18]

14. In the disability context, the key standards of international law are those set out in the United Nations Convention on the Rights of Persons with Disabilities (hereinafter: "the CPRD").[19] The CRPD has been described by the UN Special Rapporteur on Disability as,

> *"authoritative guidance on the rights of persons with disabilities supplementing the Covenant and other core human rights treaties. The CRPD rejects the medical model approach of earlier non-binding standards such as the 1991 Principles for the Protection of Persons with Mental Illness, which had condoned coercive practices and detention in the field of mental health. The CRPD instead adopts a standpoint of equality and non-discrimination in all aspects of life, and provides that persons with disabilities, including persons with psychosocial disabilities, have the right to exercise legal capacity and decision-making, the right to be free from unwanted medical treatments, and the right to remain at liberty in the community so long as they do not infringe laws applicable to the population as a whole."*[20]

15. Two clear themes arise from this international material that are of particular relevance to this case. Firstly, states parties must ensure that persons with disabilities are not deprived of their liberty on the basis of their disability, including in the criminal law context. Secondly, forced psychiatric treatment is not only in violation of the right to freedom from torture, but also of the rights to personal integrity, freedom from violence, exploitation and abuse and the right to decide about medical treatment. This means that persons with psychosocial disabilities must have access to a range of supports and services in the community, to include support for independent living as an alternative to the medical model of mental health.

International Standards on Forensic Detention

16. The CRPD entered into force on 3 May 2008. It was ratified by Poland on 6 September 2012 and to date has been ratified by 45 Council of Europe member states.

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[17] *VK v Russia,* Application No. 9139/08, judgment of 4 April 2017, at para. 30., *MS v Croatia* (No. 2), Application No. 75450/12, judgment of 19 February 2015, para. 144.

[18] *Neulinger v Switzerland,* Application No. 41615/07, judgment of 6 July 2010, para. 131.

[19] See, amongst other authorities, *Glor v Switzerland*, Application No. 13444/04, judgment of 30 April 2009, para. 53.

[20] Letter from the UN Special Rapporteur on Disability to Members of the UN Human Rights Committee, re: General Comment No. 35 (CCPR/C/107/R.3) on Article 9 (right to liberty and security of person), 27 May 2014.

17. Article 14 of the CRPD provides:

> *"1) States Parties shall ensure that persons with disabilities, on an equal basis with others:*
> *(a) Enjoy the right to liberty and security of person;*
> *(b) Are not deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty is in accordance with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*
>
> *2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."*

18. This provision is "*essentially a non-discrimination provision*"[21] according to which the perceived or diagnosed disability or the mental health "*status*" of the person can never provide justification for his or her detention in a hospital, prison or other place of detention. As the United Nations Committee on the Rights of Persons with Disabilities (hereinafter: "the CRPD Committee") has stressed,[22] it includes the following principles of particular relevance to this case:

1) *The absolute prohibition of detention on the basis of disability*. There are still practices in which state parties allow for the deprivation of liberty on the grounds of actual or perceived disability. In this regard, the CRPD Committee has established that Article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived disability. However, as it has been noted by the UN Special Rapporteur on Disability, "many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a "danger to oneself and others" or in "need of treatment". The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty."[23] This position has been echoed by the Office of the UN High Commissioner for Human Rights as well.[24]

2) *Mental health laws that authorise detention of persons with disabilities based on the alleged danger of persons for themselves or for others*. Through all the reviews of state party reports

[21] UN, Convention on the Rights of People with Disabilities, Ad Hoc Committee, Daily Summary of Discussion at the Seventh Session, 19 January 2006, (Vol. 8#4); CRPD Committee's Guidelines on Article 14 adopted during its 14th session in September 2015, para. 4.

[22] UN, Committee on the Rights of Persons with Disabilities, "*Statement on article 14 of the Convention on the Rights of Persons with Disabilities*", September 2014, and the Committee's Guidelines on article 14, September 2015. See also: United Nations Committee on the Rights of Persons with Disabilities, "Concluding observations on the initial periodic report of Hungary (17-28 September 2012)", CRPD/C/HUN/1, para. 28.; "Concluding observations on the initial report of Austria (2-13 September 2013)", CRPD/C/AUT/1, paras. 29-31.

[23] Manfred Nowak, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/63/175, 28 July 2008, para. 64.

[24] Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, UN Doc A/HRC/10/48, 26 January 2009, paras. 48-49.

the CRPD Committee has established that it is contrary to Article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities, for example, delusional disorder or paranoid schizophrenia, based on presumptions of risk or dangerousness tied to disability labels is contrary to the right to liberty and is arbitrary.

3) Enjoyment of the right to liberty and security of the person is central to the implementation of Article 19 on the right to live independently and be included in the community. The Committee has placed emphasis on this inter-relationship. The Committee has expressed concern about the institutionalisation of persons with disabilities and the lack of support services in the community;[25] has recommended addressing such concerns with organisations of persons with disabilities;[26] and has called for greater allocation of resources to ensure sufficient community-based services. The Committee has also stated that deprivation of liberty in criminal proceedings should apply only as a matter of last resort, and once other programs for diversion, or restorative justice have proved insufficient to deter future crime.[27]

19. These standards reflect the paramount importance of liberty and the serious impact of a forced removal of liberty. Article 5(1)(e) should therefore be interpreted consistently with these standards. As in the torture context, it is necessary to synthesise standards and coordinate actions in the context of the deprivation of liberty in line with the CPRD.[28]

Involuntary Treatment

20. There is a significant overlap between the unlawful and arbitrary detention of people with disabilities, which breaches Article 14 of the CRPD and forced treatment of those detained, in breach of Articles 15, 16 and 25 of the CRPD. These provisions also overlap substantially, in this context, with Articles 12 and 17 of the CRPD, which protect the right to equal recognition before the law and the integrity of the person respectively. This is mirrored in Articles 3, 5 and 8 of the Convention. Forced psychiatric treatment violates the right to freedom from torture and ill-treatment, but also the rights to dignity, personal integrity, freedom from violence, exploitation and abuse and the right to decide about medical treatment.

21. These overlaps have been recognised by many international authorities. For example:

    a. The UN Special Rapporteur on Torture has noted that the inherently *"discriminatory character of forced psychiatric interventions, when committed against persons with psychosocial disabilities, satisfies both intent and purpose required under the Article 1 of the Convention against Torture."*[29]

[25] CRPD/C/ESP/CO/1, paras. 35-36; CRPD/C/CHN/CO/1, para. 26; CRPD/C/ARG/CO/1, para. 24; CRPD/C/PRY/CO/1, para. 36; CRPD/C/AUT/CO/1, para. 30; CRPD/C/SWE/CO/1, para. 36; CRPD/C/CRI/CO/1, para. 30; CRPD/C/AZE/CO/1, para. 29.

[26] Ibid.

[27] UN, Committee on the Rights of Persons with Disabilities, "Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, September 2015, para 21.

[28] See, by analogy, the approach of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, para. 62.

[29] Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, UN Doc. A/HRC/22/53, 1 February 2013, para.

b. The CRPD Committee in its General Comment No. 1 on Article 12 states that institutionalisation against a person's will or without their free and informed consent constitutes arbitrary detention and violates Article 12 on equal recognition before the law, in addition to Article 14 on liberty and security of the person.[30] A person's actual or perceived deficits in mental capacity or decision-making cannot justify a denial of legal capacity including the standing and agency to make decisions about medical (including psychiatric) treatment.[31] Support for decision-making must be made available based on the person's will and preferences rather than a perception of their best interest.[32] It characterises forced psychiatric treatment as an infringement of the freedom from torture as well as a violation of the right to decide about medical treatment under Article 12, and urges its abolition.[33]

c. The UN Special Rapporteur on Disability has echoed the CRPD Committee, and stated unequivocally that when considering detention in breach of Article 14 of the CRPD, many other CRPD rights are in play, including Articles 12 (on equal recognition before law), 15 (on freedom from torture and ill-treatment), 17 (on bodily integrity), 19 (on living independently in the community) and 25 (on right to health). He has made clear that, in order to be CRPD-compliant, mental health services must be based on the free and informed consent of the person concerned.[34] This has been reiterated by the UN Special Rapporteur on Torture as well.[35]

22. Research across Europe by the European Union Agency for Fundamental Rights highlighted users' positive attitude to treatment in hospital where this had been on the basis of choice and consent.[36] A respondent diagnosed with bi-polar affective disorder, who had been admitted to hospital voluntarily when in crisis, told researchers from the Mental Health Alliance in the United Kingdom that "being able to make such decisions about my mental health is more empowering than being forcibly admitted to a hospital under a section [of the Mental Health Act 1983]."[38] As one mental health consumer put it: "The truth is, you can't heal me without my cooperation, you cannot. There's no such thing as forced healing."[39]

23. MDAC submits that involuntary treatment under detention amounts to a breach of Article 3 of the Convention, read through the prism of the CRPD generally and in particular Articles 12, 15, 16, 17 and 25 of the CRPD; but it also affects the intensity of the violation of an individual's right to liberty and security under Article 5(1)(e).

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[30] CRPD/C/GC/1, at paras. 8 and 36.

[31] Ibid at paras. 7, 8, 12, 13, 16, 25(f), 27, 37, 38.

[32] Ibid at para. 25(b); see also para. 17.

[33] Ibid at para. 38 and the Committee's Guidelines on article 14, *above,* para. 11.

[34] Letter from the UN Special Rapporteur on Disability to Members of the UN Human Rights Committee, re: General Comment No. 35 (CCPR/C/107/R.3) on Article 9 (right to liberty and security of person), 27 May 2014.

[35] Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, UN Doc. A/HRC/22/53, 1 February 2013, para. 28.

[36] Involuntary placement and involuntary treatment of persons with mental health problems, FRA, 2012, page 44.

[38] A Mental Health Act fit for tomorrow: An agenda for reform, June 2017 http://www.mentalhealthalliance.org.uk/news/A_Mental_Health_Act_Fit_For_Tomorrow.pdf.

[39] Carol J Patterson's personal testimony, available at http://www.mindfreedom.org/personal-stories/personal-stories/atct_topic_view?b_start:int=20&-C (last accessed on 29 September 2017).

Community and consent-based treatment, habilitation and rehabilitation

24. Community-based services offering consensual and habilitation and rehabilitation-focused treatment are essential for people with disabilities, including people who come into contact with the criminal justice system. Therefore, MDAC wishes to draw particular attention to the increasing recognition of the need for those with psycho-social disabilities to have access to "a range of supports and services in the community, based on the free and informed consent of the person concerned to include support for independent living as well as alternatives to the medical model of mental health, such as peer support, trauma counseling and non-judgmental support."[40] The "right to health includes the right to integration and treatment to both live independently and to exercise legal capacity."[41] This is especially relevant in the context of forensic detention. Even though the purposes of the so-called 'preventive measures' or forensic detention are therapy, rehabilitation and reintegration,[42] the shift from the reliance on punitive measures to that of real rehabilitation must take place in practice, so people with mental disabilities in the criminal justice system – through consent- and community- based mental health services – "may re-enter society as productive members of their communities."[43]

25. Examples of existing alternative approaches include the de-institutionalisation project in Trieste,[44] the Soteria and Open Dialogue models,[45] and the Peer Support Approach.[46]

26. Reflecting the above mentioned trends in international human rights law and psychiatry, the UN Committee on Economic, Social and Cultural Rights considered the sixth periodic report of Poland and called on Poland to increase its financial and human resources on mental health; guarantee full respect for the human rights of patients in psychiatric institutions, ensure that treatment is provided on the basis of free and informed consent and provide alternative forms of mental health treatment, including outpatient treatment.[47]

The Domestic Context

27. The conditions for detaining people "of unsound mind" who are not criminally responsible on medical grounds were laid down in the Polish Criminal Code ("PCC") of 1997 and the Executive Penal Code

[40] Shuaib Chalkelen, UN Special Rapporteur on Disability: Urgent request to amend the Human Rights Committees draft version of General Comment No. 35 (CCPR/C/107/R.3), 27 May 2014.

[41] Report of the Special Rapporteur on the Right of everyone to enjoy the highest standard of physical and mental health, A/HRC/35/21, 28 March 2017, para 31.; see also paras. 55., 56. and 57. and further references.

[42] See for example Article 202 of the Polish Executieve Penal Code of 1997 ('Kodeks karny wykonawczy').

[43] Professor Michael L. Perlin & Meredith R. Schriver: „You That Hide Behind Walls": The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients, in Torture in health-care settings: reflections on the Special Rapporteur on Torture's 2013 Thematic report, 2013, page 207.

[44] From residential facilities to supported housing: the Individual Health Budgeting method as a form of co-production: Journal of Nervous and Mental Disease, May 2014. The experience of replacing psychiatric hospitals with supported housing and primarily community-based services is described as "a comprehensive definition of rehabilitation as a program of restitution and *(re)construction of full rights (political, civil, social) and citizenship for people suffering from mental illness."*

[45] Mental Health Europe - Compulsory psychiatric treatment and its alternatives - the facts; see also Recognising and Supporting Alternatives to Western Psychiatry, Critical Psychiatry Network, 22 July 2014.

[46] International Peer Support: An Alternative Approach 2014.

[47] Committee on Economic, Social and Cultural Rights: Concluding observations on the sixth periodic report of Poland, E/C.12/POL/CO/6, 26 October 2016.

of 1997 ("EPC"). This was the applicable law at the time of the domestic adjudication of the subject matter of this application. MDAC submits that the PCC and EPC permit treatment of people with disabilities that is not compliant with Article 5(1)(e) or with Article 6 of the Convention when interpreted in accordance with the international standards set out above.

28. For the avoidance of doubt, MDAC invites the Court to interpret Article 5(1)(e) consistently with the requirements of the CRPD. Since the PCC and the EPC do not require consent by a person with a disability to an involuntary measure and permit the deprivation of liberty on the grounds of actual or perceived disability, the domestic legislative provisions applicable at the time of the domestic adjudication of the matter were incompatible with Articles 14 and 15 of the CRPD as interpreted by the CRPD Committee.

29. However, even before the CRPD was ratified there was a clear international consensus that reflected the high standards that were considered necessary to justify a deprivation of liberty.[48] The Court has repeatedly held that detention of an individual suffering from mental illness is only justified where other less severe measures have been considered and found insufficient to protect the individual or the public.[49] This standard is reinforced by Article 10(ii) of Rec(2004)10, which urges States to "make alternatives to involuntary placement and to involuntary treatment as widely available as possible." Whilst the Court has interpreted Article 5(1)(e) broadly in articulating the 'Winterwerp criteria',[50] MDAC submits that these criteria must be applied so as to ensure the widest possible protection of the rights of people with disabilities and to avoid, as far as possible, perpetuating conflicting international legal standards. Further, MDAC submits that any dilution of the minimum protections contained in those criteria would give rise to a significant risk of arbitrariness.

30. On the face of Articles 93 and 94 PCC and Chapter XIII of the EPC:
    a. Domestic provisions appear to lack safeguards to ensure that an unsoundness of mind is reliably established at the date of the adoption of the measure depriving the person of liberty.[51]
    b. The PCC and the EPC – before amendments made to it came into effect from 1 July 2015 – appear to allow for detention when this is not the only means available to prevent immediate or imminent harm to the applicant or others and carries no safeguard for the purpose of least restriction and the need to ensure alternatives to compulsory confinement or less severe measures.

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[48] This included the Council of Europe Parliamentary Assembly Recommendation 1235(1994) on psychiatry and human rights, which stresses that "*compulsory admission must be resorted to in exceptional cases only*" and can only be justified where there is a serious danger to the patient or to other persons. To similar effect, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4 April 1997 (CETS 164, Oviedo Convention) provides, at article 7 that, "*a person who has a mental disorder or a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.*" Finally, article 17 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10 provides that a person may be subject to involuntary placement only if their condition "*represents a significant risk of serious harm to his or her health.*"

[49] MS v Croatia (No. 2), Application No. 75450/12, judgment of 19 February 2015, para. 144., VK v Russia, Application No. 9139/08, judgment of 4 April 2017, with further references.

[50] Winterwerp v the Netherlands, Application No. 6301/73 judgment of 24 October 1979.

[51] *Raudevs v Latvia,* Application No. 24086/03, judgment of 17 December 2013; *Lorenz v Austria,* Application No. 11537/11, judgment of 20 July 2017, para. 55.

c. Article 5 requires that any detention be "*in accordance with law*" which is interpreted by the Court to require that law to be Convention-compliant.[53] The general principle of legal certainty must be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law should be clearly defined, and that the law itself be foreseeable in its application, so that a person can foresee, to a degree that is reasonable in the circumstances, the consequences of a given action. Article 94.1 of the PCC expressly permits detention where the offender has committed a prohibited act "in a state of insanity". This concept is vague and undefined. It gives rise to a real risk of discriminatory treatment of those with disabilities.

Conclusion

31. This case demonstrates a need for the Court to reinforce its safeguards under article 5(1)(e) to reflect in its jurisprudence the full sense of the recent international recognition of the right of people with disabilities not to be subjected to discriminatory treatment. The Court is invited to stress the importance of self-determination and dignity which underpin both the Convention and the CRPD. The CRPD embodies this approach by providing for a shift away from the traditional medical model based on detention and involuntary treatment. This is aimed at destigmatisation, and the inclusion of those with psychosocial disabilities into society without discrimination.

32. The CRPD recognises that forced psychiatric treatment is a consequence of such detention. Involuntary treatment is a violation not only of the right to freedom from torture and ill-treatment, but also of the rights to personal integrity, freedom from violence, exploitation and abuse and the right to decide about medical treatment.

33. Moreover, the CRPD Committee has emphasised the relationship between Articles 14 and 19 of the CRPD thereby recognising the principle and need for the availability of less severe measures, such as community treatment, and independent living, to avoid compulsory detention and treatment. The criminal law can provide appropriate sanctions for criminal behaviour. The provision of genuine alternatives to compulsory treatment allows those with psychosocial disabilities to exercise their capacity and enjoy independence on an equal basis.

34. In making these submissions, MDAC acknowledges the tension between Article 5(1)(e) and Article 14 of the CRPD. Nevertheless, it is submitted that by a strict adherence to some elements of the criteria set out in the Convention jurisprudence, (in particular, the requirement of the principle of least restriction and resort to alternatives), the Court can uphold the most basic guarantee of individual freedom and may promote the convergence of international standards in relation to the right to liberty, autonomy and dignity.

ASWINI WEERERATNE QC
SOPHY MILES
Doughty Street Chambers, London

BARBARA MÉHES
MDAC, Hungary

[53] *Kawka v Poland*, Application No. 25874/94, judgment of 9 January 2001, paras. 48-49.