The European Union Structural Funds and the Right to Community Living[1]

Introduction

It is estimated that over 300,000 people with disabilities are housed in institutions across Central and Eastern Europe (CEE).[2] Traditionally, this has been the predominant, if not the only, form of 'care' in CEE, with large, long-stay institutions housing hundreds, sometimes thousands, of people. This practice continues in many parts of CEE, despite the widespread acknowledgement that the institutionalisation of people with disabilities is an outmoded and unacceptable model of care in the 21st Century and leads to serious human rights violations.

This article is based on a report recently published by the Open Society Mental Health Initiative (MHI), *The European Union and the Right to Community Living: Structural Funds and the European Union's Obligations under the Convention on the Rights of Persons with Disabilities*.[3] MHI's report considered whether the use of European Union (EU) funds, known as 'Structural Funds' to build new, or renovate existing, long-stay institutions for people with disabilities, rather than developing alternatives to institutionalisation, is contrary to EU law in light of the EU's ratification of the Convention on the Rights of Persons with Disabilities ('the CRPD'). That some EU Member States were using Structural Funds for such purposes was highlighted in a report published by the European Coalition for Community Living

[1] Camilla Parker, Mental Health & Human Rights Consultant and Partner *Just Equality* and Professor Luke Clements, Cardiff Law School. The authors would like to thank Israel Butler for his very helpful comments on an earlier draft.

[2] This figure is based on the findings of a study covering the EU Member States plus Turkey. The figures for CEE countries were as follows: Bulgaria (13,269), Czech Republic (66,865), Estonia (22,421), Hungary (24,390), Latvia (10,053), Lithuania (45,464), Poland (73,741), Romania (32,783), Slovakia (12,252) and Slovenia (821). See: Mansell J, Knapp M, Beadle-Brown J and Beecham, J (2007) Deinstitutionalization and community living – outcomes and costs: report of a European Study. Volume 2: Main Report. Canterbury: Tizard Centre, University of Kent; p. 97 (further referred to as 'the DECLOC report'), page 29.

[3] Camilla Parker and Luke Clements, Open Society Foundations, May 2012. Referred to hereafter as 'the MHI report'. Available at: http://www.soros.org/sites/default/files/europe-community-living-20120507.pdf

in 2010, *Wasted Time, Wasted Money, Wasted Lives*.[4] This practice continues to be of concern.[5]

Importance of the Convention on the Rights of Persons with Disabilities

Both MHI's report and the report of the United Nations Office of the High Commissioner on Human Rights (OHCHR), *Getting a Life: Living Independently and Being Included in the Community*,[6] emphasise the importance of the CRPD in promoting the right of people with disabilities to live and participate in the community and the role of the EU in realising this goal. All Member States of the EU have signed the CRPD, with 22 having ratified it.[7] The CRPD was also ratified (referred to as 'confirmation') by the EU in December 2010.[8] Accordingly, the CRPD has a significant impact on the responsibilities of the European Commission and Member States in relation to the investment of Structural Funds for services for people with disabilities.

The CRPD and EU law: Implications of the EU's ratification of the CRPD

The EU's ratification of the CRPD means that the institutions of the EU and Member States are under an obligation to implement the CRPD insofar as its provisions are within the scope of EU competence.[9] Both 'action to combat discrimination on the

[4] Parker and Bulić, *Wasted time, wasted money, wasted lives – A wasted opportunity?* European Coalition for Community Living, 2010 (http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf) (ECCL)

[5] See for example, presentation by Elena Iorga, IPP, *Evaluating the effects of Structural Funds in new Member States – the case of Romania*, 7th May 2012: *'Despite having ratified the CRPD in 2010, Romania has extensively used EU money for investments in institutions, while independent living and development of community based services were not a priority for the social services system, neither under Structural Funds nor under the national budget.'*
www.europe.ohchr.org/EN/NewsEvents/Pages/PresentationsGettingaLife.aspx

[6] Gerard Quinn and Suzanne Doyle, 2012. The report is available at:
http://www.europe.ohchr.org/Documents/Publications/Getting_a_Life.pdf

[7] As at 25th June 2012 – see: http://www.un.org/disabilities 115 States have ratified the CRPD. Of the 27 EU Member States, those yet to ratify are: Finland, Ireland, Malta, Netherlands and Poland

[8] Council Decision 2010/48 EC on November 26 2009 permitted the EU to conclude the Convention, following adoption, by the Council, of a Code of Conduct and the submission of an instrument of formal confirmation at the United Nations

[9] Pursuant to CRPD Article 44, a declaration of competence was annexed to the Council of the EU's decision on the conclusion of the CRPD

ground of disability',[10] and the use of Structural Funds, fall within the area of shared competence between the EU and Member States.[11]

It is important to note that the CRPD provisions take precedence over secondary EU legislation. This is made clear by Article 216(2) of the Treaty on the Functioning of the European Union which provides that international agreements concluded by the EU are binding for the EU institutions as well as for Member States.[12] As the Court of Justice of the European Union ('the CJEU') has stated:

> *'...the primacy of international agreements concluded by the Community over provisions of secondary Community [now Union] legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.'* [13]

Accordingly, it has been argued that the CRPD 'will provide the basis for consistent interpretation of EC (now EU) secondary law' and:

> *'...It can therefore be concluded that accession to the UN CRPD creates an obligation to interpret EU law in a manner that is consistent with the Convention. To this end, if the wording of EU law legislation is open to more than one interpretation, the ECJ [now CJEU] should adhere, as far as possible, to the interpretation that renders the provision most consistent with the UN CRPD. Similarly, and in line with Article 300(7) TEC, all European institutions and the Member States (for matters falling within EU competence) are required to apply EU law in a manner that is consistent with the UN CRPD'.*[14]

Thus, to be lawful, the regulations governing Structural Funds must be interpreted consistently with the requirements of the CRPD.[15]

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[10] See Annex II of Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC) pages L 23/55

[11] *Ibid.* The regulations governing the use of Structural Funds are listed in the Appendix setting out 'Community Acts which refer to matters governed by the Convention', p. L 23/58

[12] OJ C 83, 30.3.2010, p. 47. This is also true of mixed agreements (such as the CRPD). See Case C-239/03 Etang de Berre at paragraph 25

[13] Case C-61/94 *Commission v Germany*, [1996] ECR I-3989, para. 52.

[14] Gerard Quinn et al, VC/2008/1214, European Foundation Centre, October 2012 page 24 http://www.efc.be/Networking/InterestGroupsAndFora/Disability/Pages/Study.aspx *Study on challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities*, p. 55 ('the EFC report'), at p. 31

[15] For further discussion of the legal framework for Structural Funds, see MHI report, Chapter 4

Relationship between the Strasbourg and Luxembourg Courts

The EU institutions, including the European Commission are required to comply with the EU Charter on Fundamental Freedoms ('the EU Charter'), which is legally binding on Member States when implementing EU law. Since December 2009:

> *'..the Charter has become the reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises'.*[16]

There is a considerable overlap between the rights set out in the EU Charter and those contained in the European Convention on Human Rights (ECHR), and while the EU is not yet party to the ECHR, [17] the ECHR has a special position in EU law.[18] Much of the case law of the CJEU refers expressly to the ECHR and in practice it seeks, if at all possible, to make its judgments consistent with those of the European Court of Human Rights ('the ECtHR') in Strasbourg.[19]

As discussed below, the ECtHR has emphasised the importance of the CRPD in protecting the rights of people with disabilities. Given the ECtHR's influence on the CJEU, its approach to the fundamental rights of persons with disabilities is likely to be reflected in determinations by the CJEU.

Reflecting socio-legal change during the second half of the 20th century the EU Charter, unlike the ECHR, is explicit in its protection of the rights of persons with disabilities. Article 21 specifically lists disability as one of the grounds on which discrimination must be prohibited, and Article 26 recognises the right of people with disabilities to 'benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.

Summary of findings

MHI's report concluded that investing Structural Funds in institutional care, rather than developing community-based alternatives:

- Constitutes a breach of the EU's international legal obligations (in particular the CRPD and the ECHR); and
- Amounts to disability discrimination under EU law.

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[16] Case C-92/09 and C-93/09 *Volker and Markus Schecke*; Case C-236/09 *Association belge des Consummateurs Tests-Achats*

[17] Article 6(2) of the Treaty on European Union provides that the 'Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

[18] See for example O*pinion 2/94 Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms* 1996

[19] For a detailed account with numerous examples see Richard Gordon *EC Law in Judicial Review* (2007, OUP) at Chapter 12.

These points, which are inter-related given the significance of the CRPD on EU law, are explored further in this article. This includes consideration of three broad areas: the relevance of the CRPD and in particular State Parties obligations under Article 19 of the CRPD, the development of case-law under the ECHR and disability discrimination under EU law. This legal analysis is preceded by an overview of the context for these discussions, namely the institutionalisation of people with disabilities in CEE and the potential role of Structural Funds.

Context

The Situation of People with Disabilities in CEE

Numerous reports have depicted appalling living conditions in institutions in CEE, such as poorly maintained buildings, lack of heating, malnutrition, inadequate clothing and unhygienic sanitation; physical and sexual abuse, lack of privacy, little to no rehabilitative or therapeutic activities as well the failure to provide procedural safeguards such as the review of involuntary placements.[20] Often these institutions are located in remote areas and residents have little to no contact with the outside world. In general; these are rigid regimes that take little or no account of individual needs or preferences.

A common response by governments presented with such concerns is to attempt to improve living conditions, principally by renovating the institution. This may improve the physical environment, but it does nothing to address the fundamental issue that the segregation of individuals from society solely on the basis of a disability label is in itself a severe infringement of their human rights. Nor does such a response address the underlying problem of why people with disabilities are placed in institutions. A primary reason is the lack of alternatives to institutionalisation. In many CEE countries there is a severe lack of support in local communities that would enable people with disabilities to live in their own homes and participate in community life. The types of necessary services are wide-ranging and include housing (including supported housing), care in the family home, social work support, and supported employment, as well as access to mainstream services such as health care.

[20] See for example: Mental Disability Advocacy Center *Cage Beds, Inhuman and Degrading Treatment in Four Accession Countries* (2003) (The countries were: Czech Republic, Hungary, Slovakia and Slovenia) and A/63/175 - Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, paras 37 – 41, 28/7/2008.

Structural Funds, namely the European Regional Development Fund (ERDF) and European Social Fund (ESF), can be the catalyst for much needed change. They can be invested in financial and technical support to assist governments in planning and implementing their deinstitutionalisation strategies and in developing the community-based alternatives to institutionalisation.[21] Indeed, the EU's *'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe'* envisages that the European Commission will promote the transition from institutional to community based care by using Structural Funds to support the development of community based services and raising awareness of the situation of people with disabilities living in residential institutions.[22] It is therefore of serious concern that some Member States are using Structural Funds to maintain the system of institutional 'care' by financing the renovation of existing institutions or the building of new institutions. [23]

The Right to Community Living

The need for action to put an end to the institutionalisation of people with disabilities, by shifting the provision of care from institutions to community-based services ('deinstitutionalisation'), has been highlighted both at international[24] and European levels.[25]

The introduction of the CRPD provides yet further weight to the calls for positive measures of this nature. By ratifying the CRPD, Member States and the EU have made a commitment to ensuring that all people with disabilities can live and receive the support they need to participate in society as equal citizens (referred to as 'the right to community living'). This right is now encapsulated in Article 19 of the CRPD which provides that people with disabilities have the right to live in the community, with the same choices as others.

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[21] Structural Funds provide the financial support for the implementation of the EU's Cohesion Policy which is the EU's strategy to promote and support the "overall harmonious development" of its Member States and regions. The objectives for the current financing period (2007-2013) are to promote sustainable development by strengthening growth, competitiveness, employment and social inclusion and by protecting and improving the quality of the environment – see Article 3, Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 – (referred to in this report as 'the General regulations')

[22] Page 6, available at: http://ec.europa.eu/news/justice/101115_en.htm

[23] See Parker and Bulić, *Wasted time, wasted money, wasted lives – A wasted opportunity?* European Coalition for Community Living, 2010 (http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf) (ECCL) and the Report of the Ad Hoc Expert Group on the Transition from Institutional Care to Community-based Care, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, September 2009

[24] See for example: Commission on Human Rights resolution 2005/24, para. 7

[25] See for example Council of Europe, Recommendation Rec(2006)5 3.8.1 www.coe.int/t/e/social_cohesion/socsp/Rec_2006_5%20Disability%20Action%20Plan.pdf

Article 19 emphasizes the importance of providing support that enables people with disabilities to engage in community life, requiring States Parties to take appropriate measures to facilitate their 'full inclusion and participation in the community'. As the former Council of Europe Commissioner for Human Rights, Thomas Hammarberg stated in his Issue Paper on Article 19, the right to live in the community applies to all people with disabilities, no matter how intensive their support needs:

> *'Time and again it has been demonstrated that people who were deemed too "disabled" to benefit from community inclusion thrive in an environment where they are valued, where they partake in the everyday life of their surrounding community, where their autonomy is nurtured and they are given choices.'*[26]

The genesis of the right to community living can be traced back to various reports, comments by treaty bodies, and resolutions[27] and is supported by rights, such as Article 26 of the EU Charter (Integration of People with Disabilities) and Article 15 of the revised European Social Charter (the right of persons with disabilities to independence social integration and participation in the life of the community). However, Article 19 of the CRPD is the first example of such an explicit right being included in a human rights treaty. It places obligations on States Parties to take action to enable people with disabilities to realise this right. While included as a specific right in Article 19, the right to community living is integral to the CRPD with the themes of inclusion and participation referred to throughout the text.[28]

Institutionalisation versus community living

There is a tendency for debates about the institutionalisation of people with disabilities and the action required to address it to focus on the size of the building. However, this is only one of a number of key factors. For example, an institution has been described as:

> *'...any place in which people who have been labelled as having a disability are isolated, segregated and/or compelled to live together. An institution is also any place in which*

[26] *The Right of People with Disabilities to Live Independently and be Included in the Community*, 13th March 2012 (page 7): https://wcd.coe.int/ViewDoc.jsp?id=1917847

[27] See for example Committee on the Rights of the Child general comment No. 7 (2006) on implementing the rights of the child in early childhood, para. 36(b); Committee on Economic Social and Cultural Rights (CESR) general comment No 6 (1995) on the economic, social and cultural rights of older persons, para 33, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993 .

[28] See for example Article 3(c) and Article 26

> *people do not have, or are not allowed to exercise control over their lives and their day-to-day decisions. An institution is not defined by its size'*.[29]

Similarly, the United Nations (UN) points out that 'the size of the building is only one of a number of factors that create a culture of institutionalization', other factors include residents having little, if any, control over their lives and day-to-day decisions and 'rigidity of routine, such as fixed timetables for waking, eating and activity, irrespective of individuals' personal preferences or needs'. [30] The UN also notes that institutionalisation itself 'can lead to serious and long-term adverse consequences' for people of any age, but particularly children, given that the 'lack of emotional attachment is very damaging to their development'.[31]

While these adverse factors are intrinsic to the traditional large, long stay institutions of CEE, they can exist in facilities of any size. Small community-based services can function as 'mini-institutions' if residents have no choices or control over their lives. It is therefore essential to change the culture within services as well as the physical environment. The manner in which services and support are delivered must be based upon each individual's own needs, wishes and aspirations and be geared towards enabling people with disabilities to participate in their communities as equal members of society.

The CRPD and Community Living

Overview of the CRPD

The CRPD sets out a wide range of rights that address all aspects of disabled peoples' lives, such as respect for home and the family, education, employment, health, participation in political and public life, participation in cultural life, recreation, leisure and sport, the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to equal protection and equal benefit of the law.[32] It also emphasises the importance of the participation of people with disabilities, requiring governments to ensure the involvement of people with disabilities in both the development of legislation and policies that impact upon

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[29] ECCL, *Wasted time, wasted money, wasted lives – A wasted opportunity?* 2010 (http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf) page 78.
[30] C. Parker (2011) *Forgotten Europeans – Forgotten Rights: The Human Rights of Persons Placed in Institutions* ('*Forgotten Europeans – Forgotten Rights'*), United Nations Office of the High Commissioner for Human Rights, Europe Regional Office, p. 5.
[31] *Ibid*, p. 6
[32] The CRPD and its Optional Protocol (which allows the Committee on the Rights of Persons with Disabilities ("the CRPD Committee") to examine individual complaints) can be found on the United Nations Enable website at: http://www.un.org/disabilities/

them[33] and the national monitoring of the implementation of the CRPD.[34] Unsurprisingly, the principles of equality and non-discrimination are integral to the CRPD, not just being addressed specifically in Article 5 but running through the CRPD like a 'red thread'.[35]

The adoption of the CRPD is the culmination of a growing acknowledgement and concern about the lack of attention given to the rights of people with disabilities.[36] In the relatively short time since it came into force (May 2008), the CRPD has taken on a significant role at the European level. For example, in *Glor v Switzerland* (2009)[37] the ECtHR emphasised the importance of the CRPD, noting that it reflects the international recognition of the need to protect the rights of disabled people.

Although some EU Member States have as yet only signed the CRPD, the Vienna Convention on the Law of Treaties 1969 makes clear that they cannot act in a manner which defeats the object and purpose of the CRPD.[38] In any event, following the EU's ratification of the CRPD, these States would be required to comply with CRPD treaty obligations in so far as these impact upon EU law. Furthermore, as was evident in *Glor,* the fact that a state had not ratified the CRPD (Switzerland had not even signed it) was not considered to be a material factor in limiting its relevance for the purpose of the ECHR.

An overview of Article 19

Article 19 is very broad in scope. It provides for "the equal right of all persons with disabilities to live in the community, with choices equal to others." States are required to "take effective and appropriate measures to facilitate" the right to live in the community and to promote "full inclusion and participation in the community." This right applies to all persons with disabilities, regardless of the degree of the disability or the level of support necessary. Article 19 has strong links to other CRPD rights. For example, the requirement in 19(a) that people with disabilities 'have the opportunity to choose their place of residence' is linked to Article 12 (Equal

[33] Article 4(3)
[34] Article 33(3)
[35] Professor Lisa Waddington, A New Era in Human Rights Protection in the European Community: The Implications the United Nations' Convention on the Rights of Persons with Disabilities for the European Community, Maastricht Faculty of Law 2007, at 4. See also Articles 3 and 4
[36] See for example Gerard Quinn, Theresa Degener et al, 'Human Rights and Disability- the current use and future potential of United Nations human rights instruments in the context of disability' – February 2002- UN Human Rights Commission, http://www.unhchr.ch/html/menu6/2/disability.doc
[37] Application No. 13444/04 30th April 2009. In this case the applicant had been deemed medically unfit to perform his military service due to his disabilities but the authorities decided that his diabetes was not severe enough for him to be relieved from paying the military exemption tax. The case is discussed below.
[38] Article 18

recognition before the law) and that they are 'not obliged to live in a particular living arrangement' links to Article 14, (Right to liberty and security of the person).

Obligations under Article 19

The transition from institutional care to community based services

Although Article 19 makes no specific reference to the need to close institutions, it is implicit that the closure of the long-stay institutions in CEE (together, with the development of community-based services alternatives – i.e. a process of deinstitutionalisation) is a necessary consequence of compliance with its provisions. For example, the requirement that States Parties ensure that persons with disabilities have access to community services that support their social inclusion and 'prevent isolation or segregation from the community' cannot happen if they continue to be placed in institutions.

Given that the emphasis of Article 19, and indeed the whole CRPD, is on the full inclusion and participation of people with disabilities in the community, irrespective of the quality of care in long-stay institutions, the practice of isolating and segregating people with disabilities in institutions conflicts with the provisions under Article 19.

Progressive realisation

While some obligations under Article 19 must be addressed by governments immediately, such as the requirement to recognise the right of people with disabilities to live in the community, 'with choices equal to others', other obligations fall into the category of 'economic, social and cultural rights' and are subject to the concept of 'progressive realisation', as described in Article 4(2) of the CRPD. This takes into account that the arrangements necessary to meet the realisation of such rights may take time to put into place and be subject to resource constraints.

For example, it may take time for some States Parties to develop a range of community-based services and supports that are geared towards the specific needs of people with disabilities as required by Article 19(b), particularly in those countries that have few community-based services and limited resources. However, the lack of resources does not justify inaction - States Parties will be required to demonstrate that they are taking concrete and targeted steps towards realising the right to community living. Furthermore, the obligation to ensure that persons with disabilities can exercise their rights 'without discrimination of any kind on the basis of disability', including 'reasonable accommodation', takes immediate effect.[39]

[39] The EFC report, *supra* 10, referring to: *see* Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion*? in O. Arnardottir & G. Quinn,

The CRPD Committee expects States Parties to monitor their progress in realising the rights under the CRPD and report on such progress in their periodic reports.'[40] For example in its concluding observations to the report submitted by Peru, the Committee raised concerns in relation to the implementation of Article 19 'at the absence of resources and services to guarantee the right of persons with disabilities to live independently and to be included in the community, in particular in rural areas'. The Committee urged the government to 'initiate comprehensive programmes' to enable people with disabilities to access a whole range community support services 'to support living and inclusion in the community, and to prevent isolation or segregation from the community, especially in rural areas.'[41]

While the details of what action will be required to be taken will vary depending on the country context, it is argued the 'progressive realisation' obligation under Article 4(2) of the CRPD requires all States Parties to elaborate a 'community living' plan.[42] This must include a strategy and action plan for the closure of long-stay institutions and set out how the comprehensive review of law, policy and practice in relation to matters covered by Article 19 will be conducted.[43]

Institutionalisation, Community Living and the ECHR

Although the ECHR contains no specific right to community living, its provisions unquestionably protect core components of this right. The freedom of individuals to exercise choice and control over their lives is, by way of example, integral to both the right to liberty (Article 5) and the right to private and family life (Article 8). The ECtHR has made this point explicit, by emphasising that 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.[44]

(eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* 19 (2009).

[40] See Committee on the Rights of Persons with Disabilities *Guidelines on treaty-specific document to be submitted by States Parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities* (CRPD/C/2/3, 2009).

[41] CRPD/C/PER/CO/1, 9th May 2012, paras 32 - 33

[42] Adopting the approach taken in *Promotion and protection of all human Rights, civil, political, economic, social and cultural rights – Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Paul Hunt A/HRC/7/11, 31 January 2008 which considers the obligations flowing from the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights. This is discussed in more detail in the MHI report, *supra* 1 pp 40 - 43. See also Quinn and Doyle *supra* 2, pp19 – 20

[43] See Article 4(1) CRPD.

[44] *Pretty v United Kingdom* (2002) 35 EHHR 1, para 61

The impact of institutionalisation

Life in an institution is subject to substantial restrictions on a person's rights and freedoms. For example an in-depth study of institutions in France, Hungary, Poland and Romania found:

> *'...in many respects, large residential institutions in these four countries are similar to those that have been studied elsewhere. Residents often live lives characterised by hours of inactivity, boredom and isolation. Staff numbers are frequently too low to provide rehabilitation and therapy. The physical environment is relatively impersonal and does not provide the kind of privacy and homeliness that the general population expect. Contact with family and friends and community is limited.'* [45]

Prohibition of torture, inhuman or degrading treatment or punishment

In some cases the decision to institutionalise people against their wishes (or without informed consent) may not just interfere with an individual's personal autonomy, it may also amount to inhuman and degrading treatment. In *Stanev v Bulgaria,*[46] the ECtHR found the living conditions in a social care home, in which the applicant was required to live for nearly 7 years amounted to inhuman and degrading treatment in violation of Article 3. The Court highlighted its particular concerns:

> *'...it appears that the food was insufficient and of poor quality. The building was inadequately heated and in winter the applicant had to sleep in his coat. He was able to have a shower once a week in an unhygienic and dilapidated bathroom. The toilets were in an execrable state and access to them was dangerous, according to the findings by the CPT [Committee on the Prevention of Torture]... In addition, the home did not return clothes to the same people after they were washed ... which was likely to arouse a feeling of inferiority in the residents.*[47]

The ECtHR noted that despite being aware of a 2003 European Torture Committee (CPT) report which held that the living conditions in the Pastra care home (where Mr Rusi Stanev lived) amounted to inhuman and degrading treatment, the government failed to act on its undertaking to close down the institution. The government had, in its 2004 response to the CPT's report, stated that the home 'would be closed as a priority and that the residents would be transferred to other institutions'.[48]

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[45] G.Freyhoff, C. Parker et al (editors) *Included in Society, Results Recommendations of the European Initiative on Community-based Residential Alternatives for Disabled People,* Brussels 2004

[46] *Stanev v Bulgaria* Application No. 36760/06,

[47] *Stanev v Bulgaria* para. 209

[48] *Stanev v Bulgaria,* para 82

The Right to Liberty

Article 5 of the ECHR (the right to liberty) is engaged where a person's placement in an institution amounts to deprivation of liberty. Although no definition of deprivation of liberty is provided by Article 5 or by the ECtHR, the jurisprudence in this area is extensive and continues to develop. The ECtHR has emphasised the importance of considering the particular circumstances of each case, taking into account a range of factors including the 'type, duration, effects and manner of implementation of the measure in question'.

In addition to determining whether an individual has been confined 'in a particular restricted space for a not negligible length of time' (the 'objective element'), the ECtHR must also be satisfied that the person 'has not validly consented to the confinement in question' and that if there is a deprivation of liberty, it is 'imputable to the State'. These additional aspects of deprivation of liberty are relevant to the practice in CEE countries that permits individuals appointed as guardians of people deemed to lack capacity to make decisions for themselves to admit the individual they are responsible for to social care homes, irrespective of the person's wishes. [49] This leads to serious human rights violations. A particular concern is that this system allows individuals subject to guardianship to be deprived of their liberty without any procedural safeguards'.[50]

Shtukatorov v Russia[51] is illustrative for this purpose. The applicant was admitted to a psychiatric hospital on the authority of his guardian. Even though under domestic law, he was considered to be 'voluntarily confined' (on the basis that his guardian had authorised the placement) the ECtHR considered that in reality he was objectively detained and even though legally incapable of expressing his opinion, the ECtHR was not satisfied that he had agreed to his continued stay in the hospital.[52]

In the more recent case of *Stanev v Bulgaria,* the ECtHR noted that following its visits to Bulgaria, the CPT had found that 'in most cases, placement of people with mental disabilities in a specialised institution led to a *de facto* deprivation of liberty'.[53] A similar conclusion was reached by Interights in the light of its survey 'of practices

[49] In many countries of Central and Eastern Europe and the former Soviet Union, a system of guardianship is still applied under which a guardian is appointed to make decisions on behalf of the person deemed to be incapacitated. Those subject to guardianship are prevented from making personal decisions in a wide range of areas such as employment, marriage, voting, and where to live.
[50] United Nations, A/58/181, para. 14 – 22 and see generally, Oliver Lewis, 'Advancing Legal Capacity Jurisprudence' in EHRLR, Issue 6 (2011) 700 – 714.
[51] Application No. 44009/05, 27th March 2008; (2008) 11 C.C.L. Rep. 440; [2008] M.H.L.R. 238. See also *HL v UK* (2005) 40 EHRR 32 and *Stanev v Bulgaria* Application No. 36760/06
[52] The ECtHR took a similar approach in the subsequent cases of *Stanev v Bulgaria* and *DD v Lithuania Application no. 13469/06 14th February 2012*
[53] *Stanev v Bulgaria* Application No. 36760/06, para. 83.

regarding placement of people with mental disorders in specialised institutions in central and east European countries'.[54]

The right to private and family life

Irrespective of a finding that the institutional placement amounts to a deprivation of liberty, the right to private and family life (Article 8) will be engaged. This is because the characteristics of institutions impair an individual's 'physical or psychological wellbeing':[55] interfering as they do with social interaction, the ability to establish relationships, educational and other personal opportunities. These factors have all been recognised by the ECtHR as being important components of Article 8. The ECtHR has stressed that there must be a clear justification for an interference with a person's ability to conduct one's life in a manner of one's own choosing.[56]

Given such an approach, Article 8 has the clear potential to challenge 'passive institutionalisation', such as the situation described by Interights (the third party intervener) in *Stanev v Bulgaria*. Interights drew attention to the dearth of community based alternatives to institutional care. Accordingly, 'when faced with a choice between a precarious, homeless existence and the relative security offered by a social care home' people 'might opt for the latter solution, simply because no alternative services were offered by the State's social welfare system'.[57]

To date the ECtHR has restricted its analysis of the inevitable institutional restrictions on social interaction to Article 5. In *Storck v Germany*[58] it held that the applicant's complaint concerning such restrictions was in substance a repeat of her claims of a breach of Article 5 (which it had upheld). It took a similar approach *Stanev v Bulgaria*, [59] stating that his complaint concerning such restrictions raised nothing new to the arguments already considered under Articles 3, 5, 6 and 13 (all of which it upheld). However, this is an issue that may receive greater attention in the future. While agreeing with the majority on the findings of violations of these Articles, four of the judges considered that the applicant's complaints concerning the infringements of his right to private and family life under Article 8 merited separate examination. In their partially dissenting judgment Judges Tulkens, Spielmann and Laffranque noted that one of the 'genuine issues' requiring specific attention was Mr Stanev's complaint that:

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[54] INTERIGHTS third party intervention in Stanev v Bulgaria before the European Court of Human Rights, paragraph 112. Available at: http://www.interights.org/document/131/index.html

[55] See for example *Tysiac v Poland* (2007) 45 EHRR 42 [107].

[56] *Pretty v United Kingdom* (2002) 35 EHHR 1, para. 62

[57] Paragraph 114

[58] *Storck v Germany* (2006) 43 E.H.R.R. 6

[59] *Stanev v Bulgaria* Application No. 36760/06

> *'...the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits.'*

Such comments reflect the view that Article 8 encompasses aspects of life that go beyond the limited parameters of Article 5. While the ECtHR has made clear that Article 5 requires consideration of the availability of less severe measures,[60] Article 5(1)(e) allows the detention on grounds of mental disorder, [61] subject to three minimum conditions being met namely: that objective medical evidence has shown that the person has a mental disorder; that this is of a nature or degree warranting compulsory confinement and the person can be detained only so long as such mental disorder persists.[62]

The threshold for meeting these criteria is low. For example in the recent case of *DD v Lithuania*[63] when determining whether the applicant's detention was lawful under Article 5(1)(e), the ECtHR relied heavily on the report of a social worker who had not seen the applicant in person,[64] stating that it was ready to find that 'the applicant has been reliably shown to have been suffering from a mental disorder of a kind and degree warranting compulsory confinement'. The ECtHR's scrutiny of alternative measures was restricted to noting that there were no appropriate alternatives to the 'compulsory confinement' because the applicant had escaped from her adoptive father's apartment and been found by the police only three months later.[65]

Article 8 demands a more careful consideration, particularly when viewed through the prism of Article 19 of the CRPD. This is discussed below.

The ECHR and Community Living

It is argued that ECtHR case-law in relation to Article 8 (right to private and family life) of the ECHR has shown that this right:

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[60] *Witold Litwa v Poland* Application no. 26629/95

[61] No such provision is included in Article 14 (the right to liberty) CRPD. See United Nations, Thematic Study by the Office of the High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, A/HRC/10/48, pp 15 - 16

[62] *Winterwerp v. the Netherlands* – 33 (24.10.79)

[63] *DD v Lithuania Application no. 13469/06 14th February 2012*

[64] Interights note on the judgment. Available at: http://www.interights.org/document/206/index.html

[65] Para. 157

> *'...embodies many (if not all) of the core components of the right to independent living: a right to positive measures to ensure "the development, without outside interference, of the personality of each individual in his relations with other human beings",[66] a state obligation to avoid interferences with a person's development of their "social identity",[67] and a right (where the state bears responsibility for the applicants predicament,[68] or the applicant has significant impairments[69]), to positive measures to address inappropriate living conditions.'*[70]

For example, in *Kutzner v Germany*[71] the ECtHR considered whether the removal of the children of parents with mild intellectual disabilities was justified. The ECtHR held that Article 8 had been breached because there were insufficient reasons for such a serious interference with the family's Article 8 rights. One of the factors taken into account by the Court in reaching this decision was its concern that the authorities had not given sufficient consideration to the additional measures of support that could have been provided as an alternative to the 'most extreme measure' of separating the children from their parents.[72]

While the ECtHR has stated that Article 8 is not 'applicable each time an individual's everyday life is disrupted', it recognises that there are circumstances in which:

> *'the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world.'*[73]

In such cases the ECtHR has placed the onus on the applicant to demonstrate 'the existence of a special link between the situation complained of and the particular needs of his or her private life'.[74] In addition, the ECtHR tends to allow States a wide

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[66] *Botta v Italy* (1998) 26 E.H.R.R. 241
[67] *Mikulic v Croatia* [2002] 1 F.C.R. 720
[68] *Moldovan v Romania* (No. 2) (2007) 44 EHRR 16 [105]
[69] App. No.36448/97, *Marzari v Italy*, May 4 1999
[70] Parker C and Clements L, *The UN Convention on the Rights of Persons with Disabilities: a New Right to Independent Living?*, European Human Rights Law Review, Issue 4(2008) 508-523; p. 516.517. INTERIGHTS third party intervention in Stanev v Bulgaria, supra 50
[71] *Kutzner v. Germany*, no. 46544/99 (Sect. 4), ECHR 2002-I – (26.2.02),
[72] *Kutzner v. Germany*, no. 46544/99 (Sect. 4), ECHR 2002-I – (26.2.02),paragraphs 69 – 81; and see also *Saviny v.Ukraine* Application no. 39948/06 18 December 2008 where on similar facts (the parents being blind in this case) a violation of Article 8 was also found: the court observing (para 57) that there had been insufficient analysis by the domestic courts of whether the 'purported inadequacies of the children's upbringing were attributable to the applicants' irremediable incapacity to provide requisite care, as opposed to their financial difficulties and objective frustrations, which could have been overcome by targeted financial and social assistance and effective counselling'.
[73] *Sentges v. The Netherlands* Admissibility Application No 27677/02; 8 July 2003.
[74] *Sentges v. The Netherlands* Admissibility Application No 27677/02; 8 July 2003.

margin of appreciation when considering matters that involve the allocation of limited State resources.

However, there are cases in which the ECtHR is not prepared to take the financial implications of its findings into account. For example, in *Stanev v Bulgaria*, [75] having found that the living conditions in the social care home amounted to a violation of Article 3, the Court stated:

> *'...the lack of financial resources cited by the Government is not a relevant argument to justify keeping the applicant in the living conditions described.'*

The allocation of resources will be relevant to arguments that Article 8 engages a positive duty to promote community living. While the ECtHR's strong statement in *Stanev v Bulgaria* related to a violation of Article 3, it makes clear that providing inexpensive care to the detriment of the dignity and human rights of people with disabilities is not acceptable. In any event it has been shown that once the comparison is made on the basis of comparable needs of the residents and the quality of care provided, 'there is no evidence that community-based models are inherently more costly than institutions'. The research also demonstrates that when properly set up, community-based systems of independent and supported living should deliver better outcomes than institutions.[76]

Furthermore, given the Court's approach to the CRPD, as highlighted in *Glor*[77] and *Kiss v Hungary*[78] (discussed below), it may take a more robust stance in cases where a person with disabilities argues that his or her right to private and family life has been unjustly interfered with because s/he has been placed in an institution rather than being provided with appropriate support in a less restrictive setting. The obligations under Article 19 to provide access to a range of community based supports and avoid seclusion and segregation would be of direct relevance. It has been argued that:

> *'...where the Court seeks to identify which positive obligations derive from Article 8 in other contexts, it has taken into account other relevant international obligations of the State concerned. It has used an estoppel-like argument: how could a State possibly argue that it would be unreasonable to expect it to adopt a particular measure, if the State has already undertaken to adopt that measure by agreeing to other international agreements?'*[79]

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[75] *Stanev v Bulgaria* Application No. 36760/06

[76] The DECLOC report p. 97

[77] *Glor v Switzerland,* Application No. 13444/04 30th April 2009.

[78] Application No. 38832/06, 20th May 2010; [2010] M.H.L.R. 245

[79] Olivier De Schutter "Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights" in *Disability Rights in Europe: From Theory to Practice* (A Lawson and CGooding (eds) Hart Publishing, Oxford, 2005) p.48

Structural Funds and disability discrimination under EU law

When determining how Structural Funds are to be invested, Member States and the European Commission must ensure that they comply with their obligations to combat discrimination, which derive from the general principles of EU law and the CRPD. As discussed above, the EU's ratification of the CRPD will require it to interpret secondary legislation consistently with its provisions, including regulations governing the use of Structural Funds. Similarly, the EU institutions and Member States are under an obligation to act consistently with the provisions of the EU Charter, prohibiting discrimination, as well as the provisions of the regulations themselves.

In addition Article 16 of the general regulations governing the use of Structural Funds states:

> '*The Member States and the Commission shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the Funds and, in particular, in the access to them. In particular, accessibility for disabled persons shall be one of the criteria to be observed in defining operations co-financed by the Funds and to be taken into account during the various stages of implementation.*'[80]

In the absence of a definition of either 'disability' or 'disability discrimination' in the general regulations, and given the status of the CRPD in EU law, it is argued that the CJEU would be guided by the provisions set out in the CRPD. Whereas, in the past the CJEU (then the ECJ) applied a somewhat restrictive and medical model approach to the definition,[81] it is likely to take the broader approach to disability, following the social model approach introduced by the CRPD.[82] Article 1 of the CRPD provides a general description of 'persons with disabilities' as including:

> *'those who have long-term physical, mental, intellectual or sensory impairments which in the interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.*

[80] See the European Disability Strategy, paragraph 10 which states *'EU action will support and supplement national efforts to improve accessibility and combat discrimination through mainstream funding, proper application of Article 16 of the Structural Funds General Regulations...'*

[81] *Sonia Chacón Navas v. Eurest Colectividades* (2006) C-13/05 paragraph 43.

[82] EFC Report, *supra* 36, 42 See also European Commission comments on the social model approach in Communication from the Commission to the Council and the European Parliament – Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities COM 2003 16 final p 7.

Similarly, Article 2 of the CRPD defines *'discrimination on the basis of disability'* very broadly, stating that it includes *'all forms of discrimination, including denial of reasonable accommodation'*. Reasonable accommodation is defined as:

> *'…necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'*[83]

As noted above, the ECtHR's decisions are likely to have a strong influence on the CJEU in its deliberations.[84] In recent years the ECtHR has taken a strong line on what might amount to discrimination, and on what is expected of States to address discriminatory practices. In *D.H. and Others v. the Czech Republic*[85] for example, it held that:

> *'...discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group and that discrimination potentially contrary to the Convention may result from a de facto situation.'* [case citations removed]

The ECtHR has commented that 'the authorities must use all available means to combat racism'.[86] Similarly, in relation to sex discrimination, it has held that: '… very weighty reasons would have to be put forward before such a difference of treatment [on grounds of sex] could be regarded as compatible with the Convention'.[87]

The CRPD has already made a significant impact on the approach taken by the ECtHR to disability discrimination, with the Court referring to the important role played by this Convention in clarifying the protection afforded by the ECHR to people with disabilities. When considering the CRPD and its impact on European

[83] EFC Report, *supra 36*, p. 54 which notes that the definition includes 'direct, indirect, structural, multiple or other, as well as discrimination by association and discrimination based on assumed or future disability'

[84] It should be noted that a different forms of discrimination are recognised in other areas of EU law. For example, Article 2 of the Employment Directive includes 'direct discrimination', 'indirect discrimination' and 'harassment'. The Directive also recognizes that, in relation to people with disabilities, the failure to provide 'reasonable accommodation' can constitute discrimination (Article 5).

[85] (2008) 47 E.H.R.R. 3 § 175.

[86] *D.H. and Others v. the Czech Republic* [GC] (2008) 47 E.H.R.R. 3 para 176.

[87] *Schuler-Zgraggen v. Switzerland* 16 E.H.R.R. 405 para 68.

equality law, Jarleth Clifford notes that the ECtHR 'has pushed the issue of discrimination against persons with disabilities into focus', setting an example 'which the ECJ should look to follow'. [88]

Thus, in *Glor v. Switzerland* (2009)[89] the ECtHR confirmed that for the purposes of Article 14 (freedom from discrimination) and having regard to the 'necessity to fight against discrimination towards disabled persons and to promote their full participation and integration into society', that the 'margin of appreciation' for States to establish different legal treatment for disabled persons is significantly reduced.[90] In finding a violation of the right to non-discrimination on the basis of disability, the Court emphasised that the adoption of the CRPD demonstrated a 'European and universal consensus on the necessity to protect' people with disabilities from discriminatory treatment.[91]

The Court took a similar approach in *Alajos Kiss v. Hungary*.[92] In this case the applicant had been diagnosed as having 'manic depression' (and was therefore considered to 'suffer from a mental disability') and had for that reason been placed under partial guardianship. Whilst acknowledging that States should enjoy a wide margin of appreciation in relation to determining whether restrictions on voting can be justified, the Court considered that an absolute bar, irrespective of the person's 'actual faculties' was not acceptable. The Court held unanimously that such an absolute ban violated the right to free elections of Article 3 of Protocol 1 ECHR. The Court observed that:

> *'... if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the discrimination in question'.*[93]

Institutionalisation as discrimination

The comments by the ECtHR in *Alajos Kiss* are pertinent to the practice of institutionalising people with disabilities. Arguably, the ECtHR's view that consideration needs to be given to the history of prejudice and discrimination towards a group of people and the requirement in such cases for States to 'have very weighty reasons for the restrictions in question' could be applied to situations where governments have decided to use available resources (such as Structural Funds) to

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[88] '*The UN Disability Convention and its Impact on European Equality Law'* The Equal Rights Review Vol. Six (2011) 19
[89] Application No. 13444/04 30th April 2009.
[90] Para 84
[91] Para 53
[92] Application No. 38832/06, 20th May 2010; [2010] M.H.L.R. 245.
[93] Para 42

maintain institutional care for people with disabilities, rather than develop community-based alternatives.

As discussed above, when considering rights under the ECHR, placement in an institution leads to substantial restrictions of a person's rights and freedoms. Further support for identifying institutionalisation in itself as a serious infringement of a person's rights is found in CRPD Article 19. While it does not prohibit 'institutions' *per se*, the range and manner of support expected under Article 19 is in direct contrast to the culture and environment found in institutions. Irrespective of the living conditions in institutions, if people with disabilities are excluded from the rest of society and prevented from participating in community life, this conflicts with Article 19.

The principle of non-discrimination is also highly significant. Article 19 of the CRPD requires that States Parties recognise 'the **equal** right of all persons with disabilities to live in the community, with choices **equal** to others...'[emphasis added]. This links to Article 5 (Equality and non-discrimination) and also Article 4 which requires 'the full realization' of the CRPD's rights and freedoms 'for all persons with disabilities without discrimination of any kind on the basis of disability'.

A decision by the United States Supreme Court is also worthy of note. *Olmstead v LC* (1999)[94] concerned the State of Georgia's funding arrangements that favoured institutional placements, rather than community-based independent living. The Supreme Court held that the arrangements in question contravened the Americans with Disabilities Act (1990) that includes the prohibition of discrimination in the provision of public services. The Court found that the complainants had the right to receive care in the most integrated setting appropriate and that their unnecessary institutionalisation was discriminatory.[95]

As Gerard Quinn and Suzanne Doyle note, although limiting its finding to situations where 'the placement could be reasonably accommodated by the State, taking into account the resources available to the State and the needs of others with mental disabilities', the thrust of the Supreme Court's decision that unjustified institutionalisation amounted to discrimination is of great significance.[96] It draws attention to the consequences of States' failure to provide appropriate care and support to people with disabilities and provides a mechanism for challenging this. The Supreme Court pointed to the negative impact of institutional care:

[94] US Supreme Court (98-536) 527 US 581 (1999).
[95] For further discussion see Arlene Kanter *There's no place like home: The right to live in the community for people with disabilities under international human rights law and the domestic laws of the United States and Israel – DRAFT, May 2011* http://law.huji.ac.il/upload/Kanter(1).pdf
[96] Quinn and Doyle, *supra* 2, 36

> *'Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life...*
>
> *...confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.'*

In a more recent case, a district court held that the New York State discriminated against people with mental illness by placing them in 'Adult Homes' which had all the hallmarks of institutional care and were not 'the most integrated settings appropriate to their needs' as 'virtually all' of them 'could be appropriately served in supported settings'.[97]

As yet this issue has not been addressed by the Strasbourg Court. As we note above, it was raised in the *Stanev* proceedings by the Intervener[98], but the Court declined to investigate it (having found violations of article 3 and 5). It is however inevitable that sooner or later the ECtHR will be called upon to address directly the nature and extent of the 'community living' obligation inherent within article 8.[99]

Indirect discrimination

Two common reasons for the institutionalisation of disabled people in CEE are the lack of community-based alternatives, and that in many parts of this region, the legal and financial systems are barriers to the development of services that are outside the institutional system.

These factors raise the question of whether the institutionalisation of people with disabilities amounts to indirect discrimination by the State, particularly in circumstances where Structural Funds are available. Indirect discrimination occurs when an apparently neutral criterion 'has the effect that members of a group protected by non-discrimination are disadvantaged compared to members of another group, and no objective justification...can be shown to exist to the applied criterion'.[100]

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[97] *DAI v Paterson* 653 F.Supp. 2d 184 (EDNY 2009) (Memorandum of Findings of Fact and Conclusion of Law). See also discussion in Arlene Kanter, *supra* 88, 31-33

[98] INTERIGHTS, *supra* 53, 114.

[99] The issue has been pleaded by MDAC as Intervener in the pending case of *Stanislaw Kedzior v. Poland*, Application 45026/07 – see http://mdac.info/sites/mdac.info/files/Kedzior_v_Poland_amicus_brief_MDAC.pdf

[100] Aart Hendricks, The UN Disability Convention and (Multiple) Discrimination', in Lisa Waddinton and Gerard Quinn (eds) *European Yearbook of Disability Law,* Intersentia, Volume 2 12-13

The issue of concern is that a Member State invests Structural Funds in renovating existing institutions and/or building new institutions rather than implementing a strategy for the development of community based services and ultimate closure of institutions. The impact of this policy, which may have no express intention of doing so, is that those already living in institutions are unlikely to be able to leave while others who are born with, or develop, disabilities are likely to be placed in institutions. In both cases the reason for institutionalisation is because there is insufficient community-based care and support available to the people with disabilities and their families. As discussed above, the consequences of institutionalisation may in some cases lead to severe human rights abuses, but in any event represents a serious infringement on individuals' right to private and family life. Accordingly the State's decision to use Structural Funds in this manner has an adverse and disproportionate impact on disabled people, (the placement in an institution constituting a severe restriction on their rights and freedoms which other non-disabled citizens do not face).

Such a situation is analogous to the circumstances considered by the ECtHR in *DH v Czech Republic,* which concerned the placement of children of Roma origin in special schools for children with learning disabilities. In that case, the ECtHR confirmed that the concept of indirect discrimination was covered by Article 14 of the ECHR.[101] Clearly an important issue will be whether those seeking to pursue a claim of indirect discrimination can demonstrate a difference in treatment (which would then shift the burden of proof to the government to show that the treatment was justified). Given the paucity of data held by governments in CEE on the situation of people with disabilities,[102] and the difficulty in getting information on use of Structural Funds,[103] this is likely to require independent research, for example to show the numbers of people with disabilities in institutions compared to the general population, those people with disabilities living in the community and of the latter, those receiving care and support other than from their families. In *DH v Czech Republic* the ECtHR was willing to accept the statistical evidence submitted by the applicants.

Furthermore, the Court recognised that the quality of evidence required would depend on the circumstance of the case: that proof 'might follow from the co-existence of sufficiently strong clear and concordant inferences or of similar unrebutted presumptions of fact'. It also noted that 'where the events in issue lie wholly or in large part, within exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation'.[104]

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[101] Para. 184
[102] DECLOC report, *supra* 96; 94
[103] ECCL *surpa 19,* 35
[104] Paragraph 179

In relation to the justification for any proven differential treatment, States might argue that the renovation work was required to rectify the squalid living conditions in the institutions. It is arguable whether such work falls within the remit of Structural Funds, unless it forms part of a corresponding plan to develop community based services as alternatives to institutional care.[105] In any event, while a Member State might be able to point to historic reasons for the institutionalisation of people with disabilities, such a position is difficult to sustain if the Member State chooses to use the additional resources provided through Structural Funds to maintain a system which is recognised as being outmoded form of care and places severe restrictions on the rights of people with disabilities. States would need to explain why they are taking such action rather than developing an alternative system of community based services that do not lead to such restrictions, when the transition to community based care forms part of EU disability policy. This argument is strengthened by:

- The widespread ratification of the CRPD, containing as it does an explicit obligation (in Article 19) to develop community-based alternatives.
- The ECtHR's comments on discrimination generally, and in relation to disability discrimination in particular, and its strong statements on the need to take action to protect the rights of people with disabilities.
- Considering the impact of a EU Member State having access to Structural Funds, particularly when the regulations require that this (substantial) additional funding is invested to prevent and combat discrimination.

Denial of reasonable accommodation

That denial of reasonable accommodation amounts to discrimination under the CRPD is 'crystal clear'.[106] Reasonable accommodation is defined in the CRPD (Article 2) as:

> *'…necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'*

[105] The MHI report argues that while in very limited circumstances Structural Funds might be capable of being used to ameliorate the poor living conditions in institutions these are restricted to cases in which: (a) there is a clearly identified and competing case to take limited action (for example to prevent an urgent and life threatening risk to the resident): and (b) their use forms part of a wider strategic program for community living. See MHI report, *supra* note 1, Chapter 6.
[106] Quinn and Doyle, *supra* 2, 35

This means that States Parties must take all appropriate reasonable accommodation steps to promote equality in the enjoyment and exercise by persons with disabilities in all human rights in a wide array of areas that go beyond employment and occupation and including education, health and the provision of goods and services.[107]

With the availability of additional funds it can be argued that investing Structural Funds in institutions rather than developing community-based alternatives, amounts to a denial of reasonable accommodation. This conclusion springs from appreciation of (a) the duty under the CRPD to promote equality and eliminate discrimination (see Article 5(3)) and (b) the definition of disability discrimination, which includes the denial of reasonable accommodation. It follows that a Member State would be required to provide clear reasons why it decided to invest in maintaining the institutional system rather than developing community-based alternatives. Force is added to this analysis by an awareness of the obligations on Member States and the European Commission to use Structural Funds to promote social inclusion (Article 3 of the general regulations) and improve quality of life (Article 4 of the ERDF regulations).

The CRPD requires States Parties to take action to provide 'reasonable accommodation' when a 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden' is needed 'to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. In *HM v Sweden*, [108] the CRPD Committee found that the refusal to grant building permission for the construction of a hydrotherapy pool (considered to be an essential and effective means of meeting the complainant's health care needs) amounted to a denial of reasonable accommodation. The Committee considered that such permission could have been given and would not have imposed a 'disproportionate or undue burden' on the State Party.

As discussed above, the ECtHR has set limits on the extent to which Article 8 might place obligations on States, particularly where there may be cost implications.[109] There are, however, grounds for arguing that in the light of the CRPD the ECtHR might scrutinise the impact of the institutionalisation of people with disabilities more closely. In addition, there are at least three reasons why, in the context of Structural Funds, the ECtHR may take a less cautious approach:

- Structural Funds are additional external funds, not domestic and limited State resources;

[107] Jarleth Clifford, *supra* 80 and the EFC report , *supra* 36 p.55
[108] *HM v Sweden* CRPD/C/7/D/3/2011
[109] See, for example, *Sentges v. The Netherlands* (2003) 7 CCLR 400, 405: Admissibility Application No 27677/02; 8 July 2003.

- Where a person with disabilities has been institutionalised purely as a consequence of having no suitable services in the community, this has a direct and immediate impact upon that person's life (interfering as it must with their 'right to personal development and their relations with other human beings and the outside world'[110]); and
- Even where the margin of appreciation is wide, it is for the Court to determine whether a person's ECHR rights have been curtailed:

> *'...to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.'*[111]

In such circumstances, the ECtHR might well consider it necessary to examine the reasons why a State has not taken reasonable steps to establish community-based alternatives to institutions, especially when it had available funds to do so[112] and in light of the following:

- the general consensus on the need to move from institutional care to a system of community-based services;[113]
- the international recognition of the need to protect the rights of people with disabilities, as reflected in the adoption of the CRPD[114] which includes the right to community living as articulated in Article 19 (and all EU Member States have recognized the rights set out in the CRPD, having signed, if not ratified it);
- the State has access to funds that would enable it to shift its model of care to community-based services.

Conclusion

In its Press Release following the EU's ratification of the CRPD,[115] the Commission Vice-President Viviane Reding referred to the EU's commitment to implement 'concrete measures with a concrete timeline'. In doing so, she specifically cited the EU disability strategy,[116] which had identified eight main areas for action, the second of which concerned the use Structural Funds to support the development of

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[110] *Botta v. Italy* (1998) 26 E.H.R.R. 241 paragraph 32.
[111] *Hirst v UK* (2006) 42 E.H.R.R. 41; 74025/01; 30 March 2004 paragraph 62.
[112] Parker C and Clements L, *The UN Convention on the Rights of Persons with Disabilities: a New Right to Independent Living?*, European Human Rights Law Review, Issue 4(2008) 508-523; p. 516.
[113] See for example Report of the Ad Hoc Expert Group on the Transition from Institutional Care to Community-based Care, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, September 2009
[114] *Glor v. Switzerland* (2009) Application No. 13444/04 30th April 2009 para 53.
[115] EU ratifies UN Convention on disability rights, 5th January 2011 at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4
[116] European Commission (2010) European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' COM(2010) 636 final p. 6.

community-based services to promote the transition from institutional to community-based care.

However, the current misuse of Structural Funds frustrates their enormous potential to be a positive force in the transition from institutional to community-based care for disabled people. This misuse is something that the Commission can and legally must now tackle. As a case study, it also presents a paradigm example of how the CRPD, for all its 'soft' soubriquets, can become a powerful vehicle that delivers practical change.

As we have discussed in this paper, over the last two decades several strands of European Law have been identified which bear upon the inappropriate institutionalisation of disabled people. These strongly suggest that such action constitutes unlawful discrimination; violates the private and family rights of disabled people to 'community living'; and engages the positive obligation on states to promote independent, non-institutional living opportunities for disabled people.

It is arguable, that in the last decade a consensus has developed as to the validity of these legal principles, and the challenge is now to establish their justiciability: what substance they should be accorded when confronted by the 'resource' argument? Rights and principles they may well be – but (save in the most stark of circumstances) are they capable of being more: more than aspirational "wouldn't it be nice" rights?

As this paper demonstrates, in relation to the use of EU Structural Funds, there are two broad grounds for believing that these rights will become hard and justiciable. Firstly, the widespread ratification of the CRPD will act both as a powerful catalyst crystallising these disparate principles as well as providing a unifying philosophical basis for their use: ECHR jurisprudence, EU Law (including the Charter of Fundamental Rights) and the established principles of non-discrimination law in combination creating a powerful default position for any legal disputation concerning these issues.

Secondly, in relation to the use of Structural Funds, the resource argument must be a very weak one. The proper application of such funds is not one that is part of the 'deference' debate – in the sense that it is not concerned with decisions by elected Governments over the use of their scarce state resources. On the contrary, the question is about how the EU distributes what are in effect grants - 'new' money, to which conditions are (indeed 'must be') attached: grants made by an awarding body which has ratified the CRPD and is subject to EU and ECHR law – to states that have (at the very least) signed the CRPD and are subject to the self-same laws.

The motives underlying a nation state's ratification of an international human rights treaty, are often open to conjecture – and speculation over the reasons for the EU's 'confirmation' of the CRPD is no less legitimate. Was this symbolic, rhetorical,

synthetic: a grand gesture to a distant set of aspirational principles – a deed full of sound and glory, but signifying precious little of substance?

Whatever the motivation and however 'soft' the CRPD may appear to be, it is difficult to envisage a more tangible – a more 'concrete' example of how it will bind the EU and its member states, than the issue analysed in this paper. Indeed, it could be said that the way the Commission responds to the challenges concerning the award of Structural Funds – whether these funds promote or undermine the right to community living - will be the litmus test, by which we measure its commitment to the CRPD.