



Third Party Submission of the PERSON Project and Mental Health Europe in  
*Ivinovic v Croatia*, Application no. 13006/13 (lodged 11 Jan 2013)  
Submitted July 2013

## I. Introduction

1. These written comments are submitted by the PERSON Project (Partnership to Ensure Reform of Support in Other Nations) and Mental Health Europe, pursuant to leave granted by the President of the Court in accordance with Rule 44§2 of the Rules of the Court. The PERSON Project is an initiative funded by the European Union and coordinated by the Centre for Disability Law and Policy (CDLP) at the National University of Ireland, Galway. The partner organizations are the SHINE (Croatia), MDRIS (Serbia), SUMERO (Bosnia and Herzegovina), ISDY (Kosovo), and RUSIHAK (Turkey). The Project's aim is to strategically advocate and monitor law and policy affecting persons with psycho-social and intellectual disabilities in the partner countries. In Croatia, the SHINE has participated in legislative reform efforts as well as strategic litigation around the right to support for decision-making and legal capacity reform. The Project as a whole is committed to working towards the realization of these goals in accordance with the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).<sup>1</sup> The notion of restoring 'voice' to persons with disabilities is a core focus of the Project's work. Mental Health Europe is a European umbrella organization uniting more than 80 non-governmental organizations representing 30 countries, working in the mental health field.
2. The European Court of Human Rights has already indicated that it is prepared to interpret the rights contained in the European Convention on Human Rights (ECHR) in the light of the CRPD. In *Glor v Switzerland*<sup>2</sup> the Court specifically referred to the CRPD as representing European and universal consensus on the need to prevent discriminatory treatment of, and ensure equality for, persons with disabilities.<sup>3</sup>
3. This submission examines the right to legal capacity as an essential component of the right to equal recognition before the law, as established in Article 12 of the UN CRPD.<sup>4</sup> Article 12 CRPD is also closely related to Article 13 CRPD on access to justice, as persons deprived of their legal capacity on disability related grounds are often prevented from enjoying equal access to justice, and appropriate accommodations to facilitate equal access to justice may not be available. In this submission, Articles 12 and 13 CRPD are analysed in connection with their counterparts under the ECHR: Article 6 (the right to a fair trial), Article 8 (the right to respect for private and family life, home and correspondence), Article 13 (the right to an effective remedy) and Article 14 (prohibition on discrimination in enjoyment of ECHR rights).

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<sup>1</sup> Croatia ratified the UN CRPD and its Optional Protocol on August 15, 2007.

<sup>2</sup> (App.no. 13444/04) Chamber judgment of April 30, 2009.

<sup>3</sup> *Ibid* §53.

<sup>4</sup> United Nations Convention on the Rights of Persons with Disabilities (CRPD) A/Res/61/106 (2006).

4. The submission first examines the substantive right to private life in Article 8 ECHR. It analyzes the deprivation of legal capacity as an unjustified intrusion of private life in violation of Article 8. It focuses on the positive obligation on states to provide support for the exercise of legal capacity as opposed to interfering with the private life of citizens by depriving them of legal capacity. It then addresses Article 14 and whether the deprivation of legal capacity constitutes a discriminatory violation of the Article 6 and 8 rights of persons with disabilities in Croatia. Finally, an examination is provided of the procedural rights to fair trial and access to justice found in Articles 6, 8, and 13, highlighting how these impact on the applicant's rights in the present case.
5. The Court has developed an increasingly impressive record of protecting the rights of persons with disabilities. This submission strives to aid the Court in its pursuit to lead global human rights law towards equality for persons with disabilities.

## **II. Article 8 – Legal Capacity Deprivation as an Unjustified Interference with Private Life**

### ***Application of Article 8***

6. The applicant in this case contends that the proceedings to deprive her of her legal capacity violated her Article 8 rights to private and family life, home and correspondence.
7. The Court held in *Brüggemann and Scheuten v Germany* that Article 8 'secure[s] to the individual a sphere within which he can freely pursue the development and fulfillment of his personality'.<sup>5</sup> Deprivation of legal capacity, by the appointment of a guardian to take decisions regarding a person's finances, health and welfare, without any obligations to consult the person on their wishes, or to act in accordance with their will and preferences, constitutes a significant limitation on the development and fulfillment of personality.
8. In *X and Y v Croatia*, the Court found that 'a measure such as divesting one of legal capacity amounts to a serious interference with that person's private life.' In *X and Y*, the second applicant complained that the institution of proceedings which aimed to appoint a guardian to her violated her Article 8 rights, and the Court agreed that 'the mere institution of these proceedings already has serious consequences' for her right to a private life.<sup>6</sup>
9. The Court found in *Shtukaturov v Russia* that the deprivation of legal capacity was a disproportionate interference with the applicant's private life, in violation of Article 8.<sup>7</sup> However, the Court did not consider deprivation of legal capacity and guardianship under Article 8 in subsequent cases such as *Stanev v Bulgaria*, *Kędzior v Poland* and *Mihailovs v Latvia*. The present case offers an opportunity for the Court to offer greater clarity on when deprivation of legal capacity may constitute a disproportionate interference with Article 8 rights.
10. An interference with the Article 8(1) rights to respect for private and family life, home and correspondence, can only be justified according to Article 8(2) if it is deemed to be a proportionate interference which observes the procedures and requirements prescribed by law and pursues a legitimate aim which is necessary in a democratic society, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
11. The deprivation of legal capacity, as the Court has held in previous cases, can constitute an interference with Article 8(1) rights where it results a failure to validate and protect the choices that an individual

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<sup>5</sup> App no. 6959/75(1977) 10 DR 115 §55.

<sup>6</sup> (2011) ECHR 1835 §102.

<sup>7</sup> (2008) ECHR 223 §95.

makes about family, home, and correspondence. Such deprivations of legal capacity vest those choices in another individual, such as a guardian, who may or may not act in accordance with the desires the individual has for those areas of his or her private life. In order for an interference with an individual's private life such as the deprivation of legal capacity to comply with Article 8, it must meet the Article 8(2) requirements for when a state is permitted to intervene in an individual's private life.

12. In *Shtukatorov v Russia, X and Y v Croatia* and *Sykora v Czech Republic*, the Court has found the deprivation of legal capacity and the appointment of an adult guardian to be a disproportionate interference with Article 8 rights, not justified under the Article 8(2) criteria.<sup>8</sup> In *Lashin v Russia*, the Court held that since the deprivation of legal capacity is such a significant interference with Article 8 privacy rights, the Court should apply strict scrutiny to the reasons provided by the State for this deprivation, notwithstanding the margin of appreciation set out in Article 8(2).<sup>9</sup>
13. When considering whether such a measure may be a disproportionate interference, the Court should recall that a range of other measures are available, in Croatia, and other countries, to protect the interests of the person and of others. Where, for example, there are concerns about a person incurring debts, there are already remedies available to creditors to enable them to recover any debts owing to them. In terms of protection for the person themselves, Article 12(3) CRPD highlights that states must provide support to enable a person to exercise their legal capacity, rather than depriving an individual of their legal capacity. A wide range of measures might constitute supports, and increasingly States Parties to both the ECHR and the CRPD are building supports into legislation or exploring other possibilities, some of which are discussed below.<sup>10</sup>
14. The Council of Europe Commissioner for Human Rights has observed that '[t]he bulk of European legal capacity systems are out-dated and in urgent need of law reform.' He has called upon states in the Council of Europe to '[r]eview existing legislation on legal capacity in the light of current human rights standards and with particular reference to Article 12' CRPD, to '[r]eview judicial procedures to guarantee that a person who is placed under guardianship has the possibility to take legal proceedings to challenge the guardianship' and '[d]evelop supported decision-making alternatives for those who want assistance in making decisions or communicating them to others'.<sup>11</sup>
15. Deprivation of legal capacity has implications for a host of issues connected with Article 8 ECHR. The Council of Europe Commissioner for Human Rights has also identified deprivation of legal capacity as an area of concern in relation to involuntary institutional placement, and denial of people's rights to live independently under Article 19 CRPD.<sup>12</sup> Of particular relevance to this case, since it concerns the applicant's right to make healthcare decisions, is the recent report by the UN Special Rapporteur on Torture, who – along with his predecessor – has noted the 'intimate link between forced medical interventions based on discrimination and the deprivation of legal capacity'. He has identified forced medical treatments as torture, and noted that torture 'presupposes a situation of powerlessness, whereby the victim is under the total control of another person.' He has called for 'an absolute ban on all forced and non-consensual medical interventions against persons with disabilities'.<sup>13</sup> Since the applicant in this case, Ms. Ivinovic, was deprived of her legal capacity in relation to decisions about

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<sup>8</sup> *Shtukatorov v Russia*, §95; *X and Y v Croatia*; *Sykora v Czech Republic* (2012) ECHR 1960.

<sup>9</sup> (2013) ECHR 63 §80-81.

<sup>10</sup> Pathare, S. & Shields, L. S., 'Supported Decision-Making for Persons with Mental Illness: A Review' (2012) 34 Public Health Reviews (2) 1-40.

<sup>11</sup> Commissioner for Human Rights, 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' (2012) (Council of Europe, Strasbourg).

<sup>12</sup> Hammarberg, T., 'The right of people with disabilities to live independently and be included in the community' Strasbourg: Council of Europe, Commissioner for Human Rights (CommDH/IssuePaper (2012)) 3.

<sup>13</sup> Méndez, J. E., 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' paper presented at: 22nd session of the United Nations Human Rights Council, 4th March 2013, Geneva.

medical treatment, the Court may find this guidance from human rights mechanisms of the Council of Europe and UN to be instructive in considering any interference with her Article 8 rights.

16. As noted above, the Court itself has found that even the mere institution of deprivation of legal capacity proceedings may violate Article 8 ECHR. In *X and Y v Croatia*, the Court found that under Article 8 there was not sufficient reason to justify deprivation of legal capacity where the Government argued that the second applicant needed to be placed under guardianship because she had refused to leave her home and to communicate with others for several days and had previously been treated in a psychiatric institution. Article 12(3) CRPD dictates that every individual has a right to support for the exercise of legal capacity regardless of decision-making ability.<sup>14</sup> The need for support does not warrant deprivation of legal capacity, as the Court itself has previously held.<sup>15</sup>
17. Research by the SHINE and the Mental Disability Advocacy Centre has found that deprivation of legal capacity in Croatia is linked to the involuntary institutionalization of persons with disabilities, and to other human rights violations relating to censorship of correspondence, arbitrary detention, seclusion, restraint and involuntary treatment.<sup>16</sup>

### **Positive obligation to provide access to support**

18. Article 12 lies at the 'core' of the UN CRPD.<sup>17</sup> It calls for the equal recognition of persons with disabilities before the law. Specifically, it requires: (1) the equal recognition of persons with disabilities before the law, (2) recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, (3) that States take appropriate measures to provide support while exercising that capacity, (4) that there be appropriate safeguards to prevent abuse of human rights, (5) that measures be taken to ensure the equal opportunity of persons with disabilities to control their own financial affairs.<sup>18</sup>
19. The Court has increasingly used Article 12 CRPD as an aid to interpretation in cases concerning legal capacity.<sup>19</sup> The UN Committee for the Rights of Persons with Disabilities has offered interpretations of Article 12 CRPD in its jurisprudence on the reports of states parties. It has called for states 'to replace substitute decision-making by supported decision-making in the exercise of legal capacity.'<sup>20</sup> In light of this, we invite the Court to consider in this case what support options could have been offered to the applicant to exercise her legal capacity.
20. A range of specialist supports for the exercise of legal capacity are being developed around the world, but some may be as simple as enabling access to financial counseling to help a person manage their

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<sup>14</sup> CRPD Article 12.

<sup>15</sup> *X and Y v Croatia* §90.

<sup>16</sup> Mental Disability Advocacy Center & SHINE 'Out of Sight: Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia' (Hungary and Zagreb: 2011).

<sup>17</sup> Written Submission of the Centre for Disability Law and Policy, NUI Galway 'Cervenka v The Czech Republic' (App no 62507/12) Submitted April 2013.

<sup>18</sup> CRPD Article 12.

<sup>19</sup> See *Lashin v Russia* (2012) ECHR 63; *MS v Croatia* (2013) ECHR 378; *Sýkora v The Czech Republic*; *DD v Lithuania* (2012) ECHR 10; *Stanev v Bulgaria* (2012) ECHR 46; *Seal v UK* (2010) ECHR 1976.

<sup>20</sup> Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia. (Fifth Session: 11-15 April 2011, Geneva, Switzerland). See also the Committee's observations on Spain (Sixth Session, 19-23 September 2011); Peru and China (Seventh Session, 16-20th April 2012); Hungary (Eighth Session, 17-28 September) and Paraguay (Ninth Session, 15-19th April 2013) Available: <[www.ohchr.org/EN/HRBodies/CRPD/Pages/Sessions.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Sessions.aspx)> (accessed 20 April 2013).

money. Independent advocacy may also be an important source of support, to enable a person to convey their concerns to relevant parties and to enable them to access justice.<sup>21</sup>

21. Some supports are specifically directed towards assisting persons with mental disabilities or impairments. In South Australia the Office of the Public Advocate has run a very successful trial where people who were at risk of entry into guardianship, or who were already subject to an administration order which gave others control of their financial affairs, set up 'support agreements' with nominated persons who would talk through decisions with them before they made them. This trial found that people provided with this support not only avoided entry into guardianship, but were successful in applying for the administration orders to be lifted.<sup>22</sup> In Sweden, schemes to support persons with mental illness through provision of a 'personal ombudsman' have actually produced financial savings as fewer people were subject to involuntary admission and treatment in hospital.<sup>23</sup>
22. In British Columbia, Canada, people with only very limited abilities to communicate can nominate a representative who can support and represent them in specified areas of decision making – including personal decisions and everyday financial decisions.<sup>24</sup> The representation agreement scheme has proven very popular and successful among persons with disabilities and their families<sup>25</sup> and is often highlighted as an example of good practice in implementation of UN CRPD Article 12.<sup>26</sup>
23. It is important to recall that where supports exist to help a person exercise their legal capacity – including by appointing third parties through instruments such as a Lasting Power of Attorney – Article 12(4) CRPD requires that there are appropriate safeguards to protect people against conflicts of interest and undue influence and the exercise of such measures in a way that does not respect the rights, will and preferences of the person. If a person has been subject to abuse by a representative or attorney, the Court should scrutinize what measures were in place to safeguard them and provide them with individual redress, and what criminal sanctions were available to prosecute those responsible for any exploitation.
24. Where a person has been subject to abuse or exploitation in the exercise of their legal capacity, the CRPD requires States Parties to focus on measures to provide them with redress and punish perpetrators, rather than deprive the individual of their legal capacity. A parallel might be drawn with the Court's observation in *Salontaji-Drobnjak v Serbia*, where it held that although a legal system must be allowed to protect itself from vexatious litigants, 'it is up to the domestic authorities to set up an effective judicial mechanism of dealing with such litigants' claims, without necessarily having to resort to additional measures affecting their legal capacity.'<sup>27</sup> Likewise, Article 16 CRPD requires States Parties to recognise the need to establish mechanisms to protect individuals against exploitation without depriving them of their legal capacity.

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<sup>21</sup> Flynn, E., 'Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law' (2013) 17 *The International Journal of Human Rights* (4) 491-510.

<sup>22</sup> Wallace, M., 'Evaluation of the Supported Decision Making Project' (2012) South Australia: Office of the Public Advocate.

<sup>23</sup> Jespersen, M., 'PO-Skåne – a concrete example of supported decision-making' (2012), paper presented at: 'International Conference on Good Policies for Persons with Disabilities' 23 January 2012, Vienna. Available: <<http://goo.gl/Hun8K>> (accessed 20 April 2013).

<sup>24</sup> Representation Agreement Act 1996.

<sup>25</sup> Nidus Personal Planning Resource Centre and Registry 'Experiences of adults living with Fetal Alcohol Syndrome Spectrum Disorder and their personal supporters in making and using a Representation Agreement' (2009) Vancouver, B.C.; Nidus Personal Planning Resource Centre and Registry (2009) 'A Study of Personal Planning in British Columbia' Vancouver, B.C..

<sup>26</sup> Zero Project, 'Canada: Advancing Supported Decision-Making' Available: <<http://www.zero-project.org/policies/y2012/canada/>> (accessed 5 July 2013).

<sup>27</sup> (2009) ECHR 1526 §144.

25. As the Court acknowledged in *Airey v Ireland*<sup>28</sup>, the provision of practical support can be essential to the actual and effective protection of civil and political rights - such as the right to exercise legal capacity, in the present case.<sup>29</sup> In *MS v Croatia*,<sup>30</sup> the Court also acknowledged that Article 8 does not simply require public authorities to refrain from interference in the person's right to a private life, but also contains positive obligations to take steps to protect and uphold those rights (in that case, to protect the applicant from physical abuse). We invite the court to find that such positive obligations include the provision of practical supports *necessary for* the exercise of legal capacity, as well as protection from exploitation and abuse. The practical supports necessary for the exercise of *legal capacity* will often simply require that people are connected back with the social capital and relationships found in their home communities.

### III. Articles 6, 8, and 13 – Procedural Fairness Issues

26. The Court has a robust record in developing fair trial guarantees under Articles 6, 8 and 13 ECHR. This section will consider procedural fairness from the perspective of Articles 6, 8 and 13 ECHR and draw out parallels with the Court's case law on procedural matters and Articles 12 and 13 of the UN CRPD.

27. Article 12 of the UN CRPD has important implications for measures that amount to deprivation of legal capacity of persons with disabilities. It requires that the right to legal capacity be respected for persons with disabilities on an equal basis with others. States may not deprive persons with disabilities of legal capacity in a manner that is discriminatory in purpose or effect. Persons with disabilities may only be deprived of legal capacity to the same extent as persons without disabilities. This raises questions about the human rights compliance of the Croatian guardianship law and legal capacity deprivation regime. This substantive issue is addressed above in relation to Article 8; however, the present section will focus on the procedural guarantees of the ECHR and the UN CRPD.

#### ***Institution of proceedings***

28. The European Court has previously noted that even the 'mere institution' of proceedings of this nature will engage a person's Article 8 rights because of the severity of the consequences and the intrusions into privacy of the process itself.<sup>31</sup> The Court has also stressed the importance of giving people an opportunity to oppose the institution of deprivation of legal capacity proceedings.<sup>32</sup>

#### ***Representation before proceedings***

29. This case offers an excellent opportunity to examine the role of *guardians ad litem* in proceedings concerning a person's legal capacity.

30. *Guardians ad litem* have an ambivalent role under the UN CRPD. On the one hand, they may represent an invaluable support for the exercise of legal capacity in accordance with Article 12, and an appropriate accommodation to ensure that persons with disabilities enjoy equal access to justice under Article 13. On the other hand, insofar as the *guardian ad litem's* representation of a person's case departs from that person's will and preferences, they are also potentially a substitute decision maker in their own right. Article 12(4) CRPD is clear that supports for the exercise of legal capacity must respect the will and preferences of the person. The UN Committee for the Rights of Persons with Disabilities has repeatedly

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<sup>28</sup> (1979) ECHR 3.

<sup>29</sup> See also *Botta v. Italy* (1998) ECHR 12 §27.

<sup>30</sup> §73.

<sup>31</sup> *X and Y v Croatia* §102.

<sup>32</sup> *MS v Croatia* (2013) ECHR 378 §105.

stated in its observations on states reports that states must ‘replace regimes of substitute decision-making by supported decision-making’.<sup>33</sup>

31. Where a *guardian ad litem* personally supports deprivation of person’s legal capacity, they may not take strenuous efforts to oppose such a measure, including critically questioning any evidence presented to the court. This is a serious conflict of interest. There is a danger that this will undermine ECHR guarantees of effective access to justice<sup>34</sup> and equality of arms for all parties to proceedings.<sup>35</sup>
32. In *Shtukaturov v Russia* and *Salontaji-Drobnjak v Serbia* the Court has emphasized that the individual who is the subject of proceedings must play a role in those proceedings.<sup>36</sup> It is respectfully submitted that it would not be in accordance with the principle of equality of arms if a person seeking to oppose such a measure were not supported to present their case effectively. Accordingly, it is submitted that the role of a *guardian ad litem* should be to help a person to put their case as effectively as possible to oppose measures with such serious consequences for their Convention rights.
33. Further support for this contention comes from the Court’s previous recognition that access to an effective remedy as guaranteed by Article 13 ECHR must not depend on the discretionary powers of public officials.<sup>37</sup> Those supporting a person to access an effective remedy must not have discretion to support measures engaging the person’s Convention rights when the purpose of the proceedings is to allow them an opportunity to oppose the measure.
34. Furthermore, Article 12(4) UN CRPD requires that supports for the exercise of legal capacity be free of conflict of interest. In Croatia, the national law permits the party who is seeking to deprive a person of their legal capacity – that is, Social Welfare Centres – to appoint the *guardian ad litem*, and they are permitted to appoint one of their own employees. As the Court has noted in other cases of this nature, ‘it would be difficult to expect an employee of that same Centre to oppose or challenge such a request’.<sup>38</sup> It is submitted that the absence of any independent legal representation, with the appropriate skills and training to represent a person in court proceedings, could constitute a violation of the fair trial guarantees of Article 6 ECHR, the procedural safeguards required in connection with Article 8<sup>39</sup> ECHR and Articles 12(4) and 13 UN CRPD.

### ***Sole reliance on expert evidence***

35. Sole reliance on medical evidence in any matters that will impact upon a person’s Convention rights will introduce an unacceptable degree of arbitrariness into proceedings.<sup>40</sup> In considering measures that will have a significant impact on individuals’ Convention rights, courts must be very cautious of accepting medical evidence at face value. The Court has previously criticized domestic courts’ reliance on expert medical evidence without critical examination.<sup>41</sup>
36. In *X and Y v Croatia* the Court established that:

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<sup>33</sup> ‘Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia’ (5th session, 11-15 April 2011) Available: <[www.ohchr.org/EN/HRBodies/CRPD/Pages/Session5.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session5.aspx)> (accessed 20 April 2013).

<sup>34</sup> *Airey v Ireland* (1980) 2 EHRR 305 §24.

<sup>35</sup> *Brandstetter v Austria* (1991) ECHR 39; *Steel and Morris v UK* (2005) ECHR 103 §72; *D.D. v Lithuania* (2012) ECHR 24 §82.

<sup>36</sup> *Shtukaturov v Russia* §72; *Salontaji-Drobnjak* §127.

<sup>37</sup> *X and Y v Croatia* §104.

<sup>38</sup> *MS v Croatia* §104.

<sup>39</sup> *AK and L v Croatia* (2013) ECHR 8 §63; *MS v Croatia* (2013) ECHR 378 §101; *Sýkora v The Czech Republic* (2012) ECHR 1960 §102; *Krušković v Croatia* (2011) ECHR 991 §31.

<sup>40</sup> *X and Y v Croatia* §§85-6.

<sup>41</sup> See *Lashin v Russia* §119; *X and Y v Croatia* §113; *MS v Croatia* §103.

at the end of the day, it is the judge and not a physician, albeit a psychiatrist, who is to assess all relevant facts concerning the person in question and his or her personal circumstances. It is the function of the judge conducting the proceedings to decide whether such an extreme measure is necessary or whether a less stringent measure might suffice. When such an important interest for an individual's private life is at stake a judge has to balance carefully all relevant factors in order to assess the proportionality of the measure to be taken. The necessary procedural safeguards require that any risk of arbitrariness in that respect is reduced to a minimum.

37. The less stringent procedural measures in the Croatian legal system allow for deprivation of legal capacity to happen solely on the ground of psychiatric reports. In previous ECHR cases such as *X and Y v Croatia* and *MS v Croatia*, it has been found that judicial proceedings only serve to verify what expert psychiatrists said during proceedings. The procedural standards in guardianship proceedings in Croatia allow considerable scope for arbitrariness in relation to people with disabilities facing deprivation of legal capacity proceedings.

### ***Standing to apply to a court and access to justice***

38. In previous ECHR cases loss of legal capacity confers loss of locus standi to initiate any proceedings before the court.<sup>42</sup> In other cases, people who have been deprived of legal capacity may simply lack the relevant supports and accommodations they need to make an application to the Court to restore their legal capacity.

39. Loss of standing to initiate proceedings, which is conferred on a person because of their disability, is a clear violation of Article 12(2) and Article 13 CRPD, as it means that people with disabilities will not be able to enjoy access to a court on an equal basis with others. It is submitted that this constitutes a form of disability discrimination, which will be explored more fully in connection with Article 14 ECHR.

40. The Court has delineated several essential rights of access to a court, that must not be obstructed even where a person is deprived of their legal capacity. In *Stanev v Bulgaria*<sup>43</sup>, *Kędzior v Poland*<sup>44</sup> and *Mikhaylenko v Ukraine*<sup>45</sup> the Court has emphasised that the right to ask a court to restore one's legal capacity is one of the most important rights for the person concerned, because it is decisive for the exercise of all other rights affected by the declaration of incapacity.

41. The obligations contained within Article 13 CRPD require States Parties to 'ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations'.<sup>46</sup> Access to justice is central to the values that animate the ECHR: in *Golder v UK*, the Court positively declared that 'one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.<sup>47</sup> There is much overlap between Article 13 CRPD and Article 13 ECHR, inasmuch as very often – as in the present case – access to justice is an essential component of the right to an effective remedy for a violation of that engages a person's rights.

42. The court has held that where states bestow discretion capable of interfering with a person's ECHR rights, the procedural safeguards available to that person must be 'fair and such as to afford due respect

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<sup>42</sup> See, e.g. *Shtukurov v Russia*; *Salontaji-Drobnjak v Serbia*; *Stanev v Bulgaria*; *D.D. v Lithuania*; *Kędzior v Poland* (2012) ECHR 1796.

<sup>43</sup> §241.

<sup>44</sup> (2012) ECHR 1809 §89.

<sup>45</sup> §§37,40.

<sup>46</sup> CRPD Article 13(2).

<sup>47</sup> (1975) ECHR 1 §34.



to the interests safeguarded to the individual'.<sup>48</sup> In the present case, and under most guardianship regimes, the lack of access to justice for individuals subject to deprivations of legal capacity presents a serious interference with their Article 13 rights in relation to the full spectrum of ECHR rights. We submit that the Court should consider how individuals can be actively supported to seek restoration of legal capacity if they wish to do so, in order to protect their Convention rights.

#### **IV. Article 14 – Non-Discrimination and the Right to Private Life and Procedural Fairness**

43. Although it is not specifically mentioned in Article 14 ECHR, disability falls under the scope of the non-exhaustive list of prohibited grounds.<sup>49</sup> We invite the court to consider whether deprivation of legal capacity may constitute a violation of Article 14 ECHR as it interferes with a person's enjoyment of their other ECHR rights – especially Articles 6 and 8 – on disability related grounds. We suggest that the Court use the CRPD as an aid to interpretation in this endeavor.
44. Article 5 of the UN CRPD<sup>50</sup> prohibits discrimination on the ground of disability. The UN CRPD defines disability discrimination as: 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.<sup>51</sup>
45. As the foremost treaty on the rights of persons with disabilities, we suggest that the CRPD is the most appropriate aid to interpreting Article 14 ECHR in relation to disability. We note that in a recent ruling, the Court of Justice of the European Community used the definition of disability given in Article 2 UN CRPD in interpreting disability discrimination under EU law.<sup>52</sup>
46. We submit that deprivation of legal capacity constitutes a form of disability-based discrimination when legal capacity is denied to persons with disabilities on the prima facie basis of disability or where the procedure to deny legal capacity is disproportionately applied to persons with disabilities.
47. In Croatia, the law requires that a person have a disability as part of the deprivation of legal capacity procedure – this constitutes prima facie differential treatment on the basis of disability. Professed to be a protective mechanism, legal capacity deprivation prevents persons with disabilities from exercising their rights, while persons without disabilities in similar situations would not be subjected to such an interference. In Croatia, a wide variety of people are dependent on social welfare support systems and can receive financial or in-kind support, but only persons with disabilities face the risk of being deprived of legal capacity if seeking support from the same system.
48. In determining whether a difference in treatment constitutes discrimination under Article 14 ECHR, the Court requires an 'objective and reasonable' justification for such differential treatment. The Court stated in *Glor v Switzerland* that 'a difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 will also be violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

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<sup>48</sup> *Buckley v UK* (1996) ECHR 39 §76.

<sup>49</sup> *Glor v Switzerland*.

<sup>50</sup> Using the interpretations of disability and discrimination supplied in Article 2 CRPD.

<sup>51</sup> CRPD Article 2.

<sup>52</sup> *HK Danmark, v Dansk almennyttigt Boligselskab* (2013) EUECJ C-335/11 (11 April 2013).

49. We ask the Court to explore whether supportive alternatives were considered to the deprivation of Ms Ivinovic's legal capacity, and if not, whether the reasonable relationship of proportionality between the means employed and the aim sought can truly be established.

## V. Conclusion

50. For the reasons discussed in this submission, guardianship law in Croatia and numerous other countries has been and will continue to be the subject of numerous cases brought before the Court. The concept of guardianship law itself does not, we submit, conform to the UN CRPD's requirements that substituted decision making regimes are replaced by supported decision making systems which respect the individual's rights, will and preferences. In light of these developments in international jurisprudence on disability discrimination and human rights, we ask the Court to carefully consider whether the system exemplified by the present case meet the requirements of Articles 6, 8, 13 and 14 ECHR. Notably, the need to reform the Croatian system has been identified by both the Croatian Government and European Union officials in the midst of Croatia's accession to the EU.<sup>53</sup>

51. We invite the Court to take this opportunity to demonstrate its leadership in the field of disability rights. The discriminatory deprivation of legal capacity of persons with disabilities has resulted in oppression, marginalization, and segregation. The Court has the opportunity to declare that this form of human rights violation must end. If States are required to respect the rights, will and preferences of persons with disabilities, the paradigm shift in the way society treats persons with disabilities can finally begin to open up space for inclusion and rights protection.

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<sup>53</sup> See Joint Memorandum on Social Inclusion of the Republic of Croatia, 5 March 2007, §4.2.4.2 (in the Memorandum, guardianship is referred to as 'custodianship') Available : [www.delhrv.ec.europa.eu/images/article/File/Microsoft%20Word%20-%20JIM-en\\_032007\(1\).pdf](http://www.delhrv.ec.europa.eu/images/article/File/Microsoft%20Word%20-%20JIM-en_032007(1).pdf) (accessed 27 June 2013) from Mental Disability Advocacy Center & SHINE, 'Out of Sight: Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia' (Hungary and Zagreb: 2011)§4.1 para 4.