

The participation of the relevant person in proceedings in the Court of Protection

Lucy Series

A briefing paper on international human rights requirements

September 2014
Version 1.2

<http://sites.cardiff.ac.uk/wccop>
<http://www.law.cf.ac.uk/chscl/>

THE PARTICIPATION OF THE RELEVANT PERSON IN PROCEEDINGS IN THE COURT OF PROTECTION

This background paper was prepared by Dr Lucy Series, a Research Associate at the Centre for Health and Social Care Law at Cardiff University¹, as part of a research project about *Welfare Cases in the Court of Protection*² (CoP). The project is funded by the Nuffield Foundation³ and led by Professor Phil Fennell; Luke Clements and Julie Doughty are consultants on the project. It explores three key themes: the efficiency, accessibility and transparency of the Court of Protection.

This briefing paper outlines the requirements of international human rights law on how the relevant person at the heart of Court of Protection proceedings participates in cases which are about them. In future work, we will explore the perspectives of stakeholders in litigation in the Court of Protection on how the relevant person is, and could be, supported to participate in practice. We will also explore in greater detail some lessons on participation from other jurisdictions. This paper, however, confines itself to recent developments in international human rights law on this issue. This version was updated as shortly afterwards another important ruling from the European Court of Human Rights was handed down.⁴

THE EMERGENCE OF THE ‘RULE OF PERSONAL PRESENCE’

Since the Court of Protection Rules 2007 were drafted there have been important developments in international human rights law concerning the participation of people with mental disabilities in mental health and guardianship proceedings which concern them.

In certain circumstances Article 6 of the European Convention on Human Rights (ECHR) guarantees a right for a litigant to be physically present in court proceedings, where a written procedure or the presence only of their lawyer will not suffice.⁵ These include cases involving the assessment of a person’s state of health and character, or of ‘emotional suffering’⁶, or where the subject of proceedings is themselves a source of factual evidence⁷.

In *Shtukaturov v Russia*⁸ the European Court of Human Rights (ECtHR) held that personal participation in proceedings was necessary because he was both a ‘subject’ and an ‘object’ of the proceedings. As an ‘object’ of proceedings, his participation was necessary ‘to allow the judge to form his personal opinion about the applicant’s mental capacity’.⁹ In *X and Y v Croatia*¹⁰, the ECtHR reiterated that although decisions

¹ <http://www.law.cf.ac.uk/chscl/>

² For more information, please see the project website: <http://sites.cardiff.ac.uk/wccop>

³ The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at www.nuffieldfoundation.org

⁴ *Ivinović v Croatia* (App no 13006/13) [2014] ECHR 964

⁵ For a review of these, see: Vitkauskas, D. and Dikov, G. (2012) *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, Strasbourg. Pages 51-55.

⁶ *Göç v Turkey* (App no 36590/97) [2002] ECHR 589

⁷ *Salomonsson v Sweden* (App no 38978/97) [2002] ECHR 736; *García Hernández v. Spain* (App no 15256/07) [2010] ECHR, unreported, judgment delivered on 16 November 2010.

⁸ (App no 44009/05) [2008] ECHR 223

⁹ *Shtukaturov v Russia*, §72

regarding legal capacity should be based on medical evidence, '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'.¹¹ Hearing from other witnesses, including the person themselves, is thus an important procedural safeguard against any arbitrariness that could result from over-reliance on expert evidence, and to consider the proportionality of any measures imposed.¹² This principle was reiterated in *Ivinović v Croatia*¹³, where the European Court was critical of the 'decisive' reliance of domestic courts on medical evidence in deprivation of legal capacity proceedings.¹⁴

Personal presence as the *subject* of the proceedings may be required to satisfy the 'adversarial' principle of Article 6.¹⁵ Article 5(1) and 5(4) may contain similar guarantees¹⁶. It may be necessary to help a person to present his case¹⁷ or to refute evidence or arguments of experts recommending measures that a person opposes.¹⁸ In *Shtukurov* the presence of a representative of the hospital and a public prosecutor was not sufficient to satisfy Article 6,¹⁹ and neither was the appointment of a temporary guardian to represent the applicant's interests in *Salontaji-Drobnjak v Serbia*²⁰, where that guardian did not oppose the measure.²¹ In *Ivinović* the applicant had been partially deprived of her legal capacity in proceedings where she had been represented by a 'legal guardian' who had worked for the same Social Welfare Centre that had instituted the guardianship proceedings. The ECtHR found that this process had violated her Article 8 rights, noting 'that national law does not provide for obligatory representation of the person concerned by an independent lawyer, despite the very serious nature of the issues concerned and the possible consequences of such proceedings'.²² The ECtHR went on to say that 'in cases of mentally disabled persons the States have an obligation to ensure that they are afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body'.²³ This suggests that when the subject of Court of Protection proceedings may have a 'Convention complaint' they must be made a party and be afforded independent legal representation. It is not yet entirely clear whether the adversarial element can be satisfied by representation through a lawyer or a litigation friend, especially if the person's own preferred outcome is at odds with the case which they advance on his behalf in his best interests. However, *Ivinović* does suggest that legal representatives must not have any conflict of interests with the person.

¹⁰ (App no 5193/09) [2011] ECHR 1835

¹¹ *X and Y v Croatia*, §82. A similar point has been made by Charles J in *A Local Authority v K & Ors* [2005] EWHC 144 (Fam) §39, §44 and Baker J in *CC v KK and STCC* [2012] EWHC 2136 (COP), §24, *A Local Authority v TZ (No. 2)* [2014] EWCOP 973, §27 and *GW v A Local Authority & Anor* [2014] EWCOP 20 §17

¹² *X and Y v Croatia*, §85

¹³ (App no 13006/13) [2014] ECHR 964

¹⁴ §40

¹⁵ *Shtukurov v Russia*, §72-3

¹⁶ *Salontaji-Drobnjak v Serbia* (App no 36500/05) [2009] ECHR 1526, §124

¹⁷ As in *Shtukurov v Russia*, §72-3

¹⁸ *Salontaji-Drobnjak v Serbia* (App no 36500/05) [2009] ECHR 1526, §127

¹⁹ §74

²⁰ See n18

²¹ §122

²² §45

²³ §45

'Personal presence' may also be required as a matter of principle in its own right. In *X and Y v Croatia* the court held that 'The Court considers that judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons'.²⁴ In *Zagidulina v Russia*²⁵ the court stated that a person's 'right to be heard' was 'ever more pressing' given their 'clear and undisputed refusal to undergo any treatment'.²⁶ Closer to home, in *Osborn v The Parole Board*²⁷, the UK Supreme Court held that the common law affords prisoners a right to an oral hearing before a parole board in a number of circumstances. The basis for this includes, but also transcends, considerations of procedural fairness, the rule of law²⁸ and the quality of decision making. The right to participate in proceedings derives from ancient common law principles²⁹ reflecting the 'prisoner's legitimate interest in being able to participate in a decision with important implications for him'³⁰ and respecting his dignity.³¹ Similar considerations seem likely to apply in CoP proceedings with serious consequences for a person's liberty or private life.

DEPARTURE FROM THE ECtHR'S 'RULE OF PERSONAL PRESENCE'

It is permissible to depart from the rule of personal presence, but the onus is on the court to examine the issue and justify its action. In *Lashin v Russia*³² the ECtHR held that departure from the 'rule of personal presence' is permissible in certain circumstances, but 'only where the domestic court carefully examined this issue'.³³ In *Lashin* the ECtHR criticized the domestic court's presumption that the applicant's participation would be 'prejudicial to his health' without first seeking a medical opinion on this matter.³⁴ In *Salontaji-Drobnjak v Serbia* the ECtHR was critical of domestic courts excluding the applicant from the proceedings on the basis that it would not be 'useful' or that it would have a detrimental impact on his health, without any reasoning to support this presumption.³⁵ In *Berková v. Slovakia*³⁶ the ECtHR found that it was lawful to exclude a woman from deprivation of legal capacity proceedings concerning her, where this was based on medical evidence.

In *Poitrimol v France*³⁷, the ECtHR held that a person can waive their right to be present, but this waiver must be unequivocal and attended by minimum procedural safeguards commensurate to its importance. In *Göç v*

²⁴ §84

²⁵ (App no 11737/06) Chamber Judgment [2013] ECHR 398

²⁶ §62, echoing the 'right to be heard' in the assessment of emotional suffering established in *Göç v Turkey*, §51.

²⁷ [2013] UKSC 61

²⁸ §71, citing Fuller, L. (1969) *The Morality of Law*, New Haven, CT: Yale University Press and Bingham, T. (2010) *The Rule of Law*, London: Allen Lane.

²⁹ 69

³⁰ §82

³¹ §68, citing arguments made by Waldron, J. (2012) 'How Law Protects Dignity', *The Cambridge Law Journal*, 71(01), 200-222.

³² (Application no. 33117/02) [2012] ECHR 63

³³ §82

³⁴ §82

³⁵ §127

³⁶ (App no 67149/01) [2009] ECHR 514

³⁷ (App no 14032/88) [1993] ECHR 54

Turkey, a case concerning the assessment of emotional suffering, the right to personal presence was held to outweigh considerations of speed and efficiency.³⁸

THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The UK ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2009³⁹. Although not binding on domestic courts, it has been recognised as a source of persuasive authority in several rulings,⁴⁰ and it has been influential in recent ECtHR rulings on legal capacity and mental health law⁴¹.

A number of CRPD provisions prohibit disability discrimination (Article 3, Article 4, Article 5), including in the exercise of their legal capacity (Article 12(2)). States must take positive steps to promote 'accessibility' for people with disabilities – including in judicial and law enforcement buildings, services and information⁴² (Article 9). Failure to provide reasonable accommodation for people with disabilities constitutes disability discrimination (Article 2, Article 5) under the CRPD (and would also under s20 Equality Act 2010). Article 12(3) includes a standalone right to support in the exercise of legal capacity – which almost certainly includes support to participate in court proceedings. Article 13 requires states 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, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings'. States must promote 'appropriate training' for those working in the administration of justice to help ensure effective access to justice for persons with disabilities.

The CRPD's guiding principles (Article 3) include respect for inherent dignity and 'Full and effective participation and inclusion in society'. As noted above, dignity forms the basis of a principled inclusion of people in proceedings concerning them under the common law. Meanwhile, Article 12(4) requires that any measures relating to the exercise of legal capacity must respect the 'will and preferences' of the person⁴³; hearing from the person directly, where that is possible, is an important source of information on their own will and preferences, unfiltered by the views and interests of others.

PRACTICAL MATTERS

Participation presents a number of practical challenges in the CoP: *how* is a person to participate, especially if their disability presents difficulties travelling to a courtroom and communicating with the judge? How are

³⁸§51, see n6

³⁹ United Nations (2006) Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD)

⁴⁰ For example: *Burnip v Birmingham City Council & Another* (Rev 1) [2012] EWCA Civ 629 and *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19.

⁴¹ Most notably, in *Stanev v Bulgaria* (App No 36760/06) [2012] ECHR 46.

⁴² Committee on the Rights of Persons with Disabilities (2014) *General comment No 2 (2014) Article 9: Accessibility*, (Adopted at the Eleventh session of the Committee, 31 March –11 April 2014, CRPD/C/GC/2) Geneva.

⁴³ This has raised questions about the CRPD compatibility of the Mental Capacity Act 2005 itself. For further reading on this, see: Committee on the Rights of Persons with Disabilities (2014) *General comment No 1 (2014) Article 12: Equal recognition before the law*, (Adopted at the Eleventh session of the Committee, 31 March –11 April 2014, CRPD/C/GC/1) Geneva; Bartlett, P. (2012) 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', *Modern Law Review*, 75(5), 752-778; Martin, W. (2014) 'Mental Capacity Law Discussion Paper: Consensus Emerges in Consultation Roundtables: The MCA is Not Compliant with the CRPD', *39 Essex St Mental Capacity Law Newsletter*, August (Issue 49); Richardson, G. (2013) 'Mental capacity in the shadow of suicide: What can the law do?', *International Journal of Law in Context*, 9(Special Issue 01), 87-105; Series, L. (2014) 'Comparing old and new paradigms of legal capacity', *Elder Law Journal*, 4(1), 62.

any increased costs of oral hearings or facilitating participation to be met, especially where no legal aid is available and any costs must be met by the person themselves?

The case law of the Court of Protection reveals judicial creativity in facilitating personal participation. The relevant person has attended court and spoken directly with the judge⁴⁴, or communicated with the judge through letters.⁴⁵ Judges have paid personal visits to the relevant person in a care home.⁴⁶ Historically, the High Court has heard cases on capacity whilst sitting in the hospital where a person was detained.⁴⁷ However there are as yet no Practice Directions offering guidance as to when, and how, judges should facilitate the direct personal involvement of the relevant person in proceedings.

If the Court of Protection were to develop such a practice direction, it could find inspiration from a range of sources. The *Equal Treatment Benchbook*⁴⁸, published by the Judicial College, highlights a range of considerations and measures relevant to helping people with disabilities in court. The rules of the First Tier Tribunal (Mental Health) – a jurisdiction which also considers matters relating to a population with serious mental disabilities – include a right of any party to attend a hearing⁴⁹. The Tribunal may only proceed in the absence of the patient if it is satisfied that the patient has decided not to attend the hearing, or is unable to attend the hearing for reasons of ill health and a medical examination has been carried out or is unnecessary.⁵⁰ In Ireland, the new Assisted Decision-Making (Capacity) Bill 2013 would establish a statutory presumption that applications are heard in the presence of the relevant person unless certain conditions are met.⁵¹

Other jurisdictions may also have practical lessons on *how* a person can be supported to participate in court. In England and Wales, the criminal courts have developed a range of ‘special measures’ to help victims and witnesses to give evidence in court,⁵² including through more ‘informal’ proceedings, video recorded evidence,⁵³ examination through intermediaries⁵⁴ and aids to communication. A number of websites offer advice and information about helping witnesses with disabilities in court.⁵⁵ Although it is important not to equate the issues relating to the participation of people with disabilities in Court of Protection proceedings

⁴⁴ See: *CC v KK and STCC* [2012] EWHC 2136 (COP); *CC v KK and STCC* [2012] EWHC 2136 (COP); *London Borough of Redbridge v G & Ors* [2014] EWHC 17 (COP).

⁴⁵ For example: *London Borough of Redbridge v G & Ors* [2014] EWHC 17 (COP)

⁴⁶ *Westminster City Council v Sykes* [2014] EWHC B9 (COP); *W v M* [2011] EWHC 2443 (Fam)

⁴⁷ *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 W.L.R. 290. The location of the hearing was discussed in a recent radio broadcast: Panting, J. and Bowman, D. (2014) *Test Case: Mr C*, 4 February 2014, London: BBC Radio 4.

⁴⁸ Judicial College (2013) *Equal Treatment Benchbook*, London.

⁴⁹ Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 Rule 36

⁵⁰ Rule 39

⁵¹ Clause 107

⁵² Youth Justice and Criminal Evidence Act 1999

⁵³ Ministry of Justice (2014) 'First victims spared harrowing court room under pre-recorded evidence pilot', *Gov.UK* [online], available: <https://www.gov.uk/government/news/first-victims-spared-harrowing-court-room-under-pre-recorded-evidence-pilot>

⁵⁴ *R (OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin)

⁵⁵ The *Advocates Gateway* (<http://www.theadvocatesgateway.org/>); National Autistic Society (<http://www.autism.org.uk/living-with-autism/out-and-about/encounters-with-the-law/people-with-an-asd-as-victims-or-witnesses-of-crime.aspx>); The British Psychological Society's Autism in the Criminal Justice System website (<http://www.autismandcjs.org.uk/>); *Legal Training* also offers a CPD accredited course on Autism and the Law (www.legaltraining.co.uk).

with children, the President's recent proposals to chair a working group on children and vulnerable witnesses in the family courts may offer some useful practical suggestions.⁵⁶

Overseas, some Australian jurisdictions have pioneered guardianship tribunals, which are said to facilitate the participation of the relevant person more successfully than courts.⁵⁷ In Ireland, special 'assistants' support parents with learning disabilities to understand and participate in care proceedings.⁵⁸ A large literature on 'therapeutic jurisprudence' explores several dimensions of how participation in judicial processes can help, or hinder, the wellbeing of people with mental health problems or disabilities.⁵⁹ In connection with the CRPD, there is also a nascent literature on the experiences of people who have been excluded, or unsatisfactorily included, in guardianship proceedings.⁶⁰

⁵⁶ Sir James Munby (2014) '12th View from the President's Chamber: The process of reform: next steps', *Family Law*, available: http://www.familylaw.co.uk/news_and_comment/12th-view-from-the-president-s-chamber-the-process-of-reform-next-steps?

⁵⁷ Carney, T. and Tait, D. (1997) *The Adult Guardianship Experiment: Tribunals and Popular Justice*, Sydney: The Federation Press.

⁵⁸ Brady, F. J. (2007) *Circular 2/2007: Arrangements to appoint persons to assist clients of impaired capacity in child care proceedings*, Legal Aid Board, Dublin. For further information on the background to these, see: <http://www.ihrc.ie/enquiriesandlegal/amicuscuriae/intellectualdis.html>

⁵⁹ Wexler, D. B. and Winick, B. J., eds. (1996) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, Durham, NC: Carolina Academic Press; see also: Perlin, M. L. (2014) "'The ladder of the law has no top and no bottom": How therapeutic jurisprudence can give life to international human rights', *International Journal of Law and Psychiatry*, Available online 26 April 2014(<http://dx.doi.org/10.1016/j.ijlp.2014.02.026>).

⁶⁰ European Union Agency for Fundamental Rights (FRA) (2013) *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Brussels; Ciocan, L. (2013) *Study: The System of Guardianship in Practice in the Republic of Moldova: Human Rights and Vulnerability of Persons Declared Incapacitated*, United Nations Office of the High Commissioner for Human Rights.

ACKNOWLEDGEMENTS

We would like to thank the Nuffield Foundation for funding this research. The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available on the Nuffield Foundation website.⁶¹

We would also like to thank the members of our advisory group for their ongoing support and advice during our study. Our advisory group members are: Alex Ruck Keene, Amanda Milmore, Anna Lawson, Denzil Lush, Jill Peay, Mat Kinton, Neil Allen, Peter Bartlett, Rachel Griffiths, Richard Jones, Tony Holland, Victoria Butler-Cole, Wayne M Martin, Liz Eaton and Joan Goulbourn. The views expressed in this report, and any mistakes, are the responsibility of the authors alone.

We would also like to thank the judiciary and staff at the Court of Protection and the Ministry of Justice for their ongoing support in the empirical aspects of this study; we are very appreciative of the great efforts they have gone to facilitate access in order to enable this research.

⁶¹ www.nuffieldfoundation.org