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VIA FAX (011 33 388 41 27 30) AND POST

The President,
European Court of Human Rights,
Council of Europe,
67075 Strasbourg-Cedex,
France

Dear President,

In the matter of application No. 13469/06, D.D. v. Lithuania, before the Second Section, communicated 21st November 2007

Written submission pursuant to Rule 44(4) of the Rules of Court of the European Court of Human Rights

Further to leave granted by the President of the Chamber under Rule 44(2) of the Rules of Court of the European Court of Human Rights (hereafter "ECtHR"), the Harvard Project on Disability respectfully provides this written submission on the development of international human rights standards as they affect disabled persons with particular reference to access to justice.

Interest of the proposed Interveners

The Harvard Project on Disability is one of the leading academic research organizations in the world dealing with international human rights standards for disabled persons. I am the Executive Director of the Harvard Project on Disability and in my capacity as an academic and as the senior legal counsel of Rehabilitation International I participated in the drafting of the United Nations Convention on the Rights of Persons with Disabilities (hereafter "CRPD" or "Convention").

A core remit of the Harvard Project is to disseminate the standards of the CRPD and to facilitate its implementation on a worldwide basis. The Harvard Project is able to draw on expertise in this field from across the globe. I worked on this submission with Robin

Allen Q.C., who was the former special legal adviser to the United Kingdom's Disability Rights Commission.

Significance of the issues which arise in this case

The central legal issues for consideration in this case concern the legal capacity of disabled persons, and in particular the manner in which that human right is affected by (1) the deprivation of liberty and compulsory treatment on the basis of disability, and (2) the deprivation of a fair trial on the basis of disability.

The Harvard Project is well aware that the judges of the ECtHR will wish to ensure that those rights enshrined in Articles 5 and 6 of the European Convention on Human Rights ("ECHR") are well and properly protected in cases where the alleged victim has a disability. The Harvard Project recalls the extensive case law of the ECtHR in relation to disabled persons. However the Harvard Project considers that the ECtHR may wish to revisit that case law in the light of (1) its established and constant jurisprudence that the European Convention is a living instrument and (2) the fact that also the standards for the protection of liberty and the right to a fair trial have been recently reconsidered by the United Nations.

It is for those reasons that in order to assist the ECtHR in its deliberation of this case, the Harvard Project offers these submissions, providing information relating to pertinent standards in these matters that arise under the CRPD.

The relevance of the CRPD to the ECtHR

The CRPD is the first legally binding instrument with comprehensive protection of the rights of persons with disabilities. For this reason alone it is submitted that the ECtHR should take the clearest notice of its contents.

Moreover the CRPD goes into much greater depth than other human rights treaties in setting out the steps that States should take to prohibit discrimination and achieve equality for all, particularly in the context of persons with disabilities.

The ECtHR will know that the CRPD was adopted by general consensus on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.¹ Lithuania has signed the Convention on 30 March 2007, as did other European States.²

¹ On that day, there were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. This is the highest number of signatories in history to a United Nations Convention on its opening day. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations.

² Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, the Russian Federation, San

Perhaps most significantly, the European Community signed the CRPD on the first day that it was open for signature³, marking the first time the Community signed a core UN human rights convention. In so doing, the Community pledged itself to ensuring that its citizens with disabilities fully enjoy their human rights and fundamental freedoms on an equal basis with others.

The importance of legal capacity

The question of legal capacity comprised perhaps the single most deliberated issue during the Ad Hoc Committee sessions negotiating the contents of the CRPD.⁴ This circumstance is reflected by the number and content of Convention Articles addressing, directly or indirectly, the limitations on State action from hindering the full and effective participation in society of persons with disabilities on an equal basis with others. Accordingly, those Articles were drafted with great deliberation and with the *overt* intention of protecting individuals with disabilities from encroachment upon their legal personhood.

The experience of the Harvard Project in working towards implementing the CRPD is that legal capacity is currently at the forefront of international disability human rights advocacy, and will likely remain at the center of legislative and juridical examination. It is submitted that to secure compliance with the standards of the CRPD, it is imperative for the ECtHR to continue to expound and develop its jurisprudence with regard to legal capacity, following the line taken in Case of *Shtukaturov v. Russia*,⁵ by providing guidance for the courts of States Parties to the European Convention on Human Rights and also to the States Parties themselves as to the margin of appreciation permitted to such States in relation Articles 5 and 6 where the liberty and legal capacity of persons with a mental disability are concerned.

The United Nations has made the importance of this development clear in its comment as to why the CRPD is necessary as follows

The Convention is necessary in order to have a clear reaffirmation that the rights of persons with disabilities are human rights and to strengthen respect for these rights. Although existing human rights conventions offer considerable potential to promote and protect the rights of persons with disabilities, it became clear that this potential was

Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom of Great Britain and Northern Ireland, among other countries have signed or signed and ratified the Convention. For a full list of signatories and ratifications see <http://www.un.org/disabilities/countries.asp?id=166>.

³ See <http://www.un.org/disabilities/countries.asp?id=166>.

⁴ The Ad Hoc Committee held eight sessions. At its first two sessions, in 2002 and 2003, the Committee considered the possibility of drafting an international instrument on the rights of persons with disabilities, and discussed the type of instrument and possible elements to be included. At its second session, the Ad Hoc Committee established a working group to prepare a draft text of a convention. The Working Group, composed of government and NGO representatives, met in January 2004 and drafted a text for negotiation. At its third, fourth, fifth, sixth, seventh and eighth sessions, the Ad Hoc Committee continued its negotiations. The Convention text was adopted by the Ad Hoc Committee on 25 August 2006.

⁵ Application no. 44009/05 (27 March 2008).

not being tapped. Indeed, persons with disabilities continued being denied their human rights and were kept on the margins of society in all parts of the world. This continued discrimination against persons with disabilities highlighted the need to adopt a legally binding instrument which set out the legal obligations on States to promote and protect the rights of persons with disabilities.⁶

Relevant CRPD Articles

It is self-evident that the CRPD is of the first importance as to the standards of human rights for all persons with disabilities in the sense described in the previous paragraphs. It is the most contemporary document and represents the accord of jurists and numerous States as to the minimum level of protection that is appropriate for the respect of the dignity of persons in a modern democratic state run under the rule of law.

Thus the ECtHR is referred to the promotion of respect for the inherent dignity of persons with a disability: see Article 1, CRPD; individual autonomy and independence: see Article 3, CRPD; equality and non-discrimination; see Article 5, CRPD; and the right to live in the community: see Article 19, CRPD.

The central issue of legal capacity in this case concerns the precise subject matter of CRPD Article 12, Article 13, and Article 14. These are now set out fully for the convenience of the Court.

Article 12 states

Equal Recognition before the Law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which

⁶ See <http://www.un.org/disabilities/default.asp?navid=23&pid=151#iq3>.

such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13 states

Access to Justice

1. States Parties shall 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, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14 states

Liberty and Security of the Person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

a) Enjoy the right to liberty and security of person;

b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Other provisions that may be relevant include Article 15 - Freedom of torture or cruel, inhuman or degrading treatment or punishment; Article 16 - Freedom from exploitation, violence and abuse; Article 17 - Protecting the integrity of the person; Article 18 - Liberty of movement and nationality; Article 19 - Living independently and

being included in the community; and Article 20 - Personal mobility. Article 25 may also be relevant in that it concerns among other health related matters the obligation “to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.”

Submissions on CRPD Standards regarding equal recognition contained in Article 12 and 13

The CRPD contains an innovative supported decision making model for legal capacity aimed at meeting the aspirations of all persons with disabilities. The ECtHR is respectfully referred to the United Nations commentary as to why the CRPD was necessary as set out above. Specifically, it was deemed necessary to have greater detail as to the basic minimum conditions for a system that ensured both equality before the law and also access to justice for persons with disabilities. This was the genesis of Articles 12 and 13. It is therefore submitted that the ECtHR should pay the closest attention to the contents of those Articles.

Turning to the details of those Articles, it is well recognised that as a modern legal construct, equal recognition before the law involves consideration of both the *capacity* to hold rights and also the ability to *exercise* or *assert* rights. It is recognised that in order to exercise legal rights, in many if not all legal systems, even a person who has no disability may need the assistance of others to exercise and assert legal rights. Where a person has a disability, that person may need extra assistance.

However, this fact cannot provide a premise for denying such a person real and effective rights. To do so would be to deny the very substance of this concept. The recognition that a person – disabled or not - may need an agent to have effective access to justice and so also equality before the law, is not novel. What is new is the extent to which the CRPD sets out the minimum conditions for such agency, to ensure that, both the capacity of the individual to hold rights, and their ability to assert them, are not undermined.

Underlying these Articles is a common agreement as to the essential conditions for any legal system if it is to meet the standards for the rule of law in a modern democratic state; such a system must provide for equal recognition before the courts as a substantive reality in relation to both *capacity* and also *exercise*.

This in turn requires the judicial authorities to exercise a profound extra *supervision* in cases wherever there is any filter between a person and the court, such as when that person is represented by another. This remains true even where the person representing another was appointed by the court.

In all cases the court or other judicial authority must ensure that the the representative acts solely in the interests of the disabled person, and to this end the court must ensure that the representative has no financial or personal interest in the affairs of the disabled

person. Moreover the court or other judicial authority must always be acute to ensure that the interests of the disabled person are the paramount and sole considerations in the actions of the representative, by ensuring that the disabled person understands to the greatest extent possible the legal process, its purpose and consequences.

In any case in which it is objectively apparent that the person being represented does not accept or adopt the steps taken by a representative, those matters must be explored by the judicial authorities, and those authorities must ensure that such a representative never acts outside the scope of the agency granted to them or is replaced by another who can and will meet those standards.

To this end it is clear that in all States it will be necessary to have a system of judicial training to secure compliance with these principles.

The above points all follow directly or by necessary implication from the content of Articles 12 and 13 CRPD.

Additionally the EctHR is reminded that the test for the adequacy of the protection of these rights lies in the principles of dignity and equality. It is of course essential for the protection of the rights of a person without a relevant disability that their dignity is respected. This includes, as a component of that dignity, the right to self – determination of their own interests.

This is no less true for persons with disabilities. This is recognised at every stage in the CRPD. Moreover equality requires that a person with a disability is entitled to the same dignity and the same respect for their right to self- determination.

Thus in every case in which there is an issue as to the capacity of a representative – whether court appointed or otherwise – of a person with a disability, in the context of legal proceedings, it is the task of the judicial authorities to protect the dignity and equality of the individual concerned.

Moreover given the possibility for abuse of the role of agent, and the possible lack of capacity for a person with a disability to fully bring such an abuse to the attention of the judicial authorities, it is necessary that they exercise a supervision of the agent to protect the interests of the person with a disability and which recognises their right to self – determination. In short, such an obligation entails an objective oversight of the scope of the agency conferred on the representative, and the withdrawal or limits of that agency.

Articles 12 and 13 were drafted precisely to advance the wider aims of the CRPD, that is to say to ensure the full inclusion of all persons within the essential protections and rights contained in the concept of equality before the law. It is noteworthy also that Article 46 CRPD did not permit reservations to be entered that would limit the concept of dignity and equality contained within Article 2 CRPD and indeed the other Articles of the CRPD.

Insofar as present day national laws deny these freedoms to persons with disabilities, it would be necessary for States in accordance with their obligation under article 4 (1) (b) to modify these laws to bring them in consonance with Article 12.

Submissions on Liberty

It is submitted that the ECtHR should pay particular attention to the way in which the CRPD has in Article 14, provided definition to the obligations inherent in international law guarantees in relation to the protection of liberty. It is submitted that in its approach to Article 5 ECHR in cases where the alleged victim is a person with a disability that the greatest consideration should be given to the standards set out in Article 14 CRPD as representing the minimum standards consistent with international human rights law. Such persons are vulnerable and their detention should be subject to the closest and most independent consideration in accordance with the highest international standards.

Summary

We respectfully thank this Court for the opportunity to submit these comments in discharging its function in 'the interests of the proper administration of justice' (Rule 44 §2a).

Yours sincerely,

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