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# Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled People

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☞ Access to justice; Admissibility criteria; Children; Disabled persons; European Court of Human Rights; Locus standi; Mental hospitals; Mental patients' rights

## Abstract

*This article analyses the way in which admissibility rules related to standing and victim status can in certain circumstances exclude persons with disabilities held in mental health institutions from the protection of the European Convention on Human Rights by denying them access to proceedings before the European Court of Human Rights. These rules compare unfavourably to rules employed by other international human rights bodies. The European Court of Human Rights has, to some extent, recognised the difficulties facing persons with disabilities in accessing justice, both in its substantive interpretation of the Convention, and in its use of procedural rules. Similar elasticity should be demonstrated in relation to rules on standing and victim status, including by recognising standing to sue on behalf of disabled victims, in certain circumstances, to public interest groups, even in the absence of specific authorisation. The European Court of Human Rights' case-law involving child victims provides a meaningful precedent for such an approach. Another rationale that finds jurisprudential support in order to overcome procedural obstacles is to rely on "the interest of human rights" in order to proceed to a determination on the merits. To the extent that procedural rules at the national level are more favourable to claimants, that should weigh heavily in the applicants' favour in the adjudication on admissibility in Strasbourg.*

## Introduction

The plight of long-term residents with mental disabilities in psychiatric and social care institutions across Europe, and particularly in some Eastern European countries, has been well-documented in reports issued by inter-governmental bodies such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>1</sup> and independent civil society organisations.<sup>2</sup> A wide range

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<sup>1</sup> Among more recent CPT reports on country visits which included psychiatric establishments see, for example, the report on the 2008 visit to Montenegro, at [83]–[147]; the report on the 2009 visit to Romania; the report on the 2007 visit to Serbia, at [111]–[181], all available at <http://www.cpt.coe.int> [Accessed November 2, 2011].

<sup>2</sup> See, for example, Centre for Legal Resources, *Report concerning observance of rights and liberties of persons committed to healthcare and social establishments for people with mental disabilities*, 2009, <http://www.crj.ro/EN/Report-concerning-the-observance-of-the-rights-and-liberties-of-persons-committed-to-healthcare-and-social-establishments-for-people-with-mental-disabilities/> [Accessed November 2, 2011]; Mental Disability International, *Torment not Treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities*, 2007, <http://www.disabilityrightsintl.org/media-gallery/our-reports-publications/> [Accessed November 2, 2011]. According to findings from inspections carried out in social care homes for children

of serious human rights violations, including substandard care and treatment, degrading living conditions, breach of privacy, unlawful deprivation of liberty, ill-treatment and even suspicious deaths are depressingly common occurrences. Victims frequently find themselves unable to benefit from the remedies normally available to those living outside institutions due to a combination of functional impairments, isolation and the fact that they are under the complete control of perpetrators.<sup>3</sup> Robust institutions and legal procedures aimed at preventing wrongdoing and promoting accountability in line with international standards, are often missing.

In these circumstances, recourse to the European Court of Human Rights becomes the victims' and their advocates' last hope for securing justice. However, unduly restrictive "standing" and "victim status" concepts make access to the Strasbourg Court conditional on the existence of a next-of-kin or a guardian willing to support the victims in lodging complaints. These requirements, as currently understood, mistakenly assume the existence of such supportive individuals, thus leaving an important constituency, mainly persons with mental disabilities locked up in institutions, whether placed under guardianship or not, outside the protection afforded under the European Convention on Human Rights (ECHR). The first part of this article examines these contentious notions and considers the ways in which they restrict access of persons with disabilities to the European Court of Human Rights. Current international standards on access to justice for persons with disabilities and the extent of their reception in the European Court of Human Rights' jurisprudence will be briefly discussed. The second part of this article seeks to identify the rationale underpinning the Court's flexible approach to admissibility criteria in other areas of its case-law, in order to render the protection afforded under the Convention "practical and effective" on a case-by-case basis, or in "the interest of human rights". The case-law involving children's rights in particular contains a set of disparate criteria which may have the potential to be used in order to replace the current ad-hoc approach to the notions of "standing" and "victim status" with one that is more principled, and consistent at the same time with the "object and purpose" of the Convention. Finally, the issue of the interaction between Convention and domestic procedural rules in this context will be considered briefly.

The case of the infamous Poiana Mare Psychiatric Hospital in Romania provides a practical illustration of the difficulties encountered in seeking to secure justice before the European Court of Human Rights on behalf of the victims of egregious human rights violations and will be referred to several times throughout this article.<sup>4</sup> One hundred and eighty-three patients died at the Poiana Mare Hospital in the course of 2½ years, between 2002 and 2004, mostly during winter-time. Human rights organisations claimed that this was caused by a combination of substandard living conditions (including malnutrition and freezing weather) and inferior care and treatment. The ensuing official investigation concluded that the patients died from natural causes and absolved all individuals involved from any wrongdoing. Two applications concerning the Poiana Mare events are currently pending before the European Court of Human Rights,<sup>5</sup> providing an excellent opportunity for a re-examination of these matters more consonant with the spirit of the Convention.

with mental disabilities in Bulgaria recently made public, 238 "unnecessary and avoidable" deaths occurred between 2000 and 2010, caused *inter alia* by famine, neglect, bad hygiene, accidents such as freezing, drowning or suffocation, cold, violence; see <http://forsakenchildren.bghelsinki.org/en/> [Accessed November 2, 2011].

<sup>3</sup> For an analysis of the range of physical, social and economic barriers preventing disabled people from exercising their rights and which help explain the relative dearth of European Court of Human Rights case-law relevant to their situation, see L. Clements and J. Read, *The Dog that Didn't Bark: The Issue of Access to Rights under the European Court of Human Rights by Disabled People*, in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford/Portland, Oregon: Hart Publishing, 2005), pp.21–34.

<sup>4</sup> The abuses perpetrated at the Poiana Mare Hospital were comprehensively documented and publicised at the time by the CPT, which visited the establishment on three occasions, in 1995, 1999 and 2004, the last time specifically in response to the high mortality rates reported at the hospital (the report on the 1995 visit to Romania, at [167]–[199]; the report on the 1999 visit to Romania at [191]–[230] and the report on the 2004 visit to Romania, at [10]–[33]). Also see Amnesty International, *Romania: State duty to effectively investigate deaths in psychiatric institutions*, November 30, 2005, <http://www.interights.org/userfiles/Documents/AMemoPM2005.pdf> [Accessed November 2, 2011].

<sup>5</sup> *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* (App. No.47848/08) pending, communicated to the Government on June 7, 2011, statement of facts available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=887105&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> [Accessed November 2, 2011], and *Malacu v Romania*, (App.

## Current restrictive construction of the locus standi and victim status requirements

According to well-established practice only direct victims of a violation of one of the rights included in the Convention acting in their personal capacity have standing to file an application before the European Court of Human Rights.<sup>6</sup> However, claims of violations of the right to life under art.2 may be brought on behalf of those who died (or disappeared) by their next-of-kin (to the exclusion of any other third parties), recognised as “indirect victims” for these purposes.<sup>7</sup> The European Court of Human Rights has justified this exception to the direct victim rule on the basis of “the nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions of the Convention system”.<sup>8</sup> This rule as currently construed leaves individuals who died in circumstances raising issues under art.2 of the ECHR and who lacked a willing next-of-kin to represent them, outside of the protection afforded under the Convention.<sup>9</sup> If on the other hand the direct victim is a living person with limited capacity to act, such as minors or persons with mental disabilities, they may either complain directly before the European Court of Human Rights, irrespective of their capacity to sue under domestic law, or through their legal representative, who may be either their custodial parents or their legal guardians.

The admissibility criteria thus formulated have a disproportionate effect on long-term residents of psychiatric and social care establishments,<sup>10</sup> whose ability to complain is frequently limited because of their impaired cognitive functioning and/or because they live in a strictly controlled environment. Their isolation is exacerbated if, as frequently happens, they do not have a guardian, they have lost contact with their relatives, and no independent institutional mechanisms entitled to intervene to safeguard their rights exist. Guardianship, although framed in national law as a “measure of support”, frequently has the opposite effect of facilitating abuse in the absence of basic guarantees against conflict of interest or undue influence. This happens whether guardians are state employees, who work for the institution where their ward is held, or family members, who may be prone to abusing their wards’ financial interests or indeed who may have been instrumental in placing them in an institution in the first place.<sup>11</sup> Justice becomes even more inaccessible if the person concerned dies in suspicious circumstances, as in such situations the only person with a direct interest in complaining about the abuse disappears. To complete the picture, restrictive admissibility requirements prevalent in domestic and international jurisdictions may prevent well-meaning outsiders, whether individuals or NGOs, to act on behalf of the victims in the absence of specific authority to act.

In the context of the Poiana Mare applications, most of those who died there shared a similar profile—they were long-term patients (some had lived in institutions their whole lives) who had lost contact with any next of kin. The Centre for Legal Resources (CLR), a Romanian NGO with expertise in

No.55093/09), pending. Further information about these cases is available on the websites of the two organisations that brought the cases before the European Court of Human Rights: the Centre for Legal Resources (<http://www.crj.ro/EN/> [Accessed November 2, 2011]) and INTERIGHTS (<http://www.interights.org/case-docket/index.htm> [Accessed November 2, 2011]).

<sup>6</sup> See, for example, *Amuur v France* (App. No.19776/92), judgment of June 25, 1996 at [36].

<sup>7</sup> See authorities cited in *Gakiyev and Gakiyeva v Russia* (App. No.3179/05), judgment of April 23, 2009 at [165]. Note, however, that next-of-kin are not granted the status of “indirect victim” status automatically, they have to demonstrate a close connection with the deceased, see *Çakici v Turkey* [GC] (App. No.23657/94), judgment of July 8, 1999 at [98]–[99].

<sup>8</sup> *Fairfield v the United Kingdom* (App. No.24790/04), decision of March 8, 2005.

<sup>9</sup> The same applies to victims with disabilities of any rights provided under the Convention other than the right to life, who died before an application was lodged with the European Court of Human Rights on their behalf. Based on current practice, next of kin will have standing to act on their behalf depending on whether the claim concerned is “transferable” or not (see *Micallef v Malta* (App. No.17056/06), judgment of October 15, 2009 at [47]). For the sake of simplicity, this article is not concerned with this scenario, but clearly when “non-transferable” rights are involved such as the right to private life, the European Court of Human Rights should take into account any circumstance which might have prevented persons with disabilities from complaining during their lifetime.

<sup>10</sup> This group is substantial—according to a study conducted in 2007, there were nearly 1.2 million people living in residential establishments for people with disabilities in 25 EU countries for which data could be collected, J. Mansell, M. Knapp, J. Beadle-Brown and J. Beecham, *Deinstitutionalisation and Community Living—Outcomes and Costs: Report of a European Study. Volume 2: Main Report* (Canterbury: Tizard Centre, University of Kent, 2007), p.25.

<sup>11</sup> See *inter alia* *Krušković v Croatia* (App. No.46185/08), judgment of June 21, 2011 and *Stanev v Bulgaria* (App. No.36760/06), decision of June 29, 2010, for examples of guardians who were state employees, and respectively *Shukaturov v Russia* (App. No.44009/05), judgment of March 27, 2008 for an example of a guardian who was a family member, all acting against their wards’ interests.

the promotion of the human rights of persons with disabilities, acted during domestic criminal proceedings on behalf of several victims. The CLR was recognised as having *locus standi* in these proceedings by the highest Romanian court (after extended litigation following a challenge filed by the Prosecution Office).<sup>12</sup> Both cases pending before the European Court of Human Rights have been filed by the CLR on behalf of six individuals who died at Poiana Mare, challenging the abuses they were subjected to as well as the flawed official investigation thereof. The applications can only proceed if the CLR succeeds in persuading the European Court of Human Rights to recognise that they have standing to act on behalf of the victims considering the special circumstances prevailing at Poiana Mare and in the absence of specific powers of attorney.

The European Court of Human Rights' highly restrictive approach to *locus standi* in this context appears to have been subjected to only limited challenge, which is perhaps hardly surprising given procedural obstacles that potential applicants face both at the national and international level. This difficulty is illustrated by an early European Commission for Human Rights (the Commission) decision in *Skjoldager v Sweden*.<sup>13</sup> The applicant in this case was a state-employed psychologist who complained on behalf of three residents of a nursing home (only one of which was fully named in the application to the Court) that they had been unlawfully detained. The applicant noticed the three individuals locked up in their room while carrying out an inspection at that establishment and argued he should be recognised as having standing to act on their behalf as they were not able to lodge an application independently. In addition, the authorities refused to disclose to the applicant the victims' names or facilitate contact between him and the victims or their guardians in order to obtain powers of attorney. The Commission rejected the complaint on the basis that the applicant lacked *locus standi*, given that he had not been authorised to act before the Court by any of the patients or their guardians. Furthermore, he failed to show that the patients were unable to lodge an application in their own names.

### Access to justice of persons with disabilities in international human rights law

The notion of “access to justice” has been defined as “the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law”.<sup>14</sup> The UN Convention on the Rights of Persons with Disabilities (CRPD) is the first UN human rights treaty which explicitly includes “access to justice” as free-standing substantive right.<sup>15</sup> According to art.13 §1, states parties may have to adopt specific positive measures, including “procedural accommodations” in order to ensure “effective access to justice for persons with disabilities on an equal basis with others” at all stages of legal proceedings. This article should be read in conjunction with art.12 which provides that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and that states parties have an obligation to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.

There is a strong international legal consensus that states have obligations of substance to ensure that all facilities and programmes designed for persons with disabilities are effectively monitored by independent authorities.<sup>16</sup> In addition, the CPT routinely recommends in its reports that states have in place a range of

<sup>12</sup> Decision in file No.4948/1/2006, High Court of Cassation and Justice of Romania, June 15, 2006 [unreported].

<sup>13</sup> *Skjoldager v Sweden* (App. No.22504/93), decision of May 17, 1995.

<sup>14</sup> F. Francioni, “The Rights of Access to Justice under Customary International Law”, in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford: OUP, 2007), p.3.

<sup>15</sup> Although access to justice is not specifically referred to in most international human rights instruments, comprehensive and detailed standards including a range of fair trial guarantees have generally been developed through a casuistic approach, see J. McBride, *Access to Justice and Human Rights Treaties* (1998) 17 (Jul) C.J.Q. 235.

<sup>16</sup> Article 33§2 of the CPRD, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 18, 2002, G.A. Res. 57/199, UN GAOR, 57th Sess., U.N. Doc. A/RES/57/199 (entered into force June 22, 2006), *CPT standards (“Substantive” sections of the CPT’s General Reports)*, [CPT/Inf/E (2002) 1—Rev. 2010] at [55], Recommendation Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder, arts 36–37.

supplementary safeguards aimed at facilitating access to justice in relation to abuses perpetrated in psychiatric institutions: establishing an effective complaints procedure, issuing brochures setting out the establishment's routine and patients' rights upon admission to an institution, ensuring ongoing contact between the patients and the outside world, and guaranteeing confidential access to a lawyer.<sup>17</sup>

Other international adjudication bodies have in place standing rules which are more permissive than the European Court of Human Rights. Perhaps not surprisingly considering the aforementioned obligation to adopt positive measures to facilitate the access to justice of persons with disabilities included in art. 13 of the CRPD, the procedure for individual communications under the Optional Protocol makes specific provision for the issues discussed in this article. Thus, according to a "fact sheet" recently adopted by the Committee on the Rights of Persons with Disabilities, a person may submit communications on behalf of individuals or groups of individuals even without evidence of consent, as long as they provide a justification in writing explaining "why the alleged victim(s) is/are unable to submit the communication in person and why a letter granting such power is not submitted".<sup>18</sup> There is as yet no jurisprudence under the Optional Protocol as to how this provision works in practice.

Adjudication bodies active in the other two regional systems which have in place an individual petition mechanism (e.g. the Inter American Commission of Human Rights and the African Commission on Human and Peoples' Rights) are able to hear applications submitted by human rights bodies on behalf of patients detained in psychiatric hospitals, even in the absence of specific written authorisation.

The African Commission case *Purohit and Moore v The Gambia*, for example, concerned a range of human rights violations perpetrated against mental health patients held in a psychiatric hospital in Banjul.<sup>19</sup> The application was famously lodged by two British mental health workers holidaying in the Gambia who witnessed the poor conditions prevailing at the Royal Victoria Hospital in Banjul.<sup>20</sup> Moore and Purohit, acting as "petitioners", brought their application to the African Commission on behalf of patients detained at the Psychiatric Unit of the hospital, as well as all "existing and future mental health patients detained under the Mental Health Act of the Republic of the Gambia",<sup>21</sup> even though they lacked any formal authority to act on their behalf in the traditional sense. The African Commission found the complaint admissible and proceeded to find a violation on the merits of the African Charter. The standing of the petitioners was not contested by the Government or even mentioned in the decision. According to procedural guidelines issued by the African Commission, it appears that any individual or entity, including an NGO, may submit a communication denouncing a violation of human rights either on its own behalf or on behalf of someone else.<sup>22</sup> Furthermore, the author of the communication need not be related to the victim of abuse in any way, but the victim must be identified by name.

In 2003 the Inter-American Commission was confronted with the issue of abuses perpetrated against residents of a psychiatric hospital on the occasion of a request for precautionary measures filed by two international NGOs.<sup>23</sup> The Inter-American Commission received evidence of the inhuman and degrading conditions and abuse prevailing at a Neuropsychiatric Hospital in Paraguay (including keeping two youths naked and in solitary confinement for over four years). In response, the Inter-American Commission asked

<sup>17</sup> *CPT standards ("Substantive" sections of the CPT's General Reports)*, [CPT/Inf/E (2002) 1—Rev. 2010] at [53]–[55].

<sup>18</sup> Committee on the Rights of Persons with Disabilities, *Fact sheet on the procedure for submitting communications to the Committee on the Rights of Persons with Disabilities under the Optional Protocol to the Convention*, June 15, 2011 at [7], <http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> [Accessed November 2, 2011].

<sup>19</sup> African Commission on Human and Peoples' Rights, *Purohit and Moore v The Gambia*, Communication No.241/2001, Sixteenth Activity Report 2002–2003, Annex VII.

<sup>20</sup> See Lawrence Marzouk, *Taking a Nation to Court*, April 21, 2004, [http://www.times-series.co.uk/news/481742.taking\\_a\\_nation\\_to\\_court/](http://www.times-series.co.uk/news/481742.taking_a_nation_to_court/) [Accessed November 2, 2011].

<sup>21</sup> *Purohit and Moore v The Gambia*, Communication No.241/2001, Sixteenth Activity Report 2002–2003 at [1].

<sup>22</sup> *ACHPR Information Sheet No.2: Guidelines on the Submission of Communications*, [http://www.achpr.org/english/\\_info/guidelines\\_communications\\_en.html](http://www.achpr.org/english/_info/guidelines_communications_en.html) [Accessed November 2, 2011].

<sup>23</sup> Only brief information regarding this case is reported on the IACommHR's website, see <http://www.cidh.oas.org/medidas/2003.eng.htm> [Accessed November 2, 2011]. For more detailed information, see A.A. Hillman, *Protecting Mental Disability Rights: A Success Story in the Inter-American Human Rights System*, 12 No.3 Hum. Rts. Brief 25.

the Paraguayan Government to adopt a range of measures protecting the life and well-being of the two youths as well as of the other 458 patients at the hospital. The Inter-American Commission's Rules of Procedure (art.25) permit it, of its own initiative or at that of a party, to request that the state in question adopt precautionary measures to prevent irreparable harm to persons, in serious and urgent cases, and whenever necessary according to the information available. Although this case did not develop beyond the stage of the precautionary measures, this is not excluded in the future on the basis of current procedural rules, since art.44 of the American Convention permits any person, group of persons, or NGO to file a petition with the Inter-American Commission. In contrast to European standing rules, the person or entity filing the petition need not be the victim of the violation alleged; instead they may assert a claim on behalf of any specific victim.<sup>24</sup>

### **Reflection of international standards on access to justice in the European Court of Human Rights procedure**

The European Court of Human Rights has developed a substantial body of jurisprudence detailing the state parties' obligations to ensure effective access to justice for persons with disabilities with respect to breaches of their rights under a range of substantive provisions, such as the obligation incumbent on the state to undertake an effective investigation under arts 2 and 3, the right to a fair trial under art.6, procedural safeguards aimed at securing a person's family life and private life under art.8 or the right to challenge in court the lawfulness of a detention order under art.5. The European Court of Human Rights has repeatedly acknowledged that persons with disabilities, particularly those placed in institutions, routinely encounter additional obstacles that impede their access to justice. Thus, in *Herczegfalvy v Austria*, the European Court of Human Rights stated that "[The] position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with".<sup>25</sup> The European Court of Human Rights has also recognised the important public interest in uncovering deficiencies inside institutions "justified in order to prevent abuse and to maintain the confidence of the public in the adequate provision of vital care services by the State".<sup>26</sup>

International human rights proceedings are not insulated from access to justice concerns prevalent in domestic jurisdictions. Various factors may coalesce to deny access to persons with disabilities, including overly restrictive admissibility requirements, lack of legal representation or the authorities' obstructive attitude hindering the victims' participation in judicial proceedings. The European Court of Human Rights has on occasion applied its rules flexibly so as to address the needs of applicants with disabilities. The following section briefly considers such instances: cases where it has applied a sympathetic construction to the notions of "standing" and "exhaustion of domestic remedies"; cases in which rule 39 requests for interim measures have been granted; and cases where the European Court of Human Rights restored applications which had previously been struck out under art.37 §2.

The European Court of Human Rights has held that persons with disabilities may validly submit an application even if they had been deprived of their legal capacity under domestic law and even against the wishes of their guardian.<sup>27</sup> Similarly, persons with disabilities divested of their legal capacity who as a consequence may be unable to access domestic proceedings independently may be exempted from the requirement to exhaust domestic remedies before filing an application.<sup>28</sup>

<sup>24</sup> J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003), pp.100 and onwards.

<sup>25</sup> *Herczegfalvy v Austria* (App. No.10533/83), judgment of September 24, 1992 at [82].

<sup>26</sup> See *mutatis mutandis Heinisch v Germany* (App. No.28274/08), judgment of July 21, 2011 at [89].

<sup>27</sup> *Zehentner v Austria* (App. No.20082/02), judgment of July 16, 2009 at [22].

<sup>28</sup> *X v Croatia* (App. No.11223/04), judgment of July 17, 2008 at [32]-[33].

Rule 39 of the European Court of Human Rights Rules provides for the Court to request that contracting states take interim measures in order to deal with urgent situations where there is an imminent risk of irreparable damage to the applicant which a favourable judgment could not undo. Although in the vast majority of cases such requested measures relate to proposed deportations or extraditions, the European Court of Human Rights has requested interim measures in cases brought by persons with disabilities requiring the removal of impediments that hinder the right to individual petition.

Thus, in the landmark case *Shtukaturov v Russia*, the European Court of Human Rights asked the Russian Government to allow the applicant, a disabled man who had been incapacitated and involuntarily committed to a psychiatric hospital, to meet his lawyer in the hospital in order to prepare the case. The European Court of Human Rights directed the government to organise the meeting outside the hearing of medical staff and to provide the lawyer with the necessary time and facilities to consult with the applicant.<sup>29</sup> A not dissimilar approach was taken in *X v Croatia* where the applicant (who had been divested of her legal capacity) complained that she was excluded from the domestic proceedings concerning the adoption of her daughter. The European Court of Human Rights decided of its own motion to indicate to the Croatian government under rule 39 that in the interests of the parties and the proper conduct of the proceedings, a lawyer should be appointed to represent the applicant. The European Court of Human Rights also exceptionally decided to make a just satisfaction award in this case, even if the applicant's lawyer failed to enter a specific claim, due to not having been able to contact the applicant. This decision, which goes against well-established Court practice, was justified on the basis that the applicant was divested of her legal capacity and that a lawyer was appointed to her as a result of a rule 39 request.<sup>30</sup>

In *Tehrani v Turkey*, the court exhibited even greater flexibility. One of the applicants was an Iranian asylum-seeker held in a detention centre in Turkey, who complained primarily under arts 2 and 3 of the risk of death or ill-treatment he would face should he be deported back to Iran. In the course of proceedings before the Court the applicant sent three successive letters requesting to withdraw his application, even though he was well aware that his life would be in danger if the deportation went ahead. Having regard to evidence that the applicant was suffering from mental health problems, the European Court of Human Rights indicated to the Turkish Government under rule 39 that the applicant's mental state should be diagnosed in a fully equipped hospital. The ensuing report produced by the Turkish authorities stated that the applicant did not suffer from any psychotic illness. Nevertheless, the European Court of Human Rights decided that it was "in the interests of human rights" to continue with the examination of the case, notwithstanding the applicant's explicit statement to the contrary.<sup>31</sup>

In similar vein, in 2009, the European Court of Human Rights decided to restore to its list of cases, an application filed by two brothers with mental disabilities deprived of their legal capacity, who had complained about the length of civil proceedings against an insurance company which they initiated after their father's death.<sup>32</sup> The European Court of Human Rights had previously struck out the cases on the basis of a friendly settlement reached between the parties which included a commitment by the Government to pay €6,000 to the applicants.<sup>33</sup> The reinstatement was due to information received by the Court that the applicants had not benefited from the payment, which was administered by their guardian, a state employee. By a third decision delivered in 2010, the Court did strike the case from its list, but only on the basis of an undertaking by the Government that: (1) the money would be used in the applicants' best interests; and

<sup>29</sup> *Shtukaturov v Russia* (App. No.44009/05), judgment of March 27, 2008 at [31] et seq.

<sup>30</sup> *X v Croatia* (App. No.11223/04), judgment of July 17, 2008 at [61]–[63].

<sup>31</sup> *Tehrani v Turkey* (App. Nos 32940/08, 41626/08 and 43616/08), judgment of April 13, 2010 at [12]–[20], [53]–[57].

<sup>32</sup> *Katic and Katic v Serbia* (App. No.13920/04), decision of July 7, 2009.

<sup>33</sup> *Katic and Katic v Serbia* (App. No.13920/04), decision of March 4, 2008.

(2) that the arrangements relating to the applicant's guardianship would be reviewed, including by appointing a friend or a family member as a guardian or, in the alternative, making sure that the existing guardian performed his duties adequately.<sup>34</sup>

## The flexible approach of the European Court of Human Rights to its admissibility rules

The European Court of Human Rights' established case-law requires that its rules of admissibility be applied with flexibility and without excessive formalism.<sup>35</sup> This approach is justified on the basis of the object and purposes of the rules of admissibility<sup>36</sup> and of the Convention in general, which, in so far as it constitutes a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical and effective.<sup>37</sup> The European Court of Human Rights has fashioned a number of exceptions to the direct victim rule as well as other admissibility rules, taking into consideration on the one hand the specific vulnerability of certain individuals (children, persons held incommunicado,<sup>38</sup> women<sup>39</sup>), and on the other hand the necessity to ensure that Conventional protection is practical and effective. Logic and consistency demand that the justifications underpinning these exceptions should also apply to cases brought by or on behalf of long-term patients of residential psychiatric and social care institutions. In this sense the European Court of Human Rights' detailed jurisprudence on the *locus standi* of persons filing applications on behalf of children is particularly instructive and is discussed in some detail below.

In addition to elaborating the "indirect victim" notion briefly discussed above, the European Court of Human Rights has widened the concept of direct victim to include "potential victims", for example individuals complaining about the existence of secret surveillance measures or of legislation permitting secret measures, without having to demonstrate that such measures were in fact applied to them.<sup>40</sup> This exception to evidentiary rules acknowledges the inherent difficulties faced by victims if they had to prove that they had been the direct target of such measures. The European Court of Human Rights has also commonly awarded "potential victim" status to applicants subject to an extradition or deportation order to a country where their rights would be endangered, an approach justified by the imperative of seeking to protect them from irremediable harm.<sup>41</sup>

A valuable illustration of the European Court of Human Rights' flexible approach to admissibility criteria is provided by *Abdullah Ocalan v Turkey* (and in particular the Government's non-exhaustion objection raised in relation to the applicant's claim under art.5 §4 that he was not able to challenge the lawfulness of his detention in police custody). In this case, the European Court of Human Rights agreed to exempt the applicant from complying with the onerous requirement to exhaust domestic remedies, based on special circumstances of the case. It is possible to draw many parallels between the factual context of the *Ocalan* application and the not dissimilar obstacles faced by persons with disabilities held in

<sup>34</sup> *Katic and Katic v Serbia* (App. No.13920/04), decision of April 29, 2010.

<sup>35</sup> *Cardot v France* (App. No.11069/84), judgment of March 19, 1991 at [34]; *Karner v Austria* (App. No.40016/98), judgment of July 24, 2003 at [25].

<sup>36</sup> *Worm v Austria* (App. No.22714/93), judgment of August 29, 1997 at [33].

<sup>37</sup> *Yaşa v Turkey* (App. No.22495/93), judgment of September 2, 1998 at [64].

<sup>38</sup> *Ocalan v Turkey* (App. No.46221/99), judgment of May 12, 2005; the issue of standing also features prominently in cases concerning migrants captured in high seas by Italian authorities and deported back promptly to Libya (see *Hussun v Italy (striking out)* (App. Nos 10171/05, 10601/05, 11593/05 and 17165/05), judgment of January 19, 2010; *Hirsi v Italy* (App. No.27765/09), pending. In these cases the Government challenged the validity of authorisations held by the applicants' representatives and their continued standing to act before the European Court of Human Rights considering that in many cases they lost contact with their clients once they were deported back to Libya.

<sup>39</sup> Thus, for example, in the case *Y.F. v Turkey*, the Court recognised that the husband of a woman subjected to a forced medical examination had *locus standi* to file an application with the Court on her behalf, in particular having regard to her "vulnerable position in the special circumstances of the case", *Y.F. v Turkey* (App. No.24209/94), judgment of July 22, 2003 at [29].

<sup>40</sup> *Klass v Germany* (App. No.5029/71), judgment of September 6, 1978.

<sup>41</sup> *Soering v the United Kingdom* (App. No.14038/887), judgment of July 1989.

institutions.<sup>42</sup> The *Ocalan* case concerned the applicant's capture by Turkish authorities in Kenya and his subsequent detention and trial in Turkey. The European Court of Human Rights rejected the objection of non-exhaustion, in consideration of "the special circumstances of the case [which] made it impossible for the applicant to have effective recourse to the remedy".<sup>43</sup> In reaching this decision, the European Court of Human Rights noted that the applicant could not personally access judicial remedies normally available as he was kept "in total isolation", that he lacked legal training and could not consult a lawyer while in police custody. In addition, the applicant was not allowed to provide the lawyer he saw while he was in custody with written authority to represent him in court proceedings. Meanwhile, the lawyers retained by his family were unable to contact him, and could not therefore obtain information which only the applicant knew concerning his arrest in Nairobi, and which was indispensable for formulating a complaint challenging the legality of his detention. This constituted a sufficient basis for the European Court of Human Rights to reject the non-exhaustion objection and to find a substantive art.5 §4 breach.

### The notion of standing in cases involving children

Children and persons with disabilities share similar traits such as restricted legal capacity or increased vulnerability. The European Court of Human Rights jurisprudence concerning the former contains important indications as to how a more coherent approach to *standing* benefiting persons with disabilities held in institutions may develop. Certain criteria, elaborated on a case-by-case basis, inform an approach to the direct victim rule characterised by flexibility, guided by the imperative of providing effective protection to children's rights. Such criteria include the closeness of the links between the victim and the person filing the complaint, the qualifications and interest of the person to represent the children in question and whether more appropriate representation exists or is available for the victims than the one provided by the person introducing the complaint.

The *locus standi* issue arises when individuals other than the direct victims' custodial parents or legal guardians claim they should have standing to file an application. Thus, the European Court of Human Rights/Commission have recognised standing to a solicitor appointed to represent the applicants, three children, in domestic care proceedings;<sup>44</sup> the Official Solicitor, acting on behalf of children abused by their parents;<sup>45</sup> the de facto carer of about 200 Vietnamese children threatened with expulsion;<sup>46</sup> the natural parent of a child born out of wedlock and lacking custody over her;<sup>47</sup> the natural parent who had been deprived of parental rights over her child.<sup>48</sup>

According to the European Court of Human Rights, the children's relative vulnerability justifies a less "restrictive or technical approach" in the area of standing/victim status.<sup>49</sup> Flexibility is also required in view of the children's general inability to properly defend their interests: "children must generally rely on other persons to present their claims and represent their interests and may not be of an age or capacity to authorise steps to be taken on their behalf in any real sense."<sup>50</sup> This reading of admissibility requirements is informed by international instruments protecting the rights of the child dictating that children are provided with specific protection of their interests, such as the UN Convention for the Rights of the Child.<sup>51</sup>

<sup>42</sup> See *mutatis mutandis*, *Rahimi v Greece* (App. No.8687/08) Judgment of April 5, 2011 at [79], [120], discussed below.

<sup>43</sup> *Ocalan v Turkey* (App. No.46221/99), judgment of March 12, 2003 at [71], wording explicitly endorsed by the GC.

<sup>44</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

<sup>45</sup> *Z v United Kingdom* (App. No.29392/95), judgment of September 10, 1999 at [2].

<sup>46</sup> *Becker v Denmark* (App. No.7011/1975), judgment of October 3, 1975.

<sup>47</sup> *Siebert v Germany* (App. No.59008/00), decision of June 9, 2005.

<sup>48</sup> *Sozzari and Giunta v Italy* (App. Nos 39221/98 and 41963/98), judgment of July 13, 2000.

<sup>49</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

<sup>50</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

<sup>51</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

In cases where no formal links in the form of specific authority to act or formal standing to act as legal representative exist, the European Court of Human Rights will examine the nature of the links between the victim and the person filing the complaint. In *Becker v Denmark*, a case concerning the threatened expulsion from Denmark of approximately 200 Vietnamese orphans placed in the applicant's de facto care, the Government contested the applicant's standing to bring a claim on the basis that he neither had the custody nor guardianship of the children. He merely had an authorisation from the Vietnamese Government to leave Vietnam with the children with the consequential right and obligation to care for them. The European Court of Human Rights recognised the validity of the application in view of the vulnerability of the children, who were "orphan or depended on the applicant". In addition, the applicant had been entrusted with at least the care of the children, and therefore he "had a valid personal interest in the welfare of the children".<sup>52</sup>

In *S.P., D.P., and A.T. v UK*, which involved similar standing issues, the European Court of Human Rights also examined the relationship between the children and the solicitor acting on their behalf. That case concerned three children who were aged between 6 and 11 at the time when the application had been filed with the European Court of Human Rights. The children had been subjected to abuse and neglect and placed with temporary foster parents. A domestic court appointed a solicitor to represent the children in the care proceedings concerning their placement with long-term foster children. After exhausting domestic remedies, the solicitor complained to the Commission on behalf of the children in relation to the length of those proceedings. The government argued that the solicitor had no valid authority to file a complaint. In rejecting the objection, the Commission noted that the letters of support for the solicitor filed by the applicants' temporary foster parents "did not constitute authority to act in any formal sense".<sup>53</sup> Whereas one of the applicants was old enough for his views on the matter to be taken into consideration, the Commission did not deem it "necessary or desirable to require or expect more than an informal indication of this kind".<sup>54</sup> At the same time, the Commission noted that the solicitor was appointed by an independent guardian ad litem, that no conflict of interest between him and the applicants was identified, that he had the requisite competence to pursue these matters before it, and finally that the object of the proceedings before it was limited to procedural questions.

The problem of identifying the person who is most suitable to represent a child victim was raised in cases concerning the conflict between a natural parent and the person appointed by the authorities to act as the child's guardian. The relevant consideration in such cases is that the child's rights enjoy effective protection under the Convention, and that their interests may be brought to the European Court of Human Rights' attention. To the extent in which the state-appointed representative does not provide the requisite protection to the child and the state fails to appoint another guardian ad litem to represent the child during domestic proceedings, the natural parent will have the requisite standing to bring the case to the European Court of Human Rights.<sup>55</sup> In *S.P., D.P., and A.T. v UK*, the European Court of Human Rights also noted the absence of any adequate alternative sources of representation, besides the solicitor appointed to represent the children during domestic proceedings. The only two sources of representation, besides the solicitor, available to the children would have been their mother or the local authority. However, since "the mother [was] apparently disinterested and the local authority is the subject of criticism in the application", the European Court of Human Rights decided that the solicitor's actions were neither "inappropriate nor unnecessary".<sup>56</sup>

<sup>52</sup> *Becker v Denmark* (App. No.7011/1975), judgment of October 3, 1975.

<sup>53</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

<sup>54</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

<sup>55</sup> *Siebert v Germany* (App. No.59008/00), decision of June 9, 2005; also see *Scozzari and Giunta v Italy* [GC] (App. Nos 39221/98 and 41963/98), judgment of July 13, 2000 at [138].

<sup>56</sup> *S.P., D.P., and A.T. v the United Kingdom* (App. No.23715/94), judgment of May 20, 1996.

Examination of the aforementioned criteria for *locus standi* purposes may also involve considerations of substantive compliance with the Convention, via a positive obligation incumbent on states, in certain circumstances, to appoint a representative to support a vulnerable applicant. One example in that respect is a recent case concerning the inadequate care and unlawful detention in Greece of an unaccompanied asylum-seeking minor. In finding multiple breaches of the Convention, the European Court of Human Rights highlighted a range of failures by the authorities, including the prosecutors' failure to appoint a guardian to the applicant in accordance with domestic law, the failure to provide him with adequate shelter and to otherwise ensure his survival after he had been released from a detention centre.<sup>57</sup> The applicant's vulnerability and in particular the fact that he did not benefit from legal representation during his detention also had admissibility implications, determining the rejection of the non-exhaustion objections raised by the Government related to the claims concerning living conditions in the detention centre and the legality of his detention.<sup>58</sup>

### Exceptional treatment granted "in the interest of human rights"

The European Court of Human Rights has, on occasion, departed from well-established admissibility rules by invoking "the interest of human rights", a concept included in art.37 §1 *in fine* of the Convention. This concept empowers the European Court of Human Rights to continue the examination of an application even when the conditions required by the same article for striking out the case have been fulfilled.<sup>59</sup> It has been applied in a variety of situations: in order to overrule a victim's specific requests to withdraw his application;<sup>60</sup> in cases in which the applicant had died while the case was pending before the European Court of Human Rights and no next-of-kin was identified who was willing to continue the application;<sup>61</sup> in a case in which the victim of a violation of art.6 §1 died before lodging a complaint with the European Court of Human Rights where a brother was accorded victim status for the purposes of the application.<sup>62</sup>

In justifying its reliance on the "interest of human rights" concept, the European Court of Human Rights has acknowledged the moral dimension to human rights complaints and that persons near to an applicant may thus have a legitimate interest in seeing that justice is done even after the applicant's death.<sup>63</sup> In *Karner v Austria*, for example (a case concerning the original applicant's inability to succeed to the tenancy of his homosexual partner when a heterosexual partner would be able to do so in analogous circumstances), the European Court of Human Rights noted that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as contracting parties.<sup>64</sup> In addition, although the Convention system aims primarily to provide individual relief, its

<sup>57</sup> *Rahimi v Greece* (App. No.8687/08) Judgment of April 5, 2011 at [87]–[94]. Another case in which the Court took issue with the authorities' failure to sufficiently protect the legal interests of two minors by taking the initiative of appointing a curator is *Stagno v Belgium* (App. No.1062/07), judgment of July 7, 2009 at [30]. In that case the applicants' mother had squandered the indemnity paid by an insurance company to their benefit after their father's death. By the time the applicants reached majority age, the statute of limitations had already expired, thus preventing them from raising these issues in court. In finding a breach of art.6§1, the European Court of Human Rights highlighted the state's failure to appoint an alternative curator to safeguard their rights before the statute of limitations expired.

<sup>58</sup> *Rahimi v Greece* (App. No.8687/08) Judgment of April 5, 2011 at [79], [120].

<sup>59</sup> There are three conditions for striking out applications in art.37§1: when the applicant does not intend to pursue his application; when the matter has been resolved; or, for any other reason established by the Court, it is no longer justified to continue the examination of the application.

<sup>60</sup> *Tehrani v Turkey* (App. Nos 32940/08, 41626/08 and 43616/08), judgment of April 13, 2010 at [53]–[57].

<sup>61</sup> *Karner v Austria* (App. No.40016/98), judgment of July 24, 2003 at [28]; *Gagiu v Romania* (App. No.63258/00), judgment of February 24, 2009 at [5]; *C.B. v Romania (revision)* (App. No.21207/03), judgment of July 19, 2011 at [5]–[11].

<sup>62</sup> *Micalleff v Malta* (App. No.17056/06), judgment of October 15, 2009 at [49]–[50]; also see *Loyen and Bruneel v France* (App. No.55926/00), judgment of April 29, 2003 at [29].

<sup>63</sup> *Malhous v the Czech Republic* (App. No.33071/96), decision of December 13, 2000.

<sup>64</sup> *Karner v Austria* (App. No.40016/98), judgment of July 24, 2003 at [26].

purpose is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention states.<sup>65</sup>

The European Court of Human Rights has affirmed its discretion to find that respect to human rights requires the continued examination of the case in accordance with art.37 §1, and that this discretion depends principally on the existence of an issue of general interest, transcending the person and the interest of the applicant.<sup>66</sup> This may arise in particular where an application concerns legislation or a legal system or practice in the defendant state.<sup>67</sup> Notwithstanding this policy position, the European Court of Human Rights decided it was justified in the interests of “human rights” to continue the examination of a case even in the absence of a manifest public interest. Thus, in *Gagiu v Romania*, the applicant complained under arts 2 and 3 about poor prison conditions, including lack of medical care and under art.34 about the hindrance of his right to petition. Although the applicant died while his application was pending, the European Court of Human Rights decided to continue its examination on the basis of his particular family circumstances—he was an indigent shepherd without any known relatives and he was unrepresented before the European Court of Human Rights.<sup>68</sup> Likewise, no public interest beyond the dire potential consequences for the applicant had he been deported to Iran was apparent in the aforementioned *Tehrani* case, which did not prevent the European Court of Human Rights from concluding that it was in the interest of human rights to continue examining the application even against the applicant’s express will.

All these considerations are clearly applicable to the un-investigated deaths at the Poiana Mare Hospital. The factual context of these cases raises issues that go beyond the interests of the victims, including, for example, the continued absence of sufficient safeguards in many domestic jurisdictions and the preventing and the punishing of the abuses perpetrated in psychiatric hospitals. The individual circumstances of the victims, who usually suffer from multiple detriments, impairing their ability to complain before a court may equally justify the application of the “public interest” argument in cases which may be hampered by overly restrictive admissibility criteria.

## The interaction between domestic and Conventional standing rules

The European Court of Human Rights’ position as to whether domestic standing rules are determinative of its own admissibility requirements is best described as ambivalent. Put differently, the question is whether an entity given standing in internal proceedings should have standing to bring a case before the European Court of Human Rights. This issue is critical considering the increased role of NGOs in certain domestic jurisdictions to engage in judicial proceedings on behalf of or in support of victims of discrimination,<sup>69</sup> at least partially as a result of specific requirements included in EU non-discrimination law.<sup>70</sup> This line of analysis does not seek to make domestic rules determinative: this should not be the decisive factor in all circumstances because it would allow states to easily restrict access to the European Court of Human Rights by changing their procedural rules. However, favourable procedural rules at the domestic level should weigh heavily in the corresponding adjudication of the *locus standi* issue before

<sup>65</sup> *Karner v Austria* (App. No.40016/98), judgment of July 24, 2003 at [26].

<sup>66</sup> *Malhous v the Czech Republic* (App. No.33071/96), decision of December 13, 2000; *Micaleff v Malta* (App. No.17056/06), judgment of October 15, 2009 at [46]. An example of such a case is *C.B. v Romania*, in which the Court refused to strike out the case from its list after the applicant died and in the absence of another individual entitled and willing to continue with his application, deciding instead that it was justified to issue a decision on the merits, in consideration of the subject matter of the case which transcended the interests of the applicant—the absence of safeguards in Romanian legislation governing involuntary psychiatric hospitalisation.

<sup>67</sup> *Altun v Germany* (App. No.10308/83), judgment of March 7, 1984 at [32].

<sup>68</sup> *Gagiu v Romania* (App. No.63258/00), judgment of February 24, 2009 at [5].

<sup>69</sup> For a survey national rules on legal standing in the European Union, see European Union Agency for Fundamental Rights, *Access to Justice in Europe: An Overview of Challenges and Opportunities*, 2011, [http://www.fra.europa.eu/fraWebsite/media/pr-230311\\_en.htm](http://www.fra.europa.eu/fraWebsite/media/pr-230311_en.htm) [Accessed November 2, 2011], p.39.

<sup>70</sup> See, for example, art.7 of the Racial Equality Directive. EU non-discrimination law requires Member States to allow associations, such as non-governmental organisations (NGOs) or trade unions, to engage in judicial or administrative proceedings on behalf of or in support of claimants.

the European Court of Human Rights. The same should apply *a fortiori*, when, as in the *Poiana Mare* case, an expansive understanding of standing is the result of specific litigation before the highest court in a state party.<sup>71</sup>

The European Court of Human Rights has acknowledged as a matter of principle that it “should have regard to the fact that an applicant has been a party to the domestic proceedings”<sup>72</sup> for the purposes of determining whether they have standing. This argument has been cited as an important factor facilitating a favourable outcome to applicants in a number of cases.<sup>73</sup> At the same time, however, the European Court has held that the concepts of “victim” and “standing” are autonomous notions, which do not depend on domestic rules on standing.<sup>74</sup> This position has benefited those applicants deprived of standing to initiate proceedings domestically, such as minors, people with disabilities or parents divested of their parental authority. The European Court suggested that domestic rules may influence its determination of standing for the purposes of an application brought before it to the extent they have similar or analogous purposes.<sup>75</sup> Arguably, if the purpose of domestic procedural rules is to ensure better protection for persons with disabilities found in a situation of vulnerability as described above, this is consonant with the “object and purpose” of Convention admissibility requirements which as we have seen is to ensure the effective protection of the rights guaranteed under the ECHR. It therefore follows that an NGO protecting the rights of persons with disabilities or any other independent specialised body established specifically for such purposes are recognised *locus standi* under domestic law to represent the interests of persons with disabilities in court, this should weigh heavily in favour of a similar approach during European Court of Human Rights proceedings, provided no willing next-of-kin or any other adequate institutional arrangements exist. Arguably, the European Court of Human Rights has already quietly adopted this reasoning for example when declaring admissible a complaint filed by the Official Solicitor on behalf of four children who had been subjected to abuse.<sup>76</sup> The Official Solicitor intervened in domestic proceedings against the local authority, acting as the applicant’s Best Friend, and would not normally enjoy standing based on the currently prevailing understanding of admissibility rules as described above.<sup>77</sup>

## Conclusion

Persons with disabilities held in institutions are one of the most marginalised groups in European society, routinely suffering from multiple violations of their rights. Their predicament is worsened by a lax approach to law enforcement at the domestic level. There is an increasing consensus in international law that states have to set up special institutions and adopt adequate procedural measures to facilitate their access to justice. This is reflected to some extent in the European Court of Human Rights’ jurisprudence, both with

<sup>71</sup> Decision in file no.4948/1/2006, High Court of Cassation and Justice, June 15, 2006 (unreported). In the decision, the High Court stated that the Prosecution Office and the lower courts interpreted the notion of standing too narrowly. The High Court relied expressly on art.13 of the Convention which in its view afforded victims the right to an effective remedy, meaning that domestic courts were the primary judicial control bodies whereas the European Court of Human Rights had a subsidiary role. Therefore, domestic courts had to be the primary adjudicators in relation to the allegations concerning the applicant’s death. The High Court noted that the CLR initiated the criminal proceedings on the applicants’ behalf and participated in all stages thereafter. In addition, the CLR was a non-profit organisation with public utility status and their object of activity included activities aimed at the protection of human rights and free access to justice as well as “the promotion and strengthening of justice”. By filing a complaint on behalf of individuals who died at the Poiana Mare Hospital, the CLR acted within their statutory limits, aiming to safeguard the rights of those individuals, and in particular their right to life and not to be subjected to inhuman and degrading treatment in line with arts 2 and 3 of the Convention.

<sup>72</sup> *Micallef v Malta* (App. No.17056/06), judgment of October 15, 2009 at [48].

<sup>73</sup> *Micallef v Malta* (App. No.17056/06), judgment of October 15, 2009 at [49]; *Gradinar v Moldova* (App. No.7170/02), judgment of April 8, 2008 at [99]–[100]; *Collectif national d’information and d’opposition à l’usine Melox—Collectif Stop Melox and Mox v France* (App. No.75218/01), judgment of 12 June 12, 2007 at [4].

<sup>74</sup> *Gorraiz Lizarraga v Spain* (App. No.62543/00), judgment of April 27, 2004 at [35].

<sup>75</sup> *Zehentner v Austria* (App. No.20082/02), judgment of July 16, 2009 at [22].

<sup>76</sup> *Z v United Kingdom* (App. No.29392/95), decision of September 10, 1999 [dec.] at [2].

<sup>77</sup> The Official Solicitor is an “independent statutory office holder”, which by providing front-line services, provides access to the justice system to those who are vulnerable by virtue of minority or lack of mental capacity where that is needed. For more details, see <http://www.justice.gov.uk/about/ospt.htm> [Accessed November 2, 2011].

respect to substantive guarantees as well as to procedural accommodations made available to persons with disabilities. However, significant obstacles remain, including the restrictive construction of the notions of “standing” and “victim status”.

The European Court of Human Rights has adopted a flexible approach to its admissibility requirements, subordinated to the imperative that the protections available under the Convention are “effective and practical”. Similar flexibility should be extended to cases brought by persons with disabilities, in consideration of their special circumstances. However, one important drawback of the current approach is that it has been developed essentially on a case-by-case basis, lacking a structural and a strategic coherence. This article advocates the development of a more systematic jurisprudence by the European Court of Human Rights. It identifies the European Court of Human Rights’ jurisprudence involving children as a sound starting point for devising the criteria governing a more nuanced approach to standing and victim status. While the goal of any assessment in this respect should be to ensure effective protection to persons with disabilities and a fair hearing before the European Court of Human Rights, this should be based on a comprehensive assessment of the availability and effectiveness of mechanisms available at the national level facilitating access to justice of persons with disabilities, including monitoring mechanisms, guardianship, institutionalised and independent representation, an effective Prosecution Service, and other forms of support. Such a reinvigorated approach to *locus standi* should also take into account any domestic rules recognising standing for NGOs or other entities to act on behalf of persons with disabilities, with a view to adopting a similar approach, taking into consideration the shared goal of ensuring full protection of human rights.

Another possible gateway for adapting current admissibility rules is to examine requests brought by persons with disabilities on an exceptional basis, “in the interest of human rights”. While this approach may be ideologically correct in the sense that there is a major gap in the protection afforded to persons with disabilities in institutions both at domestic and European level, it has significant limitations—not least that the benefits that would result would be essentially discretionary, adopted on a case-by-case basis. A set of criteria defining with a higher degree of precision the situations when a more flexible notion of standing would benefit persons with disabilities is clearly desirable. This would also assuage any concerns that relaxing *locus standi* criteria would open the floodgates of public interest litigation, not limited to persons with disabilities, while maintaining the relevance of the European Court of Human Rights as an instrument protecting the most vulnerable sections of our society.