

EHRAC

Bulletin



Georgian Guardianship Procedure and the European Court of Human Rights

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Under the European Convention on Human Rights (ECHR), there is a positive duty to establish substantial and procedural guarantees to prevent abuse of guardianship arrangements.¹ However, it would seem that Georgian legislation does not comply with ECHR standards.

Provisions on guardianship

According to the Georgian Civil Code, the rights of an adult declared incapable due to 'mental retardation or mental illness' are vested in the guardian,² who is their statutory representative.³ There are four levels of incapacity: slight, moderate, significant and high. The level of incapacity must be deemed to be in the latter three categories to allow for the deprivation of legal capacity.⁴ The law determines legal capacity by assessing clinical, social, professional and psychological states, yet provides no guidance as to how and by whom these assessments should be conducted - it can even take place without the adult in question being examined (e.g. where the adult cannot travel).⁵ The law remains ambiguous as to whether the adult in question has the right to legal representation.⁶ Similarly, it makes no indication as to whether s/he has the right to be present and heard in the legal process. Finally, there is no provision for an adult to invite an independent expert to challenge forensic expertise.

The legislation differentiates between capacity assessment periods depending on the degree of incompetency; an adult with a moderate to sig-

nificant level of incompetency is entitled to a yearly assessment, whilst those with the highest degree are entitled to assessment twice a year.⁷ However, an incapacitated adult who shows no improvements after five years has no right to further assessments.⁸ An adult deprived of legal capacity has recourse to a judicial review, but legal capacity will only be restored upon a finding of 'recovery or significant improvement in [...] health'.⁹ The legislation allows for an appeal by an interested person,¹⁰ but, in practice, the incapacitated adult may not have been informed of the decision.

Incapacity assessment

In *Shtukurov v Russia* (No. 44009/05) 04.03.10, the European Court of Human Rights (ECtHR) held that the existence of a mental disorder, including a serious one, cannot alone justify full incapacitation - the mental disorder must be 'of a kind or degree warranting such a measure'.¹¹ Georgian legislation fails to address the 'kind' or 'degree' of disability in sufficient detail.

Legal Representation

The ECtHR stated that, as mental illness may require restricting or modifying the manner of the exercise of the right of access to a court under Art. 6, special procedural safeguards may be called for to protect the interests of persons who are not fully capable of acting themselves.¹² Proceedings which determine civil rights without the participation of the party are in violation of Art. 6 (1).¹³ The ECtHR has interpreted that

particular diligence is required during the determination of 'civil status and capacity'¹⁴ where legal representation shall be 'effective'.¹⁵

Georgian law provides no judicial review of an adult who is deemed permanently incapacitated where there is no change in status after five years. The ECtHR reasons that when there is no 'automatic periodic review' of a judicial character, the law shall provide for 're-viewing a declaration of incapacity'.¹⁶ The principles of proportionality and flexibility require that any measures involving the restriction of a person's legal capacity are applied only as long as justified by the condition of the person concerned.¹⁷ The Memorandum to Recommendation No R(99)4 further emphasises that an indefinite incapacity order should be exceptionally rare.¹⁸ The ECtHR asserts that the right to ask a court to review a declaration is one of the 'most important rights for the person concerned'.¹⁹ Despite this, it is evident that Georgian legislation is neither proportionate nor flexible in its response.

The ECtHR further specifies that the law must provide for the possibility for the adult in question to bring a request for restoration of legal capacity.²⁰

Appeal

Georgian legislation is vague about the procedural guarantees for the adult to be present and heard during proceedings, to have evidence considered and to have an effective right to ap-

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peal. However, the ECtHR highlights the importance of these safeguards and insists on the right to be heard in person.²¹ The ECtHR submits that any reports contracted on behalf of the person whose capacity is in question should be considered in the same way as other experts' opinions.²² Contrary to these requirements, Georgian law does not allow for any independent expert opinion. Similarly, the lack of guarantee to be informed of a court decision renders the right to appeal illusory. The ECtHR asserts that 'persons amenable to the law' shall enjoy before the appeal courts the fundamental guarantees contained within Art. 6.²³ The ECtHR further asserts that unduly restricting the prospect of an appeal, even with the assistance of the guardian, is a violation of fair trial.²⁴

Concluding remarks

Analysis of Georgian law on guardianship suggests that legal capacity proceedings do not guarantee the

requisite and fundamental procedural safeguards of participation, representation and effective appeal and that substantial revision is in order to ensure compliance with the ECHR.

1 Under Art. 6 and 8 ECHR as well as COM Recommendations No. R (99) 4 on the Principles Concerning the Legal Protection of Incapable Adults.

2 The Civil Code of Georgia, Art 12 (5).

3 Ibid, Art. 1293.

4 Ibid, Art. 10 (3).

5 The law on Medical Examination, Art. 51(2).

6 The Civil Code of Georgia, Art. 325 (2)

7 The Law on Medical Examination, Art. 12.

8 Ibid, Art. 14.

9 The Civil Code of Georgia, Art. 12 (6).

10 The Civil Code of Georgia, Art. 1305.

11 *Shtukurov v Russia* (No. 44009/05), 27.03.08, para 95, see also the principle 3 (1) of the Recommendation No. R (99) 4 of the COM concerning the legal protection of incapable adults.

12 *Winterwerp v the Netherlands* (No. 6301/73) 24.10.79 supra note 14, para 60.

13 Art. 6 (1) ECHR. In the criminal law context the Court asserted that a person can waive the right to be present at the court hearing only if sufficient notice has been served. See *Poitrinol v France* (No. 14032/88), 26.10.93, para 31.

14 *Matter v Slovakia* (No. 31534/96), 05.07.99, para 54.

15 *Czekalla v Portugal* (No. 38830/97), 10.01.03, para 60.

16 *Stanev v Bulgaria* (No. 13770/88) 17.01.12, para 241.

17 Recommendation No R (99) 4, Principle 14.

18 According to the explanatory Memorandum to Recommendation No R (99), an indefinite incapacity order should be the exception and happen only in cases where the individual has dementia or Alzheimer's disease, para 54.

19 *Stanev v Bulgaria* (No. 36760/06) 17.01.12, supra note 16, para 241. The Court also refers to the United Nations Convention on the Rights of Persons with Disabilities which recommends adequate procedural safeguards to be put in place to protect legally incapacitated persons and ensure periodic reviews of their status and provide appropriate remedies, para 244.

20 Ibid, para 245.

21 *Botten v Norway* (No. 16206/90) 19.02.96, para 53. See also Recommendation No R (994), Principle 14.

22 *Kutzner v Germany* (No. 46544/99) 10.06.02, para 73.

23 *Delcourt v Belgium* (No. 2689/65) 17.01.70, 1 EHRR 355, para 25.

24 *Salontaji-Drobnjak v Serbia* (No. 36500/05) 13.10.09, para 134-135.

