

CYPRUS

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I. Executive Summary

A. Definitions

[1]. The definitions of the terms relevant to this study, such as ‘mental patient’, mental disorder, severe mental disorder and disability are useful not only in casting light upon the terms used but also in highlighting the scope of the law and the draftsman’s intentions as regards the focus and purpose of a law. Thus, the ‘criminal’ approach adopted in the 1959 law was replaced by a more human rights based approach in 1979 focusing on the person’s state of mind and behaviour indicating mental disorder.

[2]. B. The Anti-discrimination National Framework

[3]. A brief overview of the applicability of UN standards to the Cypriot context is presented, highlighting the slow process towards ratification of the UN Convention on the Rights of Persons with Disabilities and the challenges posed by the new approach introduced. At the level of the anti-discrimination legal framework, the equality provisions of the Cypriot Constitution and their narrow interpretation by the Cypriot Courts are presented. The legal vacuum created in the field of Court jurisdiction by a Labour Court decision in 2008, although remedied for the other laws it affected, remains pending for the disability law, to the effect that persons seeking to invoke the disability law in the absence of an employment relationship may find that there is no Court competent to hear their case.

[4]. A list of measures of preferential treatment afforded to persons with intellectual disability is set out, with emphasis on the important institution of ‘supported employment’ which places persons with mental disability in the open labour market. No measures are in place for persons with mental disorders unless the disorder is such that it falls within the definition of ‘disability’.

C. Specific Fundamental Rights

[5]. A number of constitutional provisions deriving from international law guarantee civil and political rights as well as the right to life and freedom from torture for all are set out. A number of legislative provisions such as the prohibition of abuse and neglect of patients during placement focus on persons with mental disorder in particular. At the same time, case law recognises undue influence over a person with unsound mind as reason to declare a contract void.

Several constitutional provisions provide safeguards for fundamental rights to all persons whilst the Law on Psychiatric Treatment, provides for a number of rights for mental patients.

D. Involuntary Placement and Involuntary Treatment

[6]. This section attempts a non-exhaustive overview of the compliance of Cypriot law and practice with the provisions of the Council of Europe’s Recommendation concerning the protection of the human rights and dignity of persons with mental disorder. The 2008 Report of the CPT regarding its 2004 visit to Cyprus contains a special chapter on the state psychiatric hospital which is summarised in this section and further referred to in relation to the implementation of laws and regulations.

[7]. The basic law governing voluntary and involuntary placement is the Psychiatric Treatment Law of 1997, N. 77(I)/1997 setting out the procedures and time lines applicable for issuing Court orders for placement and for renewing such Court orders. In the absence of any legal

provisions on hospital practices, resort is made to the CPT report describing the practices at the state psychiatric hospital.

E. Competence, capacity and guardianship

- [8]. In 1996 a special law was introduced to govern the administration of the property of persons incapable of managing their property and affairs, the scope of which includes persons with ‘intellectual disorder’. The law does not recognise different degrees of incapacity but merely grants the Court power to decide, upon medical advice, whether a person is or is not capable of administering ones property and affairs.
- [9]. This section also provides details on the roles and functions of bodies and persons involved or impacting the appointment of guardians.

E. Miscellaneous

- [10]. The issue of lack of protective measures for persons with mental illnesses who do not have relatives to care for them as well as the lack of infrastructure for offenders with mental illnesses to serve sentences are raised in this section as deficiencies of the system.

II. Definitions

- [11]. The obsolete Mental Health Law Cap.252 of 1959, which was drafted in English, now repealed in its entirety, defines a “criminal mental patient” as “a person found to be insane upon inquiry directed to be made by a District Court or an Assize Court before which such person is being tried and shall include a person who has been acquitted by the District Court or by an Assize Court or the Supreme Court on the ground of insanity under the provisions of the Criminal Procedure law or of the Criminal Law.” In the same law, mental patient is defined as “a lunatic and includes an idiot or any other person of unsound mind.” These definitions are only of historical value now and form the historical legal antecedents to the current legal regime.
- [12]. The Law on Psychiatric Treatment N. 77(I)1977 as amended defines mental disorder in article 3 as follows: disorder of behaviour due to a mental illness which is incompatible with the place time and age of the person in which it is manifested.¹ Article 4 of the same law defines “severe mental disorder” warranting involuntary placement and treatment as “mental disorder as defined in article 3, when it is expressed with violence and serious antisocial behaviour or when the patient’s personal judgement has deteriorated to such an extent which renders his placement necessary for the protection of himself and of the persons close to him.”²
- [13]. In the case *Kypros Kyprianou v. Despo Kyprianou* (Supreme Court, 27.05.2003, Civil appeal no. 11347) an appeal was filed to the Supreme Court against a trial court decision ordering the appelland to submit to involuntary medical examination in order to assess

¹ In Greek: “Ψυχική διαταραχή σημαίνει διαταραχή της συμπεριφοράς που οφείλεται σε ψυχική νόσο, η οποία είναι ασύμβατη με τον τόπο, το χρόνο και την ηλικία του ατόμου στο οποίο εκδηλώνεται».

² In Greek: «Ψυχική διαταραχή ... όταν εκδηλώνεται με βιαιότητα και σοβαρή αντικοινωνική συμπεριφορά ή η κριτική ικανότητα του ασθενούς έχει επιδεινωθεί σε τέτοιο βαθμό που καθιστά την κράτηση του ασθενούς αναγκαία για την προστασία του ιδίου και των πλησίων του, θα αναφέρεται ως σοβαρή ψυχική διαταραχή και για την οποία δικαιολογείται υποχρεωτική νοσηλεία».

whether he would be involuntarily committed or not. The trial court decision was issued following the application of the estranged wife who suspected that he was suitable for commitment. In support of her claim she stated that her estranged husband's behaviour was inappropriate towards their children, that he vowed to destroy her and their children, that he spoke badly of her in various governmental departments in order to secure her dismissal etc. Upon appeal from the estranged husband, the Supreme Court found that her allegations do not prove a mental disorder as this is defined in article 3 of the law. The court pointed out that the appellant's alleged behaviour is not approved as the normal reaction of a logical and sane person and may even amount to a criminal offence; however this does not prove that the appellant has mental disorder in order to be subjected to involuntary examination.

- [14]. The Law on Mentally Retarded Persons N.117/89, defines in article 2 "mentally retarded persons" as persons of any age who are permanently incapable of securing by themselves some or all of their basic needs for smooth personal or social subsistence due to insufficient development or deficiency of their mental abilities, whether by birth or not.³
- [15]. The term 'disability' is defined in the Law concerning Persons with Disabilities No. 127(I)2000 enacted prior to the new anti-discrimination laws of 2004: "Disability"⁴ is defined in article 2 of Law N. 127(I)/2000 as "any form of deficiency or disadvantage that may cause bodily, mental or psychological limitation permanently or for an indefinite duration⁵ which, considering the background and other personal data of the particular person, substantially reduces or excludes the ability of the person to perform one or more activities or functions that are considered normal or substantial for the quality of life of any person of the same age that does not experience the same deficiency or disadvantage". When comparing this definition with the concept adopted in the *Chacón Navas* case,⁶ it emerges that the ECJ focused equally on the source of the limitation ("physical, mental or psychological impairments") and on the impact ("which hinders the participation of the person concerned in professional life"). The definition in the Cypriot law first describes the characteristics of this condition in a liberal fashion ("deficiency that *may* cause indefinite or permanent, mental or psychological or bodily limitation") and then goes on to describe the impact in a rather restrictive mode (substantially reducing or excluding the ability to perform an activity that is "normal" or substantial for the quality of life).
- [16]. The Law on Public Service (N. 1/1990), which provides for employment opportunities in favour of persons with disabilities in the public sector, defines a "disabled" person as "a person who congenitally or by a subsequent incident suffers full or limited impairment, and the disability originates from a serious deformation or mutilation of the upper part of the lower limbs, or muscle disease, paraplegia, tetraplegia, or loss of sight in both eyes or loss of hearing in both ears or any other serious condition that substantially reduces a person's

³ In Greek: "Πρόσωπο οποιασδήποτε ηλικίας που είναι μόνιμα ανίκανο να εξασφαλίσει μόνο του όλες οι μερικές από τις απαραίτητες ανάγκες για ομαλή ατομική ή κοινωνική διαβίωση λόγω ελλειπούς ανάπτυξης ή ανεπάρκειας εκ γενετής ή μη των νοητικών του δυνατοτήτων.

⁴ This law uses the term 'disability' and not 'special needs', as used in the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law of 2004.

⁵ The Ombudsman's Annual Report for 2005 refers to two cases in which the welfare services discontinued the payment of a benefit to persons with a disability on the ground that the disability could potentially be remedied through an operation and that the disability was not permanent, respectively. In both cases, the Ombudsman found that the complainants' disabilities did fit the definition of the term as found in the law because the inference that can be drawn from the medical certificates is that the disability in question is of an indefinite duration. The Ombudsman criticised the practice followed by the welfare office in discontinuing benefits on the basis of the impressions of the social worker who visited the person and stated that decisions touching upon medical knowledge cannot be justified exclusively on the basis of subjective judgement: File Nos. A/P 2175/04, A/P 368/05, described in the Ombudsman's Annual Report for 2005, published in Nicosia in December 2006

⁶ In the landmark ECJ case of *Chacón Navas* (No. C-13/05), the European Court of Justice ruled that "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" (Paragraph 4).

physical condition confining the person to a limited circle of jobs.” This definition, which clearly excludes persons with mental disorder or intellectual disability, follows the restrictive tradition of the Article 2 of Law N.127(I)/2000 and it is arguably more restrictive than the position adopted by the ECJ in the *Chacón Navas* case.

- [17]. The Law on Social Insurance 1980 as amended from 1982 - 2008 (Law N. 41/80) defines disability, for the purposes of that law, as “loss of health, strength or the ability to enjoy life” (article 2(1) of the Law). Article 46 of the same law, which regulates entitlement to disability benefit, defines a person with disability as “an employee who suffered a physical injury as a result of an industrial accident which caused the loss of physical or mental ability the extent of which exceeds 10 per cent.” The provision does not purport to provide an exhaustive definition but rather to determine entitlement to disability benefit under the particular provision.
- [18]. A draft law was compiled and is currently under examination before the House of Representatives regarding the procedures for the hiring of persons with a disability in the public service. The draft law which is entitled ‘Law introducing special provisions for the hiring of persons with a disabilities in the wider public sector’ sets out quotas in the employment of persons with disabilities at 10 per cent of the number of the vacancies to be filled in at any given time, provided that this does not exceed seven per cent of the aggregate of employees per department. The draft law marks a departure from the approach taken by the Courts so far, which interpret the equality principle narrowly as prohibiting good practice measures in favour of vulnerable groups.⁷ At the same time, the draft law was met with reaction from KYSOA, the confederation of the organisations of persons with disabilities, who issued a statement on 15.10.2009. The objections of the confederation rest, inter alia, upon the premise that the definition of the term “person with a disability” in the draft law is wide enough to cover persons with chronic diseases. Although the confederation has no objection to the category of the chronically ill persons benefiting from quotas or other perks, it believes that they should not be granted benefits at the expense of persons with disabilities.

III. Anti-discrimination

A. Incorporation of United Nations standards

- [19]. The open-ended consultation on key legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities (CRPD), held by the office of the UN Human Rights Commissioner on 24.10.2008 provides valuable insights and experiences regarding the rights-based approach introduced into national frameworks by the CRPD. The experience of other countries in repealing legal provisions which automatically disqualified a person from public or fiduciary office on the grounds of a “mental disability/disorder” or which placed an obligation upon trustees to give notice of appropriation of property to all interested persons, and not only to those of full mental capacity, will hopefully serve as yardstick in amending Cypriot legislation. For the time being, Cypriot legislation in this field does not extend beyond the mere ratification of the CRPD, which provides for a strict guardianship regime, rigorously applied by the Cypriot

⁷ See for instance *Charalambos Kittis et al v. Republic of Cyprus*, 8.12.2006, Appeal No. 56/06, where the law granting priority in employment for war-disabled persons is declared unconstitutional as violating the equality principle.

Court.⁸ The CPRD's requirement that the guardianship system be replaced with substituted-decision making, already meeting with resistance in other countries, will probably also be seen as problematic by the Cypriot government and Courts. The identification of national human rights institutions as key actors in raising awareness and monitoring actions will hopefully lead to the strengthening and capacitating of such institutions. It is expected that such a development will also lead to allocation of funding and resources and with an extension of mandate which is at the moment very limited. Cyprus was not represented at the consultation either with NGO or a government representative. It subsequently responded with a paper informing of its intention to set up a multi-disciplinary technical committee in order to screen and review existing laws so to bring them in line with the CPRD. It should however be noted that such a process was not followed in the case of transposing the anti-discrimination Directives, which require revision of laws and practices containing discriminatory provisions. As a result of this, a number of laws containing discrimination continue to be in force whilst the equality body's referrals to the Attorney General with the request to proceed with revision of these laws have not so far produced results.

[20]. Cyprus signed the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 30.03.2007 but has not ratified it yet. At the First Disability High Level Group report of 2008, Cyprus is mentioned as having expressed its intention to ratify the Convention and its Optional Protocol before May 2008, however a year and a half later this promise did not yet materialise. The Cypriot government's contribution to the Second Disability High Level Group report of May 2009 regarding the current state of affairs in a number of areas of focus, indicates a lack of familiarisation with relevant terms and concepts. Thus, under the heading of 'legal capacity', the government set out the equality principle of the Constitution and then the function of the equality, but omitted reference to the laws on legal capacity; similarly, under the heading 'access to justice', the government presented issues of accessibility to the Court building and the training of police officers.

[21]. The reason for not ratifying the CRPD was explained to the confederation of disability organisations KYSOA to be the government's decision to conduct a thorough study into the anticipated impact from the implementation of the Convention on various aspects (laws, policy, budget etc).⁹ The delay in ratification does not specifically relate to the rights of persons with mental disorder or persons with intellectual disability, but rather to the slow operation of the state bureaucratic apparatus.

B. The Anti-Discrimination National Framework

[22]. The anti-discrimination legal framework does not contain provisions targeting persons with mental disorders and persons with intellectual disability in particular and therefore recourse must be had to the provisions for all persons with disability.

a) **The Cypriot Constitution:** The Constitution contains a general anti-discrimination provision in Article 28. Article 28(1) of the Constitution provides: "All persons are equal before the law, the administration and justice, and are entitled to equal protection thereof and treatment thereby." Article 28(2) guarantees the enjoyment of economic, social and cultural rights by all persons without any discrimination and provides that every person shall enjoy all the rights and liberties provided for in the Constitution without any direct or

⁸ For instance, in the Supreme Court case of Charalambos Loizou v. Androula Fotiou (Civil Appeal 7487 of 22.06.1989, the Court rejected the appeal on the sole basis that it was initiated by a mentally ill person directly and not through his guardian or representative.

⁹ Information supplied to the author by the president of the Pancyprian Organisation for the Blind.

indirect discrimination against any person on the grounds of: community; race; religion; language; sex; political or other conviction; national or social descent; birth; colour; wealth; social class; *or any ground whatsoever*, unless the Constitution itself otherwise provides. Prior to the anti-discrimination laws of 2004 that transposed the *acquis*, the ground of disability was not expressly prohibited under this provision, although it may be deemed to be included in the concept of 'any other ground whatsoever' of Article 28. Even though the Constitution itself is silent as to whether it is directly applicable or not, a landmark Supreme Court decision of 2001 ruled that all constitutional and other rights that are constitutionally guaranteed are directly and indirectly applicable in the private and public sectors.¹⁰

In July 2006, the Cypriot Constitution (until then the supreme law of the country) was amended to give supremacy to EU laws. The amendment adds a new article to the Constitution providing that nothing therein stated shall nullify laws, acts or measures rendered necessary as a result of Cyprus' obligations as an EU member state, or to prevent Regulations or Directives or other binding legal measures enacted by the EU or its bodies from having force in Cyprus. This development is significant vis-à-vis the national anti-discrimination legislative framework because, prior to its enactment, the anti-discrimination provision of Article 28 of the Cypriot Constitution was interpreted by the Courts to mean that any positive measures taken in favour of vulnerable groups were violating the Constitution's equality principle.¹¹ The new amendment renders the positive measure provisions of EU directives superior to the Constitution and thus unchallengeable on the basis of Article 28. Indeed, in 2009 a bill was proposed purporting to introduce a quota of 10 per cent in favour of persons with a disability in the wider public sector. The bill is currently under examination.

b) **Legislative measures:** At the legislative level, in 2000 a general law on disability was enacted which was amended in 2004 in order to introduce the disability component of Council Directive 2000/78/EC.¹² This law was subsequently amended in 2007 to introduce more favourable provisions for persons with disability and in order to rectify the incorrect transposition of the provisions on reasonable accommodation and on the reversal of the burden of proof.¹³ As it stands now, the law fully transposes Council Directive 2000/78/EC subject to a complication created by the decision of the Labour Court, which decided that it cannot try disputes which do not involve an employment relationship. This case is explained in the following paragraph.

c) **Case law:** As a measure, litigation is in practice not available to the large majority of the vulnerable groups in Cyprus due to the cost and length of time involved, hence the conspicuous absence of any court decisions in the field of discrimination, based on the laws transposing the two directives. Since the enactment of the laws transposing the anti-discrimination directives, only one case was decided by the Court invoking the provisions of these laws, and in particular age discrimination, and in that case the Court found that it lacked jurisdiction to try the case.¹⁴ Although this case concerned age discrimination, it raises important implications for all grounds covered by Council Directive 2000/78/EC. The Labour Court in this case decided it had no jurisdiction to adjudicate on the complaint of a job candidate whose application had been turned down because of her age. For this ruling, the Court relied on Law N.8/67 which sets out its mandate, according to which it

¹⁰ *Yiallourou v. Evgenios Nicolaou* (2001), Supreme court case, Appeal No. 9331, 08.05.2001.

¹¹ *Cyprus/ Charalambos Kittis et al v. Republic of Cyprus through the Commission for Public Service* (8.12.2006, Appeal No. 56/06).

¹² Law on Persons with Disabilities No. 57(I)2004 (31.03.2004).

¹³ *Cyprus/ Law Amending the Law on Persons with Disability N. 72(I)/2007*.

¹⁴ *Cyprus/ Avgoustina Hajiavraam v. The Cooperative Credit Company of Morphou* (30.07.2008) Limassol Labour Tribunal, Case No. 258/05.

can try only labour disputes, defined in the law as disputes between employer-employee. According to this ruling, since the complainant was never hired, no relationship between employer-employee emerged at any point in time. However, in view of the fact that all laws transposing Council Directive 2000/78/EC expressly provide that the competent court to adjudicate on matters arising under the law is the labour court, the said court decision effectively denies claimants the right to redress to the Courts when their claim involved discrimination in the employment field in the absence of an employer-employee relationship, for instance in access to employment or self-employment or training or membership to trade unions. Following this decision, the law transposing Council Directive 2000/78/EC Law for all grounds except disability¹⁵ was amended by Law 86(I)/2009 to the effect that all disputes arising under the said law, whether concerning access to employment or self-employment or training or membership to trade unions, shall for the purposes of this law be deemed to be labour disputes. However, the law transposing the disability component of Directive 2000/78/EC has not been amended accordingly, to the effect that the ruling of the Labour Court in the case of *Hadjiavraam* continues to apply; as a result, persons with disability claiming discrimination in the hiring process (i.e. in access to employment) and in other employment areas not involving an employment relationship are likely to be denied access to the Courts, following the legal vacuum created by this court ruling.

- [23]. Preferential treatment is afforded to persons with intellectual disability by the public sector, the semi-public and the private (NGO) sector. A few service based schemes for persons with mental disorders are in place. Some cases of intellectual disability may be deemed to fall under the definition of “a person with disability” in which case they become entitled to the preferential treatment that all other persons with disability are. In general it is noted that no preferential treatment is afforded to persons with mental disorder or intellectual disability by either the Cypriot Constitution or by the Cypriot Courts. In fact, the approach taken by the Cypriot Courts until now is that the equality principle established by Article 28 does not allow any preferential treatment to be afforded to any group. At the legislative and policy level there are a number of measures in favour of all persons with disabilities. A few of these are targeting in particular persons with intellectual disabilities, described in the relevant laws and policy instruments as “persons with mental deprivation” or “mental retardation”.

The most important of schemes targeting persons with intellectual disability is the institution of ‘Supported Employment for Persons with Mental Illness’ which provides *supported* employment for persons with mental illnesses. The main actor involved is the Committee for the Protection of Mentally Retarded Persons and Service for the Welfare of the Disabled of the Ministry of Labour and volunteer organisations. It covers SMEs in the private sector but mostly large company in private sector, with the support of civil society. In terms of funding, 70% comes from the Service for the Welfare of the Disabled (Ministry of Labour) and 30% by the implementing volunteer organisation. This program offers to persons with mental disability the possibility for socialization and integration in the real labour market with personalised support. Evaluations of the program which are carried out every few years show an increasing satisfaction of all actors concerned with the institution and an increasing independence of persons with mental disability from public benefit and from their families. Sixty per cent of the persons so employed have stated that they were very happy with their work, even though the pay was very small (Euros 1,70 per hour). The main weakness is that very few have found employment in the service industry, which according to the organizers, renders it questionable whether the preferences of the persons with mental disability were taken into account. Also, the pay is extremely low and below the poverty line. Some families have discouraged their disabled member from participating

¹⁵ Cyprus/ Equal Treatment in Employment and Occupation N.58(I)/2004 (30.03.2004).

in the scheme as this would result in losing their state benefit, which is often a higher amount than the remuneration received at supported employment.

In addition to the above a number of grants and services are available¹⁶ which may be summarised below:

(i) State services and benefits for persons with intellectual disability by various governmental ministries and departments:

- The Department of Social Inclusion of Persons with Disabilities under the Ministry of Labour and Social Insurance offers several schemes for persons with physical disability but none targeting persons with intellectual disability in particular. Amongst the schemes offered are the subsidising of disability organisations and the subsidising of holidays for persons with disabilities.
- The Social Welfare Services of the Ministry of Labour offers a grant to persons with “intellectual deprivation” irrespective of the income of his/her family but provided that the person is not in gainful employment and does not own property (immovable or cash). For the year 2009 this grant amounted to €452 monthly. If a person is in gainful employment then the grant is reduced; if the person’s salary exceeds €512 monthly then the grant is discontinued.¹⁷ In addition to this grant, benefits are offered for: travelling, disposable nappies, monthly benefit for personal comfort, subsidy for heating up to €102 per annum, benefit for special diet as a result of an illness, benefit for assistance outside the home; subsidy for household equipment (furniture, electrical appliances), benefit for clothing and shoes, benefit for special needs which cannot be covered by other ministries (e.g. visual or hearing aids, false teeth, etc), assistance for home improvements, assistance for mental treatments especially for children with “mental deprivation”.
- The Social Insurance Department offers disability pensions and incapacity pensions.
- The Disability Welfare Services of the Labour Office has introduced two schemes of providing motives to employers in the private sector in order to employ persons with disability (including mental disability), co-funded by the European Social Fund. One scheme targets persons irrespective of the degree of the disability and the other scheme focuses on persons with severe disability (physical, sensory or mental).
- The Ministry of Finance offers a monthly benefit to persons with a disability who are in employment and to students and pupils who attend vocational training courses.
- The Ministry of Health offers free medical care in Cyprus for all persons with “intellectual deprivation” who receive disability benefit (i.e. who do not own property and are not in gainful employment).
- The Ministry of Education offers special education to children with “intellectual deprivation”.

(ii) Preferential treatment is offered by semi-governmental organisations to all persons with disability. The Cyprus Telecommunications Authority offers reduced subscriptions for land lines; the Electricity Authority of Cyprus offers reduced electricity rates; and Cyprus Airways (the national air carrier) offers discount at 50 per cent on air tickets to all persons with disability including mental disability and their escorts.

(iii) A number of NGOs¹⁸ offer (state funded) services to persons with mental disabilities in the following areas: daily care; after noon care, special treatment; therapy; home in the community

¹⁶ <http://www.cpmental.com.cy/epnka/page.php?pageID=38> (31.10.2009).

¹⁷ This is a highly problematic approach as in practice it results in persons not taking up employment opportunities so as not to lose their state benefit.

¹⁸ In December 2006 there were 28 NGOs offering programs to persons with mental disabilities, according to the record of the Committee for the Protection of the Mentally Deprived.

(continuous stay); employment in sheltered workshops; supported employment in the open market.

(iv) A number of services are offered by the Ministry of Health specifically for persons with mental disorder. These can hardly be described as *preferential* treatment but rather as measures towards treatment and or rehabilitation in the community. They are listed below:

- Hospital Treatment:- Offered in the Psychiatric Clinics of the Nicosia and Limassol General Hospitals and in the Athalassa Psychiatric Hospital;
- Outpatient Clinic Services:- Offered in all district hospitals, in urban and rural health centres and in community mental health centres;
- Services at Home: Community nursing and occupational therapy programmes
- Services for Drug Addiction (on Alcohol, pills or other legal or illegal substances)- offered mainly in the frame of the Nicosia General Hospital (THEMEA) and Limassol General Hospital (THEA) and in the counselling / prevention centres, like "PERSEAS" and "TOXOTIS".
- Services for Children and Adolescents:- Offered in Archbishop Makarios III Hospital in Nicosia and in the Limassol General Hospital
- Psychosocial Rehabilitation Services:- Offered mainly at the Day Centres in Nicosia, Limassol and Larnaca and at the Vocational Rehabilitation Centres.

[24]. Council Directive 2000/78/EC was transposed by three separate laws. The disability component of the said Directive was transposed by way of amending the existing disability law¹⁹ so as to introduce the anti-discrimination acquis. Although the amending law²⁰ did not add a lot towards defining any concepts, the existing law contains a definition of ‘disability’ which remains in force. The definition includes ‘mental or psychological limitation permanently or for an indefinite duration which, considering the background and other personal data of the particular person, substantially reduces or excludes the ability of the person to perform one or more activities or functions that are considered normal or substantial for the quality of life’. Therefore in order for a mental or intellectual condition to fall within the scope of this law, this must be either permanent or of indefinite duration and it must be substantial enough so as to reduce a person’s ability to perform normal or essential tasks of life. This clearly covers all forms of intellectual disability but only some forms of mental disorders. There is no case law on this issue. However there are a number of equality body decisions recognising even less severe forms of mental disability such as dyslexia as disability warranting protection from discrimination, even in fields beyond employment, such as education.²¹

[25]. The Law on Persons with Disability N.127(I)/2000 provides for a number of rights beyond employment for all persons with disability in general, which however are far too general to create a mandatory regime. These include: prompt diagnosis of the disability, intervention and prevention of its consequences, provision of medical and pharmaceutical care,

¹⁹ Cyprus/ Law on Persons with Disability N. 127(I)/2000.

²⁰ Cyprus/ Law Amending the Law on Persons with Disability N.57(I)/2004 (31.03.2004).

²¹ In its decision dated 31/10/2006 (File No. A.K.I. 24/2006, A.K.I. 27/2006) the equality body investigated a complaint from the parents of a dyslexic pupil against the absence of reasonable accommodation measures for dyslexic pupils taking exams at public schools. The Equality Body criticised the provisions of Law N.22(I)/2006, which provides for additional examination time as the only accommodation for dyslexic students. It referred to measures adopted in other countries seeking to assist dyslectic students at exams and found that such measures do not give the dyslexic student an advantage over other students, as the Ministry claimed, but merely serve to place the dyslexic student in an equal position to that of other students. The decision found that the Education Ministry’s practice was discriminatory towards dyslexic children; and also that the national law regulating the measures for children with special needs at exams introduced indirect discrimination on the ground of special needs in the field of education.

rehabilitation of functions including the provision and training in the use of added and corrective limbs, as well as psychological and other support for the person and his/her family;²² personal support with auxiliary equipment and other means and services which assist a person in everyday living and work, with an interpreter or an escort as well as with any other required support where this is deemed necessary;²³ accessibility to housing, buildings, streets and generally to the natural environment, in public transport and other means of transportation;²⁴ access to special education according to their needs;²⁵ access to information and communication with special means where this is deemed necessary;²⁶ the creation of personal and family life;²⁷ participation in cultural, athletic, social, religious and other recreational activities.²⁸ These rights are not absolute; they are enforceable through the taking of “reasonable measures” which are, according to article 9(1) of the law, obligatory only if the preconditions of the law are met.²⁹ They are not, in other words, absolute rights in the ordinary sense of the word.

In addition to the aforesaid rights, Article 6(1) of the law establishes the right to equal treatment in the provision of goods, facilities and services, unless this is “justified”. Article 6(2) defines what does *not* constitute ‘equal treatment’ for the purpose of this provision, and is therefore prohibited, as follows: refusal to provide services; provision of services of a lower standard; provision of goods and services with substandard conditions; the failure to carry out changes in services or facilities which render their use by a person with disability difficult or impossible. Such changes may include the creation of suitable accessibility features for comfortable and safe use of the services or facilities; the use of special means, equipment or persons for the facilitation of communication and information to persons with disability; the use of specialized means, equipment and facilities in places where services are offered, such as schools, hospitals, clinics etc. All the rights created by article 6 are, once more, subject to the ‘reasonable measure’ restriction of article 9(1) referred to above. Also, the article itself limits its applicability to cases where there are no reasons rendering the implementation of equal treatment ‘unjustified’.

Article 7 provides that all means of public transport must comply with regulations in force regarding the entry into and transport of persons with disability. This provision is not subject to the ‘reasonable measure’ restrictions of article 9(1). It should be added, however, that the public transport network in Cyprus is rather poor and limited and is hardly ever used by persons with disabilities.

Article 7A provides for the issue of a special parking ticket that secures preferential parking for persons with disability.

Article 8(1) provides that the competent governmental services must proceed “within a short period of time” to the installation of a special telephone service for persons with a

²² Law on Persons with Disability 127(I)/2000, article 4(2)(a).

²³ Law on Persons with Disability 127(I)/2000, article 4(2)(b).

²⁴ Law on Persons with Disability 127(I)/2000, article 4(2)(c).

²⁵ Law on Persons with Disability 127(I)/2000, article 4(2)(d).

²⁶ Law on Persons with Disability 127(I)/2000, article 4(2)(e).

²⁷ Law on Persons with Disability 127(I)/2000, article 4(2)(h).

²⁸ Law on Persons with Disability 127(I)/2000, article 4(2)(i).

²⁹ Article 9(1) of the Law on Persons with Disabilities N.127(I)2000, as amended by Law 72(I)/2007. The factors which must be taken into account in order to determine whether a measure is reasonable or not, are as follows: (1) The nature and required cost for the adoption of the measures; (2) the financial sources of the person who has the obligation to adopt the measures; (3) the financial situation and other obligations of the state in those cases where the obligation for the adoption of measures refers to the state; (4) the provision of donations by the state or other sources as a contribution towards the total cost of the said measures; (5) the socio-economic situation of the person with the disability concerned. The law provides that the aforesaid factor (socio-economic situation of the disabled claimant) must not be taken into account as regards the principle of non-discrimination in employment.

hearing disability so as to enable these persons to communicate in the same manner as persons without such disability. Article 8(2) provides that there must be public telecommunication means accessible to persons with disability including wheelchair users. Article 8(3) provides that television stations must offer sign language interpretation to the news program once a day. The rights of article 8 are also enforceable only through the adoption of ‘reasonable measures’ in accordance with article 9(1), the scope of which is so wide that it does not create a mandatory regime.

- [26]. According to Cypriot disability law, an absolute obligation to provide reasonable accommodation exists only in the field of employment.³⁰ However, the law also provides for certain rights for persons with disabilities (set out in the previous paragraph) going beyond the minimum standards of Directive 2000/78/EC, from which a (relative) obligation to provide reasonable accommodation in fields outside employment may be inferred. The nature of the rights is such that a duty to provide reasonable accommodation for their implementation can be implied, because the absence of such accommodation would make nonsense of these rights.

The equality body is already referring to the Horizontal Directive in its decisions and uses its wide mandate in order to investigate discrimination complaints on the ground of disability beyond the field of employment.

With regard to reasonable accommodation at the workplace, the law provides that “equal treatment” means, inter alia, “the obligation to provide reasonable access and facilities in the working environment, including: (i) the necessary modifications or adjustments of accessibility to existing facilities so as to make them accessible to persons with disabilities; (ii) the reshaping of work by creating working schedules of part-time occupation or modified working hours, with the acquisition of new or the modification of existing equipment, machinery, tools, means and any facilities or services”.³¹

- [27]. The equality body is vested with the powers well beyond the minimum required by Article 13 of Council Directive 2000.43.EC. Its mandate includes:

- The power to promote equality in the enjoyment of rights and freedoms safeguarded by the Cyprus Constitution (Part II) or the Conventions ratified by Cyprus and referred to explicitly in the Law³²
- The power to promote equality of opportunity irrespective of, inter alia, *special needs*³³ in the areas of employment, access to vocational training, working conditions including pay, membership to trade unions or other associations, social insurance and medical care, education and access to goods and services including housing.³⁴

The equality body’s mandate covers all five grounds of the two anti-discrimination Directives but extends even further to include gender, nationality, community as well as

³⁰ Law on Persons with Disability 127(I)/2000, article 5(1A), as amended by law 72(I)/2007.

³¹ Article 5(2)(d) of the Law on Persons with Disabilities N.127(I)2000, as amended by Law No. 57(I) of 2004.

³² These Conventions include: Protocol 12 of the European Convention for Human Rights and Fundamental Freedoms; the Covenant for Civil and Political Rights and the Convention against Torture and Inhuman and Degrading Treatment or Punishment.

³³ In a debate over the correct terminology, the organisations of persons with disabilities considered that in Greek the term ‘special needs’ («ειδικές ανάγκες»), particularly in the case of ‘mental disability’, was more appropriate than the Greek translation of ‘mental disability’ («πνευματικές αναπηρίες»). ‘Special needs’ is a term commonly used in Cyprus to encompass all types of disabilities including mental disabilities.

³⁴ The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004), Section 3(1)(b), Part I.

rights and freedoms contained in the Cypriot Constitution and in international conventions ratified by the Republic of Cyprus.

[28]. Since the enactment of the anti-discrimination laws in May 2004, there have been several complaints of discrimination filed with the equality body. A certain confusion is apparent between the functions and competences of this body as ombudsman and as equality body. A large section of the public is not aware of the difference, as a result of which they file their complaints to the ombudsman rather than the equality body. A manifestation of this is the fact that whilst there is an abundance of complaints and decisions against state organs, there are very few complaints against companies or individuals in the private sector, reflecting the fact that the new competencies of the ombudsman as equality body with wide powers examining complaints in both the public and the private sector are not widely known to the public.

[29]. Since its inception in 2004, the equality body has been greatly understaffed and under funded by the government,³⁵ which partly accounts for the fact that it has not made full use of the powers granted to it by the law, such as the power to draft codes of conduct intended to combat discrimination on the grounds provided by the Directives.

IV. Specific Fundamental Rights

[30]. Persons with mental disorder and persons with intellectual disability are, according to the international conventions ratified by the Republic of Cyprus, entitled to fully enjoy civil and political rights. However, the constitution, which on the one hand proclaims that fundamental rights are afforded to “every person”,³⁶ contains considerable restrictions for persons of an “unsound mind”³⁷ as will be outlined further below. Most of the Articles of Part 2 of the Constitution correspond to relevant Articles of the European Convention of Human Rights, which is said to have been in operation prior to and after Cypriot independence from British colonial rule, even before it was ratified by the relevant law.³⁸ This means that it has superior force over any national law under Article 169.3 of the Constitution.³⁹ It should be noted that disability is not a legal ground for restriction of legal capacity as it contravenes the right to equality of Article 28 of the Constitution. Moreover, the Law on Persons with Disabilities prohibits all kinds of discrimination – direct and indirect - against persons with disabilities.

[31]. **The right to life:** under the heading “Life, Personal Integrity” (Article 7) the constitution safeguards that “every person has the right to life and corporal integrity.” The restrictions provided do not have any specific references to persons with mental disorder and persons with intellectual disability.⁴⁰

³⁵ In his 2006 report (dated 29.03.2006), the Commissioner for Human Rights of the Council of Europe Mr. Alvaro Gil-Robles expresses his regret for the fact that the necessary increase in funding to deal with the extra work-load has not been provided to the ombudsman and recommends that greater resources be devoted to this office to enable it to deal effectively with its new competencies. Similarly, in its third report on Cyprus dated 16.05.2006, ECRI also stresses the need for resources to be made available to the Ombudsman to enable her to respond to her tasks.

³⁶ Under Part 2 of the Cypriot Constitution which is entitled “Fundamental Rights and Liberties” (Articles 6-35).

³⁷ In Greek translated as «άτομα ασθενούντα διανοητικώς».

³⁸ Cyprus/Law 38/1962. See C. Tornaritis (1983) *The Operation of the European Convention of for the Protection of Human Rights in the Republic of Cyprus*, Nicosia, pp. 2-3.

³⁹ Providing that the Convention applies to the other party thereto.

⁴⁰ Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary - (a) in defence of person or property against the infliction of a proportionate and otherwise unavoidable and irreparable evil;

[32]. The **right to freedom from torture or cruel, inhumane or degrading treatment or punishment** is guaranteed under Article 8 of the Constitution, which provides a safeguard against inhumane or degrading treatment or punishment by providing that no person shall be subjected to torture or to inhuman or degrading punishment or treatment. Similar safeguards can also be found in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁴¹ the UN Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁴² and the Optional Protocol.⁴³ Concerning the rights of mental patients who are institutionalised, abuse and neglect during placement is prohibited by the Law on Psychiatric Treatment.⁴⁴

[33]. **The right to freedom from exploitation:** Persons with mental disorder or intellectual disability are protected from exploitation in a number of ways.

- There are provisions protecting parties in contractual situations deriving from the rules of equity, such as for instance the notion of undue influence. In the case of *Iacovos Costa Christophorou v. Anna Charalambous as Administrator of the Estate of Charalambos Iacovos Papachrystophorou*,⁴⁵ which involved the concept of undue influence,⁴⁶ the appeal court ruled that when a person is a party to a contract and the transaction appears prima facie or from the evidence adduced to be unconscionable, the burden of proof in establishing that the contract was not the result of undue influence, lies with the person who is in a position to dominate over the will of the other.⁴⁷ In the said case, the appellant was the nephew of a deceased person who had been suffering from arteriosclerosis, senility and Parkinson disease. Before the deceased's death, the appellant had obtained the deceased's signature on a power of attorney in his favour. He subsequently used this power of attorney to transfer onto himself property belonging to the deceased. Medical evidence submitted to the Court proved beyond doubt that the deceased had no contact with his environ and could not be deemed responsible for his actions. Thus the appellant was in a position to dominate over the deceased's will, exercising psychological pressure in order to achieve a transaction detrimental to the deceased: he succeeded in transferring immovable property of significant value onto himself without giving any substantial consideration in return. The Court ruled that in the case of contracts so detrimental to one party it is necessary to prove that the donor was acting out of his own free will without influence from the person who would benefit from the transaction. It also found that it was necessary to show that the donor was fully responsible for his actions. The most common way to prove that a gift is not the result of psychological pressure is to introduce testimony that the gift was the result of having obtained suitable and independent legal advice.
- The Law on Psychiatric Treatment⁴⁸ provides for the setting up of the Supervisory Committee for the Protection of the Rights of Mental Patients,⁴⁹ which aims amongst other matters to safeguard the rights of mental patients. The appointment of the

(b) in order to effect an arrest or to prevent the escape of a person lawfully detained;

(c) in action taken for the purpose of quelling a riot or insurrection when and as provided by law.

⁴¹ <http://www.cpt.coe.int/en/documents/ecpt.htm> Ratified by Cyprus/Law N. 24/1989 (24.02.1989)

⁴² Cyprus/Law 1N, 235/1990

⁴³ Cyprus/Law N. 2(III)/2009

⁴⁴ Cyprus/ Law on Psychiatric Treatment N. 77(I)/1997 (as amended in 2003 and 2007) article 29 provides for imprisonment of up to two years and/or a fine of up to 2000 Cyprus pounds (3,417 euro).

⁴⁵ Civil appeal no. 10944, 14.01.2002.

⁴⁶ Cyprus/ Law on contract Cap. 149, article 16(1).

⁴⁷ Cyprus/ Law on contract Cap. 149, article 16(3).

⁴⁸ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997 (as amended in 2003 and 2007).

⁴⁹ In its website the Committee uses the name "Mental Health Commission", however this is not an accurate translation of the text of the Law on Psychiatric Treatment N. 77(I)/1997: <http://mentalhealthcommission.org.cy/en/law> (31.10.2009).

Supervisory Committee has significantly contributed to the implementation of the principles of this Law and to the promotion of the rights of mental patients.

- [34]. There are restrictions to **the right to liberty and security** contained in Article 11 of the Constitution, which deals with Liberty and Security of the Person and corresponds to Article 5 of the ECHR. Whilst on the one hand this provision safeguards that “every person has the right to liberty and security of person” and that “no person shall be deprived of his liberty”, it stipulates amongst the exceptions in Article 11.2(e) “the detention of persons for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”.

As for the meaning of the term “person of unsound mind”, it is contended by one legal scholar⁵⁰ that guidance must be sought in the case of *Winterwerp v. Netherlands*,⁵¹ which decided that no final interpretation could be given as medical opinion is constantly evolving according to medical knowledge. However, “what is certain is that detention of persons under this paragraph cannot be justified ‘merely because the views or the behavior of this person deviates from the dominant norms in a society’”.⁵² In *Winterwerp v. Netherlands* it was held that except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of ‘unsound mind’: “The very nature of what has to be established before the competent national authority – this is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.” Therefore Article 11.2(e) of the constitution and Article 5(1)(e) of the ECHR provide the basis for a five-stage test for detaining persons of unsound mind, as established in *Winterwerp v Netherlands*: (a) The mental disorder must be established by objective medical expertise; (b) The nature and degree of the disorder must be sufficiently extreme to justify the detention; (c) Detention should only last as long as the medical disorder and its required severity persists; (d) In cases where detention is potentially indefinite, periodical reviews must take place by a tribunal which has powers to discharge; (e) Detention must take place in a hospital, clinic or other appropriate institution authorised to detain such persons.⁵³

- The Law on Psychiatric Treatment⁵⁴ provides for instances where “psychological disturbance” is of such serious nature which warrants his placement necessary for the protection of him-/herself and of the persons close to him/her, i.e. (a) manifests itself violently and with serious anti-social behaviour or (b) the critical judgement of the patient has deteriorated to such an extent which renders his/her placement necessary for the protection of him-/herself and of the persons close to him/her. The court appoints a “personal representative” to administer his/her affairs.⁵⁵ The rights of the patient are restored when the court is satisfied that the patient has recovered his ability to responsibly and freely exercise his will, following a relevant of opinion from the treating psychiatrist.⁵⁶

⁵⁰ A. Loizou (2001) *Το Σύνταγμα της Κυπριακής Δημοκρατίας*, Nicosia, p.67. The author is the former President of the Supreme Court

⁵¹ 6301/73 (1979) ECHR 4 <http://www.juridischeuitspraken.nl/19791024EHRMWinterwerptegenNederland.pdf>

⁵² A. Loizou (2001) *Το Σύνταγμα της Κυπριακής Δημοκρατίας*, Nicosia, p.67.

⁵³ There is no right to treatment, but failure to treat may amount to a breach of the right to physical integrity (ECHR Article 8) or be inhuman treatment (ECHR Article 3).

⁵⁴ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Section 4.

⁵⁵ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Section 17.

⁵⁶ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, article 19(d).

- Under the Law on Psychiatric Treatment⁵⁷ there is a procedure for detention for the purposes of examination of a seriously disturbed patient who refuses to be examined, when an examination order is issued by the court. A seriously disturbed patient creating problems in public may be apprehended by the police and transferred to a secure establishment for 24 hours' observation and treatment while the procedures for a court order are initiated. In Cyprus there are no crisis mobile teams for intervention.

[35]. The Law on Psychiatric Treatment provides for the Court's obligation to hear the patient in proceedings concerning an application for the patient's involuntary placement. The Court has no duty to hear the patient if it is satisfied from the testimony introduced that the patient is not in a position to testify.⁵⁸ Beyond this provision there are no guarantees for a fair trial specifically targeting persons with mental disorder and persons with intellectual disability to enable their proper access to justice, but there are general provisions applicable to all. Two aspects are relevant here:

- A general principle derived from the right to fair trial is the right to meaningful participation in the proceedings. The prerequisites for a fair trial are stipulated in articles 12.5⁵⁹ and 30.3 of the Constitution of the Republic of Cyprus: Article 30(3) provides for litigants' participation by safeguarding the right (a) to present their case before the court and to have sufficient time necessary for its preparation; (c) present evidence and to examine witnesses; (d) to have a lawyer of their own choice and free legal assistance where the interests of justice so require; (e) to have free assistance of an interpreter. Procedurally, this means that the rights of the litigants are an inseparable aspect of a fair trial.⁶⁰ The Supreme Court has set aside a trial court decision because the plaintiff was denied the opportunity to be present at the stage of the final address.⁶¹ The notion of fair trial entails the basic jurisprudence of the ECtHR and Cypriot case law supports the idea that there is a right of the litigant to be present at his or her trial. An unjustifiable refusal of an application of the plaintiff for adjournment on the grounds of illness depriving him of the right to be present at the trial was found to be a breach of the fair trial principle. The proceedings were nullified and a retrial was ordered.⁶²

- In 1997 article 70 of the Criminal Procedure Law, Cap. 155, was amended to deal with situations when there is an inability to plead in criminal proceeding,⁶³ so as to harmonize its provisions with the new approach regarding mental patients. Article 70 of the Law deals with the procedure followed when the accused brought before the court is unable to follow the proceedings due to insanity. Before the amendment of this section, the court gave directions for an inquiry to be carried out as to the mental state of the accused. If the inquiry showed that the accused was indeed 'insane' and unable to follow the proceedings, the court would order his/her detention for an indefinite period, at the pleasure of Her Majesty when Cyprus was a colony or at the pleasure of the Council of Ministers of Cyprus after Cyprus became a republic. This was considered to be an inequity because a person who could have been proven innocent at trial was sent for an indefinite period to a mental hospital just because s/he could not follow the proceedings. Under the new law an inquiry is not undertaken unless the court, after reviewing the statements and evidence in the hands of the prosecution, forms the opinion that there is a prima facie case against the accused. If the court is not satisfied that there is a case against the accused, it orders his/her release; in such a case, if the

⁵⁷ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997 (as amended in 2003 and 2007), article 36.

⁵⁸ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, article 10(1)(h).

⁵⁹ This corresponds to 6.3(c) of the ECHR.

⁶⁰ Cyprus/ Yangou Lemonas v. The Police (2001) 2 CLR 421 (CA).

⁶¹ Cyprus/ Gregoriou v. Bank of Cyprus (1992) 1222 CA.

⁶² Cyprus/ K. G. Kyriakides v. Lumian Ltd a.o. (2000) 2 CLR 343 (CA).

⁶³ Cyprus/Law 89 (I) 1997.

condition of the accused is such as to warrant compulsory treatment then the provisions of the Psychiatric Treatment Law are invoked. However, if after an inquiry the accused is proved to be unable to follow the proceedings, then the case is adjourned and the accused is placed under the care of a psychiatrist for treatment until his/her condition improves to the point where s/he is able to follow the proceedings. The court may instead order the detention of the accused in a psychiatric centre for treatment for a period of time analogous to that provided by Law 77 (I) of 1997; however no centres are currently in operation for the detention of persons with mental disorder serving a sentence.

- [36]. **The right to privacy is guaranteed** for all persons under Article 15 of the Constitution, which corresponds to Article 8 of the ECHR, providing: “Every person has the right to respect for his private and family life”.⁶⁴ However, Article 15.2 includes the following limitation: “There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person.” Concerning the right to access to one’s own confidential medical records, this is safeguarded by the Law on Psychiatric Treatment,⁶⁵ which entitles the patient his or her confidential medical records. An exception to this rule applies when the person in charge of the hospital or clinic where he/she is being held decides access to one’s medical files may adversely affect his/her mental state or may adversely affect other persons. The patient or his/her personal representative may apply to the Supervisory Committee for the Protection of the Rights of Mental Patients to have this refusal reversed.⁶⁶
- [37]. Patient’s with mental disorder placed in psychiatric centers have the **right to free communication** with any persons outside the centre of treatment, providing that this does not adversely affect his treatment or the smooth operation of the centre.”⁶⁷
- [38]. **The right to marry, to found a family and to respect of family life** is safeguarded for all persons under Article 22 of the Constitution which provides that “any person reaching nubile age is free to marry and to found a family according to the law relating to marriage, applicable to such person under the provisions of this Constitution.” Also the right to family life is safeguarded under Article 15 of the Constitution, which corresponds to Article 8 of the ECHR. Articles 15 and 22 of the Constitution are relevant **to the right to have children and maintain parental rights**. However, the law regulating the relations between parents and children provides that where the parent “cannot or is incapable of providing parental care”,⁶⁸ or where the court considers that the parental care is badly exercised by one or both parents it may, partly or fully, remove parental care from them and appoint another person to carry out such responsibilities.⁶⁹
- [39]. The court has the power to intervene on matters relating to the protection of property for the benefit of children in cases of parents who due to incapacity are considered incapable of concluding certain transactions. The old law on the custody of children,⁷⁰ which was abolished and replaced by the new law,⁷¹ defines a prodigal as "a person who by reason of

⁶⁴ Article 15.1.

⁶⁵ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997 (as amended in 2003 and 2007), Article 34(1).

⁶⁶ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997 (as amended in 2003 and 2007), Article 34(2).

⁶⁷ This is safeguarded under Article 33 of the Law on Psychiatric Treatment N. 77(I)/1997.

⁶⁸ Cyprus/ Law on the relations between parents and children N.216/1990, Article 5(3).

⁶⁹ Cyprus/ Law on the relations between parents and children N.216/1990, Articles 18 and 19.

⁷⁰ In particular article 2 of Cap. 277.

⁷¹ Cyprus/Law 216/1990 and Cyprus/Law 7(I)/1992.

his profuse or wasteful expenditure is unfit to administer his own property". In spite of the abolition of Cap. 277 the principle of court intervention remains intact.⁷² Legal precedent has established that such intervention by the Court is not contrary to the Constitution but instead an expression of safeguarding the **right to private and family life**. The Court in that case added that "in accordance with the clear meaning of such provision, it is not the mere fact of profuse or wasteful expenditure that renders a person a prodigal, but such expenditure must establish that the person concerned is 'unfit to administer his own property.'"⁷³

- [40]. The **right to property** is safeguarded by Article 23 of the Constitution. This stipulates that "every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right". No deprivation or restriction or limitation of any such right are allowed except, inter alia, in the case of "restrictions or limitations which are absolutely necessary in the interest of the public safety or the public health or the public morals or the town and country planning or the development and utilisation of any property to the promotion of the public benefit or for the protection of the rights of others may be imposed by law on the exercise of such right." As illustrated in the preceding paragraph, the Court can and will intervene in cases where it deems a person incapable of managing his/her own affairs. In any case, the law on administering the property of persons lacking capacity provides jurisdiction for the district court to intervene in order to protect the property rights of "a person incapable of exercising his judgement and will to administer his property or his affairs," due various factors including mental disturbance.⁷⁴ In such cases the court will appoint an administrator to administer all the patient's affairs, including his property⁷⁵ and is appointed as a Trustee.⁷⁶ Also, the law on Psychiatric Treatment⁷⁷ provides for instances where "psychological disturbance" is of such serious nature which warrants the appointment a "personal representative" to administer his affairs.⁷⁸
- [41]. The **right to vote** is safeguarded by Article 31 of the Constitution which stipulates that "every citizen has, subject to the provisions of this Constitution and any electoral law of the Republic or of the relevant Communal Chamber made thereunder, the right to vote in any election held under this Constitution or any such law". The abolition of the old colonial law on mental health, Cap. 252⁷⁹ and Cap. 277 on the Guardianship of Infants and Prodigals,⁸⁰ is thought to have removed the denial or suspension of civic and political rights of persons with mental disorders and persons with intellectual disabilities, as there is no longer any legal authority for suspending these rights. According to the Secretary of the Supervisory Committee for the Protection of the Rights of Mental Patients, even persons in involuntary placement do not lose their rights; if their psychiatrist considers that they are in a mental state to vote they are given permit to leave the centre to exercise their right to vote; if not, they are not given permit to leave the centre they are being held at. This is line with Article 4 of the Council of Europe Recommendation which deals specifically with civil and political rights and provides, providing that persons with mental disorder should be entitled to exercise all their civil and political rights, whilst restrictions should comply

⁷² See A. Loizou (2001) *Το Σύνταγμα της Κυπριακής Δημοκρατίας*, Nicosia, p.106.

⁷³ Cyprus/ *In the matter concerning Ali Ratip* 962, 3.R.S.S.C. 102.

⁷⁴ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 2.

⁷⁵ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Articles 2, 6 and 7.

⁷⁶ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of administration N. 23(I)/1996, Article 7(4).

⁷⁷ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 4.

⁷⁸ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Section 17.

⁷⁹ Cyprus/Law on Psychiatric Treatment N. 77(I)1997, Section41.

⁸⁰ Cyprus/Law 216/1990 and Cyprus/Law 7(I)/1992.

with the ECHR and should not be based on the mere fact that a person has a mental disorder.⁸¹ However, there are old provisions in some laws which seem to have survived, possibly by default, that contradict this principle. These are set out in the next paragraph.

- [42]. In order to exercise his/her civic and political rights in Cyprus, a person must be a citizen of the Republic of Cyprus. One mode of acquisition of Cypriot nationality⁸² is provided for persons born on or after 16 August 1960 and who are of Cypriot origin.⁸³ These persons are entitled to be registered as citizens provided that they are adults and of ‘sound mind’ or of ‘full ability’.⁸⁴ It follows that persons who are not of ‘full ability’ are not entitled to citizenship. Also the antiquated (but still valid) law on Aliens and Migration provides that “any idiot or insane or feeble-minded person or any person who for any other cause is unable to take care of himself”⁸⁵ is considered to be a “prohibited immigrant”.
- [43]. Voting rights are regulated by the law on voting⁸⁶ which provides for the right to vote for all citizens over the age of 18, who are registered and are usual resident in Cyprus. A person can be deprived of the right to vote on the basis of the law or a decision of the court, in which case the person’s name will be struck off the voters’ list for as long as the deprivation of the voting right lasts.⁸⁷ In such circumstances the citizen deprived of his/her voting rights, or where this is not possible due to the circumstances, the person in charge of his/her property, must submit his/her electoral book.⁸⁸ The author was informed that this procedure is no longer activated and that persons with mental disorder or intellectual disability are not removed from the voting lists. Therefore, civic and political rights for persons with mental disorder are placed under the discretion of the treating psychiatrist who will decide whether the person concerned is of such mental state so as to be able to exercise such rights. A patient regains all his civil, political and other rights after discharge from involuntary placement. There is currently a debate as to whether even during his involuntary placement patients could still retain some of those rights.⁸⁹

V. Involuntary placement and Involuntary Treatment

- [44]. When Cypriot legislation and practice is compared with Recommendation Rec (2004)10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder of 22.09.2004, a number of issues arise, mostly to do with the impact and effectiveness of measures, rather than with the adoption of measures.⁹⁰ For instance, no programmes have been developed in order to

⁸¹ 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 (Adopted by the Committee of Ministers on 22 September 2004 at the 896th meeting of the Ministers' Deputies).

⁸² Under articles. 109(3) of Cyprus/Law 141(I)/2002

⁸³ i.e. descendants of a person who: a. became a British citizen on the basis of the Cyprus (Annexation) Order-in-Council between 1914 and 1943; or b. was born in Cyprus between 5 November 1914 and 16 August 1960 during which time his or her parents were ordinarily resident in Cyprus.

⁸⁴ The Greek text refers to ‘πλήρης ικανότητα’, which literally translated means ‘full ability’ or ‘full capacity’, but must be construed as meaning of ‘sound mind’, which was the formulation in the old British colonial law.

⁸⁵ Cyprus/Law on Aliens and Migration Cap. 105, Article 6(1)(b). The Greek text, translated from the original English, reads as follows: “6(1)(β) οποιοδήποτε ηλίθιο ή παράφρονα ή διανοητικά ασθενή ή οποιοδήποτε πρόσωπο το οποίο για οποιαδήποτε άλλη αιτία είναι ανίκανο να φροντίζει κατάλληλα τον εαυτό του.”

⁸⁶ Cyprus/ Chapter 6, articles 92-107 of Cyprus/Law 141(I)/2002

⁸⁷ Article 93(I) of Cyprus/Law 141(I)/2002.

⁸⁸ Article 93(I) of Cyprus/Law 141(I)/2002.

⁸⁹ See website of Supervisory Committee for the Protection of the Rights of Mental Patients (or ‘Cyprus Mental Health Commission’) at <http://mentalhealthcommission.org.cy/en/law/> (05.11.2009).

⁹⁰ Information included in this section was derived from conversations of the author with the Secretary of the Supervisory Committee for the Protection of the Rights of Mental Patients and with the president of the NGO ‘KAPSY’ (initials stand for ‘Movement for the Rehabilitation and Promotion of Mental Health’).

improve public awareness of mental disorders, as required by Article 5 of the Recommendation. Also, access to information regarding their rights is poor and patients are not informed individually, in accordance with Article 6, the only measures in place at the moment being the distribution of a leaflet prepared by the Supervisory Committee on the Rights of Mental Patients.⁹¹ No particular measures are in place to protect those especially vulnerable nor is there a mechanism to protect their economic interests (articles 6 and 7).⁹² There are a few vocational rehabilitation measures in place (article 9 of the Recommendation) however they are poorly attended by persons with mental disorder. Employers are reluctant to hire them and there are very few suitable jobs in the market anyway. These factors render the impact of the measure very minimal. There are no hospital facilities with appropriate levels of security or community-based services to meet the health needs of offenders with mental disorder, as required by article 10 of the Recommendation, although the issue has been debated amongst stakeholders for years now. Professional staff involved in mental health services does not receive human rights training, as required by article 11 of the Recommendation. The Psychotherapy Unit of the Ministry of Health provides support for the children of persons with mental disorder, as required by article 15 of the Recommendation, but not for any other dependents (e.g. spouse). Although the decision to involuntarily admit a person to a psychiatric centre is taken by the Court, the decision to subject a person to involuntary treatment is taken by the psychiatrist who is treating the patient with his/her consent if s/he is in a position to make that decision or with the consent of his/her guardian or representative (article 20 of the Recommendation). There are no provisions relating to minors with mental disorder, as recommended by article 29. Due to lack of infrastructure, minors are not placed in psychiatric centres. They are treated at the state children hospital “Makarios” in Nicosia but, to the knowledge of the author’s informants, they are not admitted into the hospital for long term stay. Members of the police do receive training on how to handle situations involving persons with mental disorder, but this does not draw attention to the vulnerability of such persons in situations involving the police as recommended by article 32 of the Recommendation. There is no quality assurance / monitoring mechanism to ensure compliance with the standards set out in the Recommendation.

[45]. In its 2002 conclusions and recommendations on the third periodic report submitted by Cyprus, the Committee against Torture welcomed the measures taken to give effect to the Psychiatric Treatment Law.⁹³ In its Third Periodic Report submitted to the CAT dated 29.06.2001,⁹⁴ the government of Cyprus provided a detailed description of the Law on Psychiatric Treatment of 1997 and provided the latest data available at the time regarding the treatment of persons suffering from mental disorder.⁹⁵ The state report also referred to

⁹¹ <http://mentalhealthcommission.org.cy/en/publications/files/mhc.en.pdf> (06.11.2009).

⁹² This situation was deplored by the Court in the cases of Attorney General v. Andri Heracleous and Attorney General v. Symeon Symeou (12.01.2005, Criminal Appeals N. 7333 and 7332) which urged the state to take measures to protect persons with mental disorders who do not have the right persons by their side to protect their interests. The case involved a number of charges against two persons for appropriating money from an aged mental patient living in an old people’s home on false pretences and forging her signature in order to misappropriate her property. The charges could not be proved due to lack of testimony.

⁹³ Conclusions and recommendations of the Committee against Torture: Cyprus, Twenty-ninth session 11-22 November 2002, CAT/C/CR/29/1, Office of the United Nations High Commissioner for Human Rights, Geneva, Switzerland, 18.12.2002.

⁹⁴ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/456/45/PDF/G0145645.pdf?OpenElement> (30.10.2009)

⁹⁵ The data is as follows:

- (a) In the mental hospital there were in October 2000 188 inpatients, whereas in 1980 there were 770. Out of these 188 persons, 54 were “mentally retarded” and 30 were suffering from senility;
- (b) The psychiatric wings of the general hospitals had a capacity for 46 persons;
- (c) Treatment was also provided on an outpatient basis at the general hospitals.
- (d). At the time of the report there were approximately 35 persons in the prison to whom psychotropic drugs were administered.

article 38 of the Psychiatric Treatment Law which provides for the issuance by the court of a psychiatric treatment order for convicted persons as an alternative to imprisonment and reported that the said provision had not as yet been put into operation because of “a confusing provision in the law which refers to centres for criminal mental patients and such centres have not yet been declared under the law.” The report mentioned that steps were being taken to establish such a centre, pointing out that the establishment of special centres for mentally disturbed convicted persons may not in fact be needed. The reasons offered for this are, on the one hand, the fact that the law does not distinguish between a mental patient and a criminal mental patient and convicted persons may allegedly be treated at a centre intended for persons suffering from severe mental disorder and, on the other hand, because it is not known how many persons would be affected by such an arrangement. The report further states that the above situation is “expected to be redressed soon.” The report admits that the treatment of prisoners suffering from mental disorder needs improvement and that the visits of a psychiatrist must be made more frequent and the placement of permanent nursing staff imperative. The report expects that the situation will improve with the establishment of a special unit for the treatment of mentally disturbed prisoners, consisting of one psychiatrist, one clinical psychologist and two work therapists trained on criminology. The state report finally refers to the amendment of the criminal procedure law in order to introduce provisions regarding an accused person’s inability to plead “so as to harmonize its provisions with the new approach regarding mental patients.”⁹⁶

[46]. In its report of 15.04.2008 regarding its visit to Cyprus between 8-17 December 2004,⁹⁷ the CPT describes the conditions at the Athalassa Psychiatric Hospital.⁹⁸ The CPT noted that since its first visit in 1992, the number of operational wards was reduced from 18 (653 patients), down to 8 wards (173 beds). In December 2004, 122 beds were occupied, predominantly by patients with chronic psychiatric disorders. The further fall in bed capacity since the CPT’s visit in 2000 follows a trend of discharges, with chronic patients being transferred to homes in the community. However, this practice often meant that some of the persons discharged had been placed in accommodation for the elderly. In 2003 for instance 21 chronic psychotic patients began “rehabilitation in the community”, although in fact this meant that 19 of them were placed in homes for the elderly, while only two were able to return to their home environment. In 2004 there was a 20 per cent increase in the number of admissions to the Hospital. This was attributed by CPT partly to policy of readmission of patients with chronic psychotic disorders who had been placed in accommodation for the elderly which proved to be inappropriate. The trend which led to the reduction of the bed capacity also led to a reduction to the number of staff and particularly doctors whose contract includes duties in community psychiatric services as well as in the hospital and provides that they finish work at 2.30 p.m. This means that no doctors were available in the hospital 2.30 p.m. until the following morning at 08.00 a.m. In emergencies or where there is a new admission it could take up to two hours before a doctor arrived at the hospital, whilst the doctors’ availability to see patients in general, was so reduced both in terms of frequency and duration, that a therapeutic relationship with patients was difficult to establish and maintain.

The report notes with satisfaction the increased role and participation of the Supervisory Committee for the Protection of the Rights of Mental Patients which undertook a number of activities, including both regular and unannounced visits to Hospital and the examination of complaints received from patients. The CPT however criticised the fact the

⁹⁶ Article 70 of the Criminal Procedure Law, Cap. 155, as amended by Law 89 (I) 1997.

⁹⁷ <http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.pdf> (31.10.2009).

⁹⁸ This is the state hospital for patients with mental disorder and the only one licensed as “secure” unit, in other words deemed appropriate by the Minister of Health to admit mental patients on an involuntary basis.

resources allocated to Supervisory Committee were extremely limited and recommended that they are increased it to enable it to carry out the important task entrusted to it.⁹⁹

A. Legal Framework

- [47]. The law regulating voluntary and involuntary placement of persons with mental disorder is the Psychiatric Treatment Law of 1997, N. 77(I)/1997 as amended between 2003-2007. It was adopted on 25.07.1997 and covers the whole of Cyprus. Its scope covers: (a) mental disorders defined as disorders of behaviour “incompatible with the place time and age of the person in which it is manifested” warranting voluntary treatment where the patient so requests; and (b) severe mental disorders “expressed with violence and serious antisocial behaviour or when the patient’s personal judgement has deteriorated to such an extent which renders his placement necessary for the protection of himself and of the persons close to him.” Severe mental disorders warrant involuntary placement.¹⁰⁰ Currently, there is a proposal under consideration compiled by the Supervisory Committee for the Protection of the Rights of Mental Patients, which was set up by the Law on Psychiatric Treatment Law of 1997 regarding the issue of permits for the operation of Psychiatric Centres. Whilst the Law on Psychiatric Treatment Law of 1997 provides that such centres must be licensed by the Minister of Health, another law dealing with the operation of private health centres *in general*¹⁰¹ provides that licenses for all private health centres are issued by the Registrar for Private Health Centres. The Supervisory Committee for the Protection of the Rights of Mental Patients proposes that licenses for psychiatric centres are issued by the Minister of Health and not by the Registrar for Private Health Centres and recommends the amendment of the law in order to reflect and clarify this. There are no other plans at the moment for any amendment to the law. The Supervisory Committee has also compiled a new bill providing for intermediary services and solutions from discharge of mental patients until their integration into the community which are currently under consideration.
- [48]. The law provides for voluntary treatment in ‘safe’ or ‘secure’ (i.e. approved by the Minister of Health)¹⁰² psychiatric centres where the patient has signed an application for placement and the centre’s psychiatrist issues an opinion after having examined the patient regarding the need to provide treatment. If the patient does not want to sign the aforesaid application, the expert opinion of two licensed doctors (one of whom must be a psychiatrist) confirming the need to provide treatment must be secured, and the Supervisory Committee for the Protection of the Rights of Mental Patients must be immediately informed.¹⁰³ The procedure for involuntary placement involves an application to the Court by the patient’s personal representative for the issue of an order of temporary placement. If the personal representative does not file such an application or if s/he cannot be located, the application is submitted by the police or a social worker. The application to

⁹⁹ The CPT reported that the Supervisory Committee still did not have its own premises and, as for its Secretariat, only one administrative officer from the Ministry of Health carried out this function alongside other full-time responsibilities. This is not a satisfactory state of affairs. The CPT recommends that the resources of the Supervisory Committee be increased and, in particular, that it be serviced by an independent and full-time Secretariat, which is located in its own separate premises and equipped with adequate facilities.

¹⁰⁰ Law on Psychiatric Treatment N. 77(I)1977, article 8.

¹⁰¹ Cyprus/ Law on the Monitoring, Establishment and Operation of Private Health Centres N. 90(I)/2001.

¹⁰² Presently eight Centres all over Cyprus (five private and three public) are registered for voluntary admission and treatment. The only secure centre for involuntary admission is the Psychiatric Hospital in Nicosia. The establishment of secure units in district hospitals for involuntary placements is under consideration: <http://mentalhealthcommission.org.cy/en/law/> (31.10.2009).

¹⁰³ Law on Psychiatric Treatment N. 77(I)1977, articles 8(1) and 8(2).

the Court must be supported by a psychiatric expert opinion regarding the need to provide treatment. The Court order has a duration of up to 28 days. Upon its issue, the Court sets a date in order to examine whether or not the issue of an order for long term placement is necessary. If upon such latter date the Court finds that long term placement is not warranted, then the patient is discharged. If the Court finds that the patient must be placed in a unit then the Court issues an order for long term placement/treatment, initially for two months which can then be renewed for a period of up to 12 months.¹⁰⁴

- [49]. There is no provision in Cypriot law for placement without treatment. The Greek word used in the text of the law («νοσηλεία») is translated as ‘nursing’ or ‘treatment’ or ‘care for the sick’.¹⁰⁵ Therefore even though no express provision is found in the law on this point, it is safe to assume that placement without treatment is not foreseen in the law.
- [50]. Although the law does not expressly state its aims, these can be inferred from the definition of ‘mental disorder’ as provided in article 3 of the Law on Psychiatric Treatment N. 77(I)1977, which sets out the aim of involuntary treatment as “the protection of [the patient] and of those close to him”.
- [51]. No provision is made in Law on Psychiatric Treatment N. 77(I)1977 for aftercare following the completion of a cycle of treatment. However, a relevant provision is found in the law on the rights of patients, whose scope is not restricted to patients with mental disorder or intellectual disability but extends to any “natural person suffering from any disease or illness, or any person seeking or provided with health care.” The said law provides that when the patient is discharged and, if his condition so requires, community and home services are offered to him/her subject to the conditions of the health care system.¹⁰⁶
- [52]. No special regulations are provided for the involuntary treatment of children or young adults. The scope of the Law on Psychiatric Treatment N. 77(I)1977 is not restricted to any age group and covers both minors and young adults. The Supervisory Committee for the Protection of the Rights of Mental Patients has advised the authors that there are no structures in place for the placement or treatment of minors but that there are plans to create such facilities at the state hospital for children in Nicosia (‘Makarios Hospital’).
- [53]. The Law on the rights of patients, whose scope is not restricted to patients with mental disorder or intellectual disability but extends to any “natural person suffering from any disease or illness, or any person seeking or provided with health care”¹⁰⁷ contains a number of provisions regarding consent to treatment, which are relevant. These may be summarised as follows:
- Where the patient is in no position, due to his mental or physical state, to express his/her will and the provision of medical care is urgently needed, the consent of the patient may be presumed, unless it is obvious from previously expressed wishes that s/he would have refused.¹⁰⁸

¹⁰⁴ Law on Psychiatric Treatment N. 77(I)1977, article 10.

¹⁰⁵ Y. Yiannakopoulou & E. Siarenou (1977), *Άριστον Ελληνοαγγλικόν Λεξικόν*, Athens: Michigan Press.

¹⁰⁶ Cyprus/ A Law providing for the safeguarding and protection of the patients’ rights and for related matters N. 1(I)/2005, article.

¹⁰⁷ Cyprus/ A Law providing for the safeguarding and protection of the patients’ rights and for related matters N. 1(I)/2005, article 2.

¹⁰⁸ Cyprus/ A Law providing for the safeguarding and protection of the patients’ rights and for related matters N. 1(I)/2005, article 13(1).

- Where, due to the patient's physical or mental state, another person is or should have been appointed by law whose consent is required for urgently needed medical treatment to the patient, and such consent cannot be obtained, treatment may nevertheless be given unless it is obvious from the circumstances that such person would have refused. When the consent of the person appointed by law is required, the patient must be involved in the process to the extent that his capacity and circumstances allow.¹⁰⁹
- If the person appointed by law refuses to give consent and the health care services provider believes that health care is in the interest of the patient, then provided time allows, the matter is referred to a court or to another body, as may be, from time to time, prescribed by the law. In the case of a medical emergency, the health care services provider shall act in his judgment to the patient's best interest, but any previously expressed wishes of the patient concerning health care must be taken into consideration.

[54]. There are no specific rules governing involuntary placements for any groups of persons. If a person falls within the definition of 'severe mental disorder' found in article 4 of the Law on Psychiatric Treatment N. 77(I)1977,¹¹⁰ then the said law's prescribed procedures will apply, irrespective of whether the person suffers from addictions, is under guardianship or otherwise. A provision in the Law on Psychiatric Treatment N. 77(I)1977 provides for the placement of offenders with mental disorders in suitable units in order to receive treatment and serve their sentence, based on a Court order issued subject to conditions and exceptions. Additionally, the Minister of Health may order the transfer of a person serving a sentence in prison to a state centre of secure placement for a period of six months (which may be renewed with approval from the Court) based on psychiatric expert opinion and following an application from the prison director.¹¹¹ However, no such units have been set up despite the debating of this issue amongst stakeholders for a number of years; as a result, patients with mental disorders are currently serving sentences in the normal prison. The opening of special units in order for offenders with mental disorders to serve sentences has been the subject of heated debate in the last few years between the Supervisory Committee for the Rights of Mental Patients and the authorities. A preliminary decision for the establishment of an independent unit in the Central Prison in Nicosia has been taken. The Supervisory Committee for the Rights of Mental Patients took the initiative of inviting an expert in Forensic Psychiatry from Germany who examined the existing framework and submitted a report with recommendations regarding amendments to the legal framework and infrastructure for the care of offenders with mental disorder.¹¹²

B. Criteria and Definitions

[55]. There is no distinction in Cypriot law between placement and treatment, as pointed out in the previous section. In order for a person to be involuntarily admitted for treatment, he/she must fall within the definition of article 4(1) of Law on Psychiatric Treatment N. 77(I)1977, which provides that mental disorder warranting involuntary treatment is manifested when the patient's judgement has deteriorated to such an extent that his/her placement is necessary for the protection of him-/herself and of those close to him/her.

¹⁰⁹ Cyprus/ A Law providing for the safeguarding and protection of the patients' rights and for related matters N. 1(I)/2005, article 13(2).

¹¹⁰ Mental disorder expressed with violence and serious antisocial behaviour or when the patient's personal judgement has deteriorated to such an extent which renders his/her placement necessary for the protection of himself and of the persons close to him

¹¹¹ Cyprus/ A Law providing for the safeguarding and protection of the patients' rights and for related matters N. 1(I)/2005, articles 37 and 38.

¹¹² <http://mentalhealthcommission.org.cy/en/law/> (30.10.2009)

- [56]. The law does not require that any less intrusive measures are adopted before involuntary placement. Voluntary placement may turn involuntary if after the lapse of 72 hours from admission of a patient to a psychiatric centre, the centre's psychiatrist believes the patient requires further treatment but the patient is unwilling to sign the relevant application form. In such a case, the provisions regarding involuntary placement are triggered off and the personal representative of the patient, or failing him/her the police or a social worker may apply to the Court for the issue of an order of temporary placement of up to 28 days. The request must be supported by psychiatric expert opinion on the need to provide treatment. The order may be renewed for an initial period of up to two months and then for a period of up to 12 months.¹¹³ However, it is not necessary to undergo the initial procedure of voluntary placement for 72 hours in order to apply for a court order for involuntary placement. The representative of the patient or the police or a social worker may directly apply to the Court to request an order of involuntary placement even where the patient had not been admitted into any psychiatric unit before.
- [57]. During the Court hearing for the issue of every involuntary placement order, the Court hears also the patient unless the Court is convinced from the testimony introduced that the patient is not in a position to testify. In such a case, the Court hears the views of the patient's personal representative and when such person cannot be located, then the views of the social worker who may be escorted by a lawyer and a psychiatrist of his/her choice.¹¹⁴ Nothing in the law obliges the Court to take these views into account but merely to hear them and decide using its discretion. In the latest CPT report issued in 2008, reporting its findings from a visit carried out in 2004, the CPT states that in practice, the patient was virtually never present at the court hearing, and very often the personal representative was a family member and was indeed the same person who had requested the hospitalisation. The CPT urged the Cypriot authorities to explore alternative solutions which would fully guarantee the independence and impartiality of the personal representative. The report also states that patients or their personal representatives did not usually benefit from the assistance of a lawyer at the hearing owing to lack of legal aid.¹¹⁵
- [58]. No definition of the risk level of danger to the health or safety of the patient and/or to the public is to be found in the Cypriot law, which is more orientated towards securing medical opinion on whether placement is necessary rather than measure and assess danger. In fact the element of danger is mentioned only once in the law in the definition of severe mental disorder.

C. Assessment, Decision Procedures and Duration

- [59]. The procedure for involuntary placement is primarily decided by the Court, using medical expert opinion regarding the need to provide treatment. The doctor from whom the expert opinion stems must be a psychiatrist, defined in the law¹¹⁶ as a doctor registered in accordance with the Registration of Doctors Law specialised in psychiatry or neurology and psychiatry under the Regulations for Doctors (Special Qualifications) of 1986.
- [60]. In the case of voluntary placement, where the patient signs an application for treatment, only one psychiatric opinion is required: that of the doctor in charge of the centre where the patient is to be admitted, following an examination of the patient.¹¹⁷ If the patient refuses to

¹¹³ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, articles 10 and 11.

¹¹⁴ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 10(1)(g).

¹¹⁵ <http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.pdf> (31.10.2009).

¹¹⁶ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 2.

¹¹⁷ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 8(1)(b).

sign an application request, then the medical expert opinion of two registered doctors is necessary at least one of whom must be a psychiatrist certifying the need to provide treatment.¹¹⁸ In the case of involuntary placement for which an application to the Court is necessary, the law states that the application to the Court for the issue of the placement order must be supported by psychiatric expert opinion regarding the need for treatment.¹¹⁹ A medical expert opinion is also required by law in order to release a patient following a compulsory medical examination from which the doctor concluded that the patient is not in need of treatment; in this case the doctor must submit this opinion to the Court which issued the compulsory medical examination order. If after the compulsory medical examination the psychiatrist is of the opinion that the patient must be admitted to a psychiatric unit for treatment, then s/he must proceed to issue the medical expert opinion required in order for the order for involuntary placement to be issued by the Court.¹²⁰

- [61]. The decision for involuntary placement is made by the Court.
- [62]. A patient's voluntary placement may be terminated at any time (provided it has not become 'involuntary') upon the request of the patient or the patient's personal representative.¹²¹ Involuntary placement may be terminated when the psychiatric centre's psychiatrist finds, after consultation with the centre's multi-disciplinary group (if this is possible), that the reasons for the initial court order for the patient's involuntary placement are no longer applicable and the patient or his/her personal representative so request supported by the psychiatrist treating the patient. If the patient's request for discharge is rejected, the patient must be informed of his/her right to apply to the Court for review of the decision rejecting the discharge application. The patient must then file an application to the Court for review of the decision for the rejection of the discharge application within 30 days from being served the said decision. If the Court accepts the patient's application, then the Court may order the reduction of the involuntary placement to two months or to a shorter period.¹²²
- [63]. Additionally to the aforesaid procedure, upon the expiration of the duration of any Court order for involuntary placement, the Court may also examine the circumstances and decide whether the order for placement should be renewed or not. If the Court decides that the order should not be renewed, then the patient is discharged immediately.¹²³ If the psychiatrist of the centre where a patient is placed decides that a patient does not need further treatment, s/he may release him/her before the expiration of the period prescribed in the Court order, after having sent prior notice to the Court.¹²⁴
- [64]. When during voluntary placement the patient demonstrates behaviour that warrants involuntary placement, then the nurse or the personal representative of the patient or a social worker must apply to the Court for an issue of an order of long term placement and must also notify the Supervisory Committee for the Protection of the Rights of Mental Patients. The application to the Court must be supported by the medical expert opinion of the psychiatrist treating the patient following consultation with the interdisciplinary team of the centre. In case of a disagreement, this must be mentioned in the expert opinion. The Court procedure for the issue of the order is the same as the one followed where an application for involuntary placement is submitted without prior voluntary placement.¹²⁵ However, in the case of involuntary placement which was not preceded by voluntary

¹¹⁸ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 8(2)(a).

¹¹⁹ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 10(1)(b).

¹²⁰ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 10(3).

¹²¹ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 14.

¹²² Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 15(4).

¹²³ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 10(1)(e).

¹²⁴ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 10(1)(e).

¹²⁵ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 12.

placement, the application to the Court must be submitted by the patient's personal representative and only if s/he refuses or cannot be located can it be submitted by the police or a social worker. In the cases where voluntary placement has preceded, the nurse treating the patient and the social worker acquire an equal right with the personal representative to apply to the Court. Also, in the case of preceding voluntary treatment, the psychiatrist issuing his expert opinion is obliged to consult the inter-disciplinary group of the centre, which is not the case where no voluntary placement preceded the involuntary one.

- [65]. The law does not provide any time limit from the date of issue of the psychiatric assessment until the commencement of the compulsory treatment.
- [66]. The law does not provide for different duration in any procedure because of any emergency situation.
- [67]. A patient who is unwilling to sign a request for admission to a psychiatric centre may still be admitted against his/her will for a period not exceeding 72 hours subject to two registered doctors (one of whom is a psychiatrist), certifying that the patient is in need of treatment. This procedure is considered by the law to be voluntary placement because the patient is accommodated in an *open* psychiatric centre, as opposed to a '*secure*' unit which is used for involuntary placements.¹²⁶ It will become involuntary if after the lapse of the 72 hours the centre's psychiatrist finds that the patient, who is still unwilling to consent to his/her placement, is in need of treatment, in which case the procedure for involuntary placement is triggered off and the application to the Court for a compulsory placement order must follow. Voluntary placements last for a maximum of two months. If at the expiration of the two months the centre's psychiatrist still thinks the patient is in need of further treatment, then treatment will continue subject to the patient submitting a written application and after the Supervisory Committee for the rights of Mental Patients is notified.¹²⁷ The initial order of the Court in the case of involuntary placements is for placement not exceeding 28 days. Upon the expiration of the 28 days, the Court may renew its order for involuntary placement for an initial period of two months which may subsequently be renewed for successive periods not exceeding 12 months each.¹²⁸
- [68]. In addition to the provisions of the law on the rights of patients in general, which regulates consent to treatment and sets out the cases where consent may be presumed,¹²⁹ the Law on Psychiatric Treatment regulates the issue of consent to treatment only in the cases of involuntary placement and its scope covers "any type of intervention"¹³⁰. According to this provision, 'intervention' treatment may be applied only upon securing the consent of the patient or the patient's personal representative. For the purpose of securing such consent the psychiatrist must explain to the patient or his/her representative the nature, purpose and possible side effects of the treatment in a clear concise and comprehensible manner, unless the treatment must be applied urgently in order to save the patient's life or in order to prevent serious deterioration of his/her condition.¹³¹
- [69]. According to the CPT report of 2008 regarding its 2004 visit, the practice concerning the provision of *electro convulsive therapy* (ECT) had improved since its previous visit of 2000: ECT was administered in a modified form, under anaesthetic and using a muscle

¹²⁶ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 8(2).

¹²⁷ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 8(3).

¹²⁸ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 11.

¹²⁹ Cyprus/ A Law providing for the safeguarding and protection of the patients' rights and for related matters N. 1(I)2005, article 2

¹³⁰ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 26(1).

¹³¹ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, articles 26 and 27.

relaxant, by a qualified anaesthetist from the Nicosia General Hospital, and in a designated room out of the view of other patients. However the CPT expressed its concern over the widespread and generalised use without systematic control by medical staff of open-ended prescriptions for drugs not administered immediately, or on an ongoing basis, but rather whenever the nursing staff believe it necessary (so-called "PRN" medication): over 90 per cent of patients in the hospital had a "PRN" prescription, mostly for powerful neuroleptic drugs by intra-muscular injection and nearly all patients in the acute admission wards appeared to receive this prescription as a matter of routine, upon entry to the hospital. On other wards, the prescription dated back many months or even years, but remained valid. "PRN" medication was used mainly in situations of conflict between patients, where two or more patients were given the medication at the same time. CPT noted that "PRN" medication could, in certain instances, amount to involuntary treatment and if so, it should be surrounded by appropriate safeguards.¹³²

- [70]. Coercive measures are not regulated by law. In its report of 2008 regarding its 2004 visit, the CPT observed that physical restraint was used only in exceptional cases and for the shortest possible period. However, the delegation was concerned to note that these measures were not always explicitly ordered by a medical doctor, or brought to his/her attention for subsequent approval. The CPT found that seclusion measures were also used sparingly but deplored that fact that there seemed to be no record of instances in which this measure was used and no detailed policy on this issue, spelling out the types of cases in which it may be used, the objectives sought, its duration and the need for regular reviews, the existence of appropriate human contact and the need for staff to be especially attentive. The report noted that the only indication given to nursing staff was a special green form inserted in the patient's file, which indicated that the patient "can be isolated, if necessary", a practice which leaves the door open for misuse of the measure.¹³³
- [71]. The Law on Psychiatric Treatment N.77(I)/1977 provides that the order for involuntary placement is issued initially for 28 days, then it may subsequently be renewed for a period not exceeding 2 months and thereafter may again be renewed for successive periods of up to 12 months each. From this provision, it follows that cases are reviewed initially upon 28 days from placement, then upon two months (maximum) and then within a maximum of 12 months from the previous issue of the order and thereafter for successive periods not exceeding 12 months each. It is doubtful whether the interval of 12 months provided in the law conforms with the "reasonable interval" requirement of the Council of Europe's Committee of Ministers Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder, article 25(1)(ii) of which safeguards the right "to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals."
- [72]. In general, any decision of a first instance Court, including an order for involuntary placement, may be appealed against at the Supreme Court, which has jurisdiction to hear and determine all appeals from all inferior courts in civil and criminal matters. The Supreme Court may uphold, vary, set aside or order the retrial of the case as it deems fit. The Supreme Court can draw its own inferences from the facts drawn on by the trial Court and, in certain exception cases, may examine further evidence. Decisions concerning involuntary treatment may become subject to judicial review Article 146 of the Constitution, provided these were taken at an executive or the administration level. Under the said Article 146, the Supreme Court has jurisdiction to adjudicate on any recourse filed against any decision act or omission of any organ, authority, or person exercising executive or administrative authority on the ground that it violates the provisions of the Constitution

¹³² <http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.pdf> (30.10.2009).

¹³³ <http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.pdf> (30.10.2009).

or of any law or it is in excess or an abuse of power vested in such organ, authority or person. A time bar of 75 days applies in the case of recourse under Article 146 of the Constitution. The Law on Psychiatric Treatment of 2007 sets out a procedure for the provision of compulsory treatment (article 26), but does not give rise to a right of action for the patient or a claim for damages or compensation to the patient in the event of a violation.

- [73]. In addition to the aforesaid legal routes, the patients' rights law (whose scope extends to all patients) has established a Complaints Examination Committee with competence to examine complaints of patients which however lacks competence to examine matters concerning medical expert evidence, or medical negligence or a claim for compensation, or to take disciplinary measures for any matter for which the Disciplinary Board of the Pancyprrian Medical Association and/or the competent authority have competence. At least the chairman and the committee member examining a complaint must be independent from the health care services provider and/or the medical institution to whom the complaint relates
- [74]. The issue of the legality of the involuntary placement or the involuntary treatment may be raised by the patients themselves through complaints to the Supervisory Committee for the Rights of Mental Patients. Mail boxes where patients and their families can file complaints and suggestions to the Supervisory Committee have been placed in each ward of the Psychiatric Hospital and are being opened by the Supervisory Committee's secretary weekly. However, the CPT report on Cyprus of 2008 regarding CPT's visit in 2004 states that at the time of the visit in 2004, the complaints boxes were either broken or missing on several wards. Furthermore, their contents were emptied and opened by the nursing staff and then transmitted to the hospital management. The CPT recommended that steps be taken to ensure that patients have confidential and direct access to the Supervisory Committee.
- [75]. Legal aid is not automatically granted to persons with mental disorder or intellectual disability. The Law on Psychiatric Treatment of 1997 provides that the Court may, if it deems it necessary and having in mind the financial circumstances of the patient, order that the expenses of both the patient's lawyer and the patient's psychiatrist be paid out of public funds.¹³⁴ The general law on legal aid, which covers criminal and civil law cases but excludes administrative law cases,¹³⁵ extends to human rights violations covered by the Constitution and by a number of international conventions including the Convention for the Elimination of All Forms of Discrimination, but not to the laws transposing the two anti-discrimination Directives.¹³⁶ The exclusion of administrative law cases from the scope of the legal aid law means that any recourse against an administrative or executive decision under Article 146 of the Constitution concerning a patient's treatment will not be covered by legal aid.

VI. Competence, Capacity and Guardianship

- [76]. The Cypriot legal framework makes provision for the administration of the affairs of persons with mental disorders and persons with intellectual disability if they are unable to do so. In 1996 a special law was introduced to govern the administration of the property of

¹³⁴ Cyprus/ Law on Psychiatric Treatment N. 77(I)1977, article 10(1)(h).

¹³⁵ A ECtHR decision of 2008 found that "a question arises as to the conformity of such legislation with the requirements of Article 6 of the [legal aid] Convention" and that "there is *a priori* no reason why it should not be made available in spheres other than criminal law." (Marangos v. Cyprus, Application no. 12846/05, dated 04.12.2008)

¹³⁶ The Law on Provision of Legal Aid (2002) N. 165(I)/2002.

persons incapable of managing their property and affairs.¹³⁷ Also the Law on Psychiatric Treatment has relevant provisions for persons who are placed in involuntary treatment.¹³⁸

[77]. The definition of the term “competence” and “capacity” can be inferred from the various definitions provided in the Cypriot legal order:

- A person “incapable” to manage his/her property and affairs is defined as “a person, who due to intellectual disorder, abuse of toxic substances, alcoholism, brain or other bodily damage or other condition or illness, is rendered incompetent/unable to exercise his judgement and will.”¹³⁹
- The Law on the Rights of ‘Mentally Retarded’ Persons,¹⁴⁰ defines “mentally retarded persons” as persons of any age who are permanently incapable of securing by themselves some or all of their basic needs for smooth personal or social subsistence due to insufficient development or deficiency of their mental abilities, whether by birth or not.

[78]. The mental health causes determining the legal capacity of adults are specified in the Law on Administration of Property of Persons Incapable of Managing their Property and Affairs are: intellectual disorder, abuse of toxic substances, alcoholism, brain or other bodily damage or other condition or illness.¹⁴¹

[79]. The law does not recognise different degrees of incapacity, such as total deprivation of capacity, limitation to perform certain legal acts, etc. Upon psychiatric advice, the Court determines whether a person is or is not capable of administering ones property and affairs¹⁴² or whether to place a person in involuntary treatment.¹⁴³ This seems to be contrary to the principles entrenched in the *Council of Europe Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults*,¹⁴⁴ as well as the *WHO Resource Book on Mental Health, Human Rights and Legislation* (2005).¹⁴⁵ Having said this, we are informed that there is flexibility in the form of discretion afforded to the psychiatrists treating mental patients based on medical grounds to seek to change the conditions of placement in involuntary treatment centres or as regard the capacity of the patient to administer his property and affairs as the court may restore the capacity of the patient.¹⁴⁶

[80]. The system of protection of adults lacking capacity in Cyprus are the following:

¹³⁷ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996.

¹³⁸ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997.

¹³⁹ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 2.

¹⁴⁰ Cyprus/ Law on the Rights of Mentally Retarded Persons, the Definition of State Obligations towards Them and the Setting up of a Committee and a Fund for the Promotion of their Rights, N.117/89, Article 2.

¹⁴¹ Section 2, Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996.

¹⁴² Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 2.

¹⁴³ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 10.

¹⁴⁴ Available at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=536854&SecMode=1&DocId=396848&Usage=2> (12.10.2009).

¹⁴⁵ available at: http://www.who.int/mental_health/policy/resource_book_MHLeg.pdf (12.10.2009), see in particular, pp. 39 ff.

¹⁴⁶ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 7(3)(a).

- The law on Psychiatric Treatment¹⁴⁷ provides for the court to appoint a “personal representative” to administer his affairs;¹⁴⁸
- Guardianship under Section 19, Law on Psychiatric Treatment;¹⁴⁹
- Court appointed administrators to administrate the patient’s affairs, including his property,¹⁵⁰ as Trustees¹⁵¹

[81]. The basic features of each legal protective regime are as follows:

- In cases of where the court appoints a “personal representative”, then the personal representative is the guardian or the closest relative.¹⁵² Article 17(2) of the same law provides that the representative must (a) ensure for the patient’s stay and welfare in general; (b) demand that the patient attends at a certain time and place for reasons of treatment, training and employment; (c) to inform the interdisciplinary team of the centre on the condition of the patient generally; (d) complies with revocation of the exit permit; (e) to submit on behalf of the patient any applications regarding state benefits, rights or facilities.
- Article 19 of the Law on Psychiatric Treatment provides for guardianship in cases where the patient has no close relative or such relative cannot be located;¹⁵³ or the closest relative is not competent to do so due to mental or other condition or illness;¹⁵⁴ or the closest relative without due reason refuses to submit an application for provision of treatment or to give consent where necessary;¹⁵⁵ or there is disagreement between the relatives as to the actions or intended actions of the closest relative;¹⁵⁶ or where treatment would require consent by the patient¹⁵⁷ under part VI of the same law which involves intervention treatment defined as “treatment which intervenes in the bodily or intellectual integrity of the patient”.¹⁵⁸ The guardian must be over 18 years old and must be considered “suitable” for the appointment i.e. s/he must be (a) a relative of the patient; (b) a cohabiter/housemate or former cohabiter; (c) an officer from the Social Welfare Services; (d) a person appointed as administrator of a property on the basis of another law; (e) any other person from the Supervisory Committee for the Protection of the Rights of Mental Patients. The role of the guardian is the same as that of the personal representative.
- Court appointed administrators to administrate the patient’s affairs (including his property) are deemed to be Trustees.¹⁵⁹ The administrator is obliged to provide a guarantee, the amount of which is determined by the Court. The administrator must provide the Court with a detailed list of the property of the patient within 30

¹⁴⁷ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 4.

¹⁴⁸ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 17.

¹⁴⁹ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19 .

¹⁵⁰ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Articles 2, 6 and 7 .

¹⁵¹ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 7(4).

¹⁵² The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 17(1).

¹⁵³ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19(4)(a).

¹⁵⁴ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19(4)(b).

¹⁵⁵ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19(4)(c).

¹⁵⁶ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19(4)(d).

¹⁵⁷ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19(4)(e).

¹⁵⁸ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 26(5) refers to «παρεμβατική θεραπεία».

¹⁵⁹ Article 7(4), Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of administration N. 23(I)/1996.

months and must submit to the court audited accounts for the administration of the property. Also the administrator has power to invest in government bonds, lease out the property for a maximum of two years, mortgage the property with permission from the court, sell the property or part of it for the maintenance of the patient, his/her spouse and children and, subject to permission from the Court, for the maintenance of other persons fully or partially depended on the patient. The reward of the administrator is determined by the Court.

- [82]. There are no minimum or maximum time limits for measures placing adults lacking capacity under a protective system. The court has a general power to decide on such matters to issue orders regarding appointing administrators to administer the property and affairs of the adults lacking capacity,¹⁶⁰ which in effect means declaring the person as lacking capacity.
- [83]. The law does not provide for detailed conditions to be met in order to place adults lacking capacity under the protective systems established by law. However the law does provide for the following test to be satisfied in each case:
- In the case of appointing a personal representative or a guardian, the test applied by the court, as set out in the Law on Psychiatric Treatment,¹⁶¹ is the following: on the basis of the psychiatric opinion of the responsible psychiatrist and other evidence, is the person relevant rendered incompetent/unable to exercise his judgement and will, is not a position administer his property and manage his affairs?
- [84]. Also, the law on Psychiatric Treatment¹⁶² provides where the mental disorder is serious enough to warrant involuntary placement necessary for the protection of the patient or the persons close to him/her,¹⁶³ a “personal representative” is appointed to manage the patient’s affairs.¹⁶⁴
- [85]. In case of administrators appointed to administer the property of patients the court will examine whether the person is capable or not of “exercising his judgement and will to administer his property or his affairs,” due various factors including mental disturbance.¹⁶⁵
- [86]. The request to place an adult lacking capacity under the protective regime may come from any “interested person” defined by section 4(2) of the law on administration of property of persons incapable of administering their property and affairs¹⁶⁶ as: the spouse of the incapable person, the father, the mother and descendants; the Director of the Mental Health Services and the Director of Social Welfare Services; any other person who satisfies the court that s/he has an interest in the property of the person lacking capacity. The burden of proof lies with the persons alleging incapacity.
- [87]. The district courts have jurisdiction in all of the following areas:

¹⁶⁰ Cyprus/Law on administration of property of persons incapable of administrating their property and affairs and for the control of administration N. 23(I)/1996, Article 5,

¹⁶¹ Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 19.

¹⁶² Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 4.

¹⁶³ i.e. (a) manifests itself violently and with serious anti-social behaviour or (b) the critical judgement of the patient has patient’s personal judgement has deteriorated to such an extent which renders his placement necessary for the protection of himself and of the persons close to him.”

¹⁶⁴ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 17.

¹⁶⁵ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 2.,

¹⁶⁶ Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 4(2).

- a) To declare the legal incapacity of an adult.
- b) To take measures directed to the protection of the person.
- c) To take measures directed to the property of the person.
- d) To ensure and monitor the implementation and follow-up of the above-mentioned measures.

[88]. The appeal procedures against a decision of incapacity/incompetence are those provided by the normal court proceedings of challenging the legality of the decision of a lower court before the Supreme Court. No appeal system is referred to in the relevant laws.¹⁶⁷ The Court may terminate appointment of a guardian, if it is satisfied on the advice of the responsible psychiatrist that the patient has regained the ability to exercise his/her will responsibly and freely.¹⁶⁸

[89]. The following persons or bodies can be appointed to implement the measures placing an adult under a system of protection:

- The “personal representative”¹⁶⁹
- The guardian;¹⁷⁰
- The administrator appointed to administrate the patient’s affairs, including his/her property;¹⁷¹
- The District Court;
- The Supervisory Committee for the Protection of the Rights of Mental Patients;¹⁷²
- The director of the Mental Health Services;
- The Commissioner for the protection of the property of the persons lacking capacity;
- A mental health centre;
- The responsible psychiatrist;
- The investigator.

[90]. The scope and extent of powers of the first three entrusted persons and bodies have already been discussed. Below we briefly outline the scope and extent of powers of the other entrusted persons and bodies:

¹⁶⁷ See above ‘C. Assessment, Decision Procedures and Duration’.

¹⁶⁸ Article 19(6)(d), Cyprus/Law on Psychiatric Treatment N. 77(I)/1997.

¹⁶⁹ The Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 4.

¹⁷⁰ Article 19, Cyprus/Law on Psychiatric Treatment N. 77(I)/1997.

¹⁷¹ Article 7(4), Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996.

¹⁷² In the website they refer to the name of the committee as “Mental Health Commission”, however this does not reflect the proper translation of the legal text of Cyprus/Law on Psychiatric Treatment N. 77(I)/1997. See <http://mentalhealthcommission.org.cy/en/law/> (31.10.2009).

- The District Court has general powers to rule over matters relating to the property and affairs of persons lacking capacity.¹⁷³
- The Supervisory Committee for the Protection of the Rights of Mental Patients¹⁷⁴ has an institutional power to have an overall supervisory role in the monitoring of implementation of the law and procedures with a view to improving them; to propose changes and improvement in the provision of care and treatment facilities for mental health patients; to make recommendations to the Minister of Health.
- The Director of the Mental Health Services is in charge of the health sector and is regarded as an “interested person”.
- The Director of the Social Welfare Services is in charge of the social welfare sector and is regarded as an “interested person”.
- ‘Mental health centre’ is the unit where the patient will be committed and treated in cases of voluntary and involuntary treatment.
- The ‘responsible psychiatrist’ is the psychiatrist of the Mental health centre who is the doctor treating the patient.
- The Commissioner for the protection of the property of persons lacking capacity under the law;¹⁷⁵
- The investigator is appointed by the court to carry out any investigation the court to examine the circumstances of the case.¹⁷⁶

[91]. The only appeal procedures against a decision of appointment of person/body entrusted to implement the system of protection are those contained in the general rules of appeal to the Supreme Court against lower court decisions.¹⁷⁷

[92]. There is nothing in the law imposing an obligation on the court to periodically review decisions of incapacity. On psychiatric advice by the responsible psychiatrist the court may revoke the order on a number of grounds including the condition that the court is satisfied that the person as lacking capacity “has regained his ability/capacity to administer his property and affairs”.¹⁷⁸ Despite the absence of any statutory reference to regular review of the decision declaring the person as lacking capacity, we are informed that the responsible psychiatrist regularly reviews the condition of the patient and can apply to the Court to revoke the said order.¹⁷⁹

¹⁷³ Article 5 and 6, Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996.

¹⁷⁴ In the website they refer to the name of the committee as “Mental Health Commission”, however this does not reflect the proper translation of the legal text of Cyprus/Law on Psychiatric Treatment N. 77(I)/1997. See <http://mentalhealthcommission.org.cy/en/law/> (31.10.2009).

¹⁷⁵ Article 2, Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996.

¹⁷⁶ Article 13, Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996.

¹⁷⁷ See above article ‘C. Assessment, Decision Procedures and Duration’.

¹⁷⁸ Article 7(3)(a), Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of administration N. 23(I)/1996.

¹⁷⁹ This is what the Secretary of the Supervisory Committee for the Protection of the Rights of Mental Patients has informed the researchers (10.11.2009).

- [93]. There are no rules in place for periodical review of the need to have a guardian appointed. However, the appointment of a guardian only applies to matters relating to persons in involuntary placement, therefore review of the need to have a guardian appointed may be inferred from the review of the placement order.

VII. Miscellaneous

- [94]. Two issues emerge as gaps in the legal and policy framework: the lack of protection for persons suffering from mental illness who have no person of trust close to them; and the lack of facilities for offenders with mental problems to serve a sentence in special psychiatric units. These are dealt with below.
- [95]. In the case of *Attorney General v. Andri Heracleous, Attorney General v. Symeon Symeou, Criminal Appeal No. 7333 dated 12.01.2005* the Attorney General sought to reverse the decision of the trial (assize) court acquitting the two respondents from responsibility with regard to alleged forgery and falsification of the signature of a mental patient, circulation of a forged document, registration of immovable property and securing of payment with false pretences etc. The Supreme Court agreed with the findings of the assize court that from the evidence submitted it was not possible to connect the commission of the offences described in the charges with the respondents. The Supreme Court stated that from the testimony delivered before the assize court, including the testimony of the respondents themselves, the suspicion arises that the respondents acted dishonestly. The Court pointed out that the state must think of ways of protecting vulnerable persons with mental or psychological illness who do not have suitable persons by their side to take care of them. In this case, the person whose signature was falsified on a Power of Attorney was an aged woman residing in an old people's home suffering from mental illness who had no relatives to protect her from exploitation.
- [96]. The Law on Psychiatric Treatment N. 77(I)1977 as amended provides in article 38 for the power of the Court to order the detention of mental patients convicted of an offence in special psychiatric units for the purpose of serving their sentence without interrupting their treatment. However, although discussions have been under way for several years now for the establishment of such a unit within the central prison, the efforts have not produced any outcome yet. The Secretary of the Supervisory Committee for the Protection of the Rights of Mental Patients has informed the author that, according to his estimates, approximately one third of detainees at the central prison are mental patients and are being treated by psychiatrists; therefore the problem of non-availability of suitable centres for the detention of these persons is very serious indeed.

Annex – Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Case title	Kypros Kyprianou v. Despo Kyprianou
Decision date	27.05.2003
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Civil appeal no. 11347 Ανώτατο Δικαστήριο Supreme Court
Key facts of the case (max. 500 chars)	The appellant applied to the Supreme Court seeking to overturn a trial court decision ordering him to submit to involuntary medical examination in order to assess whether he would be involuntarily committed or not. The trial court decision was issued following the application from the appellant's estranged wife who alleged that he was suitable for commitment. In support of her claim she stated that her estranged husband's behaviour was inappropriate towards their children, that he vowed to destroy her and their children, that he spoke badly of her in various governmental departments in order to secure her dismissal etc.
Main reasoning/argumentation (max. 500 chars)	The Supreme Court found that the respondent's allegations as to the appellant's mental condition did not prove a mental disorder as this is defined in article 3 of the law. The court pointed out that the appellant's alleged behaviour is not approved as the normal reaction of a logical and sane person and may even amount to a criminal offence; however this does not prove that the appellant has mental disorder in order to be subjected to involuntary examination.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	An estranged wife may not be considered as a guardian of her estranged husband. In cases where fundamental rights are at stake, the Court may look not only into the procedural aspect of the matter but also into the substantial one, in order to safeguard the rights of persons with mental disorders, on the basis of contemporary and humanistic perceptions and approaches. The trial court was criticised for approaching the case as a routine matter using summary procedures in order to issue the requested order for involuntary examination; the Supreme Court found that this approach is not acceptable when fundamental rights are at stake

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The trial court decision was overturned and the order for involuntary examination of the appellant was cancelled. The Supreme Court's ruling calling for an examination of the substance of the case when fundamental rights are at stake has set a significant precedent which rejects the procedural approach and sets the rights of a person at a higher priority.
Proposal of key words for data base	Involuntary examination; mental state

Text of the original decision:

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27 Μαΐου, 2003

[ΑΡΤΕΜΙΔΗΣ, ΝΙΚΟΛΑΟΥ, ΧΑΤΖΗΧΑΜΠΗΣ, Δ/στές]

ΚΥΠΡΟΣ ΚΥΠΡΙΑΝΟΥ,

Εφεσείων,

v.

ΔΕΣΠΩΣ ΚΥΠΡΙΑΝΟΥ,

Εφεσίβλητης.

(Πολιτική Έφεση Αρ. 11347)

Ψυχικά ασθενείς — Έκδοση διατάγματος υποχρεωτικής εξέτασης του συζύγου από την εν διαστάσει σύζυγό του στη βάση του περί Ψυχιατρικής Νοσηλείας Νόμου του 1997, Ν. 77(1)/97 — Ακύρωση του διατάγματος κατ' έφεση λόγω εσφαλμένης εφαρμογής του Νόμου, τόσο ως προς το διαδικαστικό του μέρος, αλλά κυρίως σε ό,τι αφορούσε τις ουσιαστικές του πρόνοιες.

Η εφεσίβλητη, αιτήτρια ενώπιον του Επαρχιακού Δικαστηρίου Λευκωσίας, καταχώρησε ένορκη δήλωση η οποία βασιζόταν στον περί Ψυχιατρικής Νοσηλείας Νόμο του 1997, Ν. 77(1)/97, και ζητούσε διάταγμα του Δικαστηρίου υποχρεωτικής εξέτασης του εν διαστάσει συζύγου της, του εφεσεϊοντος. Το Δικαστήριο εξέδωσε το διάταγμα.

Ο εφεσεϊών επιδιώκει την ακύρωση της πιο πάνω απόφασης υποστηρίζοντας ότι αυτή είναι καθ' ολοκληρίαν άκυρη γιατί δεν εφαρμόστηκε ορθά ο Νόμος τόσο ως προς το διαδικαστικό του μέρος αλλά κυρίως σε ό,τι αφορά τις ουσιαστικές του πρόνοιες.

Αποφασίστηκε ότι:

1. Ο Νόμος σκοπεί στην ορθή αντιμετώπιση ατόμων που είναι ψυχικά ασθενείς, ώστε να διασφαλίζονται από την πολιτεία τα θεμελιώδη δικαιώματά τους. Δημιουργείται με το Νόμο η υποχρέωση της πολιτείας για δημιουργία κατάλληλων χώρων με επαρκή αγωγή για ανάρρωση. Το Δικαστήριο, πρέπει μέσα σ' αυτό το πνεύμα να εξετάζει αίτηση που υποβάλλεται βάσει των προνοιών του Νόμου.

2. Η εφεσίβλητη, με δεδομένο ότι είναι η εν διαστάσει σύζυγος του εφεσεϊοντος, δεν μπορούσε να θεωρηθεί κηδεμόνας του βάσει του Άρθρου 18 του Νόμου. Αναφορικά με την ουσία της υπόθεσης, αυτά που αναφέρει η εφεσίβλητη, για τη συμπεριφορά δηλαδή του εφεσεϊοντος στην ένορκη της δήλωση, δεν αποδεικνύουν ψυχική διαταραχή όπως ορίζεται στο Άρθρο 3 του Νόμου, ώστε να προωθηθεί η διαδικασία για την υποχρεωτική εξέτασή του.

3. Το Δικαστήριο, σε περιπτώσεις όπως η παρούσα, που αφορούν στα θεμελιώδη ανθρώπινα δικαιώματα, πρέπει εκτός από τη βεβαίωση της ορθής διαδικασίας, να προβαίνει και σε έρευνα για την ορθή εφαρμογή του ουσιαστικού περιεχομένου και σκοπού του νόμου.

Η έφεση επιτράπηκε χωρίς έξοδα.

Έφεση.

Έφεση από τον καθ' ου η αίτηση κατά της απόφασης του Επαρχιακού Δικαστηρίου Λευκωσίας που δόθηκε στις 21/3/03 (Αρ. Αγωγής 57/02) με την οποία εκδόθηκε το αιτηθέν από την εφεσίβλητη διάταγμα υποχρεωτικής εξέτασης του εφεσεϊοντα σύμφωνα με τον περί Ψυχιατρικής Νοσηλείας Νόμο του 1977, Ν.77(1)/97.

Π. Λιβέρας, για τον Εφεσεΐοντα.

Καμιά εμφάνιση για την Εφεσίβλητη.

Cur. adv. vult.

ΑΡΤΕΜΙΔΗΣ, Δ.: Στις 21.3.02 η εφεσίβλητη, αιτήτρια ενώπιον του Επαρχιακού Δικαστηρίου Λευκωσίας, καταχώρισε ένορκη δήλωση με την οποία βεβαίωνε πως «είχε σοβαρό λόγο να υποψιάζεται και να πιστεύει πως ο σύζυγος της (εφεσεΐον), ήταν κατάλληλο πρόσωπο για περιορισμό» και ζητούσε διάταγμα του Δικαστηρίου υποχρεωτικής εξέτασης του. Η ένορκη δήλωση βασιζόταν στον περί Ψυχιατρικής Νοσηλείας Νόμο του 1997, Ν.77(Ι)/97.

Η πιο πάνω δήλωση, που φαίνεται να έγινε σε έντυπο, στηριζόταν στα πιο κάτω στοιχεία, τα οποία και καταγράφουμε αυτούσια.:

«Η συμπεριφορά του (του εφεσίβλητου δηλαδή) είναι πρόστυχη έναντι των παιδιών. Απειλεί ότι θα μας καταστρέψει, εμένα και τα παιδιά μας. Επισκέπτεται κανάλια, εφημερίδες, για να με καταστρέψει. Σήμερα αναστάτωσε το υπουργείο εσωτερικών για να με κάνει να χάσω τη δουλειά μου. Κτυπά πόρτες διαφόρων υπουργείων για να με κατηγορήσει.»

Ο δικαστής, ενώπιον του οποίου τέθηκε η ένορκη δήλωση, σημείωσε στο πρακτικό πως, αφού τη μελέτησε διαπίστωσε πως η εφεσίβλητη ήταν ο προσωπικός αντιπρόσωπος του εφεσεΐοντα, όπως προβλέπεται στα άρθρα 17(1) και 18(1) και (2) του Νόμου, η αίτηση σκοπούσε στην έκδοση διατάγματος προσωρινής νοσηλείας του εφεσεΐοντα σύμφωνα με το άρθρο 10(1) (α) και, εφόσον ο εφεσεΐον αρνείτο να εξεταστεί για τους σκοπούς ετοιμασίας ιατρικής γνωμάτευσης όπως προβλέπεται στο άρθρο 10(3), εξέδωσε διάταγμα υποχρεωτικής εξέτασης του, με τα παρεπόμενα της διαδικασίας όπως προβλέπονται στις σχετικές διατάξεις του ίδιου άρθρου.

Ο εφεσεΐον επιδιώκει την ακύρωση της πιο πάνω απόφασης. Εισηγείται πως αυτή είναι καθ' ολοκληρίαν άκυρη γιατί δεν εφαρμόστηκε ορθά ο Νόμος, τόσο ως προς το διαδικαστικό του μέρος, αλλά κυρίως σε ό,τι αφορά τις ουσιαστικές του πρόνοιες.

Ο εφεσεΐον έχει δίκαιο. Δεν θα επεκταθούμε σε λεπτομερή συζήτηση των προνοιών και του σκοπού του Νόμου, γιατί τα γεγονότα της υπό συζήτηση έφεσης δεν δικαιολογούν κάτι τέτοιο. Να επισημάνουμε μόνο πως ο Νόμος σκοπεί στην ορθή ρύθμιση του κεντρικού θέματος με το οποίο επιλαμβάνεται στη βάση των σύγχρονων και ανθρωπιστικών αντιλήψεων, την ορθή δηλαδή αντιμετώπιση ατόμων που είναι ψυχικά ασθενείς, ώστε να διασφαλίζονται από την πολιτεία τα

θεμελιώδη δικαιώματα τους. Δημιουργείται με το Νόμο η υποχρέωση της πολιτείας δημιουργίας κατάλληλων χώρων με επαρκή αγωγή για ανάρρωση. Είναι μέσα σ' αυτό το πνεύμα που πρέπει να εξετάζεται από το Δικαστήριο αίτηση που υποβάλλεται βάσει των προνοιών του Νόμου.

Στην υπόθεση που εξετάζουμε η εφεσίβλητη είναι σύζυγος του εφεσείοντα. Το ζεύγος όμως ήταν σε διάσταση. Μ' αυτό ως δεδομένο δεν μπορούσε να θεωρηθεί κηδεμόνας του εφεσείοντα βάσει του άρθρου 18 του Νόμου, κυρίως λόγω της διασάλευσης των συζυγικών σχέσεων, που οπωσδήποτε οδήγησαν και στη συμπεριφορά του εφεσείοντα όπως περιγράφεται στην ένορκη δήλωση, και παραθέσαμε πιο πάνω αυτούσια. Η σοβαρότερη όμως πτυχή της έφεσης αγγίζει την ουσία της υπόθεσης. Αυτά που αναφέρει η εφεσίβλητη, για τη συμπεριφορά δηλαδή του εφεσείοντα δεν αποδεικνύουν ψυχική διαταραχή, όπως ορίζεται στο άρθρο 3 του Νόμου. Κατά το ερμηνευτικό αυτό άρθρο «ψυχική διαταραχή σημαίνει διαταραχή της συμπεριφοράς που οφείλεται σε ψυχική νόσο η οποία είναι ασύμβατη με τον τόπο, το χρόνο και την ηλικία του ατόμου στο οποίο εκδηλώνεται». Η συμπεριφορά του εφεσείοντα, όπως βεβαίως καταγγέλλεται από την εφεσίβλητη, δεν εγκρίνεται ως η φυσιολογική αντίδραση ενός λογικά σκεπτόμενου και ψύχραιμου ατόμου. Μπορεί ακόμη να συνιστά και ποινικά κολάσιμη πράξη. Δεν αποδεικνύει όμως άτομο με ψυχική διαταραχή, ώστε να προωθηθεί η διαδικασία για την υποχρεωτική εξέταση του.

Είναι φανερό πως ο δικαστής λειτούργησε με συνοπτική διαδικασία, ως να επρόκειτο για μια συνήθη υπόθεση ρουτίνας στην οποία δεν χρειαζόταν και πολλή έρευνα, παρά μόνο να εγκριθεί τυπικά το αίτημα με απλή αναφορά στα διάφορα άρθρα του Νόμου. Όπως υποδείξαμε δεν είναι έτσι τα πράγματα. Αντιλαμβανόμαστε πως αιτήσεις αυτού του είδους μπορεί να παρουσιαστούν ανά πάσαν στιγμή στο Δικαστήριο και να χρειαστεί η άμεση αντιμετώπιση τους με κατ'επίγειουσα απόφαση. Αυτή η αναγκαιότητα όμως δεν μπορεί να εκτρέψει από την ορθή πορεία της λειτουργίας του δικαστηρίου πάνω σε ένα τόσο σοβαρό ζήτημα, που αφορά στα θεμελιώδη ανθρώπινα δικαιώματα. Χρειάζεται, επομένως, εκτός από τη βεβαίωση της ορθής διαδικασίας, και η απαραίτητη έρευνα για την ορθή εφαρμογή του ουσιαστικού περιεχομένου και σκοπού του Νόμου.

Η εφεσίβλητη, μολονότι ειδοποιήθηκε για την έφεση, δεν εκπροσωπήθηκε.

Η έφεση επιτυγχάνει. Το επίδικο διάταγμα που εξέδωσε το Επαρχιακό Δικαστήριο Λευκωσίας, ακυρώνεται. Καμιά διαταγή για έξοδα, εφόσον δεν ζητήθηκαν.

Η έφεση επιτρέπεται χωρίς έξοδα.

Case title	Iacovos Costa Christophorou v. Anna Charalambous as Administrator of the Estate of Charalambos Iacovos Papachrystophorou
Decision date	14.01.2002
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Civil appeal no. 10944 Ανώτατο Δικαστήριο Supreme Court
Key facts of the case (max. 500 chars)	The appellant was the nephew of a deceased person who had been suffering from arteriosclerosis, senility and Parkinson disease. Before the deceased's death, the appellant had obtained the deceased's signature on a power of attorney in his favour. He subsequently used this power of attorney to transfer onto himself property belonging to the deceased. Medical evidence submitted to the Court proved beyond doubt that the deceased had no contact with his environ and could not be deemed responsible for his actions. The deceased daughter, in her capacity as administrator of the deceased's estate, obtained from the trial court an order cancelling the transfer and registration of the property onto the name of the nephew (appellant) due to undue influence having been exercised by the appellant on the deceased. The appellant applied to the Supreme Court seeking to reverse the trial court decision which cancelled the transfer of the property onto him. The grounds for appeal included: the doctrine of undue influence is not applicable in the present case; the trial court's finding, that the deceased's intellectual ability at the time of the transaction was reduced, was erroneous; the trial court was wrong in shifting the burden of proof onto the appellant.
Main reasoning/argumentation (max. 500 chars)	The Supreme Court rejected all grounds for appeal, ruling that the medical evidence submitted showing that the deceased had reduced intellectual ability was satisfactory; that the trial court was right in reversing the burden of proof, as this is provided in the Law of Contracts in all cases where the transaction appears by itself or from the testimony delivered to be particularly detrimental for one party.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court ruled that in the case of contracts so detrimental to one party it is necessary to prove that the donor was acting out of his own free will without influence from the person who would benefit from the transaction. When the court is satisfied that a deed of gift is the result of influence on the donor, or where the relationship between the parties is such where a presumption of undue influence is created, the Court has the power to cancel the transaction. It also found that it was necessary to show that the donor was fully responsible for his actions. The most common way to prove that a gift is not the result of psychological pressure is to introduce testimony that the gift was the result of having obtained suitable and independent legal advice. In this case no testimony was submitted to prove that the deceased did receive such advice.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Supreme Court confirmed the trial court decision which cancelled the registration of the property in the name of the appellant and instead ordered the registration of the property onto the respondent (the deceased's daughter) in her capacity as administrator of the deceased's estate.
Proposal of key words for data base	Undue influence; reversal of burden of proof

Original text of the decision:

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14 Ιανουαρίου, 2002

[ΝΙΚΗΤΑΣ, ΝΙΚΟΛΑΪΔΗΣ, ΚΡΑΜΒΗΣ, Δ/στές]

ΙΑΚΩΒΟΣ ΚΩΣΤΑ ΧΡΙΣΤΟΦΟΡΟΥ,

Εφεσίων,

v.

ΑΝΝΑΣ ΧΑΡΑΛΑΜΠΟΥΣ ΙΑΚΩΒΟΥ, ΩΣ ΔΙΑΧΕΙΡΙΣΤΡΙΑΣ ΤΗΣ
ΠΕΡΙΟΥΣΙΑΣ ΤΟΥ ΑΠΟΒΙΩΣΑΝΤΟΣ
ΧΑΡΑΛΑΜΠΟΥ ΙΑΚΩΒΟΥ ΠΑΠΑΧΡΙΣΤΟΦΟΡΟΥ,

Εφεσίβλητης,

(Πολιτική Έφεση Αρ. 10944)

Συμβάσεις — Ψυχική πίεση (undue influence) — Ο περί Συμβάσεων Νόμος Κεφ. 149, Άρθρο 16(1) — Το βάρος αποδείξεως ότι η σύμβαση δεν έχει συναφθεί συνεπεία ψυχικής πίεσης, φέρει το πρόσωπο που είναι σε θέση να κυριαρχεί της θέλησης του άλλου, όταν το πρόσωπο αυτό συμβάλλεται και η συναλλαγή φαίνεται από μόνη της ή από τα αποδεικτικά στοιχεία που προσάχθηκαν ότι είναι υπέρμετρα επαχθής (Άρθρο 16(3) — Η ψυχική πίεση είναι δημιούργημα των αρχών της Επιείκειας.

Πολιτική Δικονομία — Δικόγραφα — Υποχρέωση έκθεσης συνοπτικώς όλων των ουσιωδών γεγονότων με στόχο τον επακριβή προσδιορισμό των επιδίκων θεμάτων — Δ. 19, θ.4 των Θεσμών Πολιτικής Δικονομίας.

Η εφεσίβλητη-ενάγουσα (η εφεσίβλητη) εξασφάλισε από το πρωτόδικο Δικαστήριο διάταγμα ακύρωσης της εγγραφής κτήματος του αποβιώσαντος πατέρα της επ' ονόματι του εφεσεϊόντος-εναγομένου (ο εφεσεϊών) και την εγγραφή του κτήματος στο όνομά της, υπό την ιδιότητά της ως διαχειρίστριας της περιουσίας του αποβιώσαντος, στη βάση της άσκησης ψυχικής πίεσης και της ετεροβαρούς συναλλαγής. Στην έκθεση απαίτησης αναφέρεται ότι ο εφεσεϊών – που ήταν παιδί αδελφού του αποβιώσαντος – εκμεταλλεζόμενος την κακή κατάσταση της υγείας του αποβιώσαντος και τη συγγένεια του με αυτόν διευθέτησε την επ' ονόματί του μεταβίβαση του ρηθέντος κτήματος.

Ο εφεσεϊών εφεσίβαλε την απόφαση προβάλλοντας τους ακόλουθους λόγους:

- 1) Τα γεγονότα που δικαιολογούσαν την αιτούμενη θεραπεία δεν προσδιορίζονταν στο κύριο σώμα της απαίτησης.
- 2) Το δόγμα του αθέμιτου επηρεασμού δεν εφαρμοζόταν στην παρούσα περίπτωση.
- 3) Η κρίση του πρωτόδικου Δικαστηρίου ότι η πνευματική ικανότητα του αποβιώσαντος ήταν μειωμένη κατά το χρόνο της επίδικης συναλλαγής είναι εσφαλμένη.
- 4) Το πρωτόδικο Δικαστήριο λανθασμένα έκρινε ότι μπορεί να εφαρμοστεί το Άρθρο 16(3) του Κεφ. 149 που μεταθέτει στους ώμους του εφεσεϊόντος το βάρος απόδειξης ότι η σύμβαση που συνήφθη ήταν προϊόν ψυχικής πίεσης.

Αποφασίστηκε ότι:

1. Η διατύπωση και μόνο της θεραπείας δεν επιτρέπει την εξέταση του θέματος το οποίο εγείρει. Ο προσδιορισμός στο κύριο σώμα της απαίτησης των γεγονότων που δικαιολογούν μια ή περισσότερες θεραπείες αποτελεί προϋπόθεση για την εξέτασή τους. Στην παρούσα περίπτωση ο όρος “αθέμιτος επηρεασμός” (undue influence), χρησιμοποιήθηκε τόσο στην οπισθογράφηση του κλητηρίου εντάλματος, όσο και στην αξίωση της έκθεσης απαίτησης. Στο σώμα δε της έκθεσης απαίτησης καταχωρούνται, με μεγάλη μάλιστα λεπτομέρεια, τα ουσιώδη γεγονότα επί των οποίων η εφεσίβλητη στηρίζει την υπόθεσή της.

2. Η ψυχική πίεση προσδιορίζεται στο Άρθρο 16 του περί Συμβάσεων Νόμου, Κεφ. 149. Το βάρος απόδειξης ότι η σύμβαση δεν έχει συναφθεί συνεπεία ψυχικής πίεσης, φέρει το πρόσωπο που είναι σε θέση να κυριαρχεί της θέλησης του άλλου, όταν το πρόσωπο αυτό συμβάλλεται και η συναλλαγή φαίνεται από μόνη της ή από τα αποδεικτικά στοιχεία που προσάχθηκαν ότι είναι υπέρμετρα επαχθής (Άρθρο 16(3)). Το βάρος αυτό ο εφεσείων δεν κατάφερε να αποδείξει, αφού το Δικαστήριο απέρριψε πλήρως την εκδοχή του.

3. Η ιατρική μαρτυρία την οποία το Δικαστήριο αποδέκτηκε ως ορθή δεν δημιουργεί καμιά αμφιβολία ότι κατά τον ουσιώδη χρόνο ο αποβιώσας δεν είχε επαφή με το περιβάλλον και συνεπώς δεν θα μπορούσε να θεωρηθεί υπεύθυνος για τις πράξεις του κι' έτσι ο εφεσείων ήταν σε θέση να κυριαρχήσει επί της θέλησής του και ασκώντας ψυχική πίεση σε αυτόν να επιτύχει μια συναλλαγή σαφώς επαχθή αφού του μεταβίβασε ακίνητο σημαντικής αξίας χωρίς ουσιαστικό αντάλλαγμα.

4. Σε περίπτωση επαχθών συμβάσεων θα πρέπει να αποδεικνύεται ότι ο δωρητής ενεργούσε ελεύθερα από οποιαδήποτε επίδραση που προερχόταν από το πρόσωπο που θα αποκόμιζε το όφελος, με πλήρη επίγνωση των πράξεών του. Ο πιο συνηθισμένος τρόπος για να αποδείξει ο δωρητής ότι η δωρεά δεν ήταν αποτέλεσμα ψυχικής πίεσης είναι η παρουσίαση μαρτυρίας ότι η εκχώρηση ήταν αποτέλεσμα λήψης κατάλληλης και ανεξάρτητης νομικής συμβουλής.

*Η έφεση απορρίφθηκε με έξοδα
εναντίον του εφεσείοντος.*

Αναφερόμενες υποθέσεις:

Courtis a.o. v. Iasonides (1970) 1 C.L.R. 180,

Πουρίκκος v. Σάββα κ.ά. (1991) 1 Α.Α.Δ. 507,

Αριστοδήμου v. Χαραλάμπους (1990) 1 Α.Α.Δ. 319,

Βασιλειάδης κ.ά. v. Πετρολίνα Ατδ (1994) 1 Α.Α.Δ. 16,

Κεφάλας κ.ά. v. Νικολάου (2000) 1 Α.Α.Δ. 1226,

Allcard v. Skinner [1887] 35 Ch. D. 145,

Σωκράτους v. Τσιβτανίδη (1998) 1 Α.Α.Δ. 1602.

Έφεση.

Έφεση από τον εναγόμενο κατά της απόφασης του Επαρχιακού Δικαστηρίου Λεμεσού που δόθηκε στις 29/9/00 (Αρ. Αγωγής 7355/95) με την οποία αποδέχτηκε την αγωγή της ενάγουσας και εξέδωσε διάταγμα ακύρωσης της εγγραφής ενός κτήματος στο χωριό Μοναγρούλι Λεμεσού επ' ονόματί του και διέταξε την εγγραφή του επ' ονόματι της ενάγουσας ως διαχειρίστριας της περιουσίας του αποβιώσαντος πατέρα της.

Φ. Τσαγαρίδης, για τον Εφεσίοντα.

Σπ. Μιχαηλίδης, για την Εφεσίβλητη.

Cur. adv. vult.

ΝΙΚΗΤΑΣ, Δ.: Η ομόφωνη απόφαση του Δικαστηρίου θα απαγγελθεί από το Δικαστή Νικολαΐδη.

ΝΙΚΟΛΑΪΔΗΣ, Δ.: Η εφεσίβλητη-ενάγουσα ήγειρε την αγωγή που είναι η βάση της παρούσας διαδικασίας υπό την ιδιότητά της ως διαχειρίστριας της περιουσίας του πατέρα της, που απεβίωσε στις 25.1.1995. Αξίωσε ακύρωση της μεταβίβασης κτήματος έκτασης δύο σκαλών και ενός προσταθίου, στο χωριό Μοναγρούλι, της επαρχίας Λεμεσού, που έγινε προς τον εφεσίοντα-εναγόμενο. Στην έκθεση απαίτησης προβάλλεται ο ισχυρισμός ότι ο αποβιώσας υπέφερε από αρτηριοσκλήρωση αγγείων του εγκεφάλου, γεροντική άνοια και την ασθένεια πάρκινσον. Αναφέρεται ότι η κατάσταση της υγείας του ήταν τέτοια που κατά το χρόνο της μεταβίβασης δεν είχε σώας τας φρένας, αλλά ούτε και συνείδηση των πράξεών του. Έτσι ο εφεσίων-εναγόμενος εκμεταλλευόμενος την κατάστασή του και τη συγγένειά του με τον αποβιώσαντα, διευθέτησε την επ' ονόματί του μεταβίβαση του ρηθέντος κτήματος.

Το πρωτόδικο Δικαστήριο απέρριψε τους ισχυρισμούς για απάτη, ψευδείς παραστάσεις και πλαστογράφηση. Κατέληξε όμως ότι η αγωγή θα έπρεπε να επιτύχει στη βάση της άσκησης ψυχικής πίεσης και της ετεροβαρούς συναλλαγής και προχώρησε στην έκδοση διατάγματος ακύρωσης της εγγραφής του κτήματος στο όνομα του εφεσίωντα και την εγγραφή του στο όνομα της εφεσίβλητης, υπό την ιδιότητά της ως διαχειρίστριας της περιουσίας του αποβιώσαντος.

Ο εφεσείων προβάλλει το επιχείρημα ότι το Δικαστήριο διαπιστώνει μεν ότι στην έκθεση απαίτησης δεν διατυπώνεται οποιοσδήποτε ισχυρισμός για ψυχική πίεση ή αθέμιτο επηρεασμό, αλλά στη συνέχεια λανθασμένα προχωρεί και καταλήγει ότι το λεκτικό της ήταν οριακά αρκετό για να θεωρηθεί ότι ο ισχυρισμός για ψυχική πίεση εγείρεται.

Ο εφεσείων βασίζεται στην αρχή ότι τα δικόγραφα θα πρέπει να διατυπώνονται με σαφήνεια και ακρίβεια, ούτως ώστε η κάθε πλευρά να γνωρίζει επακριβώς την υπόθεση που έχει να αντιμετωπίσει. Περαιτέρω προβάλλει τον ισχυρισμό ότι κανένας από τους μάρτυρες δεν αναφέρθηκε σε γεγονότα που συνιστούν, άμεσα ή έμμεσα ψυχική πίεση.

Ο εφεσείων επισημαίνει ότι η διατύπωση της θεραπείας στο αιτητικό μόνο, δεν επιτρέπει την εξέταση του θέματος το οποίο εγείρει. Ο προσδιορισμός στο κύριο σώμα της απαίτησης των γεγονότων που δικαιολογούν μια ή περισσότερες θεραπείες αποτελεί προϋπόθεση για την εξέτασή τους.

Συμφωνούμε με τις διαπιστώσεις του πρωτόδικου Δικαστηρίου επί των γεγονότων. Ο αποβιώσας μέχρι την 31.12.1993 ήταν εγγεγραμμένος ιδιοκτήτης του συγκεκριμένου τεμάχου. Ο εφεσείων που είναι παιδί αδελφού του αποβιώσαντα αποπειράθηκε με τη χρήση γενικού πληρεξούσιου να μεταβιβάσει επ' ονόματί του το κτήμα. Όταν το Επαρχιακό Κτηματολόγιο Λεμεσού απέρριψε το γενικό πληρεξούσιο, εξασφάλισε την υπογραφή του αποβιώσαντα σε ειδικό πληρεξούσιο, ημερ. 2.12.1993.

Στις 3.12.1993 ο εφεσείων παρουσιάστηκε στο Επαρχιακό Κτηματολόγιο Λεμεσού, μαζί με κάποια δικηγορική υπάλληλο και το κτήμα μεταβιβάστηκε στο όνομά του, δυνάμει δωρεάς. Κατά το χρόνο υπογραφής του ειδικού πληρεξούσιου ο αποβιώσας ήταν ηλικίας 83 περίπου χρόνων.

Είναι παραδεκτό ότι η εφεσίβλητη ενώ ακόμα ζούσε ο πατέρας της, στις 13.9.1994 διορίστηκε από το δικαστήριο διαχειρίστρια της περιουσίας του, γιατί κρίθηκε ότι ήταν διανοητικά ασθενής. Μετά το θάνατό του στις 25.1.1995, διορίστηκε διαχειρίστρια της περιουσίας του. Το Δικαστήριο κατέληξε ότι κατά πάντα ουσιαστικά χρόνο, περιλαμβανομένης και της περιόδου που υπογράφηκε το ειδικό πληρεξούσιο, ο αποβιώσας υπέφερε από αρτηριοσκλήρωση των αγγείων του εγκεφάλου, γεροντική άνοια και πάρκινσον και γενικά δεν μπορούσε να θεωρηθεί υπεύθυνος για τις πράξεις του, αφού δεν μπορούσε να επικοινωνήσει με το περιβάλλον του. Το πιο πάνω συμπέρασμα βάσιζε στη μαρτυρία του γιατρού που παρακολουθούσε τον αποβιώσαντα περιοδικά από το τέλος του 1990 μέχρι τις αρχές του 1995. Το Δικαστήριο δεν δέχτηκε τη μαρτυρία του εφεσείωντα ως αληθή και απέρριψε τους ισχυρισμούς του ότι κατά την περίοδο της υπογραφής του πληρεξούσιου ο αποβιώσας περπατούσε 4 χλμ την ημέρα, έβαλλε στην εκκλησία, μετέβαινε στη Λεμεσό και διεκπεραίωνε μόνος του τις δουλειές του και γενικά ότι εκείνη την περίοδο ήταν απόλυτα υγιής.

Το Δικαστήριο κατέληξε ότι η πνευματική ικανότητα του αποβιώσαντα μεταξύ των ετών 1990 και 1994 ήταν επηρεασμένη, όχι μόνο λόγω ηλικίας, και πνευματικής και σωματικής κατάπτωσης, αλλά και λόγω των ασθενειών από τις οποίες υπέφερε.

Όπως αναφέρει και το πρωτόδικο δικαστήριο, στη γενική οπισθογράφηση του κλητηρίου εντάλματος αναφέρεται ότι η εγγραφή του κτήματος στο όνομα του εναγόμενου είναι άκυρη γιατί, μεταξύ άλλων, η μεταβίβαση έγινε με “αθέμιτο επηρεασμό” του αποβιώσαντος ο οποίος κατά το χρόνο της μεταβίβασης ήταν διανοητικά ασθενής και δεν είχε επίγνωση, συνείδηση ή συναίσθηση των πράξεών του. Η ίδια διατύπωση και αναφορά σε “αθέμιτο επηρεασμό” γίνεται και στην παραγρ. 18Α της έκθεσης απαίτησης που συνιστά το αιτητικό.

Σωρεία νομολογίας, ήδη από πολύ νωρίς, επισημαίνει τη σημασία των δικογράφων (*Courtis and Others v. Iasonides (1970) 1 C.L.R. 180*). Είναι βασική αρχή ότι η μαρτυρία που προσάγεται για θέματα που δεν καλύπτονται από αυτά, δεν μπορεί να γίνει αποδεκτή (*Πουρίκκος v. Σάββα κ.ά. (1991) 1 Α.Α.Δ. 507*).

Η Δ. 19, θ. 4 των Θεσμών Πολιτικής Δικονομίας, επιβάλλει στο διάδικο την υποχρέωση να εκθέτει συνοπτικά όλα τα ουσιώδη γεγονότα που συνθέτουν και στηρίζουν την υπόθεσή του. Οι πρόνοιες αυτές αποβλέπουν στον επακριβή προσδιορισμό των επίδικων θεμάτων και στον αποκλεισμό πιθανότητας αιφνιδιασμού του αντίδικου. Η υποχρέωση για αποκάλυψη περιορίζεται στα ουσιώδη γεγονότα (*Αριστοδήμου v. Χαραλάμπους (1990) 1 Α.Α.Δ. 319, 329*).

Όταν εκδίδει την απόφασή του το Δικαστήριο εξετάζει και λαμβάνει υπ’ όψιν μόνο μαρτυρία που καλύπτεται από τα δικόγραφα και αγνοεί μαρτυρία που δεν συνάδει με αυτά. Τα επίδικα θέματα επί των οποίων καλείται να βασίσει την απόφασή του καθορίζονται με αναφορά στο περιεχόμενο των δικογράφων (*Πουρίκκος v. Σάββα κ.ά.*, ανωτέρω, στη σελ. 517). Προσαχθείσα μαρτυρία που δεν καλύπτεται από τα δικόγραφα δεν μπορεί να ληφθεί υπ’ όψιν.

Στην *Αριστοδήμου v. Χαραλάμπους*, ανωτέρω, τονίστηκε ότι η διατύπωση και μόνο της θεραπείας δεν επιτρέπει την εξέταση του θέματος το οποίο εγείρει. Ο προσδιορισμός στο κύριο σώμα της απαίτησης των γεγονότων που δικαιολογούν μια ή περισσότερες θεραπείες αποτελεί προϋπόθεση για την εξέτάσή τους. Η αρχή ότι η όποια αξίωση για θεραπεία προϋποθέτει πραγματικό υπόβαθρο στο σώμα της έκθεσης απαίτησης επαναλήφθηκε και στην υπόθεση *Βασιλειάδης κ.ά. v. Πετρολίνα Ατδ (1994) 1 Α.Α.Δ. 16, 20*.

Στην παρούσα περίπτωση ο όρος “αθέμιτος επηρεασμός” (undue influence), χρησιμοποιήθηκε τόσο στην οπισθογράφηση του κλητηρίου εντάλματος, όσο και στην αξίωση της έκθεσης απαίτησης. Στο σώμα δε της έκθεσης απαίτησης

καταχωρούνται, με μεγάλη μάλιστα λεπτομέρεια, τα ουσιώδη γεγονότα επί των οποίων η εφεσίβλητη στηρίζει την υπόθεσή της.

Θα πρέπει να παραδεχθούμε ότι η έκθεση απαίτησης στην παρούσα υπόθεση έχει πολλά να ζηλέψει από ένα σωστά συνταγμένο δικόγραφο, αλλά από την άλλη, δεν είναι ορθή η θέση ότι ο εφεσείων κατελήφθη εξ απροόπτου, ή δεν γνώριζε ποια είναι η υπόθεση που θα αντιμετώπιζε.

Μπορεί να μη γίνεται λεπτομερής ανάλυση που θα καθιστούσε άμεμπτη την αναφορά σε αθέμιτο επηρεασμό, αλλά σε πλείονες της μίας περιπτώσεων αναφέρονται γεγονότα που δείχνουν ακριβώς αυτό τον επηρεασμό. Τέτοια παραδείγματα είναι η παραγρ. 7 της έκθεσης απαίτησης όπου αναφέρεται ότι ο εφεσείων εκμεταλλεόμενος την κατάσταση της υγείας του αποβίωσαντα παρουσίασε πληρεξούσιο που εξασφάλισε με σκοπό τη μεταβίβαση του κτήματος, και η παραγρ. 16 όπου αναφέρεται ότι ο αποβιώσας καθόλου δεν είχε συνείδηση των πράξεών του και την ικανότητα να αντιληφθεί τη σημασία τους, κατάσταση που ο εφεσείων εκμεταλλεύτηκε για να πετύχει τη μεταβίβαση επ' ονόματί του, του κτήματος. Αναφέρεται επίσης ότι ο αποβιώσας δεν είχε καθόλου ικανότητα σύναψης οποιασδήποτε συμφωνίας γιατί δεν είχε σώας τας φρένας.

Περαιτέρω στις λεπτομέρειες δόλου αναφέρεται ότι ο εφεσείων γνώριζε ότι ο αποβιώσας δεν μπορούσε να προβεί σε οιαδήποτε συμφωνία γιατί ήταν ψυχικά ασθενής και κυρίως, ότι εκμεταλλεύτηκε τη συγγενεία του με τον αποβίωσαντα. Προβάλλεται επίσης και ο ισχυρισμός ότι ο εφεσείων εκμεταλλεύτηκε την απουσία των παιδιών του αποβίωσαντα στο εξωτερικό.

Έτσι βλέπουμε ότι εκτός από το χαλαρό, όπως χαρακτηρίστηκε από το πρωτόδικο Δικαστήριο λεκτικό της παραγρ. 16, υπάρχουν και άλλα σημεία που δικαιολογούν την απόφαση του Δικαστηρίου να καταλήξει ότι ο ισχυρισμός για ψυχική πίεση ή αθέμιτο επηρεασμό εγείρεται στην έκθεση απαίτησης. Όλα τα στοιχεία και οι ουσιώδεις ισχυρισμοί που απαιτούνταν για να αντιληφθεί ο εφεσείων την υπόθεση που είχε να αντιμετωπίσει, βρίσκονταν στο σώμα της έκθεσης απαίτησης.

Συμφωνούμε επίσης και με τη νομική ανάλυση στην οποία προβαίνει το πρωτόδικο Δικαστήριο. Πράγματι το άρθρο 10(1) του Κεφ.149 προϋποθέτει ότι για να είναι μια σύμβαση έγκυρη, καταρτίζεται με την ελεύθερη συναίνεση μερών ικανών προς το συμβάλλεσθαι. Σύμφωνα με το άρθρο 14 η συναίνεση θεωρείται ελεύθερη, όταν δεν προκαλείται με εξαναγκασμό, ψυχική πίεση, απάτη, ψευδή παράσταση ή πλάνη.

Το άρθρο 16 προσδιορίζει τον όρο ψυχική πίεση και προβλέπει τα ακόλουθα:

“16(1) Η σύμβαση θεωρείται ότι συνάφθηκε συνεπεία “ψυχικής πίεσης” όταν οι σχέσεις που υπάρχουν μεταξύ των μερών είναι τέτοιες ώστε το ένα από αυτά είναι σε θέση να κυριαρχεί επί της θέλησης του άλλου και να επωφελείται από τη θέση αυτή για να εξασφαλίσει αθέμιτο όφελος έναντι του άλλου.

(2) Ειδικότερα και χωρίς επηρεασμό της πιο πάνω αρχής, θεωρείται ότι είναι σε θέση να κυριαρχεί επί της θέλησης άλλου, κάθε πρόσωπο το οποίο-

(α) έχει πραγματική ή προφανή εξουσία επί του άλλου ή βρίσκεται σε σχέση εμπιστοσύνης έναντι του άλλου ή

(β) καταρτίζει σύμβαση με πρόσωπο, του οποίου η πνευματική ικανότητα είναι προσωρινά ή μόνιμα επηρεασμένη λόγω ηλικίας, ασθένειας ή πνευματικής ή σωματικής κατάπτωσης.

(3) Όταν πρόσωπο το οποίο είναι σε θέση να κυριαρχεί επί της θέλησης άλλου, συμβάλλεται μαζί με αυτόν, και η συναλλαγή φαίνεται από μόνη της ή από τα αποδεικτικά στοιχεία που προσάχθηκαν, ότι είναι υπέρμετρα επαχθής, το βάρος απόδειξης ότι η σύμβαση δεν συνάφθηκε συνεπεία ψυχικής πίεσης φέρει το πρόσωπο που είναι σε θέση να κυριαρχεί επί της θέλησης του άλλου.”

Θα σταθούμε ιδιαίτερα στο άρθρο 16(2)(β). Στην παρούσα περίπτωση το Δικαστήριο δέκτηκε την ιατρική μαρτυρία και κατέληξε ότι κατά πάντα ουσιώδη χρόνο ο αποβιώσας υπέφερε από αρτηριοσκλήρωση αγγείων του εγκεφάλου, γεροντική άνοια και πάρκινσον και ότι γενικά δεν μπορούσε να θεωρηθεί υπεύθυνος για τις πράξεις του, αφού δεν μπορούσε να επικοινωνεί με το περιβάλλον του.

Το βάρος απόδειξης ότι η σύμβαση δεν έχει συναφθεί συνεπεία ψυχικής πίεσης, φέρει το πρόσωπο που είναι σε θέση να κυριαρχεί της θέλησης του άλλου, όταν το πρόσωπο αυτό συμβάλλεται και η συναλλαγή φαίνεται από μόνη της ή από τα αποδεικτικά στοιχεία που προσάχθηκαν ότι είναι υπέρμετρα επαχθής (άρθρο 16(3)). Το βάρος αυτό ο εφεσείων δεν κατάφερε να αποσείσει, αφού το Δικαστήριο απέρριψε πλήρως την εκδοχή του. Περαιτέρω, πολύ ορθά αναφέρει ότι η συναλλαγή από μόνη της είναι ετεροβαρής, αφού ο εφεσείων ισχυρίστηκε ότι το κτήμα που είναι συμφωνημένης αξίας £12.000 του το δώρησε ο αποβιώσας, επειδή κατά καιρούς τον βοηθούσε με διάφορους τρόπους. Σημειώνεται επίσης ότι δεν υπάρχει μαρτυρία ότι ο αποβιώσας έτυχε οποιασδήποτε νομικής ή άλλης συμβουλής για τις συνέπειες υπογραφής του πληρεξούσιου (βλέπε *Κεφάλας κ.ά. ν. Νικολάου (2000) 1 Α.Α.Δ. 1226*).

Η εφαρμογή του δόγματος του αθέμιτου επηρεασμού, σύμφωνα με το δίκαιο της επιείκειας, σκοπό είχε να εξασφαλίσει ότι κανένας δεν θα επιτρέπεται να διατηρεί τα οφέλη του δόλου του ή της άδικής του πράξης (Chitty on Contracts, 27η Έκδοση, Τόμος 1ος, παραγρ. 7-042).

Όπως αναφέρεται στην υπόθεση *Allcard v. Skinner [1887] 35 Ch. D. 145*, 190, η αντιμετώπιση αυτή δεν είναι περιορισμός που τίθεται στο δωρητή, αλλά εμπόδιο στη συνείδηση του αποδέκτη της δωρεάς, το οποίο βασίζεται στο δημόσιο συμφέρον και στην ορθή συμπεριφορά. Όταν το δικαστήριο ικανοποιηθεί ότι η δωρεά ήταν αποτέλεσμα επηρεασμού που ασκήθηκε άμεσα από το δωρεοδόχο για το σκοπό αυτό ή όπου οι σχέσεις μεταξύ του δωρητή και του δωρεοδόχου κατά το χρόνο της δωρεάς ή λίγο πριν από αυτή, είναι τέτοιες που να δημιουργούν τεκμήριο ότι ο δωρεοδόχος έχει επηρεάσει το δωρητή, το δικαστήριο ακυρώνει τη δωρεά. Για να είναι έγκυρη θα πρέπει να αποδειχθεί ότι η δωρεά συνιστούσε αυθόρμητη πράξη του δωρητή, ο οποίος ενεργούσε υπό περιστάσεις που τον καθιστούσαν ικανό να εκδηλώσει ανεξάρτητη βούληση και μόνο αφού το Δικαστήριο ικανοποιηθεί ότι η δωρεά ήταν το αποτέλεσμα της ελεύθερης βούλησης του δωρητή (κατά το Λόρδο Cotton L.J., στην υπόθεση *Allcard v. Skinner*, ανωτέρω).

Ο εφεσείων ισχυρίζεται επίσης ότι το Δικαστήριο λανθασμένα έκρινε ότι η πνευματική ικανότητα του αποβιώσαντα κατά το χρόνο υπογραφής του ειδικού πληρεξούσιου ήταν μειωμένη, αποδεχόμενο τη μαρτυρία του θεράποντος ιατρού ο οποίος τον εξέταζε ανά τριμηνία περίπου. Σημειώνει ότι δεν προσδιορίστηκε ποτέ τον εξέτασε για τελευταία φορά, ενώ παρέλειψε να αναφερθεί με συγκεκριμένο τρόπο στη διανοητική κατάσταση του αποβιώσαντα κατά τον ουσιώδη χρόνο. Ο εφεσείων υποστηρίζει ότι το Δικαστήριο θα έπρεπε να έχει συγκεκριμένη μαρτυρία για τη διανοητική κατάσταση του αποβιώσαντα κατά το χρόνο υπογραφής του πληρεξούσιου. Αντίθετα, αγνόησε τη μαρτυρία του κοινοτάρχη ο οποίος πιστοποίησε την ενώπιόν του υπογραφή από τον αποβιώσαντα του ειδικού πληρεξούσιου.

Και ο λόγος αυτός θα πρέπει να απορριφθεί. Η ιατρική μαρτυρία, την οποία το Δικαστήριο αποδέκτηκε ως αληθή, είναι καταπελτική επί του σημείου. Δεν αφήνεται καμιά αμφιβολία ότι κατά πάντα χρόνο μέσα στη χρονική περίοδο που μας ενδιαφέρει, ο αποβιώσας δεν είχε επαφή με το περιβάλλον και συνεπώς δεν μπορούσε να θεωρηθεί υπεύθυνος για τις πράξεις του. Έτσι ο εφεσείων που ήταν σε θέση να κυριαρχήσει επί της θέλησης του αποβιώσαντα δεν κατάφερε να αποδείξει ότι η σύμβαση δεν έχει συναφθεί συνεπεία ψυχικής πίεσης. Πολύ ορθά το πρωτόδικο Δικαστήριο αναφέρει ότι η ύπαρξη της υπογραφής του αποβιώσαντα στο ειδικό πληρεξούσιο από μόνη της, έστω και πιστοποιημένη από τον κοινοτάρχη, δεν είναι αρκετή για να αποδείξει την πνευματική του κατάσταση.

Όσον αφορά τον τελευταίο λόγο έφεσης ότι δηλαδή το Δικαστήριο λανθασμένα έκρινε ότι μπορεί να εφαρμοστεί το άρθρο 16(3) του Κεφ.149 που μεταθέτει στους ώμους του εφεσείοντα το βάρος απόδειξης ότι η σύμβαση που συνήφθη δεν ήταν προϊόν ψυχικής πίεσης, νομίζουμε ότι έχει καλυφθεί με όσα έχουμε πει πιο πάνω. Περιοριζόμαστε να προσθέσουμε ότι από τη στιγμή που το Δικαστήριο απέρριψε την εκδοχή του εφεσείοντα ότι ο αποβιώσας ήταν τόσο καλά στην υγεία του και αφού έκρινε ότι οι τυχόν υπηρεσίες που ο εφεσείων δυνατόν να προσέφερε στον αποβιώσαντα

ήταν ευτελείς σε σχέση με την υπέρμετρη αξία του δωρηθέντος κτήματος, δεν χρειάζεται να πούμε περισσότερα. Πρόκειται περί μιας δωρεάς ακίνητου σημαντικής αξίας, χωρίς ουσιαστικό αντάλλαγμα, συναλλαγή σαφώς επαχθής.

Έχει λεχθεί (*Σωκράτους ν. Τσιβτανίδη (1998) 1 Α.Α.Δ. 1602*), ότι σε περίπτωση επαχθών συμβάσεων θα πρέπει να αποδεικνύεται ότι ο δωρητής ενεργούσε ελεύθερα από οποιαδήποτε επίδραση που προερχόταν από το πρόσωπο που θα αποκόμιζε το όφελος, με πλήρη επίγνωση των πράξεών του. Στην ίδια υπόθεση τονίζεται επίσης ότι ο πιο συνηθισμένος τρόπος για να αποδείξει ο δωρητής ότι η δωρεά δεν ήταν αποτέλεσμα ψυχικής πίεσης είναι η παρουσίαση μαρτυρίας ότι η εκχώρηση ήταν αποτέλεσμα λήψης κατάλληλης και ανεξάρτητης νομικής συμβουλής.

Η έφεση απορρίπτεται με έξοδα εναντίον του εφεσείοντα, όπως θα υπολογιστούν από τον Πρωτοκολλητή.

*Η έφεση απορρίπτεται με έξοδα
εναντίον του εφεσείοντος.*