


# Systemic discrimination of intellectually disabled children: V.I. v. Moldova paves the way

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In the judgment of *V.I. v. Moldova*, the Court uses a fine-toothed comb to go over the string of events that left V.I. an orphaned child stuck in a psychiatric hospital. The Court not only assesses the applicant's individual case under Article 3, but also highlights the structural issues related to the systemic placement of mentally disabled persons in psychiatric hospitals under Article 14 taken together with Article 3.

Both the clear structure and thoroughness of the reasoning lead to a balanced judgment that takes into account the broader context of treatment of persons with intellectual disabilities in Moldova. After highlighting some aspects that make this judgment exemplary, we focus on the Court's reasoning under Article 14, which is promising for the fight against systemic discrimination.

## Facts

The case relates to V.I.'s involuntary placement in a psychiatric hospital as a child with psychosocial disabilities. V.I. lost both his parents at a young age, and at the age of 14 he was placed under the guardianship of the mayor of a Moldovan municipality. As attempts to find him a place in foster care failed, he was sent to a boarding school. When his year at the boarding school ended, the mayor had to identify a summer placement as the school closed over the summer. The applicant had a 'mild mental disability' (§5) and had trouble adapting and behaving at the school, which led a medical professional to refer him to a psychiatric hospital for treatment without ever seeing V.I. in person.

Following this, the mayor ordered his transfer to a psychiatric hospital for a three-week-long treatment. The applicant, aged fifteen at the time, stated that he was not informed of the transfer decision, nor did he see a doctor to evaluate his case. He opposed his admission to the clinic, but domestic law required only the consent of his legal guardian due to his age.

After three weeks no one came to arrange his discharge and further placement. The hospital contacted the mayor, but to no avail. After more than two months had passed, the applicant was transferred to the adults' psychiatric unit, despite still being a child, as his behaviour had become more erratic and aggressive. During this period the applicant had to take a variety of medications.

After almost four months in the psychiatric institution and multiple attempts by the administration to contact the mayor, the child protection authority assessed V.I.'s case and concluded that placement was needed in a residential institution. A few weeks later, before any arrangements had been made, the applicant's cousin became his guardian and discharged the applicant.

With the help of an NGO, the applicant's complaints were examined in two separate sets of proceedings. The first set related to charges of professional negligence against his legal guardian. After extensive judicial proceedings, the Supreme Court of Justice acquitted the mayor on all charges related to the placement and neglect in the hospital, as there was no evidence of any 'serious consequences' or 'serious damage' to the applicant's health. The second set of proceedings related to the ill-treatment inflicted by hospital staff. Here, the investigation was discontinued due to a lack of evidence, and appeals from the applicant were dismissed.

## **Judgment**

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### **Article 3**

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The Court starts its reasoning reaffirming that as a general rule, cases concerning medical interventions, including those without consent from the patient, are examined under Article 8 of the Convention. However, in some cases, the treatment will fall under the scope of Article 3. Importantly, the Court reaffirms that 'increased vigilance' in this type of cases is necessary due to the position of inferiority and powerlessness experienced by patients confined in psychiatric hospitals.

Firstly, from a procedural perspective, the Court looks at States' obligation to carry out an effective investigation. Multiple elements challenge the legality of the applicant's placement, such as the fact that the doctor who referred the applicant had never seen him in a consultation (§112) and the lack of investigation into the applicant's health condition. Moreover, the Court notes that the investigators among others failed to examine the impact of certain treatments on the applicant, their therapeutic necessity and the allegations of violence and sexual abuse at the hands of other patients. The ECtHR concludes that the authorities failed to carry out an effective investigation, emphasising that they should have taken V.I.'s vulnerability, age and disability into account (§119).

Secondly, the Court turns to Moldova's obligation to put in place an appropriate legislative and regulatory framework to protect the physical and psychological integrity of individuals. It establishes that States have a heightened duty of protection 'towards children with intellectual disabilities who [...] have been placed in the care of the state' (§124). While affirming that Moldovan law contains clear legal provisions concerning the admission of children to mental health institutions, the Court finds issue with the absence of certain

safeguards. Specifically, it holds that the lack of independent monitoring of involuntary admission to psychiatric institutions and involuntary treatment amounts to a failure by the State to fulfil its obligations under the Convention. The Court asserts that the lack of mechanisms capable of preventing and detecting ill-treatment of children such as V.I. were 'systemic deficiencies' of the Moldovan legal framework (§128).

Finally the Court examines the obligation to protect the applicant's physical and mental integrity. Both the legal guardian and the psychiatric hospital had a duty of care towards the applicant. As such, the Court examines the alleged ill-treatment 'simultaneously' from the perspective of negative and positive obligations (§130). It looks at three key aspects from the applicant's complaints, specifically his placement, the necessity of the therapeutic treatment and his transfer to the adult section.

Regarding the applicant's placement in the psychiatric hospital, the Court finds that the absence of a mechanism for child participation prevented the authorities from properly assessing V.I.'s best interests and identifying the need for additional safeguards, such as an independent review of the medical necessity of his placement.

Regarding the therapeutic necessity, the lack of referral to any mental illness but rather to a mild intellectual disability is in itself 'insufficient ground for placement in a psychiatric hospital' (§137). Here, the Court emphasises how the specific context in Moldova, where a 'deficient' practice of placing persons with psychosocial disabilities in hospitals persists, conflicts with international standards (§137). The government bears the burden of proof to show the necessity of the treatment, but it failed to refute the applicant's claims. The Court therefore finds that the placement and treatment lacked therapeutic necessity, even during the first three weeks.

Regarding his transfer to the adult section and the use of heavy medication to control his increasingly aggressive behaviour, the Court also finds the threshold of ill-treatment to be met. The Court accepts the applicant's narrative that his behaviour was linked to his growing frustration due to the absence of prospects (§150). Finally, as regards his complaints that he had suffered (sexual) violence from other patients, the Court found that V.I. did not submit prima facie evidence that would shift the burden of proof. Only in this regard did the Court decide there was no violation of Article 3.

### **Article 14 in conjunction with article 3**

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Notably, the judgment does not end after the Court finds a violation of both the substantive and procedural limb of Article 3. The Court examines the applicant's complaint that societal stigma against persons with intellectual disabilities has led to the ill-treatment. It considers this complaint 'distinct' from V.I.'s Article 3 complaints, as it is based on a 'broader allegation': it 'was not an isolated occurrence but was due to the general stereotypes held by the Moldovan authorities' (§167).

The Court sets out by reaffirming that the margin of appreciation is substantially narrower in cases concerning mentally disabled persons, as they belong to a particularly vulnerable group. In accordance with its approach to discrimination on the basis of race or sex, it requires very weighty reasons for a restriction of this group's fundamental rights. The ECtHR explicitly refers to the consistent reporting of UN Special Rapporteurs on the 'existence of systemic discrimination of persons, specifically children, with intellectual disabilities in the Republic of Moldova in the form of psychiatric institutionalisation' (§172).

In V.I.'s case, a diverse range of actors all relied on his intellectual disability as the reason for his placement and psychiatric treatment, which for the Court confirms a 'defectology' approach (§173). The lack of alternative care options is part of the authorities' failure to attempt to correct inequality, and is thus discriminatory.

Overall, this case cannot be seen as an 'isolated failure' to protect the applicant, according to the Court, but rather 'perpetuate[s] a discriminatory practice' (§175). The burden of proof thus lies with the State, who failed to rebut the presumption of discrimination against the applicant. As such, the Court unanimously finds that there has been a breach of Article 14 read in conjunction with Article 3.

## **Article 46**

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As the case discloses a systemic problem with respect to involuntary treatment and placement, the Court requires Moldova to take a number of general measures aimed at reforming this system. It specifies that the measures should include legal safeguards on chemical restraints; independent monitoring of involuntary admission and treatment; legal provisions, safeguards and mechanisms capable of preventing and detecting ill-treatment of children with mental disabilities; and mechanisms enabling them to have their complaints examined (§197, read together with §§127-129). In addition, the measures should address the discrimination of persons with intellectual disabilities, and in particular children.

## **Comment**

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### **Beyond paternalism**

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In reading this judgment several elements stand out. First of all, it is clearly structured and thorough. In setting out the legal framework, the Court meticulously addresses virtually all complaints brought by the applicant.

Secondly, the use of sensitive language and the attention to stigmatisation of (presumed) intellectually disabled persons stands out. Moreover, the Court attaches specific attention to the position of the child-applicant and the interaction of his different 'vulnerabilities'. We

would argue that this judgment is part of a wider positive trend in which the Court enhances the protection of persons with (presumed) intellectual disabilities, as one of the authors argued [here](#) as well.

Thirdly, and connected to these points, is the importance attached by the Court to agency under article 3 ECHR. The Court finds that a mechanism for child participation is necessary in order to consider the views of children who are placed in psychiatric hospitals. While the absence of such a mechanism does not ‘automatically invalidate the applicant’s placement’, some sort of ‘child-friendly procedure’ is necessary in order to properly assess the applicant’s best interests (§§152-153). Furthermore, such a mechanism could have identified the placement as involuntary, triggering additional safeguards in the form of independent review of the medical necessity of his placement (§153).

In our opinion, this attention to the opinion of a child with an intellectual disability is notable and commendable, and the Court seems to align itself with international standards in this regard. It might be further evidence of increasing importance attached to the agency of intellectually disabled persons, even when it considers children whose legal guardians agree with certain treatments.

## **Discrimination as a systemic problem**

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Turning to the aspect of discrimination, it is noteworthy that by engaging with the applicant’s arguments under Article 14, the Court explicitly accepts that this claim constitutes a fundamental aspect of the case. In the past it has often refrained from analysing the Article 14-claim, even in cases that essentially seemed to raise an issue of discrimination (e.g. [Fedotova and others v. Russia](#), see also dissenting opinion of Judge Pavli, joined by Judge Motoc and [commentary](#)), leading it to be termed ‘the Cinderella-provision’.

Even more interesting is that the Court argues that the *systemic* nature of the issues at hand warrants the Article 14 investigation. As such, the central issue the Court tackles is not whether the applicant suffered discriminatory treatment in the case at hand, but instead whether the general stereotypes prevailing in Moldovan society lead to discriminatory treatment of persons with intellectual disabilities as a group.

This approach, which is reminiscent of that taken in the key case of [D.H. v the Czech Republic](#), raises a few questions on what the Court considers Article 14’s function to be. In several cases we can see the Court flushing out discriminatory aspects and arguments already in its reasoning under a specific Convention right, e.g. Article 8 in [Fedotova](#) or, closer to the case at hand, Article 3 in [G.M. v. Moldova](#). It also did that in the present case (e.g. §119).

When will the Court then deem applicants' Article 14-complaint sufficiently important to warrant a separate examination? Where the existence of discrimination has been meticulously pleaded, will the Court then only go into Article 14 when a case raises a broader issue of discrimination? One could argue that also other cases, such as the recent case of D. v Latvia concerning the informal caste system in Latvian prisons and the above-mentioned case of Fedotova, raised broader issues of (systemic) discrimination. What then leads the Court to (1) accept that the element of discrimination raised a separate issue and (2) focus on structural discrimination in its Article 14-assessment? Still, after over a decade of criticism of the Court's murky practice in this regard, these questions remain unanswered.

In the case at hand, the Court points out some of the issues that lead to the structural discrimination of persons with intellectual disabilities in Moldovan society. It highlights the vulnerability of the mentally disabled, the stereotypes and stigma prevailing in Moldova and the existence of a widespread perception that persons with disabilities are abnormal, leading to a practice of institutionalising them solely due to the existence of an intellectual disability. All these elements bring the Court to the conclusion that the facts of the current case 'perpetuated a discriminatory practice' in respect of children with an actual or perceived intellectual disability (§175).

In spite of a strong substantive approach against such structural discrimination and contrary to what the press release would have us believe, the Court does not explicitly call the situation at hand an instance of 'structural' or 'systemic' discrimination. It does hold that there is a 'structural issue' concerning the legal framework and its implementation (§122), that 'systemic deficiencies' persisted some eight years after the facts of the present case (§128) and that the present case discloses a 'systemic problem' as regards the involuntary placement and treatment in a psychiatric hospital (§196).

This shows that the Court's approach towards structural discrimination seems to be one of shaming, but not naming. This provides for interesting evolutions in the Court's case law on discrimination. One of the authors argues elsewhere that it has led to an implicit widening of the prohibition of discrimination under the Convention in the case law on Roma segregation in education.

## **Measures tackling systemic issues**

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Under Article 46 the Court demands general measures which, although remain vague in requiring 'safeguards' and 'mechanisms', are quite detailed with respect to the areas they should tackle. The Court thereby makes it very clear that measures are required in a number of different areas in order to solve the systemic issues it highlighted in the case, and that providing individual redress to the applicant is not sufficient to comply with the judgment.

This approach of combining strong legal analysis which identifies the systemic issues lying at the origin of the facts of an individual case with requiring specific remedies aimed at solving such systemic issues, is especially promising for finally tackling some of the structural discrimination that pervades in our societies. The exemplary judgment in *V.I. v Moldova* may pave the way not only for the fight against structural discrimination of persons with intellectual disabilities, but also for the fight against all structural discrimination experienced by disadvantaged groups.