



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

**CASE OF LASHIN v. RUSSIA**

*(Application no. 33117/02)*

JUDGMENT

STRASBOURG

22 January 2013

**FINAL**

**22/04/2013**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Lashin v. Russia,**

The European Court of Human Rights (Chamber), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,

Elisabeth Steiner,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyev,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 18 December 2012,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in an application (no. 33117/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Aleksandr Petrovich Lashin (“the applicant”), on 29 July 2002.

2. The applicant, who had been granted legal aid, was represented by Mr D. Bartenev, a lawyer practising in St Petersburg. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, about his status as a legally incapacitated person, his non-voluntary commitment to a psychiatric hospital and his inability to marry.

4. By a decision of 6 January 2011, the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations on the merits (Rule 59 § 1 of the Rules of Court). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other’s observations.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Omsk.

#### A. Deprivation of legal capacity

7. The applicant suffers from schizophrenia, which was first diagnosed in 1987. In the 1980s and early 1990s he was employed as a bus driver, but in 1995 he stopped working. The applicant kept writing nonsensical letters to state officials and lodged numerous administrative complaints and lawsuits. At some point he started giving money and clothes to strangers and invited them to his house, explaining it by religious considerations. Such behaviour led to recurrent conflicts with his wife. The applicant became irritable, aggressive and once in 1996 tried to strangle her. As a result, they divorced. In 1998 the applicant was officially given the “2<sup>nd</sup> degree disability” status due to his mental disorder.

8. Between 1989 and 17 July 2000 the applicant was hospitalised nine times in the Omsk Regional Psychiatric Hospital. As follows from the opinion of the Serbskiy Institute of 19 August 1999 (a leading State psychiatric research centre based in Moscow) during that period the applicant considered himself as a “defender of justice”, believed that he knew important State secrets, and claimed that there was a conspiracy against him. Amongst other things, he challenged his diagnosis, complained of his confinement to the hospital, threatened the doctors who had been treating him in the Omsk Regional Psychiatric Hospital, and tried to institute criminal proceedings against them. The report did not mention any incidence of violence or self-destructive behaviour after 1996, and it was not alleged that during that period the applicant was unable to take care of himself in everyday life. However, it is clear that his mental condition had a persistent character, and that he kept harassing doctors from the Omsk Regional Psychiatric Hospital with complaints and litigations.

9. On 5 April 2000 the applicant underwent an examination in the Omsk Regional Psychiatric Hospital by a panel of doctors, who confirmed the previous diagnosis and the opinion by the Serbskiy Institute and concluded that the applicant was “incapable of understanding the meaning of his actions and was unable to control them”.

10. On 16 June 2000, following an application by the public prosecutor, the Kuybyshevskiy District Court of Omsk declared the applicant legally incapacitated because of his illness. The hearing took place in the absence of the applicant. On 30 August 2000 the Omsk Regional Court upheld the decision of the District Court.

11. On an unspecified date the Omsk Municipal Public Health Department appointed the applicant's father as his guardian.

## **B. Attempts to restore legal capacity**

### *1. First request*

12. On 2 October 2000 the applicant's daughter brought court proceedings seeking to restore his legal capacity. Her request was supported by the applicant's father as guardian. The plaintiffs claimed that the applicant's mental state had significantly improved and requested that the court conduct a new psychiatric examination of his health. As the plaintiffs did not trust doctors from the Omsk Regional Psychiatric Hospital, they insisted that the process of the psychiatric examination of the applicant be recorded on a videotape.

13. On 27 October 2000 the court commissioned a psychiatric examination of the applicant, but refused to order a video recording of it. The expert examination was entrusted to the Omsk Regional Psychiatric Hospital. However, the applicant failed to submit himself for an examination at the hospital, so the examination was not conducted.

14. On 19 March 2001 the Sovetskiy District Court of Omsk decided to confirm the status of legal incapacity and maintain the applicant's guardianship. It is unclear whether the applicant was present at the hearing. The court noted that because the new expert examination could not be conducted due to the applicant's failure to cooperate, the results of the examination of 5 April 2000 were still applicable. It appears that the decision of 19 March 2001 was not appealed against.

### *2. Second request*

15. On 9 July 2001 the applicant's father (as guardian) instituted court proceedings challenging the medical report of 5 April 2000 by the Omsk Regional Psychiatric Hospital which had served as grounds for declaring the applicant legally incapacitated. He also sought restoration of the applicant's legal capacity. Since the plaintiffs did not trust doctors from the Omsk Regional Psychiatric Hospital they requested that the court commission a panel of experts from the Independent Psychiatric Association of Russia, a non-State professional association of psychiatrists, based in Moscow, to assess the applicant's mental capacity.

16. On 26 February 2002 the Kuybyshevskiy District Court held a hearing in the applicant's absence, having decided in particular that:

“... [the applicant's] mental condition prevented him from taking part in the hearing, and, moreover, [his] presence would be prejudicial to his health”.

The court further refused to commission a new expert examination by a non-State psychiatric association, on the ground that only State-run

institutions were allowed by law to conduct such examinations and issue reports. The relevant part of the District Court judgment reads as follows:

“... under section 1 of the Psychiatric Care Act ... State forensic examination activity in judicial proceedings is carried out by State forensic examination institutions, and consists of organising and implementing the forensic examination”.

In conclusion the court found that the expert report of 5 April 2000 was still valid, that the applicant continued to suffer from a mental disorder and that, therefore, his status as a legally incapacitated person should be maintained.

17. The applicant’s father (as his guardian) appealed to the Omsk Regional Court, which on 15 May 2002 upheld the judgment of 26 February 2002.

### **C. Confinement of the applicant in the psychiatric hospital**

18. Some time later the applicant’s father solicited an opinion from Dr S., a psychiatrist not affiliated with the Omsk Regional Psychiatric Hospital, concerning the applicant’s mental condition. Dr S. examined the applicant and on 1 July 2002 he submitted a report according to which the applicant’s mental illness was not as serious as claimed by the doctors at the Omsk Regional Psychiatric Hospital.

19. On an unspecified date in 2002 the applicant’s father, as his guardian, delivered a power of attorney to a third person, mandating that person to act in the applicant’s name. However, a notary public refused to certify the power of attorney, on the basis that under the law a guardian should represent his ward personally and could not confer his duties on a third person. The applicant’s father brought proceedings against the notary public in court, but to no avail: on 10 October 2002 the Sovetskiy District Court of Omsk confirmed the lawfulness of the refusal.

20. On 2 December 2002 the applicant and his fiancée, Ms D., requested that the municipality register their marriage. According to the applicant, they received no reply from the municipality.

21. On 4 December 2002 a district psychiatrist (*uchastkovyi psikhiatr*) examined the applicant and concluded that the latter suffered from “paranoid schizophrenia with paraphrenic delusion of reformism”. The psychiatrist delivered a hospitalisation order, which relied strongly on the “nonsensical complaints” lodged by the applicant’s representatives.

22. On 6 December 2002 the Guardianship Council of the Omsk Region decided to strip the applicant’s father of his status as the applicant’s guardian. The decision was taken by the Guardianship Council without the applicant or his father being heard.

23. By virtue of the hospitalisation order the applicant was placed in the Omsk Regional Psychiatric Hospital on 9 December 2002. According to the

applicant, he and his father unambiguously opposed this provisional placement in the hospital.

24. On the same day a panel of three doctors from the Omsk Regional Psychiatric Hospital examined the applicant and concluded that he should stay in the hospital. They mostly based themselves on the medical history of the applicant that had led to the deprivation of legal capacity. The report stated that the worsening of the applicant's mental condition was demonstrated by the numerous complaints by which he had tried to recover his legal capacity and challenge the actions of the hospital.

25. On 10 December 2002 the Omsk Municipal Public Health Authority approved the decision taken by the Guardianship Council on 6 December 2002. From that moment on the applicant's father ceased to be his guardian and, according to the Government, the functions of the applicant's guardian were performed by the municipal authorities, namely the Omsk Public Health Authority.

26. On 11 December 2002 the Omsk Regional Psychiatric Hospital requested that the Kuybyshevskiy District Court authorise the applicant's further confinement. On the same day the judge, in accordance with section 33 of the Psychiatric Care Act, ordered that the applicant be held in the hospital for such time as was necessary for the examination of his case. The provisional order issued by the judge was a one-sentence annotation on the hospitalisation order of 4 December 2002: "I hereby authorise detention [in hospital] pending the examination [of the case] on the merits".

27. Having been informed of that ruling, the applicant asked the hospital staff to release him for home treatment. The hospital staff refused, however, and prohibited him from seeing his relatives or talking to them.

28. On 15 December 2002 the applicant lodged an application with the court for his release from the Omsk Regional Psychiatric Hospital. However, the judge informed the applicant by letter that such a provisional placement of a patient in a psychiatric hospital for a period necessary for the examination of the case on the merits was not subject to judicial review.

29. On 17 December 2002 the District Court held a hearing in the presence of the applicant, the applicant's father, the public prosecutor, and a representative of the hospital. From the case file it appears that the participants and the judge himself were not aware that the applicant's father was no longer the applicant's guardian.

30. At that hearing the applicant and his father claimed that the applicant's condition did not require hospitalisation. They insisted that the hospital had not proved the medical necessity of such a measure. The applicant and his father referred to the report by Dr. S. of 1 July 2002 (see paragraph 18 above). In order to clarify the matter, the applicant asked the court to commission a fresh medical examination of his mental health, in order to establish whether there had been any deterioration. The court rejected the request, while at the same time admitting the applicant's

medical record in evidence. At the end of the day the hearing was adjourned to 24 December 2002.

31. On 20 December 2002 the Guardianship Council appointed the administration of the Omsk Regional Psychiatric Hospital as the applicant's guardian and delivered an authorisation for his extended confinement in the hospital.

32. On 24 December 2002, without holding a hearing, the District Court closed the proceedings because the hospital, as the applicant's only legitimate guardian, had revoked its request for authorisation of his confinement. The applicant's confinement was thus considered to be "voluntary", and therefore did not require court approval.

33. On the same day, the applicant's father and fiancée asked the court to give them a copy of the decision, so that they could lodge an appeal. The judge refused because the applicant's father, who was no longer his guardian, could not act on behalf of the applicant. The court also denied a request to consider the applicant's fiancée to be his representative.

34. On 27 January 2003, the applicant's fiancée wrote a letter to the Guardianship Council where she requested that the council appoint her as the guardian of "her husband, Mr. Lashin". There is no information whether she received any reply.

35. On an unspecified date the applicant's father lodged an appeal against the decision of 24 December 2002. On 10 February 2003 the Regional Court refused to examine the appeal on the grounds that the applicant's father had no right to represent his son and that no decision on the merits of the case had been taken by the first-instance court.

36. On 2 February 2003 the applicant's fiancée lodged a supervisory review appeal, which was returned to her without examination on 13 February 2003 on the basis that she had no power to represent the applicant.

37. In the following months the applicant's father and fiancée lodged several criminal-law complaints against the hospital and its doctors. Their complaints were addressed to various state authorities and the courts. It appears that none of those complaints was successful.

38. On an unspecified date the applicant's father challenged the decision of the Guardianship Council of 6 December 2002, as approved by the municipal authorities on 10 December 2002, stripping him of his status as the applicant's guardian. On 16 July 2003 the Kuybyshevskiy District Court of Omsk upheld the decision of the Guardianship Council. The District Court found that the applicant's father had neglected his duties on many occasions and had tried to entrust the guardianship to a third party, referring in particular to the episode concerning the power of attorney (see paragraph 19 above). The court also noted that the applicant's father had failed to secure appropriate medical treatment for the applicant as prescribed by the doctors, as a result of which the applicant's condition had



worsened. According to the applicant, he lodged an appeal against that decision.

39. In their letters to the Court of 28 July 2002 and 25 July 2003 the applicant and his fiancée informed the Court of their desire to marry.

40. On 10 October 2003 the Guardianship Council decided to appoint the applicant's daughter as his guardian. That decision was approved by the municipality on 17 October 2003.

41. On 10 December 2003 the applicant was released from the town hospital. The medical report issued in connection with the applicant's discharge indicated that his mental health during his confinement had been predominantly characterised by "litigious" ideas similar to those he had presented at the time of his admission.

42. It appears that in 2006 the applicant's relatives brought court proceedings seeking to restore the applicant's full legal capacity. The Court has not been provided with any information about the outcome of those proceedings.

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

### A. Legal capacity

#### 1. Substantive provisions

43. Under Article 21 of the Civil Code of the Russian Federation of 1994, any individual aged 18 or more has, as a rule, full legal capacity (*дееспособность*), which is defined as "the ability to acquire and enjoy civil rights, [and] create and fulfil civil obligations by his own acts". Under Article 22 of the Civil Code, legal capacity can be limited, but only on the grounds defined by law and within a procedure prescribed by law.

44. According to Article 29 of the Civil Code, a person who cannot understand or control his or her actions as a result of a mental disease may be declared legally incapacitated by a court and placed in the care of a guardian (*опека*). All legal transactions on behalf of the incapacitated person are concluded by his guardian. In practical terms this means that the guardian ensures mandatory representation of the incapacitated person in all matters concerning his property, income, work relations, travel and residence, social contacts and so on. The incapacitated person can be declared fully capable if the grounds on which he or she was declared incapacitated cease to exist.

45. Article 30 of the Civil Code provides for the partial limitation of legal capacity. If a person's addiction to alcohol or drugs is creating serious financial difficulties for his family, he can be declared partially incapacitated. That means that he is unable to conclude large-scale

transactions. He can, however, dispose of his salary or pension and make small transactions, under the control of his guardian.

46. Under Article 35 (4), where a person deprived of legal capacity is placed under the supervision of a medical institution, that medical institution must take on the functions of the guardian.

47. It follows from Article 39 (3) of the Civil Code that the guardianship authority may revoke the authority of a guardian who neglects his duties.

## 2. *Incapacitation proceedings*

48. Article 258 of the Code of Civil Procedure of 1964, as in force at the material time (hereinafter “the old CCP”), established that members of the family of the person concerned, a prosecutor, a guardianship authority or a psychiatric hospital, as well as “trade unions and other organisations”, might apply to a court seeking to deprive a person of his legal capacity. The court, if there was evidence of a mental disorder, was required to commission a forensic psychiatric examination of the person concerned (Article 260). The case was required to be heard in the presence of the person concerned, provided that his presence was compatible with his state of health, and also in the presence of the prosecutor and a representative of the guardianship authority (*орган опеки и попечительства*, Article 261 paragraph 2 of the old CCP). Under Article 263 of the old CCP it was possible for legal capacity to be restored by a court decision upon the application of the guardian or the persons listed in Article 258, but not based on the application of the person declared incapacitated.

49. Article 32 of the old CCP provided that a person declared incapacitated could not bring an action before the courts. The guardian was entitled to do so in order to protect the rights of the incapacitated person.

## **B. Confinement to a psychiatric hospital**

50. The Psychiatric Care Act of 1992, as amended (hereinafter “the Act”), stipulates that any recourse to psychiatric aid must be voluntary. However, a person declared fully incapacitated may be subjected to psychiatric treatment at the request or with the consent of his official guardian (section 4 of the Act).

51. Section 5 (3) of the Act provides that the rights and freedoms of persons with mental illnesses cannot be limited solely based on their diagnosis or the fact that they have undergone treatment in a psychiatric hospital.

52. Under section 5 of the Act a patient in a psychiatric hospital can have a legal representative. However, pursuant to section 7 (2) the interests of a person declared fully incapacitated are represented by his official guardian or, in absence of an officially appointed guardian, the administration of the psychiatric hospital where the patient is confined.

53. Section 28 (1) of the Act (“Grounds for hospitalisation”) provides that a person suffering from a mental disorder may be placed in a psychiatric hospital for further examination or treatment on the basis of a decision by a psychiatrist or on the basis of a court order. Section 28 (3) and (4) states that a person declared incapacitated can be placed in a psychiatric hospital at the request or with the consent of his guardian. This hospitalisation is regarded as voluntary and, unlike non-voluntary hospitalisation, does not require court approval (sections 29 and 33 of the Act).

54. Section 29 sets out the grounds for non-voluntary placement in a psychiatric hospital in the following terms:

“A mentally disturbed individual may be hospitalised in a psychiatric hospital against his will or the will of his legal representative and before a court decision [on the matter] has been taken, if the individual’s examination or treatment can only be carried out in in-patient care, and the mental disorder is severe enough to give rise to:

- a) a direct danger to the person or to others, or
- b) the individual’s helplessness, i.e. inability to take care of himself, or
- c) a significant health impairment as a result of a deteriorating mental condition, if the affected person were to be left without psychiatric care.”

55. Section 32 of the Act specifies the procedure for the examination of patients compulsorily confined in a hospital:

“1. A person placed in a psychiatric hospital on the grounds defined by section 29 of the present Act shall be subject to compulsory examination within 48 hours by a panel of psychiatrists of the hospital, who shall take a decision as to the need for hospitalisation. ...

2. If hospitalisation is considered necessary, the conclusion of the panel of psychiatrists shall be forwarded to the court having territorial jurisdiction over the hospital, within 24 hours, for a decision as to the person’s further confinement in the hospital.”

56. Sections 33-35 set out the procedure for judicial review of applications for the non-voluntary in-patient treatment of mentally ill persons:

### **Section 33**

“1. Non-voluntary hospitalisation for in-patient psychiatric care on the grounds laid down in section 29 of the present Act shall be subject to review by the court having territorial jurisdiction over the hospital.

2. An application for the non-voluntary placement of a person in a psychiatric hospital shall be filed by a representative of the hospital where the person is detained ...

3. A judge who accepts an application for review shall simultaneously order the person’s detention in a psychiatric hospital for the term necessary for that review.”

**Section 34**

“1. An application for the non-voluntary placement of a person in a psychiatric hospital shall be reviewed by a judge, on the premises of the court or hospital, within five days of receipt of the application.

2. The person shall be allowed to participate personally in the hearing to determine whether he should be hospitalised. If, based on information provided by a representative of the psychiatric hospital, the person’s mental state does not allow him to participate personally in the hearing, the application shall be reviewed by the judge on the hospital’s premises. ...”

**Section 35**

“1. After examining the application on the merits, the judge shall either grant or refuse it. ...”

57. On 5 March 2009 the Constitutional Court of Russia adopted Ruling No. 544-*O-P* in which it examined the compatibility of sections 32 and 34 (1) and (2) of the Psychiatric Care Act with Article 22 of the Constitution of the Russian Federation, which provides that a person can be arrested without a court order for a maximum period of forty-eight hours. The Constitutional Court found that the Psychiatric Care Act did not allow non-voluntary hospitalisation in a mental clinic for more than forty-eight hours without a court order (point 2.3 of the Ruling). It appears from the last paragraph of point 2.2 of the Ruling that the Constitutional Court did not consider that an interim decision taken by a judge by virtue of section 33 (3) of the Act qualified as a “court order” within the meaning of Article 22 of the Constitution, since the judge in such a situation did not examine the reasons for the confinement and had no power to release the person concerned. However, the Constitutional Court did not declare the relevant provisions of the Psychiatric Care Act unconstitutional.

58. Section 36 (3) of the Act provides for the courts to verify every six months whether the patient’s non-voluntary confinement continues to be necessary.

59. Section 37 (2) establishes the rights of a patient in a psychiatric hospital. In particular, the patient has the right to communicate with his lawyer without censorship. However, under section 37 (3) the doctor may limit the patient’s rights to correspond with other persons, have telephone conversations and meet visitors.

60. Section 47 of the Act provides that the doctors’ actions are open to appeal before a court. Section 48 stipulates *inter alia* that the person whose rights are affected by the actions of the psychiatric institution must participate in the court proceedings if it is compatible with his or her mental condition.

### **C. State and private expert institutions**

61. The State Forensic Expert Activities Act of 2001 (no. 73-FZ) defines the basic principles of the functioning and organisation of the State forensic institutions, which are supposed to assist judges, prosecutors and investigators in their professional activities where technical or scientific knowledge in a particular field is needed. Section 41 of that Act provides that forensic examination may be conducted by experts not belonging to the State forensic institutions, in accordance with Russia's procedural laws.

62. Article 75 of the old CCP provided that an expert examination had to be entrusted to "experts of the appropriate expert institutions or to other specialists appointed by the court. Any person having the appropriate knowledge [to give expert evidence] might be called [to testify before the court]."

### **D. Family Code**

63. Article 14 of the Family Code of the Russian Federation of 1995 (Federal Law No. 223-FZ) makes it impossible to marry if at least one of the would-be spouses has been declared incapable by a court because of a mental illness.

64. Under Article 16 of the Family Code a marriage may be dissolved at the request of the guardian of a spouse who has been declared incapable by the court.

### **E. International instruments concerning legal capacity and confinement to a psychiatric institution**

65. On 23 February 1999 the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The relevant provisions of these Principles read as follows:

#### **Principle 2 – Flexibility in legal response**

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal responses to be made to different degrees of incapacity and various situations. ...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

#### **Principle 3 – Maximum reservation of capacity**

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete

removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ...”

#### **Principle 6 – Proportionality**

“1. Where a measure of protection is necessary it should be proportionate to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ...”

#### **Principle 13 – Right to be heard in person**

“The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.”

#### **Principle 14 – Duration review and appeal**

“1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews. ...

3. There should be adequate rights of appeal.”

66. The United Nations Convention on the Rights of Persons with Disabilities (the “CRPD”), which Russia signed on 24 September 2008 and ratified on 25 September 2012, provides in Article 12 (3) that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. Article 12 (4) stipulates:

“States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity ... are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. ...”

Article 23 (a) of the CRPD establishes that “the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised.”

### **F. Comparative law**

67. A comparative law research concerning the law of persons with mental disabilities to marry and covering 25 member States of the Council of Europe demonstrated that in approximately one half (13/25) of the States

an incapacitation decision automatically leads to the loss of the right to marry. In approximately one third (9/25) of them a guardian's consent to the conclusion of marriage of an incapacitated person is needed. An express ban on the right to marry for mentally disabled persons is in place in six of the 25 member States. The language and procedures used to verify the legal consequences of the mental insufficiency in the marital sphere vary considerably from one member State to another.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

68. The applicant complained about his inability to have his legal incapacity reviewed. The Court will examine this complaint under Article 8, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

#### A. The parties' submissions

##### 1. *The Government*

69. The Government started by summarising provisions of the Russian legislation on legal capacity. They admitted that deprivation of legal capacity would constitute an interference with the private life of the person concerned. However, in the applicant's case it had been necessary in view of his diagnosis – schizophrenia, twice confirmed by doctors at the Serbskiy Institute in Moscow and the Omsk Regional Psychiatric Hospital, in 1999 and 2000 respectively. In particular, the psychiatric examination report prepared in 2000 concluded that the applicant was incapable of understanding the meaning of his actions and unable to control them. The incapacitation decision had thus been taken in order to protect the interests of other people, as well as his own interests. Such a limitation of his rights was provided for by Article 29 of the Civil Code and had therefore been “lawful”. The decision to deprive him of legal capacity had been taken in the applicant's absence because he was in a psychiatric hospital at that time and his appearance before the court could therefore have been prejudicial to his health. The option of taking a decision without seeing the person

concerned was provided for under Article 261 of the Code of Civil Procedure. The case had been heard by courts at two levels of jurisdiction, which had both concluded that the applicant's illness warranted the deprivation of his legal capacity.

70. The Government further indicated that the applicant's father had ceased to be his guardian on 10 December 2002, when the Public Health Authority approved the decision of the Guardianship Council. Between 10 and 20 December 2002 the applicant had no guardian.

## *2. The applicant*

71. The applicant argued that the decision of 26 February 2002 had been procedurally flawed. The judge conducted the hearing in the applicant's absence without giving any explanation as to why the latter's mental health prevented him from attending the hearing. The applicant acknowledged that he had suffered from some psychiatric problems, but there had been no indication that the applicant was aggressive or incapable of understanding the proceedings. It was therefore important for the judge responsible for deciding whether to restore the applicant's legal capacity to form a personal opinion about his mental capacity.

72. During the 2002 proceedings the applicant's representatives had requested that the District Court commission an independent medical body (a panel of experts from the Independent Psychiatric Association of Russia) to assess his mental capacity. This application was dismissed because in the court's view the law did not allow private entities to perform such assessments. However, Section 41 of the State Forensic Expert Activities Act explicitly stated the contrary. Moreover, Article 75 of the old CCP had provided for expert assessments to be performed by experts from the relevant institutions or by other specialists appointed by the court.

73. The applicant also stressed that, having rejected the request to commission an independent panel of experts, the District Court had not made arrangements for any other expert assessment of his mental capacity. The only State expert psychiatric institution in the Omsk Region was the Omsk Regional Psychiatric Hospital whose actions the applicant had challenged in the proceedings in question, and which had previously sought the incapacity in 2000 by applying to the prosecutor's office. It would have been contrary to the principle of equality of arms to appoint experts from the respondent hospital to assess the applicant's mental capacity.

74. The applicant also complained that after the transferral of the guardianship on 20 December 2002 to the Omsk Regional Psychiatric Hospital he had lost any possibility to have his legal capacity reviewed.

75. As to the substance of the domestic decisions, the applicant recalled that he had been entirely deprived of his legal capacity in accordance with Article 29 of the Civil Code, that is to say on the sole basis that he suffered from a mental disorder. In 2002 the judge had simply reiterated the



conclusion of the 2000 expert report and of the incapacity judgment, without establishing the actual mental capacity of the applicant at the time of the hearing. Thus, in the court's view, the mere diagnosis of a mental disability had been enough to strip the applicant of all his fundamental rights. The judge had not examined the applicant's actual capacity in any meaningful way in order to establish whether his mental health still prevented him from understanding the meaning of his actions and from controlling them. In any event, the existing legislative framework had not left the judge any other choice than to declare the person concerned fully incapacitated. The Russian Civil Code distinguished between full capacity and full incapacity, but did not provide for any borderline situation, except for drug or alcohol addicts.

### **B. The Court's assessment**

76. The Court notes that the applicant's complaint is two-fold. First, he complained that his Article 8 rights had been breached in the 2002 proceedings seeking the restoration of his legal capacity. Second, he complained that after 20 December 2002 he had no possibility to have his legal incapacity reviewed. The Court will start its analysis by addressing the first limb of the applicant's complaint.

#### *1. The applicant's attempts to recover his legal capacity until 20 December 2002*

77. The Court recalls that deprivation of legal capacity may amount to an interference with the private life of the person concerned (see *Matter v. Slovakia*, no. 31534/96, § 68, 5 July 1999, and *Shtukaturov v. Russia*, no. 44009/05, § 83, ECHR 2008). The Government in the present case did not contest that the applicant's incapacitation had amounted to such an interference, and the Court does not see any reason to hold otherwise, especially in view of various serious limitations to the applicant's personal autonomy which that measure entailed.

78. Under the six-month rule in Article 35 of the Convention the Court is precluded from examining the original incapacitation proceedings of 2000. That being said, the Court may examine the applicant's situation under Article 8 of the Convention insofar as his attempts to have his capacity restored in 2002 are concerned (see the admissibility decision of 6 January 2011 in the present case).

79. An issue arises as to whether the applicant's inability to obtain the review of his status must be examined in terms of the interference by the State with his Article 8 rights or rather in view of the positive obligations of the State under that provision. The Court recalls in this respect that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under

paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see *Oluić v. Croatia*, no. 61260/08, § 46, 20 May 2010, with further references). This approach is fully applicable in the case at hand: the Court will examine whether a fair balance was struck between his Article 8 rights and any other legitimate interest, private or public, which may have been at stake in the 2002 proceedings.

80. The Court accepts that depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure. In deciding whether legal capacity may be restored, and to what extent, the national authorities have a certain margin of appreciation. It is in the first place for the national courts to evaluate the evidence before them; the Court's task is to review under the Convention the decisions of those authorities (see, *mutatis mutandis*, *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33; *Luberti v. Italy*, 23 February 1984, Series A no. 75, § 27; and *Shtukurov v. Russia*, cited above, § 67).

81. That being said, the extent of the State's margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant's personal autonomy as in the present case (compare *X. and Y. v. Croatia*, no. 5193/09, § 102, 3 November 2011), the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure (see *Shtukurov v. Russia*, cited above, § 91). Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see *Görgülü v. Germany*, no. 74969/01, § 52, 26 February 2004).

**(a) Procedural aspects**

82. As to the procedural aspect of the domestic decisions, the Court first of all observes that on 26 February 2002 the domestic court refused to restore the applicant's legal capacity. The court made this decision without seeing or hearing him (see paragraph 16 above). The Court recalls that in such cases the individual concerned is not only an interested party but also the main object of the court's examination (see *X. and Y.*, cited above, § 83, with further references; see also *mutatis mutandis*, *Winterwerp*, cited above, § 74). There are possible exceptions from the rule of personal presence (see, as an example, *Berková v. Slovakia*, no. 67149/01, §§ 138 et seq., 24 March 2009); however, departure from this rule is possible only where the domestic court carefully examined this issue. In the present case, however,

the District Court merely stated that the applicant's personal presence would be "prejudicial to his health", and there is no evidence that the court ever sought a doctor's opinion on that particular question, namely what effect appearing in court might have had on the applicant. The Court is not aware of any other obstacles to the applicant's personal appearance in court. The Court considers that a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient.

83. The second aspect of the domestic proceedings of concern to the Court is the refusal of the domestic court to commission a new psychiatric examination of the applicant (see paragraphs 14 and 16 above). The Court recalls its findings in *Stanev v. Bulgaria* [GC] (no. 36760/06, § 241), ECHR 2012) where it held, in the context of the right of access to court under Article 6 § 1, that "the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned".

84. The Court observes that in February 2002 more than a year and a half had elapsed since the original incapacitation decision had been taken in June 2000 (see paragraph 10 above). Nothing in the case file indicates that the applicant's condition was irreversible, or that the time elapsed since his incapacitation was too short for the question to be examined again. The Court concludes that in these circumstances the applicant was entitled to a full review of his status, which, as a matter of principle, should have included some sort of fresh expert assessment of his condition.

85. The applicant asked for a fresh examination of his mental condition and asked the court to entrust it to a non-State medical institution. However, the court refused on the sole ground that it was prohibited by law. The Court is not aware of any norm in Russian law that would prohibit a court from seeking an expert opinion from a clinic or a doctor not belonging to the State system of public health institutions. The Government did not refer to any such norm either. The fact that there is a State-run system of forensic institutions (see the domestic court's reasoning in paragraph 16 above) does not mean that they have a monopoly on providing expert opinions to the courts. On the contrary, Russian law at the time explicitly permitted examinations by experts not belonging to the State forensic institutions (see paragraph 61 above). The domestic court's decision in this respect appears to have no basis in the domestic law.

86. Further, the Court does not see what prevented the domestic court from seeking a fresh expert opinion from experts not directly affiliated with the Omsk Regional Psychiatric Hospital. The Court observes that one of the reasons for the applicant's many hospitalisations in the Omsk Regional Psychiatric Hospital were his numerous complaints about the doctors of that institution. His incapacitation was also based on the opinion of the doctors from that hospital. Nevertheless, when the applicant sought to restore his legal capacity (see paragraphs 12 et seq. above), the District Court entrusted his examination to the same hospital. In such circumstances the applicant's

demand was not frivolous: first, he refused to submit himself for an examination in the Omsk Regional Hospital, and then he asked for an examination by the doctors from the Independent Psychiatric Association of Russia (see paragraph 15 above).

87. The Court reiterates that where the opinion of an expert is likely to play a decisive role in the proceedings, as in the case at hand, the expert's neutrality becomes an important requirement which should be given due consideration. Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention (see, *mutatis mutandis*, *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007, with further references). In the Court's opinion an expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake.

88. The Court notes that the applicant never categorically refused to submit himself to an examination, and that he doubted the neutrality of the doctors from the Omsk Regional Psychiatric Hospital. Without taking a position as to whether his doubts were well-founded, the Court considers that in such circumstances it was the District Court's duty to make arrangements for a fresh examination of the applicant by an independent psychiatric institution – not necessarily private, but lacking direct affiliation to the Omsk Regional Psychiatric Hospital. The Government have not referred to any serious considerations that might have prevented the court from seeking such an examination.

89. The Court recalls that according to the judgment of 26 February 2002 the applicant continued to suffer from a mental disorder which had warranted his incapacitation in 2000. However, in a situation where the court did not see the person concerned personally and did not obtain a fresh assessment of his mental condition, such a conclusion cannot be regarded as reliable.

**(b) Substantive aspects**

90. As to the substance of the domestic decisions, the Court observes that the judgment of 26 February 2002 relied on the medical report prepared in 2000. The Court does not cast doubt on the findings of that report, in particular that in 2000 the applicant suffered from schizophrenia. However, the Court recalls that in the *Shtukurov* case, cited above, § 94, it held that “the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure”. In *Shtukurov* the Court found that in the domestic proceedings the issue of “the kind and degree” of the applicant's mental illness remained unresolved.

91. In the present case the Court faces essentially the same situation as in *Shtukurov*. On the one hand, it is clear that the applicant suffered from a

serious and persistent mental disorder: he had delusory ideas, was a vexatious litigant, etc. On the other hand, the Serbskiy Institute report of 1999 did not refer to any particular incident of violent, self-destructive or otherwise grossly irresponsible behaviour on the part of the applicant since 1996, and did not allege that the applicant was completely unable to take care of himself (see paragraph 8 above).

92. The Court is ready to admit that some measure of protection in respect of the applicant might have been advisable. However, the Russian Civil Code did not provide for any intermediate form of limitation of legal capacity for mentally ill persons – this existed only in respect of drug or alcohol addicts (*ibid.*, § 95). Therefore, the domestic court in the present case, as in *Shtukaturov*, had no other choice than to apply and maintain full incapacity – the most stringent measure which meant total loss of autonomy in nearly all areas of life. That measure was, in the opinion of the Court and in the light of materials of the case, disproportionate to the legitimate aim pursued.

#### (c) Conclusion

93. In sum, the confirmation of the applicant's incapacity status in 2002 based on the report of 2000 was not justified for at least two reasons: first, because no fresh assessment of the applicant's mental condition was made (either by the doctors, or by the court itself) and the applicant was not personally present in court, and, second, because it is doubtful whether the applicant's mental condition, as described in the report of 2000, required full incapacitation. Therefore, there was a breach of Article 8 of the Convention on that account.

#### 2. *The applicant's inability to restore his legal capacity after 20 December 2002*

94. The Court will now turn to the applicant's situation after 20 December 2002, when the guardianship was transferred to the Omsk Regional Psychiatric Hospital (see paragraph 31 above). The Court recalls that before that date the applicant's guardian (his father) supported the applicant's attempts to restore legal capacity. Afterwards, the situation changed when the guardianship was transferred to the hospital administration. It is clear from the materials of the case that the hospital sought the applicant's confinement and was opposed to his attempts to recover his legal capacity. Thus, from 20 December 2002 onwards, the applicant had no opportunity of challenging his status.

95. Subsequently, the applicant's father tried to reinstate himself as the applicant's guardian (see paragraph 38 above). If successful, he would have been able to challenge the applicant's status again. However, the attempt failed with the judgment of 16 July 2003 by the Kuybyshevskiy District Court, which appears to have been the final decision on that matter. From

that date onwards the applicant was fully dependant on the psychiatric hospital.

96. The Court recalls its findings in the *Shtukaturov* case, cited above, § 90, where it criticised the Russian law on incapacitation in the following terms:

“ [T]he Court notes that the interference with the applicant’s private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life. Furthermore, “full incapacitation” was applied for an indefinite period and could not, as the applicant’s case shows, be challenged otherwise than through the guardian, who opposed any attempts to discontinue the measure ...”

In the present case the situation was identical: the applicant could only challenge his status through the guardian, who opposed any attempts to discontinue the measure. That situation continued at least until 10 October 2003, when the applicant’s daughter was appointed as his guardian (see paragraph 40 above). It is unclear whether she wished to restore the applicant’s status: the Court does not have sufficient information about the proceedings allegedly initiated in 2006 by the applicant’s relatives (see paragraph 42 above). Be that as it may, it is clear that at least during the time when the role of the applicant’s guardian was assumed by the psychiatric hospital the applicant was unable to institute any legal proceedings to challenge his status.

97. The Court reiterates that in the vast majority of cases where the ability of a person to reason and to act rationally is affected by a mental illness, his situation is subject to change. This is why the Principles concerning the legal protection of incapable adults of 1999 (see paragraph 65 above, Principle 14), recommend a periodical re-assessment of the condition of such persons. A similar requirement follows from Article 12 (4) of the CPRD (see paragraph 66 above). In *Stanev*, cited above, the Court observed that “there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity” (§ 243). In Russia at the time the law neither provided for an automatic review nor for a direct access to the court for an incapacitated person, so the latter was fully dependant on his guardian in this respect (see, *mutatis mutandis*, *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 134, 13 October 2009). Where, as in the present case, the guardian opposed the review of the status of his ward, the latter had no effective legal remedy to challenge the status. Having regard to what was at stake for the applicant, the Court concludes that his inability for a considerable period of time to assert his rights under Article 8 was incompatible with the requirements of that provision of the Convention. Consequently, there was a violation of Article 8 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

98. The applicant complained that his confinement in a psychiatric hospital in 2002-2003 was contrary to Article 5 §§ 1 (e) and 4 of the Convention, which read as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(e) the lawful detention of persons ... of unsound mind ...;

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

### A. The parties' submissions

#### 1. *The Government*

99. The Government claimed that the applicant's rights under Article 5 of the Convention had not been violated. As to the placement of the applicant in a psychiatric hospital in December 2002, the Government indicated that he had been taken there at the request of the district psychiatrist. Upon his arrival at the hospital the applicant had been immediately examined by a doctor on duty. In the ensuing forty-eight hours he had been examined by a panel of three psychiatrists. Following that examination the hospital had sent a hospitalisation request to the court. Consequently, his confinement had been requested and authorised in accordance with the domestic procedural rules established in the Psychiatric Care Act of 1992.

100. Subsequently, his further hospitalisation had been ordered in connection with the state of his health. The applicant's mental illness had been diagnosed on many occasions. Thus, according to the letter of the Ministry of Public Health and Social Development, the applicant suffered from severe schizophrenia. He had thus been incapable of understanding his actions or controlling them. Occasionally he had been in remission, but without any stable improvement in his health. Towards the end of 2002 the applicant had suffered yet another deterioration of his mental condition. He had stopped taking his medicine and visiting the district psychiatrist regularly. As a result, without proper medical supervision and treatment, there had been a risk of further deterioration of his health. In such circumstances the doctors, in accordance with the Psychiatric Care Act of 1992, had ordered the applicant's confinement against his will.

101. As to the legal remedies in force at the material time, the Government submitted that the applicant's father had been stripped of his guardianship in accordance with the law. The applicant's further

hospitalisation had been requested by the hospital, which, from 20 December 2002, had been appointed to act as his guardian. The proceedings concerning the applicant's confinement had been terminated because, after the appointment of the hospital as his guardian, his confinement had become, in domestic law, voluntary. The first-instance court had examined the case on the merits because the judge had not been informed by the parties of the decision of the Guardianship Council stripping the applicant's father of his guardianship. Under the domestic law, the applicant had been able to act, including before the courts, albeit only through his guardian.

## *2. The applicant*

102. The applicant maintained that he had been admitted to the mental hospital against his own and his guardian's will. His psychiatric confinement in 2002 had probably been formally lawful, but his disorder had not been of a kind or degree warranting the confinement. It appears from the hospitalisation order that the psychiatrist had decided to confine the applicant in order to prevent him from lodging complaints. The Government had provided no explanation as to why the applicant's "reformist" behaviour indicated any real threat of further worsening of his state, if left without the prescribed treatment. The hospital's psychiatric report had never considered less restrictive measures such as out-patient treatment. The applicant had been detained in the mental hospital for a year, and upon his discharge his mental health remained the same as at the time of his admission.

103. The applicant noted that from 11 December 2002 his confinement had been authorised by the provisional detention order. However, in its decision of 5 March 2009 the Constitutional Court of the Russian Federation had held that a provisional detention order was not a judicial decision required in constitutional terms (see paragraph 57 above). Furthermore, in the present case the court had issued the order without hearing the applicant or his representative. Lastly, under Russian law its validity had been limited to five days, whereas the applicant had been detained pursuant to that provisional order at least until 20 December 2002, when his further confinement had been authorised by the Guardianship Council.

104. As regards the applicant's detention from 20 December 2002 onwards, the applicant noted that, formally speaking, his hospitalisation had become voluntary: the consent of the hospital – his new guardian and at the same time the detaining authority – had been considered sufficient under the domestic law for his indefinite detention without court order. In other words, he was detained on the basis of an administrative decision which was issued without the applicant being heard, and his objection to the hospital placement had been ignored. In the applicant's opinion, such consent was



no substitute for a judicial decision. His subsequent detention was therefore arbitrary.

105. The applicant further submitted that, under Russian law, the courts were required to verify every six months whether the patient's non-voluntary confinement continues to be necessary (see paragraph 58 above). It was not evident from the Government's submissions and from the documents appended thereto that the applicant had been regularly examined by a panel of psychiatrists in order to decide on the need for his continued confinement, and thus that the procedure prescribed by domestic law had been followed in this regard.

106. The applicant noted that the only way he could have applied for release from the hospital was through his guardian. However, since the detaining authority had become the applicant's guardian by virtue of law, it obtained unrestricted discretion to decide on the continuation of his detention. Thus, judicial review provided by Section 47 of the Psychiatric Care Act could not have been regarded as an effective remedy.

## **B. The Court's assessment**

### *1. Compliance with Article 5 § 1*

107. Insofar as the applicant's complaint under Article 5 § 1 of the Convention is concerned, his confinement in the mental hospital can be divided into two periods: between 9 and 20 December 2002, and after 20 December 2002, when the hospital became his guardian.

108. At the outset, the Court notes that it is not disputed by the parties that the applicant's confinement in the mental hospital constituted "deprivation of liberty" within the meaning of Article 5. The Government also conceded that the applicant had been confined against his will, even though subsequently the newly appointed guardian had approved that measure.

#### **(a) General principles**

109. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must comply with two major requirements. First of all, it must be "lawful" in domestic terms, including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Secondly, the Court's case-law under Article 5 requires that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Creangă v. Romania* [GC], no. 29226/03, § 84, 23 February 2012; *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244; see also *Venios v. Greece*, no. 33055/08, §§ 48, 5 July 2011, and

*Karamanof v. Greece*, no. 46372/09, §§ 40 et seq., 26 July 2011). That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

110. As to the second of the above conditions, an individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement (i.e. where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, or where he needs control and supervision to prevent him, for example, causing harm to himself or other persons - see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV); thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39; *Shtukaturov*, cited above, § 114; and *Varbanov v. Bulgaria*, no. 31365/96, § 45, ECHR 2000-X).

**(b) The period between 9 and 20 December 2002**

111. The Court will first examine whether the applicant’s detention between 9 and 20 December 2004 was lawful under domestic law. The Court observes that the parties involved in the proceedings at that moment seemed to be uncertain about the legal framework in which they operated. Thus, the Guardianship Council decided to strip the father of his status as guardian on 6 December 2002. It is difficult to say whether that decision became effective in its own right, or only upon further confirmation by the Public Health Authority (which was obtained on 10 December 2002). Be that as it may, during that period the hospital and the court acted as if the father was still the applicant’s guardian and, therefore, as if the confinement in the mental hospital was “non-voluntary”.

112. In this assumption, the provisions of Sections 32 et seq. of the Psychiatric Care Act of 1992 (see paragraphs 55 and 56 above) concerning non-voluntary confinement must have applied. According to the Act, the authorities may place a person in the “preliminary confinement” for eight days in order to decide whether his further confinement is necessary. Thus, the hospital has forty-eight hours to examine the patient (Section 32 (1) of the Act), and then twenty-four hours to submit a hospitalisation request to a competent judicial authority (Section 32 (2) of the Act), which, in turn, has five days to decide on that request (Section 34 (1) of the Act).

113. The Court notes that in 2009 the Constitutional Court examined the compatibility of those provisions with Article 22 of the Constitution (see paragraph 57 above). While the Psychiatric Care Act was not declared unconstitutional, the Ruling can reasonably be construed as requiring that a person confined in a psychiatric hospital obtain full judicial review of his situation not within eight days, as provided by the Act, but within forty-

eight hours – the maximum period of detention without a court order provided for by the Constitution. The Court observes, however, that the Ruling of the Constitutional Court was formulated in indecisive terms, and the validity of the Act was finally confirmed. In any event, nothing suggests that the 2009 Ruling should have had a retroactive effect and apply to the applicant's situation. The Court concludes, therefore, that the "lawfulness" of the applicant's confinement in 2002 must be established in terms of the provisions of the Psychiatric Care Act, as it could have reasonably be interpreted at the time of the events.

114. The applicant's initial admission to the Omsk Regional Psychiatric Hospital was ordered by a district psychiatrist on 4 December 2002 (see paragraph 21 above). It appears that at that stage the requirements of the law were respected: the applicant was suffering from a mental disorder and there was a decision of a psychiatrist to conduct his further examination in the hospital (see paragraph 53 above). After the applicant's placement in the hospital on 9 December 2002, the hospital, under Section 32 of the Act, had forty-eight hours to conduct a further assessment of the applicant's mental health and twenty-four hours to seek a hospitalisation order from the court (see paragraph 55 above). Although the panel examined the applicant on the same day, which was within the time-limits, the request for further detention was received by the court only on 11 December 2002, that is more than twenty-four hours. The court then had five days under the Act to examine the request and authorise further detention or order the applicant's release (see paragraph 56 above). That time-limit was not observed either – the first hearing on was held on 17 December 2002, and at the end of that hearing the judge, without taking any decision on the substance of the case, adjourned the hearing until 24 December 2002, although the Act did not provide for such a possibility (see *Rakevich v. Russia*, no. 58973/00, § 35, 28 October 2003). The Court concludes that the applicant's detention during this first period was not authorised in accordance with the procedure prescribed by the Psychiatric Care Act.

**(c) The period after 20 December 2002**

115. On 20 December 2002 the hospital, which had earlier requested the applicant's confinement, became the applicant's guardian by virtue of the decision of the Guardianship Council and in accordance with Article 35 (4) of the Civil Code. According to Section 28 of the Psychiatric Care Act, if the guardian consented to the hospitalisation it was deemed "voluntary", regardless of the actual wishes of the ward, and no court authorisation for the hospitalisation was required (see paragraph 53 above). The court proceedings concerning the applicant's confinement were consequently terminated.

116. The applicant's situation during the second period closely resembles the one examined by the Court in the *Shtukaturov* case (cited

above, § 21). The Court reiterates that confinement in a psychiatric hospital does not necessarily become “voluntary” in Convention terms because the consent of the guardian was obtained. Although it is sometimes difficult to discern the genuine will of a mentally ill person (see, for example, *Storck v. Germany*, no. 61603/00, § 74, ECHR 2005-V), the Court is confident that in the present case the applicant did not agree to the hospitalisation. This is clearly demonstrated by the fact that his confinement was originally regarded as non-voluntary by all the parties involved. Despite that, from 20 December 2002 it became possible to keep him confined without a court order. As a result, the applicant was unable to enjoy the safeguards associated with the judicial process. This factor alone is sufficient, in the Court’s view, to conclude that the applicant’s detention was incompatible with Article 5 § 1 of the Convention.

117. Moreover, the guardian was the same medical institution which had initiated the hospitalisation, which was responsible for the patient’s further treatment and which had previously been attacked in court proceedings by the applicant. In other words, the impartiality of the newly appointed guardian vis-à-vis the applicant were open to doubt.

118. Finally, in the absence of a judicial decision on the substance of the applicant’s situation, it is difficult to say whether his confinement was justified in the light of the criteria set out in the *Winterwerp* case, cited above, § 39. Having examined the reports prepared by the district psychiatrist on 4 December 2002 and by the panel of three doctors inform the Omsk Regional Psychiatric Hospital on 9 December 2002, the Court notes that the applicant did indeed suffer from schizophrenia. However, those reports mostly referred to the history of the applicant’s illness and did not mention recent instances of aggressive or self-destructive behaviour. It appears that the major reason for the confinement in 2002 were his numerous complaints to various State bodies, in particular his complaints against his doctors, but those incidents were clearly not such as to warrant his confinement (cf. *Stanev v. Bulgaria*, cited above, § 157).

119. The Court reiterates that normally it would not review the opinion of a doctor whose impartiality and qualifications were not called into question and who had the benefit of direct contact with the patient. In the present case, however, the Court is prepared to take a critical view of the findings of the psychiatrists, mostly because (a) their conclusions were not submitted to judicial scrutiny at the domestic level, (b) their neutrality was open to doubt, and (c) their reports were not specific enough on points which are crucial for deciding whether compulsory hospitalisation was necessary.

**(d) Conclusion**

120. The above elements are sufficient for the Court to conclude that the applicant's hospitalisation between 9 December 2002 and 10 December 2003 was contrary to Article 5 § 1 of the Convention.

*2. Compliance with Article 5 § 4 of the Convention*

121. The Court reiterates the principle established in § 39 of the *Winterwerp* judgment to the effect that the validity of a person's continued confinement depends upon the persistence of mental illness of a kind or degree warranting compulsory confinement. The Psychiatric Care Act contains similar requirements, providing that the court should consider this issue every six months. However, its provisions concern only those who are confined to a hospital against their will. In domestic terms the applicant's detention was "voluntary" (see paragraph 53 above). Therefore, while the hospital remained the applicant's guardian, there was no possibility of automatic judicial review. In addition, the applicant himself, as an incapacitated person, was unable to seek release from the hospital. In a nearly identical situation the Court found that the inability of a patient of a psychiatric hospital to seek release from it otherwise than through his guardian, where there was no periodic judicial review of the lawfulness of his confinement, amounted to a violation of Article 5 § 4 of the Convention (see *D.D. v. Lithuania*, (no. 13469/06, §§ 164 et seq., 14 February 2012).

122. The Court concludes that in this situation the applicant was unable to "take proceedings by which the lawfulness of his detention [would] be decided ... by a court". There was, therefore, a breach of Article 5 § 4 of the Convention on this account.

### III. ALLEGED VIOLATION OF ARTICLES 12 OF THE CONVENTION

123. The applicant complained that he had not been able to register a marriage with his fiancée. He referred to Article 12 of the Convention (right to marry), which reads as follows:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

124. The Court observes that the applicant's inability to marry was one of many legal consequences of his incapacity status. The Court has already found that the maintenance of that status (the only measure of protection applicable under the Russian Civil Code to mentally ill persons) was in the circumstances disproportionate and violated Article 8 of the Convention (see paragraph 97 above). In other words, the applicant was unable to marry primarily because of the same two major factors analysed under Article 8, namely the deficiencies in the domestic decision-making process and the rigidity of the Russian law on incapacity. In view of its findings under

Article 8 of the Convention, the Court considers that there is no need for a separate examination under Article 12 of the Convention.

#### IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

125. The applicant also complained that he did not have effective remedies under Article 13 of the Convention in connection with his complaints under Articles 8 and 12, set out above. Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

126. The Court notes that in analysing the proportionality of the measure complained of under Article 8 it took account of the fact that the applicant had been unable to challenge that measure independently from his guardian, and that the applicant had not obtained an effective review of his status even when his guardian had sought it. In these circumstances the Court does not consider it necessary to re-examine the issue of effective remedies under Article 13 of the Convention separately (see *Shtukurov*, cited above, §§ 132-133).

#### V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

##### **A. Damage**

128. The applicant claimed EUR 30,000 (thirty thousand euros) under the head of non-pecuniary damages. The Government disputed that figure as excessive and considered that the mere finding of a violation would constitute sufficient just satisfaction. The Court, taking into account the cumulative effect of the violations of the applicant’s rights, their duration, and the fact that the applicant, who suffered from a mental disorder, was in a particularly vulnerable situation, and ruling on an equitable basis, awards the applicant EUR 25,000 in respect of non-pecuniary damage.

129. If, at the moment of payment of the award, the applicant is legally incapacitated, the Government should ensure that the amount awarded is transferred to the guardian, on the applicant’s behalf and in his best interest.

## **B. Costs and expenses**

130. The applicant did not ask for reimbursement of costs and expenses incurred in connection with the proceedings. The Court therefore does not award anything under this head.

## **C. Default interest**

131. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Holds* that there has been a violation of Article 8 of the Convention on account of the maintenance of the applicant's status as an incapacitated person and his inability to have it reviewed in 2002 and 2003;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's hospitalisation in the psychiatric hospital in 2002-2003;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the applicant's inability to obtain a review of the lawfulness of his detention in the psychiatric hospital;
4. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 12 of the Convention;
5. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 13 of the Convention;
6. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage, to be converted into the Russian Roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen  
Registrar

Isabelle Berro-Lefèvre  
President