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

1959 · 50 · 2009

SECOND SECTION

**CASE OF SALONTAJI-DROBNJAK v. SERBIA**

*(Application no. 36500/05)*

JUDGMENT

STRASBOURG

13 October 2009

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Salontaji-Drobnjak v. Serbia,**

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

Françoise Tulkens, *President,*
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria,
Kristina Pardalos, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 22 September 2009,

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

# PROCEDURE

1. The case originated in an application (no. 36500/05) against the State Union of Serbia and Montenegro lodged with the Court, under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by, at that time, a national of the State Union of Serbia and Montenegro, Mr Slavko Salontaji-Drobnjak ("the applicant"), on 11 October 2005.

2. As of 3 June 2006, following the Montenegrin declaration of independence, Serbia remained the sole respondent in the proceedings before the Court.

3. The applicant was represented by Mr Y. Grozev, a lawyer practising in Sofia, and Ms Lj. Palibrk of the Helsinki Committee for Human Rights in Serbia, a non-governmental organisation based in Belgrade. The Government of the State Union of Serbia and Montenegro and, subsequently, the Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.

4. The applicant alleged numerous violations of his rights guaranteed under Articles 6 § 1, 8 and 13 of the Convention, all of which occurred in the context of the partial deprivation of his legal capacity and his subsequent attempts to have this capacity fully restored.

5. On 22 May 2008 the President of the Second Section decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it was also decided to examine the merits of the application at the same time as its admissibility.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949 and lives in Vrbas, Serbia.

7. The facts of the case, as submitted by the parties, may be summarised as follows.

## A. Introduction

8. Since 1973 the applicant has brought, mostly before the Municipal Court (*Opštinski sud*) in Vrbas, some two hundred lawsuits against his employer and its management, as well as various private parties and Government officials, alleging irregularities, harassment and/or malfeasance. He has also lodged numerous criminal complaints on the same grounds.

9. In 2003 insolvency proceedings were instituted in respect of the applicant's employer and the applicant was laid off.

10. The said lawsuits, however, continued, some of which were subsequently concluded in favour of the applicant.

## B. The first set of criminal proceedings and other related facts

11. In June 1996 the applicant threatened his employer's general manager with a hunting knife and a fake hand grenade. Ultimately, however, he voluntarily surrendered both, leaving the manager with a cut on his right hand.

12. The applicant was subsequently charged with the crime of intimidation (*ugrožavanje sigurnosti*).

13. In the course of these proceedings the applicant was examined by two teams of medical experts.

14. On 30 August 1996 the first team of experts (*Medicinski centar Novi Sad - Institut za psihijatriju*) stated that he was mentally ill, suffering from paranoid psychosis, and could not therefore be held criminally liable. Further, since there was a real danger that the applicant could reoffend, the team recommended mandatory psychiatric treatment on an in-patient basis.

15. On 6 November 1996 the second team of experts (*KPD bolnica u Beogradu*) found that the applicant had a borderline personality disorder, but deemed him not seriously aggressive and recommended no in-house psychiatric treatment.

16. On 22 November 1996 the Municipal Court in Vrbas found that the applicant was not criminally liable given that he could not control his actions nor properly comprehend their meaning (see paragraph 84 below). It ordered, however, the applicant's mandatory psychiatric treatment on an out-patient basis.

17. Between 22 November 1996 and 15 November 1998 the applicant regularly reported for treatment. On 16 November 1998 he was discharged from this obligation.

18. On 5 September 2003 the applicant was summoned by the Vrbas police in order to give a statement concerning his repeated threats allegedly made to the same general manager.

## C. The proceedings for the assessment of the applicant's legal capacity and other related facts

19. Following receipt of requests to this effect from the District Court (*Okružni sud*) in Novi Sad and the Supreme Court of Serbia (*Vrhovni sud Srbije*) of 26 October 2001 and 31 October 2001 respectively, which courts had themselves already been dealing with the applicant's claims in a number of separate, pending civil suits (see paragraph 106 below, Articles 82 and 79, in that order), in March 2002 the Municipal Court in Vrbas recommended to the local Social Care Centre (*Centar za socijalni rad*, "the SCC") to formally request the institution of proceedings for the assessment of the applicant's legal capacity.

20. On 18 March 2002 the SCC agreed with this proposal.

21. On 21 March 2002 the Municipal Court noted that the said proceeding had thus been instituted *ex officio* and ordered that the applicant be subjected to a psychiatric examination by the Forensic Medical Board of the Novi Sad Medical Faculty (*Sudsko-medicinski odbor medicinskog fakulteta u Novom Sadu*). In so doing, it reasoned as follows:

> "Considering the fact that [the applicant] is involved in many legal cases and that the number of these cases ... is sharply on the increase, it is in the court's interest that his decision-making ability be examined ... [as already] ... pointed out by the District Court in Novi Sad and the Supreme Court of Serbia ..."

22. On the same day the applicant was served with this decision.

23. The Forensic Medical Board thereafter scheduled examinations for 8 April 2002 and 15 April 2002, but the applicant refused to be examined unless certain conditions were met. In particular, the applicant requested that: (i) he be informed in advance of the identity of the experts who would examine him; (ii) he, ultimately, be given an opportunity to accept or reject the experts selected; (iii) his examination be carried out in a courtroom in the presence of the judge as well as the public; and (iv) the entire examination be recorded audio-visually.

24. On 26 April 2002 and again on 14 March 2003 the Forensic Medical Board informed the Municipal Court that these conditions were unacceptable.

25. Two other experts, appointed by the Municipal Court subsequently, shared this view and declined the assignment, while another two were unavailable or unwilling to personally examine the applicant.

26. In the meantime, on 20 March 2003, the SCC appointed Lj.Z. to act as the applicant's temporary guardian and represent him in the proceedings.

27. On 29 May 2003 the applicant was informed that the President of the Municipal Court had agreed to allow him to make an audio recording of his psychiatric examination.

28. On 8 November 2003 the SCC appointed Z.P. to act as the applicant's new temporary guardian.

29. On 17 February 2004 the applicant requested a loan from one of the experts, given his "difficult financial situation".

30. On 19 February 2004 the applicant informed the Municipal Court about his family's grave financial difficulties, citing his inability to obtain compensation in various civil suits as the main reason therefor.

31. Following several hearings, held by June 2004, attended by the experts and/or the applicant, on 28 June 2004 the Municipal Court ordered that the latter be subjected to a compulsory examination and placed in a psychiatric institution for a period of no longer than three months. In so doing, the court relied on the opinions of the experts heard to date and the applicant's own unwillingness to be subjected to a psychiatric examination.

32. The applicant and Z.P. each filed an appeal against this decision.

33. On 12 July 2004 the District Court confirmed the decision rendered at first instance.

34. On 5 August 2004 the District Public Prosecutor (*Okružni javni tužilac*) in Novi Sad urged the Municipal Court to expedite the proceedings, alleging that the applicant had recently threatened his staff in a telephone conversation.

35. The Municipal Court subsequently, on two separate occasions, invited the applicant to willingly undergo a psychiatric examination.

36. On 13 September 2004, 17 September 2004 and 8 October 2004 Z.P. complained to the President of the Municipal Court, the President of the Supreme Court and the SCC, respectively, stating that the proceedings were initiated in violation of the law, that they were excessively long and had a negative impact on the applicant and his family.

37. On 20 October 2004 Z.P. informed the SCC and the Municipal Court that he had decided to cease being the applicant's temporary guardian.

38. On 25 November 2004 the SCC informed the Municipal Court that the applicant could represent himself in the proceedings.

39. On an unspecified date the Municipal Court ordered the police to arrest the applicant and place him in a psychiatric institution for examination.

40. On 7 December 2004 the applicant accepted to be examined in the premises of the Novi Sad Psychiatric Institute (*Institut za psihijatriju kliničkog centra u Novom Sadu*). Upon his request, the judge in charge of his case was present during the examination.

41. On 24 December 2004 the Novi Sad Psychiatric Institute concluded that the applicant suffered from litigious paranoia (*paranoia querulans*), and recommended that his legal capacity be restricted. The experts recalled, *inter alia*, numerous lawsuits brought and submissions lodged by the applicant, the criminal proceedings instituted against him in 1996, the threats allegedly made in August 2004, and his debt incurred on account of legal costs.

42. On 16 December 2004 the presiding judge, V.J., requested to be removed from the case, noting that he had been subjected to continued harassment by the applicant. On 27 December 2004, however, the acting President of the Municipal Court rejected this request.

43. In response to the Municipal Court's prior motion, on 12 February 2005 the SCC appointed M.G. to act as the applicant's temporary guardian and represent him in the proceedings.

44. On 20 January 2005 the applicant informed the Municipal Court about his family situation. He described the ongoing conflict with his wife concerning his alleged failure to contribute to the family budget, the mutual threats made, and her opinion that all problems stemmed from his “status”.

45. The applicant subsequently gave a written authorization to his neighbour S.N. to represent him before the Municipal Court. S.N. duly submitted his power of attorney and was accordingly summoned to appear at the next hearing.

46. The hearing scheduled for 7 February 2005 was adjourned, at the applicant's request, and the next hearing was scheduled for 22 February 2005.

47. On 22 February 2005 the hearing was held and presided over by another judge. The applicant was not present because he had already been placed in pre-trial detention within a separate criminal case brought against him (see paragraph 53 below). The applicant's representative, S.N., appeared at the hearing, but was not allowed inside the courtroom. The applicant was instead represented by M.G., the lawyer employed at the SCC who had been appointed to represent him. It would seem that the applicant had never met M.G. and was not aware of her appointment.

48. After the hearing, on the same day, the Municipal Court ruled that the applicant was to be partially deprived of his legal capacity. It further specified that his capacity for taking part in legal actions, deciding about his own medical treatment, and dealing with large amounts of money, was to be restricted (“*ograničava se poslovna sposobnost za učestvovanje u pravnim radnjama, odlučivanje o sopstvenom lečenju i raspologanje većim novčanim sredstvima*”). The Municipal Court relied on

the report produced by the Novi Sad Psychiatric Institute, and recalled the expert reports produced in 1996. Lastly, it stated that there was no need to hear the applicant in person since, based on the available psychiatric evidence, this would serve no useful purpose (*nije celishodno*) within the meaning of Article 36 § 2 of the Non-contentious Proceedings Act ("the NCPA"; see paragraph 101 below). There is no evidence in the case file indicating that M.G. had challenged this decision or the report issued by the Novi Sad Psychiatric Institute.

49. On 24 March 2005 the applicant filed an appeal, arguing that: (i) the proceedings had been instituted unlawfully; (ii) the SCC had appointed a person to represent him without his knowledge; (iii) the person whom he had authorised to represent him was not allowed to do so; and (iv) he had personally been excluded from the hearing when his legal capacity was being considered.

50. On 12 May 2005 the District Court in Novi Sad upheld the decision rendered at first instance.

51. On 31 May 2005 the applicant filed an appeal on points of law (*revizija*) with the Supreme Court, relying on the same arguments. He further complained about the methods of his examination and its conclusions.

52. On 28 February 2006 the Supreme Court ruled against the applicant.

### D. The second set of criminal proceedings

53. On 9 February 2005 the applicant was arrested by the police and charged with the crime of intimidation. These charges were based on complaints filed by V.J., the judge who had been dealing with the applicant's civil case, the President of the Municipal Court in Vrbas, and several other individuals.

54. On the same day the applicant was questioned by the investigating judge of the Municipal Court in Vrbas who ordered his detention.

55. On 14 February 2005 the investigating judge opened a formal judicial investigation against the applicant, and on 23 March 2005 he ordered that the applicant be subjected to a psychiatric examination.

56. On 26 April 2005 a team of medical experts from the Belgrade Prison Hospital (*KPD bolnica u Beogradu*) issued a report. The report, *inter alia*, concluded as follows:

> "It is evident that at the time when ... [the criminal act in question was allegedly committed by the applicant] ... he had had distorted ideas ... [about] ... the court ... [as well as] ... the judges and other ... [persons] ... involved in the proceedings ... Taking into account ... [the applicant's] ... personality and his ... disorder ... we consider that his capacity to comprehend the meaning of his actions, as well as to control them, was significantly reduced ... [but not excluded] ..."

57. On 9 May 2005 the applicant was released from detention.

58. On 25 May 2005 the investigating judge questioned one of the members of the said team of medical experts in order to clarify their current conclusions in the light of any inconsistencies with their report of 1996. The expert explained, *inter alia*, that the applicant suffered from a borderline personality disorder, that this disorder was not, as such, a mental illness, but that it was also characterised by occasional psychotic episodes when the applicant' state could be considered as a temporary mental illness. The decisive factor was the specific situation faced by the applicant and his reaction thereto. In 1996, in view of the relevant circumstances, the applicant was therefore rightly considered as not being criminally responsible, whilst in 2004 his criminal responsibility could not be excluded altogether.

59. On 12 September 2005 the District Court in Novi Sad decided that the proceedings should be continued before the Municipal Court in Bačka Palanka. It reasoned that this was necessary because the alleged victims in the case were all employed with the Municipal Court in Vrbas.

60. On 16 May 2006 the Municipal Court in Bačka Palanka found the applicant guilty and sentenced him to six months in prison, suspended for a period of three years. The court noted that the applicant had already been deprived of his legal capacity, but relied on the opinion of the Belgrade Prison Hospital as regards his criminal responsibility.

61. On 30 May 2006 and 31 May 2006, respectively, the applicant's lawyer and the applicant personally each filed an appeal with the District Court in Novi Sad. Both appeals, however, were ultimately rejected.

### E. The attempted restoration of the applicant's legal capacity and other related facts

62. On 7 June 2005 the applicant filed a request with the Municipal Court in Vrbas, seeking restoration of his full legal capacity. The clerk, however, refused to accept it, referring to an internal order issued by the court's vice-president on 31 May 2005, whereby no submission lodged by the applicant was to be accepted until he was provided with a guardian.

63. On 13 June 2005 the SCC appointed I.S., the applicant's son, as his guardian. The SCC specified that, in order to undertake the "restricted actions" on the applicant's behalf, I.S. would have to obtain its consent.

64. On 23 June 2005 I.S lodged a request with the Municipal Court, seeking restoration of the applicant's full legal capacity (2P 6/05).

65. On 25 August 2005 I.S. filed another submission with the Municipal Court to the same effect (2P 8/05).

66. On 12 September 2005 the SCC informed the Municipal Court that it would not support the request.

67. On 23 September 2005 the court rejected the request of 23 June 2005, explaining that, in the absence of the SCC's consent, I.S. had no standing to initiate the proceedings at issue. On the same date the Municipal Court also rejected the request of 25 August 2005, stating that a motion of this sort had already been filed.

68. I.S appealed both decisions, but on 25 January 2006 the District Court in Novi Sad confirmed the decision adopted in case no. 2P6/05. On the same date, however, it quashed the decision adopted in case no. 2P 8/05, stating that the submission filed on 25 August 2005 was not a separate matter, but merely additional written pleadings to the first request.

69. On 30 March 2006 the applicant filed a request with the SCC, seeking institution of judicial proceedings for the restoration of his full legal capacity.

70. On 20 April 2006 the SCC rejected this request, stating that the applicant's legal capacity was restricted which is why he could not file any requests personally.

71. On 28 April 2006 the applicant filed an appeal, via the SCC, against this decision. The appeal was addressed to the Regional Secretariat for Health and Social Policy (*Pokrajinski sekretarijat za zdravstvo i socijalnu politiku*).

72. On 5 June 2006 the SCC rejected the appeal, stating that the applicant was not authorised to file it.

73. On 8 June 2006 I.S. filed a new request for the restoration of the applicant's legal capacity with the Municipal Court (2P 4/06). On the same day he filed an identical request with the SCC.

74. On 10 June 2006, as part of the process of reviewing the applicant's status, the SCC stated, *inter alia*, that he had remained litigious, the only difference being that his submissions were now being signed by I.S. The SCC's team comprised of a psychologist, a lawyer, and a social worker.

75. On 14 June 2006 the applicant again filed an appeal against the SCC's decision of 20 April 2006, this time directly with the Regional Secretariat.

76. On 19 July 2006 I.S received a letter from the Regional Secretariat informing him that he should address his requests to the SCC.

77. On 3 October 2007 the SCC lodged a disability pension request on behalf of the applicant.

78. On 21 November 2007 the SCC, *inter alia*, reaffirmed its views of 10 June 2006.

79. On 19 December 2007 the Municipal Court decided to join the proceedings in case files nos. 2P 8/05 and 2P 4/06, and on 20 December 2007 it invited the SCC to express its opinion as to whether proceedings for the restoration of the applicant's full legal capacity should be instituted.

80. On 25 December 2007 the SCC stated that there were no reasons for so doing, and on 26 December 2007 the Municipal Court rejected the request in question.

81. On 18 March 2008 the SCC appointed T.M. as the applicant's new guardian.

82. The applicant subsequently wanted to take out a loan in order to purchase a new car, but T.M. refused to act on his behalf. The SCC thereafter appointed I.S. as the applicant's temporary guardian in this respect only.

83. On 11 August 2008 the SCC discharged T.M. from being the applicant's guardian and re-appointed I.S. to this position.

## II. RELEVANT DOMESTIC LAW

### A. General Criminal Code (Osnovni krivični zakon, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – nos. 44/76, 46/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90, the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, as well as the Official Gazette of the Republic of Serbia – OG RS – no. 39/03)

84. The relevant provisions of Article 12 read as follows:

> "1. A perpetrator [was] mentally incompetent if, at the time of commission of the offence in question, he was unable to understand the significance of his own actions or control his behaviour due to a permanent or temporary mental illness, a temporary mental disorder or mental retardation ...
>
> 2. A perpetrator ... whose ability to understand the significance of his own actions or control his behaviour was substantially diminished due to any of the conditions referred in paragraph 1 of this Article ... may be punished with more leniency ..."

### B. Marriage and Family Relations Act (Zakon o braku i porodičnim odnosima; published in OG RS nos. 22/80, 11/88, 22/93, 25/93, 35/94, 46/95 and 29/01)

85. Article 15 provided that at the age of 18 all persons shall gain full legal capacity.

86. Article 274 § 2 provided that persons of age who, due to mental illness or "retardation", substance abuse or "old age feebleness", or another similar reason, put in jeopardy their own rights and interests, or those of others, shall be partially deprived of their legal capacity.

### C. Family Act (Porodični zakon; published in OG RS no. 18/05)

87. Article 12 § 1 provides, *inter alia*, that family support and guardianship shall be provided by the guardianship authority (*organ starateljstva*), i.e. the competent SCC.

88. Article 64 §§ 1, 2 and 3 provides that a child below the age of 14 shall only be able to independently engage in legal actions of minor significance or those which do not entail the undertaking of any obligations. A child aged between 14 and 18, however, shall be able to undertake all legal actions, albeit with the prior or subsequent consent of his or her parents, or the consent of the guardianship authority concerning particularly valuable properties. A child aged 15 shall be able to independently undertake legal actions as regards the management and disposal of his or her earnings or of other property acquired through employment.

89. Articles 124, 125 § 3 and 137 state that a child without parental care, as well as a person of age who has been deprived of his or her legal capacity, shall be provided with a guardian. The guardian shall be appointed by the guardianship authority, and shall represent his or her ward in the same way in which a parent represents a child. With the prior consent of the guardianship authority, the guardian shall, *inter alia*, be able to decide about any medical procedures needed by the ward, give consent to any legal actions undertaken by a ward aged 14 or more, and undertake all legal actions necessary for the management and disposal of the income acquired by a ward below the age of 15.

90. Article 139 provides that the ward's property not acquired through his or her own work shall be managed by the guardian. The guardian shall be independent as regards the "regular management" of this property, but may undertake additional actions only with the prior consent of the guardianship authority.

91. Article 140 §§ 1 and 2 provides that the guardian shall, with the prior consent of the guardianship authority, be able to dispose of the ward's property not acquired through his or her own work.

92. Article 147 provides that a person of age may be fully or partially deprived of legal capacity if, due to an illness or developmental problems, he or she endangers his or her own rights or interests or the rights and interests of others. The legal capacity of the person partially deprived thereof shall be equal to the legal capacity of a minor between the age of 14 and 18. A court decision shall determine the legal actions which the person concerned may or may not undertake independently.

93. Article 132 § 1 provides that the guardianship authority may also, if needed, appoint a temporary guardian to safeguard the rights and interests of the ward.

94. Article 148 provides that a ward's legal capacity may be restored by the competent court once the reasons for its deprivation have ceased to exist.

95. The Family Act entered into force on 1 July 2005, thereby repealing the Marriage and Family Relations Act.

### D. Non-contentious Proceedings Act (Zakon o vanparničnom postupku; published in OG RS nos. 25/82, 48/88, 46/95 and 18/05)

96. Articles 31-44 provide details as regards the procedure for the full or partial deprivation of legal capacity, as well as its possible subsequent restoration.

97. Article 31 § 1, in particular, states that a person of age shall be fully or partially deprived of legal capacity depending on the degree of ability to independently take care of his or her rights and interests, and providing there are legal grounds for so doing.

98. Article 32 provides that the proceedings can be instituted by the competent court *ex officio,* by the guardianship authority, by a spouse, a child or a parent of the person concerned, or by his grandparents, brothers, sisters, or grandchildren, if they live together. The procedure may also be initiated by the person concerned if he or she is capable of understanding the significance of such a motion.

99. Article 33 § 2 provides that if the proceedings have not been instituted by the guardianship authority, the request must be submitted with the necessary authorisation.

100. Article 35 provides that the court shall decide after having held a hearing. The court shall summon to this hearing the person concerned, a representative of the guardianship authority, the concerned person's guardian or temporary representative, as well as the person who had proposed the institution of the proceedings. At the hearing the person concerned shall be heard by the judge. Should he or she happen to be placed in a medical institution, the hearing shall be held in that institution.

101. Article 36 § 1 provides that the court shall "personally hear" the individual concerned. Under Article 36 § 2, however, the court may dispense with a hearing if it would be harmful to his or her health or if no hearing is possible due to his or her mental or physical condition.

102. Article 37, *inter alia*, provides that the court shall also hear all other persons capable of providing relevant information.

103. Article 38, *inter alia*, provides that the person concerned shall be examined by at least two medical specialists who shall give their opinion as regards his or her mental condition. If needed in this respect and if this would not be harmful to his or her health, the competent court shall have the right to order the placement of the person concerned in a psychiatric institution for a period no longer than three months.

104. Article 42 provides that full legal capacity shall be restored by the court, either upon a motion filed by the guardianship authority or *ex officio*, when the reasons for the deprivation have ceased to exist. All those entitled to file a motion for the deprivation of legal capacity may also file a motion for its restoration.

105. Finally, Article 43 states that the provisions concerning the deprivation of legal capacity shall, *mutatis mutandis*, be applied in the proceedings concerning its restoration.

### E. Civil Procedure Act 1977 (Zakon o parničnom postupku; published in OG SFRY nos. 4/77, 36/77, 6/80, 36/80, 43/82, 72/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91, as well as OG FRY nos. 27/92, 31/93, 24/94, 12/98, 15/98 and 3/02)

106. The relevant provisions of this Act provide as follows:

**Article 79**

"A party with full legal capacity may personally undertake all acts in the proceedings (litigation capacity).

A person of legal age whose legal capacity has been partially restricted ... [shall be able to litigate] ... within the limits of his or her [existing] legal capacity.

..."

**Article 82**

"Throughout the proceedings the [civil] court shall *ex officio* monitor whether the person appearing as a party may [indeed] be a party to the proceedings, as well as whether he or she has the [necessary] litigation capacity ..."

## III. RELEVANT INTERNATIONAL DOCUMENTS

107. 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."

# THE LAW

## I. THE GOVERNMENT'S PRELIMINARY OBJECTION

108. The Government implied that a part of the application was incompatible *ratione temporis* with the provision of the Convention since it concerned events which had occurred before the Serbian ratification thereof.

109. The applicant did not comment.

110. The Court observes that, in accordance with the generally accepted principles of international law, a Contracting Party is only bound by the Convention in respect of events occurring after its entry into force. It further notes that Serbia ratified the Convention on 3 March 2004 and that some of the events referred to in the application in the present case had indeed taken place before that date. The Court shall therefore have jurisdiction *ratione temporis* to examine the applicant's complaints in so far as they concern events as of 3 March 2004. It shall nevertheless, for reasons of context and whilst examining the applicant's complaints as a whole, also take into account any and all relevant events prior to that date (see, *mutatis mutandis*, *Sovtransavto Holding v. Ukraine*, no. 48553/99, §§ 54-58, ECHR 2002-VII). Consequently, the Government's preliminary objection must be dismissed.

111. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

112. The applicant complained, under Article 6 § 1 of the Convention, about the violation of his right to a fair hearing in the proceedings concerning the assessment of his legal capacity.

113. The applicant further complained, under the same provision, that he had been denied access to a court as regards his request to have his legal capacity fully restored.

114. Article 6 § 1 of the Convention reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ..."

### A. As regards the applicant's complaint about the fairness of the proceedings concerning the assessment of his legal capacity

*1. The parties' arguments*

115. The applicant reaffirmed his complaint. He placed particular emphasis on the manner and circumstances in which the proceedings had been instituted, his exclusion from the final hearing held on 22 February 2005, the lack of any effective legal representation on that occasion, the inconsistency of the existing medical reports, and, lastly, the insufficiency of the domestic courts' reasoning.

116. The Government asserted that the impugned proceedings had been fair within the meaning of Article 6 § 1 of the Convention.

117. In particular, the Municipal Court's decision to institute *ex officio* the proceedings for the assessment of the applicant legal capacity could not, in itself, lead to a conclusion that the said court had breached the principle of procedural fairness. Certain lawsuits had to be instituted *ex officio* because, *inter alia*, the party concerned was unable to do so personally.

118. On 21 March 2002 the Municipal Court had both instituted the proceedings for the assessment of the applicant's legal capacity and ordered that the applicant be subjected to a psychiatric examination. It had also provided adequate reasoning in each respect.

119. The reason for the institution of the proceedings in question had been to assess the applicant's ability to independently take care of his own rights and interests, whilst his excessive litigiousness had been merely a relevant factual indication in this respect.

120. In accordance with the NCPA, the Municipal Court had had no obligation to produce a "formal motion of its own" in order to institute the impugned proceedings. Instead, having taken into account the requests issued by the District Court and the Supreme Court, and having obtained the consent of the SCC, it had adopted a decision to institute the proceedings at issue and had thus fully complied with the relevant domestic legislation.

121. The Municipal Court had also complied with Article 36 § 2 of the NCPA, having decided that there had been no need to hear the applicant in person on 22 February 2005. The applicant had already been heard in court on several prior occasions, his temporary guardian had attended the hearing in question, and there had been compelling forensic, as well as other documentary evidence to decide the case on its merits in his absence. The Municipal Court had further reasonably presumed that, if summoned, the applicant could not have been properly heard due to his condition and/or that a hearing would have had an adverse effect on his health. In any event, even if the applicant had been heard, the Municipal Court could not have reached a different conclusion.

122. The appointment, on 12 February 2005, of a temporary guardian to represent the applicant had been in the latter's best interests and, as such, had disclosed no hidden agenda. In accordance with Article 35 § 2 of the NCPA, the person authorised by the applicant to represent him had clearly not been entitled to attend the final hearing in the proceedings. The temporary guardian appointed by the SCC had been a professional, fully committed to the protection of the applicant's interests, which cannot be disputed merely on the basis that he had not contested the overwhelming evidence indicating that the applicant's legal capacity had to be restricted.

123. The applicant had had every opportunity to present his case, and various expert reports concerning his mental condition had not been mutually exclusive, as the

issue of the applicant's criminal responsibility had been separate and distinguishable from the issue of his legal capacity in the civil context. Lastly, the Government maintained that the Municipal Court had collected and thoroughly examined various pieces of evidence and had ultimately reached a reasonable conclusion.

*2. The Court's assessment*

124. In most of the previous cases before the Court involving "persons of unsound mind", the domestic proceedings concerned their detention and were thus examined under Article 5 of the Convention. However, the Court has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 are broadly similar to those under Article 6 § 1 of the Convention (see, for instance, *Winterwerp v. the Netherlands*, 24 October 1979, § 60, Series A no. 33; *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, Series A no. 318-B; *Ilijkov v. Bulgaria*, no. 33977/96, § 103, 26 July 2001). Therefore, in deciding whether the proceedings here at issue were "fair", the Court will have regard, *mutatis mutandis*, to its case-law under Articles 5 § 1 (e) and 5 § 4 of the Convention, as well as Article 6 § 1 thereof.

125. The Court recalls that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain margin of appreciation. It is in the first place for the national authorities to evaluate the evidence adduced in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Luberti v. Italy*, judgment of 23 February 1984, Series A no. 75, § 27).

126. In the context of Article 6 § 1 of the Convention, the Court assumes that in cases involving a mentally ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make the relevant procedural arrangements in order to secure the good administration of justice, the protection of the health of the person concerned, etc. However, such measures should not affect the very essence of the applicant's right to a fair hearing as guaranteed by Article 6 (see, *inter alia*, *Shtukaturov v. Russia*, no. 44009/05, § 68, 27 March 2008).

127. Turning to the present case, the Court firstly notes that the applicant had been excluded from the final hearing and had therefore been unable to personally challenge the experts' report recommending the partial deprivation of his legal capacity (see paragraphs 47-48 above). Secondly, the Municipal Court's decision to this effect had merely stated that the applicant's appearance in person would not have been "purposeful", offered no additional reasoning, and referred to Article 36 § 2 of the NCPA in only the vaguest of terms (see paragraphs 48 and 101 above). Thirdly, the applicant's participation could neither have reasonably been excluded on the basis of an arbitrary prediction of its hypothetical "uselessness", as subsequently argued by the Government. Finally, given the information contained in the case-file, although the applicant had been provided with a State-appointed lawyer to represent him at the hearing in question, he had had no opportunity to meet with her or give her instructions as to how the case should be conducted (see paragraphs 47 and 48 above).

128. Having regard to the above and notwithstanding its readiness to accept the Government's position that the various expert reports had not, *per se*, been mutually exclusive (see paragraphs 123, 84, 86, 92 and 97 above, in that order), the Court concludes that the proceedings in question, "taken as a whole" (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 68, Series A no. 146), have not

satisfied the requirements of a fair hearing. Consequently, it finds a violation of Article 6 § 1 of the Convention.

### B. As regards the applicant's complaint that he has been denied access to a court concerning his request to have his legal capacity fully restored

#### *1. The parties' arguments*

129. The applicant reaffirmed his complaint, adding that his inability to institute proceedings for the restoration of his legal capacity, even with the consent of his guardian, amounted to a violation of Article 6.

130. The Government noted that mental illness may render legitimate certain limitations upon the exercise of the "right to a court". The applicant's inclination towards vexatious litigation did not serve his own best interests, nor indeed the best interests of the State, which had limited resources to deal with a large number of cases within its jurisdiction.

131. As regards the specific attempts to have the applicant's legal capacity fully restored, the Government maintained that the domestic authorities had properly applied the relevant domestic law, which was itself fully in accordance with the Convention. The applicant had had the possibility to have these proceedings instituted at any point when the relevant evidence so justified. Finally, the Government pointed out that there had been no contradiction between the various expert reports.

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

132. In its *Golder v. the United Kingdom* judgment of 21 February 1975, the Court held that Article 6 § 1 "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (§ 36, Series A no. 18). This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her (civil) rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X).

133. Certainly, the right of access to a court is not absolute but may be subject to limitations (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93). In laying down such regulations, the Contracting States enjoy a certain margin of appreciation (see, *mutatis mutandis*, the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, § 49). Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among others, the *Ashingdane* judgment cited above, § 57).

134. As regards the present case and even assuming that the restriction on the applicant's right of access to a court was fully in accordance with the relevant domestic law and in pursuit of a legitimate aim, it is this Court's opinion that it was nevertheless disproportionate. Firstly, although the applicant and his guardian have lodged numerous requests to this effect, four years later a court of law has yet to consider on the merits the full restoration of the applicant's legal capacity (see paragraphs 62-83 above). Secondly, during this time and quite apart from a seemingly

rather cursory review of the applicant's condition by the SCC on two separate occasions (see paragraphs 74 and 78 above), there has been no comprehensive psychiatric examination of the applicant undertaken in this context. Lastly, the applicable domestic legislation does not seem to provide for a periodical judicial re-assessment of the applicant's condition (see paragraphs 94 and 104 above; see also paragraph 107, Principle 14, above), the key, almost discretionary, role in this regard having instead been granted to the SCC (see paragraphs 79 and 80 above, as well as paragraph 124 above and, *mutatis mutandis*, *X v. the United Kingdom*, 5 November 1981, §§ 53 and 54, Series A no. 46).

135. The foregoing considerations are sufficient to enable the Court to conclude that the very essence of the applicant's right to a court has been impaired. There has accordingly been a violation of Article 6 § 1 of the Convention.

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

136. Under Article 8 of the Convention, the applicant complained that the partial deprivation of his legal capacity had been disproportionate and, as such, in a violation of the right to respect for his private life.

137. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

### A. The parties' arguments

138. The applicant maintained that the filing of allegedly frivolous lawsuits could not have been a sufficient reason for the partial deprivation of his legal capacity, and that, even if there had been a need to protect the public interest, this could easily have been achieved by significantly less intrusive means.

139. The Government restated their arguments made under Article 6 above and concluded that the applicant had suffered no violation of Article 8. They further noted that the domestic courts' decisions had been adopted in accordance with the relevant domestic legislation, pursued the legitimate aim of protecting the rights of the applicant, as well as the rights of others, and were proportionate in view of the fact that there were no other less intrusive measures available.

### B. The Court's assessment

140. The Court reiterates that any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought.

141. In particular, the authorities must strike a fair balance between the interests of a person of "unsound mind" and the other legitimate interests concerned. However, as a rule, in such a complex matter as determining somebody's mental capacity, the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with the persons

concerned and are therefore particularly well placed to determine such issues. The task of the Court is rather to review under the Convention the decisions taken by the national authorities in the exercise of their powers (see, *mutatis mutandis, Bronda v. Italy*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1491, § 59).

142. The margin of appreciation to be afforded to the competent national authorities will vary according to the nature of the issues and the importance of the interests at stake (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII). A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life.

143. Further, the Court reiterates that, 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). The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see, *mutatis mutandis*, *Sahin v. Germany*, no. 30943/96, §§ 46 et seq., 11 October 2001).

144. Turning to the present case, the Court notes that the restriction of the applicant's legal capacity undoubtedly amounts to an interference with his "private life". Even assuming that this interference has been "in accordance with the law" and that the domestic authorities have pursued a "legitimate aim", within the meaning of Article 8 § 2, the Court is of the opinion that the means employed were not proportionate to the aims sought to be realised. In particular, whilst the limitation of the applicant's legal capacity (involving his inability to independently take part in legal actions, file for a disability pension, decide about his own medical treatment, or even get a loan) has been very serious, the procedure on the basis of which the domestic courts had so decided had itself been fundamentally flawed (see paragraphs 127 and 128). Moreover, some four years later and despite repeated requests to this effect, the applicant's legal capacity has yet to be re-assessed on the merits by a court of law (see paragraphs 134 and 135). Finally, the Court acknowledges that a legal system must be allowed to protect itself from vexatious litigants, but considers that it is up to the domestic authorities to set up an effective judicial mechanism of dealing with such litigants' claims, without necessarily having to resort to additional measures affecting their legal capacity.

145. There has, accordingly, been a breach of the applicant's right to respect for his private life and a violation of Article 8 of the Convention.

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

146. Lastly, the applicant complained, under Article 13 of the Convention that the proceedings resulting in the partial deprivation of his legal capacity had not provided him with an effective remedy for the violation of his private life, and that his subsequent attempts to have this decision reviewed were all rejected without having been considered on their merits.

147. The Court is of the opinion that this complaint, although somewhat rephrased, is essentially the same as those already examined under Article 6 § 1. Having regard to its finding in relation to this provision, the Court considers that the applicant's complaint under Article 13 does not require a separate examination on the merits.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. 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

149. The applicant claimed 20,000 euros (EUR) in respect of the non-pecuniary damage suffered.

150. The Government contested this claim.

151. The Court considers that the applicant has suffered some non-pecuniary damage which cannot be sufficiently compensated by its mere finding of a violation of the Convention. Having regard to the character of the violations found in the present case and making its assessment on an equitable basis, the Court therefore awards the applicant EUR 12,000 under this head.

### B. Costs and expenses

152. The applicant also sought the reimbursement of EUR 3,360 incurred in lawyers' fees for the proceedings before the Court. He submitted a fee agreement between him and Mr Y. Grozev, as well as a time-sheet.

153. In the Government's view, this claim was excessive.

154. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were also reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award to the applicant the sum of EUR 3,000 for the proceedings before it.

### C. Default interest

155. The Court considers it appropriate that the default interest 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the fairness of the proceedings resulting in the partial deprivation of the applicant's legal capacity;

3. *Holds* that there has also been a violation of Article 6 § 1 of the Convention as regards the applicant's right of access to a court concerning the restoration of his full legal capacity;

4. *Holds* that there has been a violation of Article 8 of the Convention;

5. *Holds* that it is not necessary to examine separately the 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, the following sums, to be converted into Serbian dinars at the rate applicable on the date of settlement:

(i) EUR 12,000 (twelve thousand euros) in respect of the non-pecuniary damage suffered, plus any tax that may be chargeable,

(ii) EUR 3,000 (three thousand euros) for costs and expenses, plus any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 13 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President“