



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

FIRST SECTION

CASE OF X AND Y v. CROATIA

(Application no. 5193/09)

JUDGMENT

STRASBOURG

3 November 2011

FINAL

03/02/2012

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

In the case of X and Y v. Croatia,

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

Anatoly Kovler, *President*,

Nina Vajić,

Peer Lorenzen,

Elisabeth Steiner,

Khanlar Hajiyev,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 11 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 5193/09) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Croatian nationals, Ms X and Ms Y (“the applicants”), on 15 January 2009. The President of the Chamber granted the applicants’ request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Ms Lovorka Kušan and Mr Zlatko Kušan, lawyers practising in Ivanić Grad. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. On 8 June 2010 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1923 and 1948 respectively and live in I.

5. The applicants are mother and daughter. Until 17 July 2006 they lived together in a house in B. owned by the first applicant.

A. Placement of the first applicant in the Caritas Home in I.

6. On an unspecified date in 2006 the I. Social Welfare Centre (*Centar za socijalnu skrb I.* – the “Centre”) instituted proceedings with a view to establishing the first applicant’s right to care outside her family (*pravo na skrb izvan obitelji*). On 6 July 2006 the Centre appointed its employee Z.J. as the first applicant’s special guardian (*poseban skrbnik*) in these proceedings on the ground that the first applicant, owing to old age and illness, was unable to undertake acts in these proceedings on her own. It was also stated that her daughter Y, the second applicant, could not adequately care for the first applicant, since she suffered from muscular dystrophy. This decision was served on the second applicant on 12 July 2006.

7. On 11 July 2006 the second applicant submitted a statement to the Centre, stating that she was unable to contribute towards the expenses arising from her mother’s care.

8. An official note drawn up by Z.J. on 16 July 2006 indicates that the second applicant urged that her mother be placed in a home and had entered into a private agreement with the I. Caritas Home for elderly and dependent persons (“the Caritas Home”) in order to place her mother there at her own expense until such time as the decision in the above-mentioned proceedings had been adopted. The first applicant was moved to the Caritas Home. She was placed in a room with three other persons.

9. The agreement, dated 17 July 2006, stipulated that the second applicant was to bear the costs of her mother’s accommodation in the Caritas Home, which in turn would provide the first applicant with accommodation and food, medical care and care for her social needs. In order to stay close to her mother and to be able to visit her frequently, the second applicant moved to her own flat in I.

10. A medical report drawn up on 19 July 2006 indicates that the first applicant was an elderly and disabled person, suffering from psycho-organic changes and dementia, and required the constant (full-day) help and care of another person.

11. On 31 August 2006 the Centre established the first applicant’s right to permanent placement in the Caritas Home from 1 September 2006. She was to cover the costs of her accommodation up to the amount of her pension, and the difference between that amount and the full price was to be paid by the Ministry of Health. The first applicant’s pension was to be paid directly into the Centre’s bank account.

12. On 23 November 2006 Z.J. ceased to be the first applicant’s special guardian.

13. On 18 February 2008 the second applicant asked the Caritas Home to allow her mother single-room occupancy on health grounds. She offered to pay the difference between the costs of such accommodation and her

mother's pension. The Caritas Home informed her that if her mother was placed in a single room she would have to pay the full cost.

14. Since the first applicant was a person in care of the State, Z.J., as the social worker from the Social Welfare Centre with responsibility for the first applicant, drew up a report on 28 February 2008, in which she stated that the first applicant was disoriented and dependent on help from others and that it was impossible to establish contact with her. She suggested that proceedings be instituted with a view to divesting the first applicant of legal capacity, because she was unable to care for her rights and interests. She also stated that the second applicant often behaved strangely, in the sense that she showed constant dissatisfaction and had locked herself in her home, refusing food.

15. On 3 March 2008 the second applicant again asked the Home to allow her mother single-room occupancy on health grounds, stating that her mother needed calm and rest. On 10 March 2008 the Caritas Home informed the second applicant that her mother had been provided with adequate health and other care and that they were waiting for a reply from the Ministry of Health and Social Care on payment for a single-occupancy room.

16. On 25 March 2008 the second applicant urged the transfer of her mother to a single-occupancy room. She also asked the Home to provide her with information on the amount of her mother's pension in order to pay the difference in the cost of single-room occupancy.

17. On 31 March 2008 the Head Nurse of the Caritas Home drew up an official note stating that over the previous year the second applicant had frequently expressed discontent with regard to the care provided to her mother by nurses, physiotherapist and physicians at the Home; this had disrupted the work of the personnel. She had held an interview with the second applicant, who denied these allegations and was very pleasant in communication with the Head Nurse during the interview. The Head Nurse further stated that the second applicant had been in the habit of visiting her mother twice a day, in the morning and afternoon, staying for a few hours. Over the previous two weeks she had been coming to the front of the Home before the reception's opening hours and had stayed until the end of working hours; she had stopped communicating with the Head Nurse, but continued to intervene in the dynamics of her mother's health care and to insult the other patients.

18. In her letter of 1 April 2008 the Directress of the Caritas Home informed the Centre of the above. In her letter of 5 April 2008 the second applicant denied these allegations and reiterated that, owing to her mother's health, it was necessary to place her in a single-occupancy room.

19. On 8 April 2008 the Caritas Home informed the second applicant that she was free to seek her mother's placement in a single-occupancy room at her own expense and that the cost of such accommodation was

4,680 Croatian kuna (HRK) per month. On 14 April 2008 the Caritas Home further explained that, in order to place her mother in a single-occupancy room she would first have to terminate her mother's accommodation on the basis of a decision adopted by the Centre and then apply in writing for her mother's placement in the Home on the basis of a private contract.

20. On 10 April 2008 the second applicant again sought to have her mother placed in a single room.

21. On 18 April 2008 the Centre informed the second applicant that the price of accommodation in the Caritas Home for persons placed there on the basis of a decision by a social welfare centre was HRK 3,000 per month. This amount had been partly covered by her mother's pension in the monthly amount of HRK 2,237.80.

22. On 22 April 2008 the Centre invited the second applicant to come to the Centre on 5 May 2008 in order to give a statement in connection with appointing a guardian for her mother in the proceedings to divest her of legal capacity. On 28 April 2008 the second applicant asked the Centre that she be appointed as her mother's guardian in these proceedings.

23. On 21 May 2008, in a letter to the V. Diocese, the owner of the Caritas Home, the second applicant sought help in placing her mother in a single room. There was no reply.

24. On 27 May 2008 the Caritas Home limited visits to multi-occupancy rooms in the Intensive Care Ward to one hour a day. Visits were allowed in the common premises between 9 a.m. and 7 p.m. in winter and between 9 a.m. and 8 p.m. in summer.

25. It appears that the second applicant did not thereafter pursue the question of placing her mother in a single room. In 2009 the second applicant submitted that she no longer had problems with the Caritas Home's management and that she was peacefully spending time with her mother.

B. Medical reports in respect of the first applicant

26. The relevant part of a discharge letter of 28 February 2002 issued by the Varaždin Hospital reads:

"The patient was hospitalised at the neurological ward of the V. Hospital owing to a cerebral-vascular accident, brain atrophy and psycho-organic changes. During her stay respiratory difficulties occurred and continuation of treatment in our institution was indicated.

...

On admission she was not febrile, was able to move about, communication was possible (*kontaktibilna*), she was eupneic ..., disoriented in time.

...

Conclusion:

The patient was hospitalised for exacerbation of chronic bronchitis, post-CVA [cerebral vascular accident] condition and psycho-organic changes. During her stay she was treated with Irumed, Andol and Prazine. Clinical status has improved and she is discharged with a recommendation to continue therapy with Irumed, Andol and Prazine. She is in need of care and the aid of others.”

27. The relevant part of the medical report of 13 December 2005 reads:

“The patient has been unable to control her sphincter for three years; she is confused and moves about with difficulty. Today she got lost and became even more confused.

Neurological status: psycho-organic syndrome, free neck [movement], no focal neurological excess, she walks with assistance ...”

28. The relevant part of a medical report of 19 July 2006 reads:

“The patient is eighty-three years old and in 2000 she suffered an (ischemic) brain stroke. She subsequently developed psycho-organic syndrome, high blood pressure and incontinence. The medical documentation shows that she underwent cataract surgery. In 2002 she was hospitalised in a neurological ward for CVA and was then transferred to the Special Hospital for Lung Diseases in K. ...

Examination reveals that she moves about with difficulty but does walk slowly with aid. She answers basic and short questions, but is disoriented in time and space and towards persons. ... Eupneic...

Since the patient is an elderly person who moves about with difficulty, has undergone psycho-organically changes [and] suffers from dementia, I consider that she needs the constant care and aid of others.”

C. Proceedings to divest the first applicant of legal capacity

29. On 17 April 2008 D.P.D., the first applicant’s niece, was heard in the Centre with a view to appointing her as the first applicant’s guardian.

30. On 16 June 2008 the Centre appointed D.P.D. as the first applicant’s guardian. On the same day the Centre asked the I. Municipal Court to institute proceedings with a view to having the first applicant divested of her legal capacity. The relevant part of the Centre’s submission reads:

“Owing to a brain stroke and brain atrophy the respondent has suffered psycho-organic changes, is incapable of independent life and entirely dependent on the help and care of others. In view of the above, this Centre recognised her right to care outside her family and she was accommodated in the Caritas Home for elderly and dependent persons ... in I. The level of the respondent’s social and intellectual functioning is significantly reduced; no communication is possible, she is disoriented and suffers from dementia. In order to protect her [person], her rights and interests it appears reasonable to give her protection through the institution of guardianship.

In view of the above, the Centre considers that the respondent is incapable of caring for her own needs, rights and interests and that the conditions for divesting her entirely of her legal capacity under section 159 of the Family Act have been met.”

Z.J.’s opinion of 28 February 2008 and medical documentation in respect of the first applicant was enclosed.

31. In a letter to the Centre of 17 June 2008 the second applicant objected that the decision appointing D.P.D. as her mother’s guardian had not been served either on her or her mother. She also objected to statements in the report drawn up by Z.J. on 28 February 2008, enclosed in the Municipal Court’s case file, and in particular to the statements concerning her ability to be her mother’s guardian and alleging that her behaviour had been strange and that she had locked herself in her house and refused food. In particular, she questioned how Z.J. could have established these facts, since she lived alone. She further stressed that she had moved to I. only to be close to her mother and that she had been caring for her mother, while D.P.D. lived in Z. and only occasionally contacted the first applicant by telephone. The first applicant considered that she was the most appropriate person to be appointed as her mother’s guardian.

32. A note from the Caritas Home of 20 June 2008 confirmed that the first applicant had received the decision of 16 June 2008 and had confirmed that fact with her fingerprint.

33. On 24 June 2008 the second applicant informed the Centre that she objected to the institution of the above court proceedings.

34. At a hearing held before the I. Municipal Court on 10 July 2008 in the presence of the Centre’s representative and the first applicant’s guardian D.P.D., a psychiatric report on the first applicant’s mental state was commissioned. D.P.D. stated that Z.J.’s allegations in her report on the first applicant were true and added that the first applicant was bed-ridden, disoriented and completely incapable of autonomous life. She depended on the constant help of others and was unable to feed herself. Her condition was not improving but was expected to deteriorate. She was able to use only one hand, could move it and put food into her mouth, but even that hand was not functional to the extent that she could properly feed herself. D.P.D. suggested that a medical examination of the first applicant be carried out.

35. The psychiatrist submitted his report on the basis of an examination of the first applicant on 18 July 2008 and medical documentation from 2002. The relevant part of the report reads:

“For the purposes of this examination the patient was seen by a psychiatrist on 18 July 2008 in the Home where she is placed.

I found her lying awake in her bed. It is not possible to establish meaningful verbal contact because she is unable to talk clearly. To my question about her name and where she is from, she incomprehensibly repeats the same word. From her mimics and gestures it is possible to conclude that the patient has preserved a basic idea of herself.

Clinical findings on her mental status:

General impression: she lies in the typical “embryo” posture – on her side with legs bent in to the knees and drawn towards the chest, the upper body and head bent forward, so that her chin almost touches her knees (posture typical for persons with serious brain damage).

Impression: a gravely ill person, completely dependent on the help of others, bed-ridden.

Contact: it is obvious that she can hear and understands something, but she is not able to form comprehensible words. It is to be expected that she [has] only a basic idea of herself. During the interview she looks aside with a dull, expressionless look or closes her eyes. When asked something loudly and directly she pays only brief attention to the speaker.

Occasionally she mumbles incomprehensibly. General facial expression reveals a mentally impaired person: empty stare and empty facial mimic.

Only basic orientation towards self is preserved.

Thought functions completely reduced – no thought process. Movement-impaired – central psychomotor damage (brain). No coordination of hands, incapable of feeding herself.

Comprehension, understanding and ability to connect causes and consequences of events are completely damaged – non-existent. Gravely reduced overall mental capacity, with only basic idea of herself preserved. She has no idea of relations between persons or of her own interests.

Disabled to the extent that she is dependent on help of another person for mere survival.

...

Conclusion:

Severe impairment of global cognitive ability, with emphasis on memory, thought process, ability to develop new ideas and make conclusions and decisions; impaired motor functions, to the extent that it renders the person so incapable that she is dependent for her survival on the care of another person.

Prognosis unfavourable.

Incapable of caring for herself and her rights and interests.

On medical grounds protection of the person's interest under guardianship is indispensable; the court is recommended to divest her entirely of legal capacity.”

36. On 14 August 2008 the first applicant submitted a power of attorney, authorising the second applicant to represent her in the proceedings. She signed the letter in her handwriting.

37. The second applicant objected to the psychiatric report in her written submission to the I. Municipal Court, arguing that it was based on five-year-old medical documentation and a twenty-minute observation by the psychiatrist and that the conclusions of the report were therefore superficial, imprecise and untrue. She maintained that the first applicant could pronounce words, had good hand movement and was able to sit and dress with help. She also claimed that the psychiatrist saw the first applicant in the afternoon, when the first applicant was tired and drowsy, under the influence of medication and alarmed by the presence of an unknown person and of the Head Nurse of the Home. She also objected to the statement given by D.P.D., and argued that D.P.D. had not even seen the first applicant.

38. The second applicant also requested the withdrawal of the judge conducting the proceedings, alleging bias.

39. On 21 August 2008 the request for withdrawal was declared inadmissible by the President of the I. Municipal Court because the second applicant was not a party to the proceedings. At a hearing held the same day in that court D.P.D. stated that she had no objections to the psychiatric report but noted that there was no medical documentation in respect of the first applicant more recent than 2002.

40. On the same day the I. Municipal Court divested the first applicant of legal capacity. The decision states that the persons present at the hearing were the Centre's representative lawyer M.G., and the first applicant's special guardian D.P.D. The relevant part of the decision reads:

"The requesting party lodged a request to divest the respondent of her legal capacity, alleging that the respondent, owing to psycho-organic changes caused by a brain stroke and brain atrophy, was incapable of autonomous life. She was entirely dependent on the help and care of others. By a decision of the requesting party her right to care outside her family had been established and she was placed in the Caritas Home for elderly and dependent persons ... in I. Her social and intellectual functioning was significantly reduced, it was not possible to establish contact with her, and she was disoriented and demented. She was in need of protection through the institution of guardianship because she was incapable of caring for her own needs, rights and interests, and therefore all requirements under section 159 of the Family Act for divesting her of legal capacity had been met.

The respondent's guardian *ad litem* replied that the allegations in the request were true and added that the respondent was bedridden, disoriented and completely incapable of autonomous life. She depended on the constant help of others and was unable to feed herself. Her condition was not improving but was expected to deteriorate. She was able to use only one hand, [and] could move it and put food into her mouth; however, even that hand was not functional to the extent that she could properly feed herself. In view of the respondent's old age, the guardian suggested that a medical examination of the respondent be carried out. She did not oppose the requesting party's application.

This court consulted the opinion of a social worker (page 2), a birth certificate (page 3), medical records (pages 4-5), a decision of the I. Social Welfare Centre of

26 June 2008 (page 6) and a report by medical expert Š.D., doctor in psychiatry, of 18 July 2008 (pages 21-24).

On the basis of the above evidence, this court has found the requesting party's application founded and has accepted it.

This court has established that the respondent is an eighty-three-year-old who suffered a brain stroke, after which she developed psycho-organic syndrome, high blood pressure and incontinence. In 2002 she underwent cataract surgery and was hospitalised at the neurological ward for a CVA [cerebral vascular accident]; she was subsequently placed in the Special Hospital for Lung Diseases in K. on account of exacerbated COLD [chronic obstructive lung disease]. Furthermore, this court has established that the respondent's entire mental capacity, in particular as regards her memory, thought processes, ability to form new ideas and reach conclusions and decisions, together with her psychomotor functions, is damaged to such an extent that it renders the respondent incapable, so that she is dependent on the help of another person for mere survival. She is incapable of caring for herself, her rights and interests and protecting them, and therefore it is necessary to protect the respondent by means of social care, since the prognosis is unfavourable.

This court accepted the report and opinion of the medical expert Š.D., doctor in psychiatry, to which the parties made no objections, because the report is detailed, objective and drawn up in accordance with the rules of the profession."

41. This decision was not served on the applicants.

42. On 22 August 2008 the first applicant asked the I. Municipal Court that the decision of 21 August 2008 be served on the second applicant. She signed the authorisation with her full name. There was no reply.

43. The first applicant is today still accommodated in the Caritas Home.

D. Medical reports in respect of the second applicant

44. The relevant part of a discharge letter of 20 December 2006, issued by the psychiatric ward of the V. Hospital, reads:

"Brought for treatment by ambulance... there is information that her behaviour has altered since July when her mother, with whom she had lived, was accommodated in a Caritas Home in I.

She subsequently locked herself in the house [and] isolated herself from everyone. The relatives who visited her noticed that she had weakened, refused communication and food; she lost a lot of weight, neglected personal hygiene.

On admission she appeared as a chronic mental patient, [was] skinny, manic conduct, affectively inadequate... she verbalised fear and the feeling of being threatened, was suspicious and complained of hallucinatory experience.

Treatment

She has been treated in a closed psychiatric ward with classical pharmacotherapy (Moditen together with Normabel).

By the second day following admission and therapy the patient started to take normal meals (first light food and then a regular diet).

She has visibly recovered physically. The psychopathology for which she was hospitalised has completely ceased – she has no fears, no psychosis towards her environment, is joyful about every visit and when information has been sought about her. She has good introspection with regard to her physical weakness. She is willing to talk and accept solutions for her life.

Optimistic prognosis for further treatment is based on the fact that her first hospitalisation in 1994, which involved deterioration of her mental health and the same clinical picture, was provoked by an external factor, as in the current episode, and in the meantime she has been in good remission, and functioned satisfactorily in society.”

E. Proceedings for divesting the second applicant of legal capacity

45. On 17 September 2008 the Centre held a hearing with a view of appointing a guardian for the second applicant, since they intended to institute court proceedings divesting her of legal capacity as well. The second applicant objected to the institution of these proceedings and stated that she had not been informed of the grounds for their institution.

46. On 18 September 2008 the Centre appointed a lawyer, N.C., as guardian *ad litem* for the second applicant in the forthcoming proceedings to divest her too of the capacity to act. The relevant part of the decision reads:

“... the case-file of this Centre shows that ... it instituted proceedings to divest Y of legal capacity in a competent court because owing to her illness and altered personality, she is not able to care for her personal needs, rights and interests.

...

Y stated that she had no objections with regard to the person [proposed] as her legal representative, but that she considered it entirely unnecessary to appoint a guardian for her and to institute proceedings before a court to divest her of legal capacity.”

47. On the same day the Centre asked the I. Municipal Court to institute proceedings with a view to having the second applicant divested of her legal capacity. The relevant part of the Centre’s submission reads:

“From early youth the respondent has suffered from muscular dystrophy, which makes it difficult for her to move about. Since two years ago, when her mother X was placed in the Home for elderly and dependent persons... the respondent has started to behave in a strange manner and once locked herself in her family house in B., refusing food and any contact with her doctor and worried neighbours. ... the medical documentation shows that the respondent was treated in the psychiatric ward of the V. General Hospital in 1994 with a diagnosis of reactive depressive psychosis. There is no evidence that the respondent continued with medical checkups following a check-up in July 1994, when she had received therapy; this shows that she does not see the need to take care of her own health.

The attitude of the respondent towards her mother X ... is possessive. At the beginning the Home's administration tolerated her whole-day visits. As a result of constant objections concerning the Home's employees as regards care [to her mother] and verbal and sometimes physical aggression, and also the fact that she disturbed other patients, necessitating a police intervention, her visits have been restricted ...

The respondent has unrealistic demands concerning her mother (she constantly seeks her placement in a single room, not accepting the explanations given as to why that is not possible).

In her contacts with the employees of the institutions involved in the proceedings conducted for the protection of her own rights and interests and those of her mother, she does not see the purpose [of these proceedings], viewing them as planned personal attacks. She has a very low tolerance level, is unable to preserve self-control [and] insults and denigrates the employees.

Also, the fact that she often changes her legal representatives, who refuse to provide further services after a short while, shows the respondent's increasing problem in establishing and maintaining any kind of social relations in everyday life.

In view of the above, the Centre considers that the respondent is not capable of caring for her personal needs, rights and interests ..."

48. The second applicant lodged an appeal against the decision of 18 September 2008 to appoint a special guardian for her, arguing that she was capable of taking care of herself and that there was no need to appoint a guardian for her.

49. On 28 October 2008 the second applicant also filed her submissions opposing the request to divest her of legal capacity lodged by the Centre. She argued that it was not correct that she had been suffering from muscular dystrophy since early youth, but that she had had a road accident in 1991, since when she had been using a walking stick. She denied the Centre's allegations as regards her behaviour over the previous two years. She stressed that she had been taking care of her elderly mother, had placed her in the Caritas Home at her own initiative and then continued to visit her regularly; she also bought a wheelchair for her mother, had been taking her out in the Home's courtyard, had succeeded in teaching her again how to feed herself and to hold a bottle with water, and provided her with all necessary care. She had also been caring for her own needs, preparing her meals or paying a maid to prepare her meals and clean her flat. She had also been regularly seeing her doctor. In 1994 she had retired and had been hospitalised in a psychiatric ward of the V. Hospital. She had not subsequently seen a psychiatrist since there had been no need and her doctor had not recommended it. She had had regular contacts with others; she was a member of two libraries, had been reading a lot, growing flowers, doing handcrafts and going on short trips. For the purposes of these proceedings she had engaged the services of a lawyer, which showed her ability to care for her interests.

50. On 2 June 2009 the Ministry of Health and Social Welfare quashed the decision of 18 September 2008 on the ground that the same person could not be a legal representative and a special guardian.

51. On 27 July 2009 the Centre issued a fresh decision appointing lawyer I.R. as Y.'s special guardian. The relevant part of the decision reads:

“On 18 September 2008 ... N.C. was appointed as a special guardian to Y. in order to represent her in the proceedings with a view of divesting her of legal capacity ... The guardian was also authorised to ... represent her in all personal matters and matters concerning her property, to manage her assets and to take proper care of her person, rights, obligations and wellbeing.

...

The Ministry also referred to a wide range of powers given to the special guardian, calling into question the need for such powers.

In this connection and on the basis of the evidence presented ... this Centre assessed that the special guardian would properly protect her person, rights and interests, with understanding of the purpose of the proceedings to divest her of legal capacity and the protection provided through the institution of guardianship. It therefore gave [N.C.] the authority to care for [Y.'s] assets, because this Centre is doubtful as to whether Y. is capable of caring for her rights and interests, including her property rights, and has therefore instituted proceedings to divest her of legal capacity, the final decision on which is to be taken by a court.

... N.C. will continue to represent Y in these proceedings on the basis of a power of attorney [given to her by Y] ...

...I.R. is appointed as special guardian for Y ...”

52. On 7 August 2009 the second applicant lodged an appeal against the above decision, arguing that there was no need to appoint a guardian for her or to institute proceedings to divest her of legal capacity because she had been adequately protecting her needs, rights and interests. She explained that she had been caring for her material needs, paying all bills, preparing her meals and maintaining social contacts, as well as regularly seeing her doctor, attending cultural events and visiting her mother. Her way of life did not show in any respect that there was a need to place her under guardianship. It appears that no decision has been adopted upon this appeal.

53. On 30 June 2009 a psychiatric report concerning a telephone interview with the second applicant was submitted to the I. Municipal Court. The relevant part of the report reads:

“The respondent is sixty years old. She has been receiving an invalidity pension for some fifteen years. She lives alone in her own flat. She is unmarried [and] has no children. Her physical health is impaired – and that is about all that we can establish without doubt with regard to her physical condition. Owing to the lack of cooperation on the part of the respondent, we have no medical records ...

At the outset it should be pointed out that the respondent refused to cooperate. During an interview (organised with great difficulty!) she held a monologue for a whole hour, in which she referred to all the injustice done to her and her mother. She ignored any attempt by the doctor to conduct a dialogue, let alone a structured one. The respondent's biography or her present life was not addressed. The only thing that happened was her raised voice, rudeness, hostility, a clearly paranoid attitude towards her surroundings, the feeling of being persecuted and a need to defend herself from the institutions that had been interfering with her life, ill-treating her, etc. The expert's expectation that during a home visit, on her own territory, the respondent would participate in the interview in a more cooperative manner was not met. More than ten telephone calls were not answered. The attempts to find her at her home address were also unsuccessful. After a few weeks she made a telephone call - shouting, accusing, insulting and attacking – in which she did not want to hear any answers.

On the basis of all this information and the expert's personal experience with the respondent, it is easy to conclude that she is a person of a very bizarre mental structure. She suffers from serious emotional disharmony and grave dysphoria and a flood of uncontrolled affective outbursts. In the background, a general paranoid attitude towards her entire surroundings is perceptible, with a fixation on institutions. She is ruled by a feeling that she is exposed to injustice, and to ill-treatment, abuse and systematic denial of her rights. She has succeeded in developing a strong hatred for the employees of the I. Social Welfare Centre and that whole institution. The same is true (maybe even more so) about the Home where her mother is placed. She is argumentative. Her behaviour is often disorganised and chaotic. She has deeply estranged herself from everyone, chased away all good-willed people, broken all threads of cooperation. She is entirely uncooperative and is prone to describe everyone who dares to say or do anything she dislikes as an ignorant person, an adversary, [or] even an enemy.

In all that 'rashomon' the respondent does not even make an attempt to control herself, does not try to hide her hostility, does not try even for a second to reflect and analyse her own contribution to the situation; she rejects any suggestion that there had been any wrong on her part. She is entirely uncritical and has no introspection; she automatically seeks the guilty parties in her surroundings. She opposes any suggestion that she address problems regarding her own person or her behaviour and threatens [to appeal to] a higher instance.

In her entire mental world there is a lot of system, that is, logical concepts – and this would all be fine if that logic were not based on an entirely false, at times even psychotic, basis.

... her entire mental world is of a paranoid nature. In the best case we are speaking of a paranoid personality disorder, that is, the condition of personal derangement in which feelings of insecurity, being exploited and having suffered damage prevail. Without restrictions and with no basis she seeks enemies in her surroundings, people who are against her, who want to exploit her or injure her. She has difficulty in trusting anyone, if that is possible at all. She is mistrustful, negative towards others who are or could become traitors; she sees hidden meaning in everything. Such an attitude warrants constant guard, suspicion and defensiveness. It is difficult to assert that this all amounts to a definitive paranoia, but the respondent – even if she is not in paranoia – is surely approaching it. We stress that paranoia is a real psychotic disorder (that is to say mental derangement) characterised by the development of and fixation on one psychotic thought – usually of a persecuting type – or on several such thoughts

which are grouped, interconnected and systematised (connected in a psychotic system). In any case, the respondent is not far from mental derangement, which, unfortunately, she does not see and does not understand and therefore refuses any professional help.

Overwhelmed with this personal condition, the respondent most often estimates the world around her entirely wrongly, giving immense importance to trivialities and at the same time ignoring crucial things. By insisting on the irrelevant, she seriously neglects her vital interests and thus directly compromises them. She exhausts her limited resources on irrelevant, sporadic things, thus calling into question her ability to organise her existence, to structure it adequately and to exploit what she has at her disposal in her best interests. Her mental condition is entirely (which still does not mean irreversibly) impaired. She has lost the ability to anticipate and to react and adapt in a preventive manner. Her understanding of the world and her position in it is limited by a feeling of injustice, and is also superficial, wrong and strict. She is incapable of locating herself correctly in the complex, abstract laws of the outside world. She is not capable of recognising the institutional resources at her disposal; even when they are presented to her, she rejects them uncritically, putting herself in a dangerous, unacceptable and miserable position.

In her mental condition she has no chance of exploiting outside resources and protecting her rights and interests. She will follow – without caution, without reflection – her first impression and thus immediately puts at risk her economic, material and health interests. At the same time she will ignore favourable outcomes and situations and potential opportunities for improvement.

On account of her clearly deeply impaired mental vitality, the respondent is in a perilous condition - her physical, economic, social and health safety is compromised and she has no resources to resist peril constructively and properly. She is not able to participate actively in the outside world and to act in a constructive manner. She is lost in everyday specific situations and exhausts herself in trivialities.

Therapeutic possibilities in her condition are still possible. The problem is that the respondent will refuse them categorically and systematically, seeing them as an attack on herself or a sign of grave hostility.

The respondent is in a situation which absolutely excludes any possibility for her to take care of her rights and interests and to show responsibility towards her obligations. Her only interest is to confirm her paranoid views – and here she does not spare her mental, financial or institutional resources. In this respect it is not possible to leave her on her own, since that will immediately put her at risk at all levels. Her mental resources have brought her to a critical mental and social situation where it is not to be expected that those same resources could save her.

I recommend that the request by the requesting party be accepted and that the respondent be entirely divested of legal capacity. There is no aspect of legal capacity that she could perform responsibly and to her own advantage.

It is to be stressed that the above statement could and should be revised in the case of a fortunate outcome, that is, if the respondent starts psychiatric treatment, offers her cooperation in therapy and achieves mental rehabilitation. However, no new assessment of her mental condition ... is recommended for at least one year in view of the nature and gravity of her disorder.”

54. At a hearing held on 25 November 2009 in the I. Municipal Court the second applicant was heard. The relevant part of the written record of the hearing reads:

“... the respondent alleges that she is entirely capable of caring for her needs and interests, that she receives a pension and lives in her own flat; her next-door neighbour M.Š. prepares her lunches and sometimes she goes to a restaurant. She further alleges that she is able to address all issues concerning her household and paying her bills. She is seeing her doctor and is able to carry out all administrative and other tasks in the city. She retired fifteen years ago because of a road accident; she is an economist with a high school education. She had enrolled in a law faculty, but had not completed her studies ... She watches television, reads daily newspapers, books, has a wide circle of friends who visit her and sometimes she also visits them; in particular, she is also visited by her relatives. She is a very communicative person and leaves a good impression on others and has never had any problems in communication with others. When her mother was placed in a home, she was overwhelmed by sadness because until then they had been living together. However, she did not lock herself in and she does not know who called the doctors and the ambulance - that happened after a report by the Centre. The discharge letters following her two hospitalisations show that her condition was good and satisfactory. Since 2006 she has not been taking any medication save for her underlying illness, which is muscle weakness (a mild form of paraplegia). Between 9 October and 10 November 2009 she was hospitalised for rheumatic diseases and rehabilitation, in order to maintain her customary condition as regards her ability to walk ...

She specifically stresses that she has reacted very badly to the institution of these proceedings to divest her of legal capacity because she considers herself entirely legally capable and healthy and able to care for her rights and interests and fulfil all her obligations as she has already described. To the question what her condition would be if she were divested of legal capacity, she answers that she could not even imagine it... it would be bad, such a decision would lead to depression and exacerbation of her illness; her soul would thus be killed and her whole life as well. She stresses that her condition does not require a guardian ...

She stresses further that before these proceedings were instituted she had not been given a chance by the Centre or the expert who prepared a report in these proceedings, to give her own overview of her condition, and therefore she has now explained her situation. She also drew up a six-page statement which she attaches to the case file. ...

She stresses further that the guardian did not contact her at all ...

... she also stresses that in her view these proceedings were instituted because the Centre wants to deprive her of her property (a flat in I. and part of a family house in B.) and various other property that she might inherit from her mother, since she has no spouse or children, but only a sister.

She alleges that her current situation is such that she is capable of caring for herself, even if her illness were to worsen, so as to choose by herself a person to care for her; she also has enough assets to pay for the care that she wishes. She has been thinking about it and she always tries to find solutions for the future. She wants to continue to live in her own flat and does not wish to leave it. Should she be divested of legal capacity, her condition would worsen; she had seen it happen to others. Then she

could be placed somewhere she would not want to be. She does not want to live in a home ... because she is used to her own home ... and wishes to be left in peace ...”

55. On 29 March 2010 the same expert in psychiatry submitted his additional report on the second applicant, in which he repeated his previous conclusions, without any further contact with her.

56. The above court proceedings are apparently still pending.

II. RELEVANT DOMESTIC LAW

57. The relevant provisions of the Family Act (*Obiteljski zakon*, Official Gazette nos. 116/2003, 17/2004, 136/2004 and 107/2007) read:

Section 159

“(1) An adult who, on account of mental illness or other reasons, is unable to care for his or her own needs, rights and interests, or who presents a risk to the rights and interests of others, shall be partly or completely divested of legal capacity by a court of law in non-contentious proceedings.

(2) Before adopting a decision under subsection 1 of this section, a court shall obtain the opinion of a medical expert concerning the health condition of the person concerned and the effect of that condition on his or her ability to protect all or individual personal needs, rights and interests and whether it could put at risk the rights and interests of others”

Section 161

“(1) A social welfare centre shall initiate court proceedings when it assesses that, on the grounds set out in section 159(1) of this Act, there is a need to divest a person of legal capacity either completely or in part.

(2) A social welfare centre shall appoint a special guardian to a person in respect of whom the proceedings for divesting him or her of legal capacity have been instituted ...”

Section 162

“The competent social welfare centre shall place under guardianship a person ... divested of legal capacity ...”

Section 179

(1) The guardian shall care for the person and his or her rights, obligations and well-being with due diligence, manage his or her assets and take measures aimed at enabling the ward to have an independent professional and personal life.

...”

Section 184

“(1) The guardian represents the ward.

...”

Section 185

“In order to take more important measures concerning the person, personal status or health of the ward, the guardian shall obtain prior consent from a social welfare centre.”

COURT PROCEEDINGS**Section 315**

“(1) Where a decision alters the personal status of a party or his or her rights and obligations, such a decision comes into effect when it becomes final.”

...”

Section 316

“An appeal may be lodged against a decision adopted at first instance where this Act does not provide otherwise.

...”

PROCEEDINGS FOR DIVESTING AND RESTORING LEGAL CAPACITY**Section 326**

“(1) A court shall invite to a hearing the requesting party, the person concerned, his or her guardian and a representative of a social welfare centre.

(2) Persons mentioned in subsection 1 and a social welfare centre may participate in the presentation of evidence, hearings and the presentation of the outcome of the entire proceedings.

(3) A court shall try to hear the person concerned. Where that person has been placed in a psychiatric or social institution, he or she shall be heard in that institution.

(4) A court may decide not to invite and hear the person concerned where it could be detrimental for that person or where it is not possible to hear that person in view of his or her mental impairment and health condition.”

Section 329

(1) A court decision divesting someone of legal capacity shall be served on the requesting party, the person concerned, his or her guardian and a social welfare centre.

(2) The court is not obliged to serve the decision on the person concerned where he or she cannot understand the legal consequences of that decision or where it would be detrimental to his or her health.

...”

58. The relevant part of section 190 of the Social Welfare Act (Official Gazette nos. 73/1997, 27/2001, 59/2001, 82/2001, 103/ 2003 and 44/2006, *Zakon o socijalnoj skrbi*) provides:

“(1) An adult accommodated on the basis of a decision by a social welfare centre is obliged to pay for his or her accommodation, up to the full price, using all of his or her income and monetary assets.

...”

59. Section 428(a) of the Civil Procedure Act (*Zakon o parničnom postupku*) enables an applicant in respect of whom the European Court of Human Rights has found a violation of the Convention or its Protocols to request, within 30 days of the Court’s judgment becoming final, the re-opening of the domestic proceedings in question. In the new proceedings the domestic courts are obliged to follow the reasons given in the Court’s judgment.

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 8 OF THE CONVENTION IN RESPECT OF THE PROCEEDINGS DIVESTING THE FIRST APPLICANT OF LEGAL CAPACITY**

60. The first applicant complained that the manner in which the proceedings divesting her of legal capacity had been conducted violated her right to a fair trial and to respect for her private life. She relied on Article 6 § 1 and Article 8 of the Convention, the relevant part of which provides:

Article 6 § 1

“1. 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.

...”

Article 8

“1. Everyone has the right to respect for his private ... 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 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. Admissibility

1. *Exhaustion of domestic remedies*

(a) The parties' arguments

61. The Government argued that the first applicant had failed to exhaust domestic remedies because she had not lodged a constitutional complaint in the proceedings with regard to her legal capacity. Had she done so, the Constitutional Court would have invited her guardian to give her consent to such a complaint and, had the guardian given her consent, the Constitutional Court would have examined the complaint on the merits.

62. The first applicant argued that a constitutional complaint was not an effective remedy because it depended on the discretion of a guardian and that the Constitutional Court sometimes took more than two years after the lodging of a constitutional complaint to ask for a guardian's consent. In any event, the decision divesting the first applicant of legal capacity had not been served on her, so she had been unable to use any remedies against it.

(b) The Court's assessment

63. The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against a State to use first the remedies provided by the national legal system, thus allowing States the opportunity to put matters right through their own legal systems before being required to answer for their acts before an international body. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged; there is no obligation to have recourse to remedies which are inadequate or ineffective (see, among many other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports of Judgments and Decisions* 1996-IV; and *Demopoulos and Others v. Turkey* (dec.), nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 70, ECHR 2010-...).

64. Remedies the use of which depends on the discretionary powers of public officials and which are, as a consequence, not directly accessible to the applicant cannot be considered as effective remedies within the meaning of Article 35 § 1 of the Convention (see *Tumilovich v. Russia* (dec.), no. 47033/99, 2 June 1999; *Gurepka v. Ukraine*, no. 61406/00, § 60, 6 September 2005; and *Tănase v. Moldova* [GC], no. 7/08, § 122, ECHR 2010-...).

65. As to the present case, the Court notes firstly that the first applicant was not informed of the proceedings initiated before the I. Municipal Court with a view to divesting her of legal capacity and was never given an opportunity to participate in these proceedings, but was represented by a guardian *ad litem*, who appears to have had no contact with her.

66. Under the relevant procedural rules, before lodging a constitutional complaint an applicant has first to exhaust all previous remedies. Thus, the first applicant should first have lodged an appeal against the first-instance decision of the I. Municipal Court. However, the decision of the I. Municipal Court divesting the first applicant of her legal capacity was never served on her and she was therefore unable to use any remedies against it.

67. Furthermore, had the first applicant lodged a constitutional complaint, the Constitutional Court would not have examined it before obtaining the consent of the first applicant's guardian. Although a guardian *ad litem* is not a public official, the Court still considers that in these circumstances it cannot be said that the remedies relied on by the Government were accessible to the first applicant. It follows that the Government's objection must be dismissed.

2. Compliance with the six-month time-limit

68. The Government argued that the first applicant had lodged her application with the Court out of the six-month time-limit, because she had received a decision on appointing D.P.D. as her special guardian on 20 June 2008.

69. The first applicant argued that the only relevant decision was that adopted by the I. Municipal Court on 21 August 2008.

70. The Court notes that the last decision in connection with the proceedings whereby the first applicant was divested of her legal capacity was adopted by the I. Municipal Court on 21 August 2008. The present application was lodged with the Court on 15 January 2009. It follows that the Government's objection must be rejected.

3. Conclusion

71. The parties did not dispute the applicability of Article 6, under its "civil" head, to the proceedings at issue concerning the first applicant, and the Court does not see any reason to hold otherwise (see *Winterwerp*

v. the Netherlands, 24 October 1979, Series A no. 33, § 73; and *Shtukaturvov v. Russia*, no. 44009/05, § 64, 27 March 2008).

72. The Court notes that the first applicant's complaints under Article 6 § 1 and Article 8 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' arguments

73. The first applicant argued that the proceedings concerning her legal capacity were unfair because she had not participated in them. Nor had she been given an opportunity to participate in the proceedings whereby the special guardian appointed to represent her in the court proceedings had been selected. The same body, the I. Centre for Social Welfare, had appointed a guardian against her will and had instituted the proceedings to divest her of legal capacity before the I. Municipal Court. The authorisation she had given to her daughter, entitling the latter to represent her in these proceedings at a time when she still had legal capacity, had been ignored and the submissions made by her daughter in these proceedings, although containing arguments relevant to assessment of her condition, had been ignored. The decision divesting her of legal capacity had not been served on either her or her daughter. All this had been in contravention of the Family Act, which required that an individual concerned by proceedings to divest him or her of legal capacity was to be heard in the proceedings.

74. The decision divesting her of legal capacity contained only one and a half page and was not adequately reasoned.

75. The consequence of the decision to divest her of legal capacity was that she had completely lost her autonomy and had no right to make any decisions concerning her life. Furthermore, her daughter, as her sole living close relative, had not been appointed as her guardian and had also been completely excluded from taking any decision as regards the first applicant's life. There had been no reason to divest her completely of legal capacity, since she had never in any manner put at risk her own or others' interests.

76. The Government argued that the measure to divest the first applicant of her legal capacity had been adopted in proceedings conducted in accordance with the relevant provisions of domestic law, and that she had been represented by her niece as her special guardian, which had ensured the adversarial nature of the proceedings. The guardian attended the hearings and had requested that the first applicant be seen by a medical expert.

77. Furthermore, the first applicant had not lodged an appeal against the decision appointing D.P.D. as her special guardian, although that decision had been served on her and she must have known that it concerned the proceedings to divest her of legal capacity.

78. The measure as such was based on the relevant provisions of the Family Act, pursued the legitimate aim of protecting the interests of the first applicant as a demented and disoriented person, incapable of caring for her interests, and was proportionate since no other, less stringent measure, would suffice in the circumstances. The decision was based on a report by the Centre, a statement given by D.P.D. and the report by an expert in psychiatry, who established that the first applicant, owing to her various health problems, was unable to care for her interests.

2. The Court's assessment

(a) General principles

79. 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, 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 of the Convention. In assessing whether or not a particular measure, such as exclusion of the applicant from a hearing, was necessary, the Court will take into account all relevant factors (such as the nature and complexity of the issue before the domestic courts, what was at stake for the applicant, whether his appearance in person represented any threat to others or to himself, etc. (see *Shtukurov*, cited above, § 68)). In particular, the Court considers that stricter scrutiny is called for where measures which have such a strong impact on one's private life as divesting one of legal capacity are at stake.

80. Furthermore, according to the Court's established case-law, reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *García Ruiz v. Spain*, 21 January 1999, *Reports 1999-I*, § 26, and *Helle v. Finland*, 19 December 1997, *Reports 1997-VIII*, §§ 59).

(b) Application of these principles in the present case

81. As regards the present case, the Court notes that it is not disputed that the first applicant was not notified of the proceedings concerning her legal capacity before the I. Municipal Court. Further, she was neither summoned by the Municipal Court in order to give evidence nor seen by the judge conducting the proceedings. The Court concludes that the first applicant was unable to participate personally in the proceedings before the I. Municipal Court in any form. It remains to be ascertained whether, in the circumstances, this was compatible with the requirements of Articles 6 and 8 of the Convention.

82. The Government argued that, according to the relevant provisions of the Family Act, the fact that the first applicant was not heard in the proceedings concerning her legal capacity had been lawful in domestic terms. However, the crux of the complaint is not the domestic legality but the “fairness” of the proceedings from the standpoint of the Convention and the Court’s case-law (see *Shtukatur*ov, cited above, § 70) and ensuring the relevant procedural safeguards when taking a decision seriously affecting the applicant’s private life.

83. The Court has already held in its above-cited *Shtukatur*ov judgment:

“72. ... the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court’s examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant’s mental capacity (see, *mutatis mutandis*, *Kovalev v. Russia*, no. 78145/01, §§ 35-37, 10 May 2007).”

84. The same is true in respect of the first applicant in the present case. The Court considers that judges adopting decisions with serious consequences for a person’s private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.

85. The Court is aware of the relevance of medical reports concerning persons suffering from impairment to their mental capacities and agrees that any decision based on the assessment of mental health has to be supported by relevant medical documents. However, at the end of the day, it is the judge and not a physician, albeit a psychiatrist, who is to assess all relevant facts concerning the person in question and his or her personal circumstances. It is the function of the judge conducting the proceedings to decide whether such an extreme measure is necessary or whether a less stringent measure might suffice. When such an important interest for an individual’s private life is at stake a judge has to balance carefully all relevant factors in order to assess the proportionality of the measure to be taken. The necessary procedural safeguards require that any risk of arbitrariness in that respect is reduced to a minimum.

86. The psychiatrist who saw the first applicant concluded that she was a gravely ill person, bedridden, completely dependent on the help of others, demented and that meaningful contact with her was not possible, suffering from severe impairment of global cognitive ability, with an unfavourable prognosis for the future (see above, § 35). She also found that the first applicant was incapable of caring for herself and her rights and interests and recommended that the court divest her entirely of legal capacity. However, in the Court's view it would still be preferable for the judge conducting the proceedings to verify that these conclusions were not arbitrary; to hear witnesses as well as the doctor. In particular, it was for the judge to make any conclusions as regards the issue of divesting the first applicant of her legal capacity.

87. In this connection the Court notes that, even if the psychiatrist examined the first applicant on 18 July 2008, the medical documentation which served as a basis for the psychiatric report dated from 2002. In this respect it should be noted that the second applicant submitted that the psychiatrist saw the first applicant for only twenty minutes, at a time when the first applicant was tired and under the influence of medication. She also drew attention to the fact that both letters, the first of 14 August 2008 and the second of 22 August 2008, by which the first applicant sought to be represented by the second applicant were signed by the first applicant with her full name.

88. The Court takes note of the second applicant's submissions to the I. Municipal Court that D.P.D. had not seen the first applicant. While it is true that the reasoning in the decision to divest the first applicant of her legal capacity also cited the statement given by D.P.D. concerning the first applicant's condition, it was exactly D.P.D. who asked the court to carry out a medical examination of the first applicant.

89. The Court also notes that on 14 August 2008 the first applicant authorised the second applicant to represent her in the proceedings at issue. At that time the first applicant still had legal capacity and according to domestic law her authorisation was thus legally valid, irrespective of the fact that a special guardian had already been appointed. However, the second applicant was not informed of the hearing held on 21 August 2008 before the I. Municipal Court and her submissions, although containing important arguments, were not addressed by that court in any manner. In addition, the decision divesting the first applicant of her legal capacity was not served on her.

90. As regards the reasons adduced by the national authorities for divesting the first applicant of her legal capacity, the Court notes that the I. Municipal Court based its decision on the findings of a medical expert stating that, on account of her mental illness, she was not capable of caring for herself, her rights and interests, was demented and was entirely dependant on the care and help of others. In this connection the Court

stresses that it is legitimate to provide care for the sick or elderly, or persons with diminished capacity who are unable to care for themselves. It is, however, an entirely different thing to deprive someone of legal capacity. Divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is thus deprived of his or her independence in all legal spheres. Such persons are put in a situation where they depend on others to take decisions concerning various aspects of their private life, such as, for example, where to live or how to dispose of their assets and all income. Numerous rights of such persons are extinguished or restricted. For example, such person is not able to make a will, cannot be employed, and cannot marry or form any other relationship creating consequences for their legal status, etc.

91. In order to ensure that the sick and elderly are properly cared for, the State authorities have at their disposal other means than divesting such persons of their legal capacity. Divesting someone of legal capacity is a very serious measure which should be saved for exceptional circumstances.

92. Finally, the Court reiterates that it must always assess the proceedings as a whole, including any decisions of the appeal courts (see *C.G. v. the United Kingdom*, no. 43373/98, § 35, 19 December 2001). The Court notes that in the present case the decision divesting the first applicant of legal capacity was not served on her, despite the fact that at that time she still preserved legal capacity since the decision in question had not yet become final. However, by failing to inform the first applicant of that decision, the Municipal Court also deprived her of the possibility of using any remedies against it. Therefore, any possible defects in the proceedings before the first-instance court could not be remedied at further instance.

93. The Court finds also that the fact that the judge who divested the first applicant of legal capacity completely ignored the second applicant's arguments in his assessment of the first applicant's condition, although the first applicant had authorised the second applicant to represent her in the proceedings at a time when she still had legal capacity, ran contrary to the guarantees of a fair hearing and also deprived the first applicant of adequate procedural safeguards in proceedings where a decision adversely affecting her private life was adopted.

94. There has therefore been a violation of Article 6 § 1 of the Convention. In view of that finding, the Court considers that no separate issue remains to be examined under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION CONCERNING THE INSTITUTION OF COURT PROCEEDINGS WITH A VIEW TO DIVESTING THE SECOND APPLICANT OF LEGAL CAPACITY

95. The second applicant, relying on Article 8 of the Convention complained that the institution of proceedings with a view to divesting her of legal capacity had violated her right to respect for her private life.

A. Admissibility

96. The Government argued that any complaint in respect of the proceedings concerning the second applicant's legal capacity was premature since these proceedings were still pending.

97. The Court notes that the second applicant is complaining that the institution of court proceedings with a view to divesting her of legal capacity amount to an unjustified interference with her right to respect for her private life. In view of the nature of this complaint, the Court considers that the question whether the second applicant's complaint under Article 8 of the Convention in connection with the institution of proceedings to divest her of legal capacity is premature because these proceedings are still pending is closely linked to the merits of this complaint. It should therefore be joined to the merits.

98. The Court further considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Moreover, it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

99. The second applicant argued that there had been no need to appoint a guardian for her and to institute the court proceedings to divesting her of legal capacity, since she had been entirely capable of caring for her needs and interests. She challenged the Centre's arguments for initiating those proceedings, namely that in 2006 she had refused to leave her home and to communicate with others for several days; that in 1994 she had been treated in a psychiatric institution; that her attitude towards her mother had been overly possessive; that she had constantly complained about the treatment of her mother in the Caritas Home; that she had repeatedly made unrealistic requests concerning her mother; and that she had changed the lawyers who represented her on several occasions.

100. As regards her complaints about her mother's treatment in the Caritas Home, the second applicant submitted that at the time that same Home had been the subject of widespread criticism by many persons; this had been reported in the media, and she enclosed press clippings. Furthermore, she did not agree that the love and care she had been showing her mother could be a sign of mental illness. In her view, the proceedings to divest her of legal capacity had been instituted because of her complaints against the Caritas Home and her opposition to the Centre's actions with regard to her mother.

101. The Government argued that the rights of the second applicant in the proceedings at issue had been adequately protected since a special guardian had been appointed for her and the second applicant had also been represented by a lawyer of her own choice. She had been invited to every hearing and given an opportunity to present her arguments. Her mental condition had been assessed by an expert in psychiatry.

2. The Court's assessment

(a) Whether there has been an interference

102. The Court considers that a measure such as divesting one of legal capacity amounts to a serious interference with that person's private life. In this connection the Court notes that the mere institution of these proceedings already has serious consequences. Thus, a special guardian is appointed for the person concerned and represents him or her in the court proceedings, and the person is subject to various assessments, including a psychiatric report, all of which concern one's private life.

103. Further, in the present case the guardian appointed to the second applicant was given a wide range of powers, such as representing her in all personal matters and matters concerning her property, managing her assets and taking proper care of her person, rights, obligations and well-being. The Court therefore considers that the institution of the proceedings with a view to divesting the second applicant of legal capacity amounted to an interference with her private life within the meaning of Article 8 of the Convention.

104. Any such interference with the right to respect for one's private life will constitute a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society"(see *Anayo v. Germany*, no. 20578/07, § 63, 21 December 2010; and *Mikolajová v. Slovakia*, no. 4479/03, § 58, 18 January 2011).

(b) Whether the interference was based on law, pursued a legitimate aim and was necessary in a democratic society

105. In the circumstances of the present case the Court considers that the issues of the legality of the interference, the legitimate aim pursued and its necessity are closely interconnected, and it will examine them together.

106. As to the legal basis for the interference concerned, the Court notes that section 159 of the Family Act provides that an adult unable to care for his or her own needs, rights and interests, or who presents a risk to the rights and interests of others on account of mental illness or other reasons may be partially or completely divested of legal capacity.

107. In the Court's view, in order to be able to institute such proceedings a social welfare centre (or any other authority) should be able to present convincing evidence that the person concerned is either unable to care for his or her own needs, rights and interests, or presents a risk to the rights and interests of others. This cannot be done on the basis of general statements but only on the basis of specific facts.

108. In the present case the Centre claimed that the second applicant was unable to protect her rights and interests, without relying in its statement on any specific fact. The general nature of the statements made by the Centre raises doubts as to the compliance with the statutory requirements for the institution of the proceedings to divest the second applicant of legal capacity (see above, § 47).

109. The Court considers that in deciding whether the proceedings to divest a person of capacity were proportionate, 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 before them in a particular case; 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 *Shtukaturv v. Russia*, no. 44009/05, § 67, 27 March 2008). In this connection the Court would like to stress once again that strict scrutiny is called for where measures that have such adverse effect on one's personal autonomy are at stake. In this connection the Court is mindful that divesting someone of legal capacity entails grave consequences for various spheres of that person's life.

110. The Government in their submissions before the Court and the Centre in its request to the I. Municipal Court both stressed that the purpose of instituting the proceedings to divest the second applicant of legal capacity was to ensure the protection of her interests through the institution of guardianship.

111. In the Court's view, however, the institution of such proceedings, which oblige the person concerned to submit himself or herself to court proceedings in which he or she is represented by a guardian and where various aspects of his or her private life are examined and questioned and

that person's mental condition, behaviour and personality are assessed, is justified where convincing evidence exists that a measure to divest that person of legal capacity is an adequate answer to the situation at issue.

112. As regards the second applicant's mental health, the Court notes that it is true that she was twice hospitalised in a psychiatric ward, the first time in 1994 and the second in 2006. The discharge letter of 20 December 2006 states that she had visibly recovered physically, had reacted positively to therapy, that the psychopathology for which she had been hospitalised had completely ceased and that there was an optimistic prognosis for further treatment (see above, § 44).

113. As regards the psychiatric report commissioned for the court proceedings to divest the second applicant of legal capacity, the Court notes firstly that the report, which is clearly negative with regard to the applicant's condition, was drawn up by a psychiatrist who had not previously treated the applicant and who held only a telephone conversation with her. The Court is sceptical as to whether a person's mental condition could be assessed with sufficient certainty after only a single telephone conversation, albeit of one hour, in particular given the significance of such a report in the present case.

114. The Court notes that under section 161 taken together with section 159 of the Family Act a social welfare centre shall institute the proceedings for divesting a person of legal capacity where it is shown that that person, on account of mental illness or other reasons, is unable to care for his or her own needs, rights and interests, or who presents a risk to the rights and interests of others.

115. The applicant in the present case, when heard by the national authorities, explained that she lived alone and had taken care of all her needs. She stressed that she regularly paid all her bills, was seeing regularly her general physician, had taken care of her meals and organised her social life. Further to her statements, the Court notes that there is no indication, either before the institution of the proceedings in question or during them, of specific damage that the second applicant had committed against her own interests or the interests of others which would warrant divesting her of legal capacity.

116. Against the above background, the Court finds that in the circumstances of the present case the institution of the court proceedings with a view to divesting the applicant of legal capacity did not observe the procedure and requirements prescribed by law, did not pursue a legitimate aim and was not necessary in a democratic society, and dismisses the Government's objections as to the exhaustion of domestic remedies.

117. There has accordingly been a violation of Article 8 in that respect.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION CONCERNING THE FIRST APPLICANT'S PLACEMENT IN A CARITAS HOME

118. Relying on Article 8 of the Convention, the applicants also complained about the refusal to place the first applicant in a single room in the Caritas Home and about the limitation on the frequency of visits allowed.

Admissibility

1. The parties' arguments

119. The applicants argued that they were not allowed to place the first applicant in a single room in the Caritas Home, although that would have been beneficial for her health. Furthermore, visits in multi-occupancy rooms were limited to one hour a day, which prevented the applicants from spending more time together; it also prevented the second applicant from spending more quality time with the first applicant, since the first applicant had been the only person who visited her.

120. The Government argued that the applicants were able at all times to enter into a private agreement with the Caritas Home with a view to placing the first applicant in a single room at their own expense. As regards contacts between the applicants, these were structured in such a way that the second applicant was able to visit the first applicant for an hour a day in her room and otherwise in the communal premises of the Caritas Home between 9 a.m. and 7 p.m. or 8 p.m. in the winter and summer periods respectively. The second applicant had been spending almost entire days with the first applicant at the Caritas Home.

2. The Court's assessment

121. The Court notes that in July 2006 the first applicant was placed in the Caritas Home at the request of her daughter, the second applicant, who claimed that, owing to the special needs caused by her mother's illness, and her own illness, she was no longer able to care for her mother alone. Shortly afterwards, in August 2006 the first applicant's right to care outside her family was established and she continued to reside in the Caritas Home. She was accommodated in a multi-occupancy room with three other persons and until May 2008 the second applicant was able to spend whole days with her.

122. The second applicant made frequent requests that her mother be placed in a single room, offering to pay the difference between the amount covered by the State and the full price for a single room. However, this request was denied on the ground that such an arrangement was not

possible; she could only ask that her mother be placed in a single room on the basis of a private contract with the Caritas Home, and then pay the full price herself.

123. In assessing whether a fair balance has been struck as regards the measure adopted, the Court reiterates that in choosing the most appropriate manner in order to comply with their obligations under the Convention, the States enjoy a certain margin of appreciation. In matters concerning its social policy this margin has been recognised as being quite wide (see, *mutatis mutandis*, *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 100, ECHR 2010-...). Furthermore, effective protection of respect for private and family life cannot require the national authorities to enable persons benefiting from State assistance to have a single room in an institution caring for them, unless prevailing health or other relevant reasons require it.

124. The applicants never explained on what exact grounds they sought a single room for the second applicant and why her placement in a room with three other persons was incompatible with her right to respect for her private and family life. The second applicant repeatedly invoked health grounds in her requests before the national authorities and the Caritas Home. However, she never gave any details concerning such grounds nor did she support her claim with any relevant medical opinion. Thus, the applicants failed to present any convincing reasons for placing the first applicant in a single room.

125. By placing the first applicant in the Caritas Home at the partial expense of the State, the national authorities satisfied their duty to provide the first applicant with adequate social care. The fact that she is placed in a multi-occupancy room and that visits in such rooms might be limited to an hour a day cannot be said to be disproportionate and in contravention of the applicants' right to respect for their private and family life, in particular in view of the fact that visits in communal premises are allowed from 9 a.m. to 7 p.m. and 8 p.m. in the winter and summer periods respectively (see paragraph 24 above).

126. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

127. The applicants further complained that the decision to pay the first applicant's pension directly to the Caritas Home and her inability to freely dispose of her assets had violated her right to peaceful enjoyment of her possessions. They relied on Article 1 of Protocol No. 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

1. The parties’ arguments

128. The applicants argued that by ordering that the first applicant’s pension was to be used to cover the costs of her accommodation in the Caritas Home, and by preventing her, as a person divested of legal capacity, from freely disposing of her pension and other assets, the State had violated her right to peaceful enjoyment of her possessions.

129. The Government argued that the right of the first applicant to care outside her family had been established on a request by her daughter, the second applicant, and that ordering the first applicant to bear part of the costs of her accommodation in a home had been based on the Social Welfare Act, since she was in receipt of a pension. However, the first applicant could have sought termination of that arrangement at any time.

130. The decision that the first applicant was to bear part of the costs of her accommodation was proportionate, since all her needs had been satisfied in the Caritas Home. The State had still been paying more than half of the costs of the first applicant’s accommodation.

(a) Payment of the first applicant’s pension to the Caritas Home

131. The Court notes that the decision of 31 August 2006 established the first applicant’s right to care outside her family. However, she was still ordered to bear the costs of her accommodation, since she was in receipt of a pension. The difference between the full costs of the first applicant’s accommodation and the amount of her pension, the former being higher, has been covered by the State.

132. The Court notes that neither the first nor the second applicant used any remedies against that decision. Therefore, the decision of 31 August 2006 which arguably represented an interference with the first applicant’s right to peaceful enjoyment of her possession was the final decision taken by the national authorities in this respect. However, the present application was lodged with the Court on 15 January 2009.

133. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(b) The first applicant's inability to dispose of her assets

134. The Court notes that the first applicant's inability to dispose of her assets is a consequence of the decisions to divest her of legal capacity. For this reason the Court considers that this part of the application must be declared admissible.

B. Merits

135. The Court notes that it has addressed the issue of the proceedings divesting the first applicant of legal capacity under Article 6 of the Convention and that the first applicant will be able to seek that the proceedings concerning her legal capacity be reopened.

136. Therefore the Court considers that there is no need to examine separately the complaint under Article 1 of Protocol No. 1 to the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

137. The applicants complained further that they had no effective domestic remedy at their disposal as regards their Convention complaints. They relied on Article 13 of the Convention, which provides:

“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.”

A. Admissibility

1. Article 13 in connection with Article 6 and 8 of the Convention as regards the proceedings divesting the applicants of legal capacity

138. The Court considers that this complaint is closely linked to that concerning Article 6 and Article 8 of the Convention as regards the proceedings divesting the applicants of legal capacity, and must also therefore be declared admissible.

2. Article 13 in connection with the complaint under Article 1 of Protocol No. 1 concerning the first applicant's inability to dispose of her assets

139. This complaint, being closely related to the complaint under Article 1 of Protocol No. 1 which the Court has declared admissible, must therefore also be declared admissible.

3. Article 13 in connection with the remaining complaints under Article 8 of the Convention and under Article 1 of Protocol No. 1

140. The Court notes that these complaints have been declared inadmissible and that Article 13 has no autonomous standing. It follows that the complaints under Article 13, in so far as they are related to the complaints under the substantive Articles of the Convention which have been declared inadmissible as manifestly ill-founded, must also be rejected as manifestly ill-founded in accordance with Article 35 §§ 3(a) and 4 of the Convention.

B. Merits

1. Article 13 in connection with Article 6 and 8 of the Convention as regards the proceedings divesting the applicants of legal capacity

141. The applicants argued that they were unable to use any remedy in the proceedings concerning their legal capacity. As regards the first applicant, the judge conducting the proceedings had not allowed the second applicant to represent the first applicant in those proceedings and the first-instance decision had not been served on them. As regards the second applicant, she had at her disposal no means to prevent the national authorities to institute the proceedings for divesting her of legal capacity.

142. The Government maintained that the first applicant could have lodged an appeal against the decision appointing D.P.D. as her guardian and filed a constitutional complaint.

143. The Court is of the opinion that this complaint, although somewhat rephrased, is essentially the same as those already examined under Article 6 § 1 and Article 8 of the Convention. Having regard to its findings in relation to these provisions, the Court considers that the applicants' complaint under Article 13 does not require a separate examination on the merits (see *Salontaji-Drobnjak*, cited above, § 147).

2. Article 13 in connection with the complaint under Article 1 of Protocol No. 1 concerning the first applicant's inability to dispose of her assets

144. As already stated above, the first applicant will have the possibility of seeking the reopening of the proceedings at issue in which the issue of her ability to dispose of her assets will also be addressed. Having regard to this the Court concludes that this complaint does not require a separate examination.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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

146. The first applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage and the second applicant EUR 10,000 on the same account.

147. The Government deemed the sums claimed excessive and unsubstantiated.

148. As regards the first applicant, the Court notes that section 428(a) of the Civil Procedure Act provides for the reopening of domestic proceedings if the Court has found a violation of the Convention and in view of that possibility the Court considers that in the circumstances of the present case the finding of a violation constitutes sufficient redress.

149. As regards the second applicant, the Court considers that she must have suffered non-pecuniary damage as a result of the institution of the proceedings to divest her of legal capacity. Making its assessment on an equitable basis, the Court awards the second applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

150. The applicants also claimed EUR 4,400 for the costs and expenses incurred before the Court.

151. The Government contested the claim.

152. 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 have been reasonable as to 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 the sum of EUR 3,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicants on this amount.

C. Default interest

153. 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. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies in connection with the second applicant's complaint under Article 8 of the Convention as regards the proceedings to divest her of legal capacity and rejects it;
2. *Declares* the following complaints admissible:
 - the complaints under Article 6 and Article 8 of the Convention concerning the fairness of the proceedings to divest the first applicant of her legal capacity and the complaint under Article 13 of the Convention in that connection;
 - the complaint under Article 8 concerning the institution of proceedings to divest the second applicant of legal capacity and the complaint under Article 13 of the Convention in that connection;
 - the complaint under Article 1 of Protocol No. 1 concerning the first applicant's inability to dispose of her assets and the complaint under Article 13 of the Convention in that connection;
 - and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the flaws in the proceedings divesting the first applicant of legal capacity;
4. *Holds* that there is no need to examine the first applicant's complaint under Article 8 of the Convention;
5. *Holds* that there has been a violation of Article 8 of the Convention on account of the institution of the proceedings to divest the second applicant of legal capacity;

6. *Holds* that there is no need to examine separately the complaints under Article 1 of Protocol No. 1 to the Convention;
7. *Holds* that there is no need to examine separately the complaints under Article 13 of the Convention;
8. *Holds*
 - (a) that the finding of a violation constitutes sufficient just satisfaction in respect of the first applicant;
 - (b) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros) to the second applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros) to the applicants jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (c) 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;
9. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 3 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lorenzen joined by Judge Steiner is annexed to this judgment.

A.K.
S.N.

CONCURRING OPINION OF JUDGE LORENZEN, JOINED BY JUDGE STEINER

We have voted with the majority in finding violations of Articles 6 and 8 of the Convention in the present case. However, we are unable to agree with the reasons which have been given for finding a violation of Article 8 in respect of the proceedings instituted with a view to divesting the second applicant of her legal capacity. Our reasons are the following:

It is obvious that divesting someone of his or her legal capacity is a serious interference with that person's private life and we can also agree that the mere fact of instituting proceedings with that aim, given the consequences, amounts to an interference. Accordingly, the conditions in Article 8 § 2 must be fulfilled.

Contrary to the Court's normal practice, the majority considers that the issues of the legality of the interference, the legitimate aim pursued and its necessity are closely interconnected and should be examined together (see paragraph 105 of the judgment). In our opinion, this manner of proceeding complicates the analysis of the case and leads the Court to consider questions which it is not necessary to examine.

In the present case the proceedings to divest the second applicant of her legal capacity were instituted on 17 September 2008 and, according to the information available to the Court, they are still pending. Accordingly, no decision whatsoever as to whether the authorities' claim is well-founded has yet been made by the domestic courts. In the absence of any rulings by the domestic courts, the judgment of the majority takes it upon itself to rule not only on the legality of the proceedings under Croatian law and the legitimate aim behind them, but also on their proportionality. The majority concludes that the proceedings did not comply with the relevant procedure and conditions prescribed by law, did not pursue a legitimate aim and were not necessary in a democratic society.

Apart from the lack of a sufficient basis for the Court to make such an assessment of the factual evidence and the application of national law in this case, it is in our opinion not properly in accordance with the principle of subsidiarity and the requirement of exhaustion of domestic remedies to do so. It interferes with the principle that the national courts have primary responsibility for guaranteeing the rights under the Convention. The reasoning of the majority implies that merely instituting proceedings to divest someone of his or her legal capacity may be found to be a violation of the Convention, without the national courts having had the possibility to redress the interference, unless the latter recognise the violation.

However, in the circumstances of the present case we can agree that there has been a violation of Article 8, but on different grounds.

In our opinion, section 161 taken together with section 159 of the Croatian Family Act provided a sufficient legal basis in national law for the institution of such proceedings and the question whether the conditions for proceeding with the request were fulfilled is primarily for the national courts to decide. We are not able to conclude, however, that national law was in conformity with the requirements of Article 8 § 2 of the Convention. According to the Court's case-law, the expression "in accordance with the law" within the meaning of Article 8 § 2 requires not only that the interference should have some basis in domestic law; it also refers to the quality of the law in question, requiring it to be accessible and foreseeable to the person concerned as well as compatible with the rule of law (see, *mutatis mutandis*, *Uzun v. Germany*, no 3523/05, § 60, 2 September 2010). Depending on the circumstances of the case, the rule of law may require that domestic law provide adequate protection against arbitrary interference with Article 8 rights enabling the Court to be satisfied that there exist effective guarantees against abuse (see *Uzun*, § 63).

We consider that such requirements should also apply in proceedings instituted with the aim of divesting someone of his or her legal capacity because of the serious consequences that the mere institution of such proceedings may have. In this connection not only are procedural guarantees that the person concerned may adequately take part in the proceedings necessary, but we also consider it indispensable, in order to avoid abuse, for the national law to provide that a court decision be given on the well-foundedness of an application to divest a person's legal capacity – at least on a provisional basis - within a reasonably short time-limit. The Croatian Family Act contains no guarantees as to the speediness of such proceedings and there is no evidence that the Croatian courts attempted, of their own motion, to expedite proceedings which have now been pending for more than three years. Accordingly, Croatian law did not, in our opinion, comply in the present case with the requirement under Article 8 § 2 that the interference be "in accordance with the law", and on that ground we can agree that there has been a violation of Article 8 of the Convention in respect of the second applicant as well.