



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

FOURTH SECTION

CASE OF KĘDZIOR v. POLAND

(Application no. 45026/07)

JUDGMENT

STRASBOURG

16 October 2012

FINAL

16/01/2013

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

In the case of Kędzior v. Poland,

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

David Thór Björgvinsson, *President*,

Lech Garlicki,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 25 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 45026/07) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Stanisław Kędzior (“the applicant”), on 4 October 2007.

2. The applicant was represented by Mr A. Bodnar and Mrs M. Zima, lawyers from the Helsinki Foundation for Human Rights (Warsaw, Poland). The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant complained, in particular, about his placement in a social care home and his inability to obtain release from the home, in breach of Article 5 §§ 1 and 4 of the Convention.

4. On 7 May 2009 the application was communicated 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

5. The applicant was born in 1956 and lives in Sośnica.

6. The applicant has been undergoing psychiatric treatment since the age of sixteen. He was hospitalised on several occasions in psychiatric hospitals in Lubliniec and Żurawica.

7. The applicant lived in Nowy Lubliniec with his mother and handicapped sister. At the end of 2000 the applicant's brother, who did not live with them, applied to the court submitting that the applicant had been aggressive, had been refusing to take his medication and had been abusing alcohol.

8. On 22 December 2000 the applicant was partly deprived of his legal capacity by a court because of his mental disorder, as he had been diagnosed with schizophrenia.

9. On 28 August 2001 the Lubaczów District Court appointed his brother, Mr Zbigniew Kędzior, as his guardian (*kurator*). Subsequently, the guardian applied to the court to have the order varied and to have the applicant declared totally incapacitated.

10. In the course of the proceedings, on 22 December 2001, an expert psychiatric opinion was prepared which confirmed that the applicant was suffering from schizophrenia and that he had a tendency to abuse alcohol.

11. On 27 December 2001 the Krosno Regional Court changed its previous decision and decided to declare the applicant totally incapacitated as his mental condition had deteriorated. The applicant's brother remained his guardian (*opiekun prawny*).

12. On an unspecified date the applicant's guardian requested the Ruda Różaniecka Social Care Home (*Dom Pomocy Społecznej*) to admit the applicant.

13. On 8 February 2002 the Lubaczów District Family Centre (*Powiatowe Centrum Pomocy Rodzinie*) decided to place the applicant in the social care home, as requested by his guardian. In terms of domestic law the admission was voluntary and did not require approval by a court.

14. Between 31 October 2001 and 11 February 2002 the applicant was in a psychiatric hospital in Jarosław.

15. On 11 February 2002 the applicant was admitted to the Ruda Różaniecka Social Care Home, where he remained for ten years.

16. The applicant complained to the Lubaczów District Court that he had been placed in the care home against his will and without any medical necessity. On 12 April 2002 the president of the court informed him that the placement had been in accordance with the law.

17. On 27 December 2004 the District Family Centre informed the applicant that his guardian was authorised to place him in the care home.

18. On 9 February 2006 the Przemyśl Regional Court rejected the applicant's request for proceedings to be initiated to have his legal capacity fully restored. The court considered that the applicant, being legally incapacitated, did not have the authority to lodge such a request, and that his guardian did not support the request.

19. On 23 February 2006 the president of the Lubaczów District Court explained to the applicant again that due to his total incapacity he had not been a party to the proceedings relating to his placement in the care home.

20. On 17 March 2006 the president of the Przemyśl Regional Court informed the applicant in a letter that there were no grounds to institute proceedings to restore the applicant's legal capacity of the court's own motion.

21. On 5 June 2006 and 15 February 2007 the District Family Centre again replied to the applicant's letters informing him that only his guardian could approve his release from the care home.

22. On 21 September 2006 the Przemyśl Regional Court again rejected a request by the applicant to have his legal capacity restored, given his lack of legal standing to initiate such proceedings.

23. On 17 January 2007 the president of the Lubaczów District Court informed the applicant that any variation of his incapacitation order was governed by Article 559 of the Code of Civil Procedure (CCP). The president further clarified that proceedings to vary the incapacitation order could be instituted by a court of its own motion. In addition, the applicant himself, although lacking legal capacity, could apply to the court for such proceedings to be instituted. According to the president, the latter possibility was based on the interpretation of the law as provided in a commentary to the CCP.

24. The applicant again asked the Przemyśl Regional Court to quash the legal incapacitation order. On 8 February 2007 the court rejected the request as inadmissible in law.

25. On 1 March 2007 the president of the Przemyśl Regional Court explained to the applicant, in a letter of response to the applicant's query, that only his legal guardian could institute proceedings to have his legal incapacity revoked. Alternatively, the applicant could request the court to institute such proceedings of its own motion, but for that to succeed new medical evidence needed to be provided.

26. On 11 May and 7 August 2007 the Przemyśl Regional Court rejected further requests by the applicant for his legal capacity to be restored, on the ground that the applicant had no legal standing to institute such proceedings.

27. On 17 September 2007 the same court rejected a further appeal by the applicant against the decision of 7 August 2007. The court noted that following the Constitutional Court's judgment of 7 March 2007 the domestic law had been amended, and it was now possible for a person lacking legal capacity to institute proceedings to have the incapacitation order set aside. However, the amendments to the CCP had been introduced by the law of 9 May 2007, which would enter into force only on 7 October 2007. Thus, the applicant's request had not been examined.

28. On 13 July 2007 the Jarosław District Prosecutor informed the applicant that his complaints, in particular against Dr F., who had prepared an expert opinion in 2001 in the proceedings concerning his incapacitation, were manifestly ill-founded.

29. On several occasions in 2008 the applicant attempted to institute proceedings to have his incapacitation quashed; however, all his requests were refused for failure to comply with various procedural requirements, including failure to pay court fees in the amount of 40 Polish zlotys (PLN, approx. 10 euros (EUR)). The applicant appealed against all the decisions and submitted new requests for the incapacitation order to be lifted.

30. It appears that a later request was successful, as on 9 March 2009 the Przemyśl Regional Court instituted proceedings to have the applicant's legal capacity restored (file no. Ns 23/09). The court decided to have an expert opinion prepared and for the applicant to be heard by a judge in the presence of a psychologist and a psychiatrist.

31. On 20 March 2009 a judge, with a panel of experts, heard the applicant during a twenty-five-minute-long interview.

32. On 7 April 2009 the experts submitted their opinion to the court on the basis of that interview with the applicant. The applicant submitted to the experts that he had been placed in the social care home against his will by his brother seven years previously. In the home he had been independent, had not been drinking alcohol and had been taking his medication. In the past four years he had been given long leaves of absence to visit his home, and had travelled alone. He would like to make his own decisions and to vote in elections and not to be obliged to ask his brother for everything. He also mentioned that if his capacity were restored he would prefer to stay in the social care home and to continue visiting his family home on leaves of absence.

33. The experts concluded that the applicant was suffering from schizophrenia, although for several years he had not experienced psychotic symptoms or displayed aggressive behaviour. However, without a rigorous therapeutic regime the applicant's state of health could worsen. According to the experts the applicant did not consider himself to be a person with a mental disorder, and showed a lack of critical judgment regarding his state of health and his actions. On the basis of the file and the interview with the applicant the experts concluded that his primary intention in applying for restoration of his legal capacity was to leave the social care home. In this context they noted that during the interview the applicant had spontaneously declared that he would prefer to stay in the social care home even if his capacity were restored. Nevertheless, judging from his consistent and extensive correspondence with the courts so far, the experts considered that his sole intention remained "to live freely in the family home and not in the social care institution". The experts concluded that the applicant's mental state had improved but not to the extent that would allow him to function independently.

34. On 8 April 2009 the experts informed the court that they considered it unnecessary to notify the applicant of any court decisions or applications to court, given his state of health.

35. On 9 April 2009 the Przemyśl Regional Court decided to stop sending the applicant any notifications of court decisions and appointed a court officer as a guardian to represent his interests in legal proceedings. The applicant submitted that he had never met this guardian.

36. On 9 April 2009 the Przemyśl Regional Court dismissed a request by the applicant to have his legal capacity restored. The decision contains no reasons, as it appears that the applicant's guardian had not asked for them. Nor did she lodge an appeal against the decision.

37. On 16 January 2012, at the request of the applicant's guardian, he was transferred to the Sośnica Social Care Home.

II. RELEVANT DOMESTIC LAW AND PRACTICE

38. Article 559 of the Code of Civil Procedure ("the CCP") provides as follows:

"1. A court may quash legal incapacitation if the reasons for which it was ordered cease to exist; the quashing may take place of the court's own motion.

2. Where the mental state of an incapacitated person improves, a court may change the total incapacitation to partial; where his or her mental state deteriorates, partial incapacitation may be changed to total."

39. On 7 March 2007 the Constitutional Court gave judgment in case no. K 28/05. The judgment was published and entered into force on 17 March 2007. The court decided that Article 559 of the CCP was unconstitutional in so far as it deprived an incapacitated person of the right to lodge a request to have a legal incapacitation order quashed or varied. As regards the consequences of the judgment, the Constitutional Court considered that the most appropriate means of enforcement would be for the legislature to introduce an amendment to the Code. In that connection it welcomed a bill under examination by Parliament which included a relevant amendment. However, it emphasised that the judgments of the Constitutional Court should be enforced not only by the legislature but also by the ordinary courts. In the present case that would mean changing the unconstitutional practice of courts examining cases concerning incapacitation, and allowing proceedings to be brought by individuals deprived of legal capacity. The Constitutional Court stated:

"From the date of publication of the judgment in the Official Journal the presumption of the constitutionality of Article 559, taken together with Article 545 §§ 1 and 2 of the CCP, in so far as it prevented an incapacitated person from instituting proceedings to quash or vary an incapacitation order, is no longer applicable. The Constitutional Court wishes to emphasise that that is so in consequence of the judgment of the Constitutional Court itself, whether or not legislative changes are eventually introduced. It should therefore be considered that the finding by the Constitutional Court of the unconstitutionality of limiting an incapacitated person's procedural rights allows the courts to interpret the Code of

Civil Procedure in accordance with the Constitution. In the context of this judgment the opinion expressed by the Supreme Court's resolution of 2004, to the effect that amelioration of the procedural position of incapacitated persons could not be achieved through interpretation of the existing regulations as that would amount to overstepping the boundaries of judicial power, is no longer applicable. Judges, when carrying out their duties, are subject not only to statute but also to the Constitution, which is the highest law in the Republic of Poland and may – and in cases of conflict with existing statutes confirmed by the Constitutional Court shall – be directly applicable.”

40. The Law of 9 May 2007, which entered into force on 7 October 2007, amended the CCP. A new paragraph was added; Article 559 § 3 provides as follows:

“An application to have a legal incapacitation order quashed or varied may also be lodged by the incapacitated person.”

41. According to the 1994 Psychiatric Protection Act (*ustawa o ochronie zdrowia psychicznego*) the admission to a psychiatric hospital of a person who has a mental disorder or is mentally disabled and is unable to express his or her consent must be approved by a civil court (section 22 (2)). A court can also decide on the admission of a person who has a mental disorder but who does not consent to treatment in the hospital. A guardian can express consent to admit an adult who is totally incapacitated, but the latter must agree too, unless he is unable to express agreement. In any event, and in particular in the event of disagreement between the patient and the guardian, the question of admission is decided or confirmed by a court (section 22). Admission to the hospital is preceded by a psychiatric examination.

42. Admission to a social care home is governed by section 38 et seq. of the Act. It provides that a person who, on account of mental disorder or mental disability, is unable to take care of himself or herself and cannot be taken care of by somebody else, and does not need hospital treatment, may be placed in a social care home with his or her consent or the consent of his or her guardian. Only if the person concerned or his or her guardian does not consent to the placement must the decision be taken by a court.

43. According to the Ordinance of the Minister of Justice of 22 February 1995, a regional court must supervise the legality of the admission and continuing residence of individuals confined to psychiatric hospitals and social care homes (section 1). However, an obligation to carry out periodic reviews, every six months, of the need for continuing residence applies only to those admitted to psychiatric hospitals (section 2 (3)).

44. The regulations on the functioning of social care homes were also governed by the 1990 Social Assistance Act (*Ustawa o pomocy społecznej*), replaced by the Act of 2004. According to the relevant regulations, the costs of the person's stay in a social care home must not exceed 70% of his or her income or pension. Both Acts provided that placement of a totally incapacitated person in a social care home may only be done with his or her guardian's consent.

45. The relevant international instruments and conclusions on the comparative law are set out in the judgment of *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 72, 73 and 88-95, ECHR 2012.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

46. The applicant complained that his placement in the social care home had constituted an unlawful deprivation of liberty in breach of Article 5 § 1 of the Convention, which reads as follows:

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

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

47. The Government contested that argument in general terms.

A. Submissions by the parties

1. *The applicant*

48. The applicant maintained that his placement in the social care home was in breach of Article 5 § 1 of the Convention. As regards the objective aspect of deprivation of liberty, the applicant submitted that his situation in the Ruda Różaniecka Home had been similar to the conditions examined by the Court in the case of *D.D. v. Lithuania* (no. 13469/06, 14 February 2012). In particular, the applicant could not leave the home freely. Only his guardian could apply to the home’s management for a leave of absence for the applicant. The length of the leave of absence was limited and could only be extended exceptionally. In the event of an unauthorised absence the police would be informed. Therefore, the applicant had been entirely under the control of the staff of the social home.

49. From the subjective point of view the applicant’s stay in the home should be considered a deprivation of liberty, as he had never consented to be placed in the home and was never asked for his view in that connection. In numerous letters he sent to various authorities and courts over the last ten years the applicant clearly expressed his wish to leave the social care home. On numerous occasions the applicant emphasised that his placement had been illegal and that he wished to return to his family home. The applicant

also submitted that he was in conflict with his brother, who had been his guardian since 2001, and that he had not seen him since 2005.

50. The applicant's representative expressed doubts as to whether his placement in the home had been in accordance with domestic law. He submitted that the applicant's brother had submitted a request for the applicant to be placed in the home on 1 December 2001, before he had been officially appointed his brother's guardian, once his brother had become a totally incapacitated person, on 30 January 2002. The applicant's brother did not discuss the matter with the applicant, nor did he apply to a court for approval of his action.

In any event, the applicant's representative considered that his detention had also been illegal in the light of the *Winterwerp* criteria (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33). The applicant did not contest the fact that he had a mental illness; however, he considered that placing him in a home against his will had not been the only way to protect his interests and well-being.

2. The Government

51. The Government did not contest the applicant's submissions as regards the applicant's situation in the social care home and the regulations regarding leave of absence. They submitted in general that given the applicant's state of health the social care home had been the best choice for him in order to protect his well-being. The Government also stated that after several years in the Ruda Różaniecka Home the applicant had been granted long leaves of absence so that he could spend a considerable amount of time with his family.

The Government considered that prior to his placement in the social care home on 11 February 2002 the applicant had been examined by a psychiatrist on 22 December 2001 in the context of the incapacitation proceedings.

52. The Government referred in general to the case of *H.M. v Switzerland* (no. 39187/98, ECHR 2002-II) and considered that the circumstances of that case were similar to the present one. They submitted that in 2009, in the course of the proceedings aimed at changing the incapacitation order, the applicant stated that he had no intention to leave the social care home (see paragraph 32 above).

3. The third party

53. The third party, the Mental Disability Advocacy Centre (MDAC) submitted their comments regarding the situation of individuals deprived of legal capacity. They considered that even total incapacitation should not automatically deprive a person of the right to independent living. An assessment of a person's mental state does not necessarily determine that

person's functional capacity. According to the World Health Organisation one in four people in the world will have a mental health problem at some point in their lives. The MDAC considered that if a person with a disability retained the functional capacity to consent to a treatment any involuntary measure in respect of such person should be considered to be in breach of the Convention.

The MDAC underlined that in many countries, including Poland, mental health services were heavily institutionalised and lacked any alternative in a form of community-based, modern and humane mental health and social care services.

B. Admissibility

1. General principles

54. The Court reiterates that in order to determine whether there has been a deprivation of liberty, the starting point must be the particular situation of the individual concerned. Account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39, and *Ashingdane v. the United Kingdom*, 28 May 1985, § 41, Series A no. 93).

55. The Court further observes that the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a length of time which is more than negligible. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see *Storck v. Germany*, no. 61603/00, § 74, ECHR 2005-V).

56. The Court notes its case-law to the effect that a person could be considered to have been "detained" for the purposes of Article 5 § 1 even during a period when he or she was in an open ward with regular unescorted access to unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *H.L. v. the United Kingdom*, no. 45508/99, § 92, ECHR 2004-IX).

The Court also had the opportunity to examine placements in social care homes of mentally incapacitated individuals, and to find that it amounted to deprivation of liberty within the meaning of Article 5 § 1 of the Convention (see *Stanev*, cited above, § 132 and *D.D. v. Lithuania*, cited above, § 152).

2. Application of these principles in the present case

57. As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to

the applicant's situation is whether the care home's management has exercised complete and effective control over his treatment, care, residence and movement from February 2002, when he was admitted to that institution, to the present day (see paragraph 44 above and *D.D. v. Lithuania*, cited above, § 149). The applicant was not free to leave the institution without the management's permission. Nor could the applicant himself request leave of absence from the home, as such requests had to be made by the applicant's official guardian. Accordingly, and as in the *Stanev* case, although the applicant was able to undertake certain journeys and to spend time with his family the factors mentioned above lead the Court to consider that the applicant was under constant supervision and was not free to leave the home without permission whenever he wished (see *Stanev*, cited above, § 128). Moreover the Court notes that it would appear that the applicant's extended visits to his family were only authorised during the last few years of his stay in the Ruda Różaniecka Home.

Finally, the management of the care home controlled the remaining 30% of the applicant's disability pension. The Court observes in this respect that the facts of the applicant's situation at the home were largely undisputed.

58. The Court next turns to the "subjective" element, which was partly disputed between the parties. The Court reiterates that the fact that the applicant lacked *de jure* legal capacity to decide matters for himself does not necessarily mean that he was *de facto* unable to understand his situation (see *Shtukaturv v. Russia*, no. 44009/05, § 108, ECHR 2008). Whilst accepting that in certain circumstances, due to the severity of his or her incapacity, an individual may be wholly incapable of expressing consent or objection to being confined in an institution for the mentally handicapped or another secure environment, the Court finds that this was not the applicant's case. The documents presented to the Court indicate that the applicant subjectively perceived his compulsory admission to the Ruda Różaniecka Home as a deprivation of liberty. On a number of occasions the applicant requested the courts to start proceedings to quash his legal incapacitation order, submitting that this would allow him to leave the home. For many years he has been consistently complaining about his placement in the care home, to the courts, the prosecutor and the District Family Centre. Also, in his correspondence with the Court between 2007 and 2012 the applicant consistently asked for help to leave the social care home where he had been placed and was being kept against his will. The Court takes note of the Government's argument relating to the applicant's own declaration made when interviewed by the experts on 7 April 2009 (see paragraphs 32 and 52 above). However, the Court would rely on the assessment of this statement made by the experts themselves who disregarded it as being in clear contradiction to the applicant's real intentions, consistently expressed so far (see paragraph 33 above).

In sum, even though the applicant had been deprived of his legal capacity, he was still able to express an opinion on his situation, and in the present circumstances the Court finds that the applicant had never agreed to being placed in the social care home.

59. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the care home. Therefore, the responsibility of the authorities for the situation complained of was engaged (see *Shtukatur*ov, cited above, § 110, and *D.D. v. Lithuania*, cited above, § 151).

60. In the light of the foregoing the Court concludes that the applicant was “deprived of his liberty” within the meaning of Article 5 § 1 of the Convention from February 2002 and remains so to this day.

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

C. Merits

62. The Court accepts that the applicant's detention was “lawful”, if this term is construed narrowly, in the sense of formal compatibility of the detention with the procedural and material requirements of the domestic law. It appears that the only condition for the applicant's detention was the consent of his official guardian, his brother, who was also the person who had sought the applicant's placement in the care home (see *Shtukatur*ov, cited above, § 112).

63. However, the Court reiterates that the notion of “lawfulness” in the context of Article 5 § 1 (e) has also a broader meaning. “The notion underlying the term [‘procedure prescribed by law’] is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary” (see *Winterwerp*, cited above, § 45). In other words, the detention cannot be considered “lawful” within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness.

64. In its above-mentioned *Winterwerp* judgment, the Court set out three minimum conditions which have to be satisfied in order for there to be “the lawful detention of a person of unsound mind” within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, the existence of a true mental disorder must be established by a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind

or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

65. Turning to the present case, the Court notes that it was submitted on behalf of the applicant that his deprivation of liberty had been arbitrary, because he had not been reliably shown to be of unsound mind at the time of his confinement. The Government submitted that the applicant was examined by a psychiatrist about one month before being placed in the home.

66. The Court reiterates that the mental condition of a person must have been established at the time he is deprived of liberty (see *O.H. v. Germany*, no. 4646/08, § 78, 24 November 2011). In the present case a psychiatrist examined the applicant on 22 December 2001 in the course of the incapacitation proceedings, while the decision to place him in the care home was taken one month and seventeen days later, on 8 February 2002.

67. Taking into account the relative brevity of this period, the Court accepts that the authorities could be considered as having based their decision on a recent medical assessment confirming the applicant's mental illness when placing him in the home (compare and contrast; *Stukatorov*, cited above, § 115 where the period amounted to ten months, and *Stanev*, cited above, § 156 where it had been over two years).

68. Nevertheless, the Court considers that the other two requirements of Article 5 § 1 (e) were not satisfied fully in the present case. As regards the need to justify the placement by the severity of the disorder, it notes that the purpose of the 2001 medical report was not to examine whether the applicant's state of health required him to be placed in a home for people with mental disorders, but solely to determine the issue of his legal protection.

69. The Court also notes deficiencies in the assessment of whether the disorders warranting the applicant's confinement still persisted. There is no appearance that the applicant was under the supervision of a psychiatrist and that there had been any periodic psychiatric examinations (see paragraph 43 above). Indeed, no provision was made for such an assessment under the relevant legislation, and the next psychiatric examination of the applicant took place almost eight years later, in April 2009, in the context of proceedings for quashing of the legal incapacitation order (see paragraph 32 above).

70. In view of the above considerations, the Court finds that the regulatory framework for placing in social care homes persons, like the applicant, who have been totally deprived of their legal capacity, did not provide the necessary safeguards at the material time. The Court will revert further to this matter in the context of the applicant's complaint under Article 5 § 4 of the Convention.

71. Having regard to the foregoing, and in particular to the total lack of continued assessment of the applicant's disorder, the Court observes that the applicant's placement in the home was not ordered "in accordance with a

procedure prescribed by law” and that his deprivation of liberty was not justified by sub-paragraph (e) of Article 5 § 1.

Furthermore, the Government have not indicated any of the other grounds listed in sub-paragraphs (a) to (f) which might have justified the deprivation of liberty in issue in the present case.

There has therefore been a violation of Article 5 § 1.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

72. The applicant complained that he had not had at his disposal any effective procedure by which he could challenge the necessity for his continued stay in the social care home and obtain his release.

The applicant submitted that he had been admitted to the care home at his guardian’s request and without his agreement. The lawfulness of his admission to the home, considered voluntary since it was made by his guardian, had not been reviewed by a court, either upon his admission or at any other time. The domestic law did not impose an obligation to have periodic reviews of the continuing need for him to remain in the social care home. In fact, he was not examined by a psychiatrist during his ten-year stay in the Ruda Różaniecka Home, except once, in 2009 in the course of the proceedings for quashing the legal incapacitation order. Being deprived of his legal capacity, the applicant was prevented from independently pursuing any judicial legal remedy to challenge his continued stay in the social care home.

Article 5 § 4, relied on by the applicant, provides as follows:

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

73. The Government did not comment on the admissibility and merits of this complaint.

A. Admissibility

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

B. Merits

1. General principles

75. Among the principles emerging from the Court's case-law on Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to bring proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; see also *Stanev*, cited above, § 171).

76. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances where the applicant's placement in the care home has been instigated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement by the courts (see *D.D. v. Lithuania*, cited above, § 164).

2. Application of these principles in the present case

77. The Court accepts that the forms of judicial review may vary from one domain to another and may depend on the type of deprivation of liberty at issue. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere (see *D.D. v. Lithuania*, cited above, § 165). However, in the present case the courts were not involved in deciding on the applicant's placement in the care home at any moment or in any form. It appears that, in situations such as the applicant's, Polish law does not provide for automatic judicial review of the lawfulness of admitting a person to, and keeping him in, an institution such as a social care home (see paragraphs 41 and 59 above). In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from

independently pursuing any legal remedy of a judicial nature to challenge his continued involuntary institutionalisation. This again confirms a lack of an effective regulatory framework in this area (see paragraph 70 above).

78. Moreover, the Court notes that the Government did not make any submissions in respect of this complaint, and did not indicate any procedure that could have given rise to a judicial review of the lawfulness of his placement as required by Article 5 § 4.

79. In the light of the above, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

80. The applicant submitted that he had been prevented from directly applying to a court for restoration of his legal capacity, in spite of the Constitutional Court's judgment finding that the relevant provisions had been unconstitutional. The applicant's representative submitted that the judgment of the Constitutional Court of 7 March 2007 had been directly applicable and had created a right for totally incapacitated individuals, such as the applicant, to directly lodge a request for an incapacitation order to be lifted. Nevertheless, all his requests lodged before the entry into force of the new law amending the Code of Civil Procedure had been refused, in disregard of the Constitutional Court's judgment. This constituted a breach of the applicant's right of access to court.

The applicant relied on Article 6 § 1 of the Convention, the relevant parts of which read:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

81. The Government did not comment on the admissibility and merits of this complaint.

A. Admissibility

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

B. Merits

1. General principles

83. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought

before a court or tribunal (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This “right to court”, of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility has been afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Salontaji--Drobnjak v. Serbia*, no. 36500/05, § 132, 13 October 2009).

84. The right of access to court by its very nature calls for regulation by the State and may be subject to limitations. Nevertheless, the limitations applied must not restrict the access allowed the individual in such a way or to such an extent that the very essence of that right is impaired. A limitation will violate the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Kreuz v. Poland*, no. 28249/95, §§ 52-57, ECHR 2001-VI, and *Liakopoulou v. Greece*, no. 20627/04, §§ 19-25, 24 May 2006).

85. The Court has already held, in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6 § 1 of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity (see *Stanev*, cited above, § 245). In the latter judgment the Court observed that eighteen of the twenty national legal systems studied in 2011 provided for direct access to the courts for any partially incapacitated individuals wishing to have their status reviewed. In seventeen States such access was open even to those declared fully incapable (see *Stanev*, §§ 95 and 243). This indicates that there is now a trend at European level towards granting legally incapacitated individuals direct access to the courts to seek restoration of their capacity.

2. Application of these principles in the present case

86. The Court observes at the outset that in the present case none of the parties disputed the applicability of Article 6 to the proceedings for restoration of legal capacity. The applicant, who has been totally deprived of legal capacity, complained that between March and October 2007 he was prevented from directly applying to a court to have his capacity restored in spite of the Constitutional Court’s judgment. The Court has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of “civil rights and obligations” (see *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999). Article 6 § 1 of the Convention is therefore applicable in the instant case.

87. It remains to be determined whether the applicant’s access to court was restricted, and if so whether the restriction pursued a legitimate aim and was proportionate to it.

88. Turning to the facts of the instant case, the Court firstly observes that it is not called here to decide whether under the Convention the right of partially incapacitated persons to have a direct access to court, established in the *Stanev* judgment, should be extended to persons totally incapacitated. The question under consideration arose because the Polish Constitutional Court declared unconstitutional the domestic provision that barred persons deprived of their legal capacity from directly instituting proceedings to have a legal incapacitation order varied. The Constitutional Court's judgment of 7 March 2007 entered into force ten days later.

The Constitutional Court explicitly addressed the lower courts, reiterating that as a consequence of its own judgment the domestic law should be interpreted as allowing incapacitated individuals access to court. That should be so with or without the relevant amendment to the CCP introduced by the legislator.

In spite of this clear indication, the applicant's requests to have his legal capacity restored were rejected on 11 May, 7 August, and 17 September 2007 as not provided by law (see paragraphs 26 and 27 above). On the last occasion the District Court referred to the Constitutional Court's judgment, but gave no explanation as to why it had not applied it. The Court notes that the Government also failed to provide any explanation in this respect.

89. The Court reiterates that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see *Shtukatur*ov, cited above, § 71, and *Stanev*, cited above, § 241).

90. The Court considers that the Constitutional Court's judgment, which explicitly urged lower courts not to limit the procedural rights of incapacitated individuals, was legally binding notwithstanding the unfinished legislative process and the domestic court's reluctance to apply directly that judgment. In these circumstances, the applicant was deprived of a clear, practical and effective opportunity to have access to court in respect of his request to restore his legal capacity. All in all, the system was therefore not sufficiently coherent and clear (see *De Geouffre de la Pradelle v. France*, 16 December 1992, § 34, Series A no. 253-B). Also, under those circumstances, refusing the applicant's requests for the incapacitation order to be changed on at least three occasions between March and October 2007 cannot be seen as justified enforcement of a legitimate procedural limitation on the applicant's right of access to court (see *Angel Angelov v. Bulgaria*, no. 51343/99, § 38, 15 February 2007).

The Court takes note that subsequently the relevant provision of the CCP was amended and in 2009 the applicant was finally able to initiate proceedings aimed at varying his incapacitation order (see paragraphs 30

and 40 above). However, this positive development cannot alter the above conclusion, which relates to the period prior to entry into force of the above-mentioned amendment.

91. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

92. The applicant further complained under Article 8 of the Convention in that placing him in the social care home for an indefinite period of time constituted an interference with his right to respect for his private and family life. The Government did not comment on the applicant's complaint.

93. The Court notes that his complaint is linked to the ones examined above and must therefore likewise be declared admissible.

94. However, having regard to the reasons which led the Court to find a violation of Articles 5 §§ 1 and 4 of the Convention (see paragraphs 70 and 78 above), the Court finds that no separate issue arises under Article 8 of the Convention, and this complaint does not require a separate examination (see *Stanev*, cited above, § 252).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. 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

96. The applicant claimed EUR 10,000 in respect of non-pecuniary damage.

97. The Government contested this claim as excessive.

98. The Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

99. The applicant, who was represented by lawyers from the Helsinki Foundation for Human Rights, did not make any claim for costs and expenses.

C. Default interest rate

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds* that there is no need to examine separately the complaint under Article 8 of the Convention;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable on the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 16 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President