



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

FOURTH SECTION

**CASE OF HADŽIMEJLIĆ AND OTHERS
v. BOSNIA AND HERZEGOVINA**

(Applications nos. 3427/13, 74569/13 and 7157/14)

JUDGMENT

STRASBOURG

3 November 2015

FINAL

03/02/2016

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

In the case of Hadžimejlić and Others v. Bosnia and Herzegovina,

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

Guido Raimondi, *President*,

Päivi Hirvelä,

Ledi Bianku,

Nona Tsotsoria,

Paul Mahoney,

Faris Vehabović,

Yonko Grozev, *judges*,

and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 13 October 2015,

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

PROCEDURE

1. The case originated in three applications (nos. 3427/13, 74569/13 and 7157/14) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three citizens of Bosnia and Herzegovina, Ms Zuhra Hadžimejlić, Mr Marcel Crepulja and Mr Esad Busovača (“the applicants”), on 5 September 2012, 12 October and 23 December 2013, respectively.

2. The applicants were represented by Vaša Prava, a local non-governmental organisation. The Government of Bosnia and Herzegovina (“the Government”) were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicants complained of the lawfulness and lack of judicial review of their detention in the Drin social care home.

4. On 12 May 2014 the applications were communicated to the Government.

5. Third-party comments were received by the civil-society partnership PERSON project (Partnership to Ensure Reforms of Support in other Nations), which had been granted leave by the President to make written submissions to the Court (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1959, 1978 and 1958, respectively, and are currently in the Drin social care home (“Drin”).

A. The facts concerning Ms Hadžimejlić

7. On 23 November 2006, at the request of the Visoko Social Work Centre, the Visoko Municipal Court deprived the applicant of legal capacity. It was established that she had been diagnosed with paranoid schizophrenia and that placement in a social care home would be in her best interest.

8. On 26 December 2006 the Visoko Social Work Centre placed the applicant under the guardianship of her sister.

9. On 23 January 2007 the Visoko Social Work Centre placed the applicant in Drin in accordance with the social care legislation.

10. On 13 June 2011 the applicant lodged a constitutional appeal concerning the lawfulness of her detention.

11. On 25 April 2013 the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) held that the applicant’s deprivation of liberty had not been “in accordance with a procedure prescribed by law” within the meaning of Article 5 § 1 of the Convention as she had been held in psychiatric detention without a decision of the competent civil court. It also found that Article 5 § 4 of the Convention had been breached because of lack of judicial review of the lawfulness of the applicant’s detention. The Constitutional Court ordered the Visoko Social Work Centre to take measures to ensure respect for the applicant’s rights under Article 5 §§ 1 and 4 of the Convention. The relevant part of the decision reads:

“27. The Constitutional Court recalls that it examined the same factual and legal situation in the decision no. AP 2472/11[...]. Therefore, instead of a separate legal analysis in this case, it refers to the reasoning set out in that decision...

28. As regards Article 5 § 1 of the European Convention...the Constitutional Court concluded that the appellant was placed in the social care home under the social care legislation of the Federation of Bosnia and Herzegovina and of the [Zenica-Doboj] Canton, which do not regulate the procedure for compulsory admission of mentally ill persons to social care homes. That procedure is regulated in the sections 22-42 of the Mental Health Act 2001. Section 41 of that Act prescribes that a mentally ill person released from a hospital, who is incapable of living on his/her own and has no relatives or others who are required by law to care for him/her, shall be placed in a social care home under the social care legislation of the Federation of Bosnia and Herzegovina. However, in that case, a hospital is under a duty to inform the competent court of such placement immediately... [I]t is evident from the case-file that the appellant was detained without a decision of the competent civil court...thus

her initial deprivation of liberty was not in accordance with the Mental Health Act 2001... [T]herefore the court concludes that the deprivation of liberty in the appellant's case was unlawful and thus in violation of Article 5 § 1(e) of the Convention.

...

30. In the above-mentioned decision, the Constitutional Court noted that the Federal and the Cantonal social care legislation, under which the appellant was placed in a social care home, do not envisage mandatory judicial control of the lawfulness of such placement...

...

32. There has been a violation of Article 5 § 1(e) of the Convention in the present case because the appellant was placed in the social care home under the Federal and Cantonal social care legislation, whereas the compulsory placement of mentally ill persons is regulated by the Mental Health Act 2001 which was not applied in this case. In view of that, her placement was not 'lawful'. There has also been a violation of Article 5 § 4 of the Convention because the appellant's placement and the prolongation of that placement was never examined by the competent court..."

12. On 3 June 2014 the Visoko Social Work Centre asked the Kiseljak Municipal Court to examine the necessity of the applicant's placement in Drin in accordance with the Mental Health Act 2001 and the Constitutional Court's decision of 25 April 2013.

13. On 8 September 2014 the Kiseljak Municipal Court concluded, on the basis of the expert medical report, that the applicant's current state of health did not warrant continued confinement in Drin. That decision became final on 26 September 2014.

14. The applicant has not yet been released from Drin.

B. The facts concerning Mr Crepulja

15. At the recommendation of the Psychiatric Clinic in Sarajevo where the applicant was treated for schizophrenia, on 15 September 2004 the Vareš Social Work Centre placed him in Drin in accordance with the social care legislation. It was established that his illness rendered him incapable of living on his own and that his family circumstances did not allow proper care at home.

16. On 25 March 2005 the Visoko Municipal Court deprived the applicant of his legal capacity.

17. On 21 April 2011 the applicant was placed under the guardianship of N.G., a director of the Vareš Social Work Centre.

18. On 2 September 2011 the applicant lodged a constitutional appeal concerning the lawfulness of his detention.

19. On 25 June 2013 the Constitutional Court held that the applicant's deprivation of liberty had not been "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention as he had been held in psychiatric detention without a decision of the

competent civil court. It also found that Article 5 § 4 of the Convention had been breached because of lack of judicial review of the lawfulness of the applicant's detention. The Constitutional Court ordered the Vareš Social Work Centre to take measures to ensure respect for the applicant's rights under Article 5 §§ 1 and 4 of the Convention and awarded him 3,000 convertible marks (BAM)¹. The relevant part of the decision reads:

“34. The Constitutional Court recalls that it examined the same factual and legal situation in the decision no. AP 2472/11 [...]. Therefore, instead of a separate legal analysis in this case, it refers to the reasoning set out in that decision...

35. As regards Article 5 § 1 of the European Convention...the Constitutional Court concluded that the appellant was placed in the social care home under the social care legislation of the Federation of Bosnia and Herzegovina and of the [Zenica-Doboj] Canton, which do not regulate the procedure for compulsory admission of mentally ill persons to social care homes. That procedure is regulated in the sections 22-42 of the Mental Health Act 2001. Section 41 of that Act prescribes that a mentally ill person released from a hospital, who is incapable to live on his/her own and has no relatives or others who are required by law to care for him/her, shall be placed in a social care home under the social care legislation of the Federation of Bosnia and Herzegovina. However, in that case, a hospital is under a duty to inform the competent court of such placement immediately ... [I]t is evident from the case-file that the appellant was detained without a decision of the competent civil court...thus his initial deprivation of liberty had not been in accordance with the Mental Health Act 2001..[T]herefore the court concludes that the deprivation of liberty in the appellant's case was unlawful and thus in violation of Article 5 § 1(e) of the Convention.

36... In the above-mentioned decision, the Constitutional Court noted that the Federal and the Cantonal social care legislation, under which the appellant was placed in a social care home, do not envisage mandatory judicial control of the lawfulness of such placement...

37. Turning to the present case, the Constitutional Court notes that the appellant was placed in the social care home at the recommendation of the Psychiatric Clinic in Sarajevo...It was established that he had been diagnosed with SCH, F23, a condition which requires constant supervision and regular therapy which he cannot have at home in view of his family's circumstances (a mother was also deprived of her legal capacity due to mental illness, a father's whereabouts are unknown, and his sister is placed under guardianship)...The court further notes that since 2004, when the appellant was placed in the social care home, the Social Work Centre revised his placement on three occasions, at the recommendation of the relevant Ministry and with the consent of his guardian Ms N.G. However, those revisions were focused on the financial aspect of the appellant's placement without any consideration for his health condition and a potential release. The fact that the Social Work Centre was the only domestic body which ever examined the appellant's placement...raises issues under Article 5 §§ 1(e) and 4 of the Convention.

38. Furthermore, although under the Mental Health Act 2001 a decision about compulsory admission of mentally ill persons must be made by a court, the appellant's case has never been examined by the competent court...

¹ The convertible mark uses the same fixed exchange rate to the euro that the German mark had: EUR 1 = BAM 1.95583.

39. Accordingly, as regards “deprivation of liberty”, the placement in the social care home and the review of the lawfulness of such placement, the court concludes, in view of the facts of the case and the reasons set out in the decision no. AP 2472/11 of 31 January 2013, that there had been a violation of Article 5 §§ 1(e) and 4 of the Convention in the present case.”

20. On 25 September 2013 the applicant received BAM 3,000 awarded to him by the Constitutional Court.

21. On 29 November 2013 the Kiseljak Municipal Court concluded, on the basis of the expert medical report, that the applicant’s current state of health did not warrant continued confinement in Drin.

22. On 18 March 2014 the Novi Travnik Cantonal Court upheld the decision of 29 November 2013 and it thus became final.

23. On 6 May 2014 the Vareš Social Work Centre informed the Visoko Municipal Court that it considered that the applicant’s continued placement in Drin was in his best interest for reasons of social protection.

24. The applicant had not yet been released from Drin.

C. The facts concerning Mr Busovača

25. In different intervals in 1997, 1998 and 1999 the applicant was treated for schizophrenia at the Psychiatric Clinic in Tuzla.

26. On 8 October 1999 the Tuzla Municipal Court deprived the applicant of his legal capacity.

27. On 8 December 1999 the Tuzla Social Work Centre placed him in Drin.

28. On 2 March 2000 the applicant was placed under the guardianship of A.B., his cousin. On 10 June 2010 he was placed under the guardianship of S.P., his sister.

II. RELEVANT DOMESTIC LAW

29. Under the social care legislation of the Federation of Bosnia and Herzegovina, placement in a social care home is a social benefit attributed to mentally ill persons (*Zakon o osnovama socijalne zaštite, zaštite civilnih žrtava rata i zaštite porodice sa djecom*, Official Gazette of the Federation of Bosnia and Herzegovina (OG FBH) nos. 36/99, 54/04, 39/06 and 14/09, and *Zakon o socijalnoj zaštiti, zaštiti civilnih žrtava rata i zaštiti porodice sa djecom*, Official Gazette of the Zenica-Doboj Canton nos. 13/07 and 13/11). If the competent social work centre considers that the basic needs of a mentally ill person cannot otherwise be satisfied, it may place that person in a social care home. It may do so either of its own motion or at the request of the person concerned or his or her guardian. The decision is subject to appeal, but a legally incapable adult may lodge an appeal only through his or her guardian (see section 52 of the Administrative Procedure Act 1998,

Zakon o upravnom postupku, OG FBH nos. 2/98 and 48/99). Persons placed in social care homes under the social care legislation of the Federation of Bosnia and Herzegovina do not benefit from the procedural safeguards applicable to compulsory admission.

As regards compulsory admission, section 45 of the Non-contentious Proceedings Act 1998 (*Zakon o vanparničnom postupku*, OG FBH nos. 2/98, 39/04 and 73/05), prescribes that a court shall make a decision to detain a person with mental disorder in a health care institution if due to the nature of his or her illness it is necessary to restrict the freedom of movement or contacts with the outside world of such a person; the court will also decide to release such a person when the reasons for his or her confinement cease to exist. The psychiatric institution to which a person with a mental disorder was involuntarily admitted shall immediately, or within a maximum of 24 hours after the adoption of the decision on involuntary admission, directly or by means of electronic communication, inform the competent court about the involuntary admission and shall forward to that court the records of the medical examination together with the reasons for the involuntary admission. In its decision the court shall determine the duration of the involuntary admission which may not exceed one year (sections 27 and 33 of the Mental Health Act 2001; *Zakon o zaštiti osoba sa duševnim smetnjama*, OG FBH nos. 37/01 and 40/02).

III. RELEVANT INTERNATIONAL LAW

A. Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”) on the visit to Bosnia and Herzegovina carried out from 19 to 30 March 2007 (document no. CPT/Inf (2009) 25)

30. The relevant part of the report on the visit to Bosnia and Herzegovina carried out from 19 to 30 March 2007 reads as follows:

“128. The placement of a resident in a social care home is proposed by the guardian of the person concerned (either the social work centre in which the resident is registered or a family member). A social work centre may request to place a resident in any of the social care homes in the country, whether they be in the Federation or the Republika Srpska. The determining factors are the availability of places and cost, as each social work centre must pay a monthly fee per resident.

The prerequisites for placing a resident in a social care home is that the person be deprived of their legal capacity (that is, declared mentally incompetent), as well as having a psychiatric disorder and/or mental disability and having completed any hospital treatment.

If these requirements (and certain others) are met, an internal commission of the social care home examines the application and decides whether or not to accept the person. This process does not involve any on-site investigation or interviews by the social care home. Upon admission, the social work centre or the family (whichever is

the guardian), signs a contract with the social care home whereby, in return for a monthly fee, the home will care for and treat the resident. The social care home also undertakes to submit a yearly report to the guardian.

129. In the context of Bosnia and Herzegovina, the CPT considers that all decisions to place a person in a social care home involuntarily or at the instigation of a guardian should be notified to a court, with a view to seeking the court's approval for the placement. Such a safeguard will represent a necessary element in the elaboration of a comprehensive legislative framework (see paragraph 110 above). **The CPT recommends that the relevant authorities take the necessary steps to ensure that such a safeguard is introduced in respect of all new placements in social care homes in Bosnia and Herzegovina.**

130. The CPT is also concerned by the apparent lack of appropriate safeguards in place for persons who have been deprived of their legal capacity and subsequently placed in a social care home. The delegation met a number of residents in both homes, but particularly at 'Drin', who gave the impression of being competent. Yet there seemed to be no concerted efforts by the guardian or the relevant social work centre to find an alternative solution for these residents in the community. An independent review of each resident's placement should be carried out at regular intervals, at which the resident should be offered the opportunity of expressing his/her views. **The CPT recommends that the relevant authorities institute regular automatic reviews for residents placed in social care homes.**

131. The yearly two-page reports drawn up for each resident at 'Drin' provided minimal information, although staff stated that they were always willing to draw up ad hoc reports on demand and to meet with the guardians, if requested. At Višegrad, even such reports were not produced. It was evident from interviews with staff, social workers and the director of a social work centre that, once a person was placed in a social care home, there was generally no further interest in their care and treatment. Consequently, it appeared that few family members or guardians from social work centres ever wrote, visited or manifested an interest in their wards. **The CPT recommends that the relevant authorities encourage the social work centres to fulfil their supervisory duties properly.**

132. Civil society can play a very important role in the lives of residents in social care homes, not least through their regular visits, which increase residents' contact with the outside world. The CPT noted that at 'Drin', contacts with the outside world were being developed, whereas at Višegrad there appeared to be no contacts with non-governmental organisations. **The CPT encourages both institutions to develop their links with outside organisations.**

In this context, the CPT would also emphasise the importance it attaches to social care homes being visited on a frequent basis by an independent outside body empowered to formulate recommendations to the authorities on ways to improve the care and conditions afforded to residents. Visits by such a body - which could also be competent to receive complaints from residents, their families or their guardians - would, in the Committee's view, constitute an important safeguard for residents at both social care homes. **The CPT recommends that the relevant authorities explore the possibility of instituting such a system of visits by an independent body.**

...

134. It would appear that no written information on residents' rights was provided to residents or their guardians at either home, although preparations were underway at 'Drin' to produce an introductory brochure and a website.

The CPT recommends that an introductory brochure for residents and guardians be provided at all social care homes in Bosnia and Herzegovina, setting out each establishment's routine and residents' rights, including information about their right to lodge formal complaints and the modalities for doing so.

135. The delegation noted that all persons admitted to social care homes had their legal capacity removed by a court decision, and had a legal guardian appointed by the social work centre where they were registered. Most of the residents in the two social care homes visited were accommodated in locked wards or could apparently be restrained by the staff of the institution whenever it was considered necessary.

136. The procedures for the removal of legal capacity are the same in both Entities. The family of the person concerned or the relevant social work centre applies to the court for a decision on removal. A medical opinion on the person concerned is drawn up by a psychiatrist and submitted to the court, which holds a hearing to decide whether the legal capacity should be removed indefinitely or for a limited time period. The hearing is conducted in the presence of the initiator (family member or social work centre), a temporary guardian appointed by the social work centre and a representative of the social work centre, as well as the person concerned, if he or she is considered capable of understanding the proceedings. Further to a decision by the court, one of the parties may appeal the ruling within three days.

The CPT recommends that the relevant authorities take the necessary steps to ensure that all persons who are the subject of proceedings with a view to being deprived of their legal capacity are systematically:

- heard in person by the court;
- given a copy of the court decision;
- informed, verbally and in writing, of the possibility and modalities for appealing against a decision to deprive them of their legal capacity.

137. Within 30 days of the court's decision, the social work centre should designate a permanent guardian, whose role should be to assist the person in regaining his/her mental capacity. It should be noted that once a person has had their legal capacity removed indefinitely by a court, there are no automatic reviews. The court may, upon its own motion or upon that of the person who initiated proceedings to have the legal capacity removed originally, examine whether to revoke its decision. However, cases involving indefinite removal of legal capacity were apparently never reconsidered in practice, and the delegation heard that discharge from a social care home occurred rarely and usually in the face of opposition from the social work centre concerned.

Moreover, it appeared that guardians frequently neglected their responsibilities towards their wards once they had signed a contract with a social care home, effectively granting blanket consent for all treatment and measures applied by the home. Further, the guardians, in general, made little effort to visit their wards or to scrutinise the care being offered.

The CPT recommends that the relevant authorities take the necessary steps to ensure that legal guardians fulfil their duties responsibly and in the interests of their wards.

138. In this context, the CPT would like to remind the relevant authorities of Recommendation Rec(99)4 of the Committee of Ministers of the Council of Europe to member States on Principles concerning the Legal Protection of Incapable Adults. This Recommendation contains 28 governing principles concerning guardianship. The CPT considers that an institute of guardianship based upon these principles would be balanced, fair and, above all, proportionate. **The CPT recommends that the authorities incorporate the Council of Europe's Principles concerning the Legal Protection of Incapable Adults into the national legal norms governing guardianship.**"

31. In its subsequent visit, in 2011, the CPT noted that the procedures for the placement of a resident in a social care home remained unchanged (see document no. CPT/Inf (2012) 15, §§ 125-127). It particularly noted that recommendations concerning the introduction of judicial review of placement and of regular automatic reviews, from 2007 report, had not been implemented.

B. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

32. This Convention entered into force on 3 May 2008. Bosnia and Herzegovina signed in on 29 July 2009 and ratified on 12 March 2010. In its relevant parts, it provides:

Article 14

Liberty and security of person

"1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

- a) Enjoy the right to liberty and security of person;
- b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."

Article 19

Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.”

C. Recommendation No. Rec(2004)10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder (adopted on 22 September 2004)

33. The relevant part of this Recommendation reads as follows:

Article 17 – Criteria for involuntary placement

“1. A person may be subject to involuntary placement only if all the following conditions are met:

- i. the person has a mental disorder;
 - ii. the person’s condition represents a significant risk of serious harm to his or her health or to other persons;
 - iii. the placement includes a therapeutic purpose;
 - iv. no less restrictive means of providing appropriate care are available;
 - v. the opinion of the person concerned has been taken into consideration.
- ...”

THE LAW

I. PRELIMINARY CONSIDERATIONS

A. The applicants’ new complaints lodged after the communication of the case to the respondent Government

34. The Court observes that further new complaints were submitted after the communication and in reply to the Government’s observations: the applicants alleged, relying on Article 6 § 1 of the Convention, that the domestic law had not afforded them the possibility of directly applying to a court for restoration of their legal capacity. However, no complaint

concerning this aspect of the applicants' treatment as mentally ill persons was included in the initial applications on which the Government have already commented (see, *a contrario*, *Winterwerp v. the Netherlands*, 24 October 1979, § 72, Series A no. 33). It was thus not raised early enough to allow an exchange of observations between the parties. The Court therefore does not consider it appropriate to take this matter up separately at this stage (see, for example, *Maznyak v. Ukraine*, no. 27640/02, § 22, 31 January 2008, and *Kuncheva v. Bulgaria*, no. 9161/02, § 18, 3 July 2008).

II. JOINDER OF THE APPLICATIONS

35. Given their common factual and legal background, the Court decides to join these three applications pursuant to Rule 42 § 1 of the Rules of Court.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

36. The applicants complained of the lawfulness of their detention in the Drin social care home. They maintained they were held there against their will and that they could not obtain release. They did not rely on any particular Article of the Convention. The Court, being the master of characterisation to be given in law to the facts of the case, considers that this complaint falls to be examined under Article 5 § 1 of the Convention.

The applicants further complained about the lack of judicial review of their placement in the Drin social care home, without relying on any particular Article of the Convention. The Court, being the master of characterisation to be given in law to the facts of the case, communicated this complaint to the Government under Article 5 § 4 of the Convention.

Lastly, the applicants implicitly raised a complaint under Article 5 § 5 of the Convention.

The relevant parts of Article 5 read as follows:

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

...

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

...

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

1. *The Government's preliminary objections*

(a) Loss of victim status

37. The Government submitted that Mr Crepulja could no longer claim to be a victim of the alleged violations of the Convention within the meaning of Article 34 of the Convention following decisions of the Constitutional Court and the Kiseljak Municipal Court of 25 June and 29 November 2013, respectively, and the payment of the compensation awarded by the Constitutional Court (see paragraphs 19, 20 and 20 above).

38. The applicants argued that Mr Crepulja, as well as Ms Hadžimejlić, did not lose their victim status because they were still deprived of their liberty despite the decisions of the Constitutional Court and the subsequent decision of the competent civil courts.

39. Although the respondent State raised this objection only as regards Mr Crepulja, the Court will also examine it as regards Ms Hadžimejlić in view of the similarity of their factual situations (see, *mutatis mutandis*, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 27, ECHR 2009).

40. From the outset, the Court notes that the Constitutional Court's decisions indeed acknowledged the alleged breach of the Convention in the cases of Ms Hadžimejlić and Mr Crepulja. The Constitutional Court established the existence of a procedural shortcoming affecting the lawfulness of their compulsory placement in a social care home. Furthermore, Mr Crepulja was awarded BAM 3,000 in respect of compensation for non-pecuniary damage. However, the competent authorities failed to eliminate the said shortcoming: despite the rulings of the Kiseljak Municipal Court of 8 September 2014 and 29 November 2013 (see paragraphs 13 and 21 above) that the current state of the applicants' mental health did not warrant compulsory confinement, they are still in Drin. Therefore Ms Hadžimejlić and Mr Crepulja can still claim to be victims of the alleged violations. The Government's objection must accordingly be dismissed.

(b) Non-exhaustion of domestic remedies

41. The Government argued that Mr Busovača's application should be rejected on non-exhaustion grounds because of his failure to complain to the Constitutional Court.

42. The applicants submitted that it was evident from Mr Crepulja's and Ms Hadžimejlić's case that a constitutional appeal had not been an effective remedy for their complaints considering that they were still deprived of their liberty. Therefore, the applicants invited the Court to declare Mr Busovača's

application admissible: since 1999, when he was placed in Drin, his deprivation of liberty had never been examined by a court.

43. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 *et al.*, ECHR 2010; *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11 and 29 other cases, §§ 69-77, 25 March 2014; and *Parrillo v. Italy* [GC], no. 46470/11, § 87, 27 August 2015).

44. As to legal systems which provide constitutional protection for fundamental rights, such as that of Bosnia and Herzegovina, the Court recalls that it is incumbent on the aggrieved individual to test the extent of that protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006).

45. That said, the Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69; *Selmouni v. France* [GC], no. 25803/94, § 77, ECHR

1999 V; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 121, 11 January 2007).

46. Turning to the present case, the Court notes that Mr Busovača failed to use a constitutional appeal before lodging his application. However, in view of the similarity of the factual situation between this and the first two applicants and the fact that decisions of the Constitutional Court in the latter favour had not been complied with by the national authorities (see paragraph 40 above), the Court considers that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld with regard to Mr Busovača (see *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04, 14140/05, 12906/06 and 26028/06, § 59, 8 July 2008). The Government's second preliminary objection must therefore be dismissed. The Court would emphasise that its decision is limited to the circumstances of this case and must not be interpreted as a general statement to the effect that an appeal to the Constitutional Court is never a remedy which must be used in the event of an allegation of unlawful detention of mentally ill persons.

(c) Conclusion

47. The Court notes that the applications 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. *Alleged violation of 5 §1 of the Convention*

(a) The applicants

48. The applicants submitted that their compulsory placement in Drin did not meet the conditions for deprivation of liberty of persons of unsound mind set out in *Winterwerp v. the Netherlands* (cited above, § 39). The social work authorities based their decisions to place them in Drin on the simple fact that their families were not prepared to take care of them and they needed social assistance. They had not examined whether the necessary assistance could be provided through alternative measures that were less restrictive of their personal liberty. Furthermore, the Constitutional Court found a violation of Article 5 §§ 1 and 4 of the Convention in the cases of Ms Hadžimejlić and Mr Crepulja. Subsequently, the competent civil court held that the current state of their mental health was not of a kind or degree warranting continued placement. However, despite these rulings, they were still in the social care home against their will.

(b) The Government

49. The Government accepted that the applicants' placement in Drin amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention, as had been established by the Constitutional Court. They submitted, however, that the placement had been lawful. The applicants are persons of unsound mind and were in a situation of social need. Their respective family circumstance did not allow for a proper care outside the social care home. The Government thus argued that the applicants' placement in a social care home had been intended to protect their interest in receiving social care.

(c) The third-party intervention

50. The PERSON Project, relying on the Court's case-law, observations of the Council of Europe Commissioner for Human Rights and the United Nations Convention on the Rights of Persons with Disabilities, submitted that the deprivation of legal capacity was an unjustified intrusion on a person's private life and that the authorities should firstly consider less restrictive measures. Deprivation of legal capacity had been identified by the Commissioner for Human Rights as an area of concern in relation to involuntary institutional placement. The United Nations Convention on the Rights of Persons with Disabilities should be understood as requiring the States to replace substitute decision-making by supported decision-making in the exercise of legal capacity. A range of specialist means of support for the exercise of one's legal capacity developed around the world had proved to be successful in aiding people with mental disabilities. The interveners criticised decisions to deprive people of their legal capacity which relied solely on expert evidence, arguing that such a practice allowed for considerable arbitrariness.

(d) The Court's assessment

51. The Court reiterates that Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance in a democratic society is paramount (see, amongst others, *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X, and *Rudenko v. Ukraine*, no. 50264/08, § 98, 17 April 2014).

52. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Herczegfalvy*

v. Austria, 24 September 1992, § 63, Series A no. 244). Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 143, ECHR 2012).

53. There is no dispute between the parties that the applicants' placement in the Drin social care home constituted a "deprivation of liberty" within the meaning of Article 5 § 1 (e) of the Convention, and the Court sees no reason to hold otherwise.

54. The Court notes that on 25 April and 25 June 2013, respectively, the Constitutional Court found that Ms Hadžimejlić's and Mr Crepulja's deprivation of liberty had not been "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention as they had been held in psychiatric detention without a decision of the competent civil court. It further found a violation of Article 5 § 4 of the Convention because of lack of judicial review of the lawfulness of the applicants' detention. The Constitutional Court ordered the competent social work centres to take measures to ensure respect for the applicants' rights under Article 5 §§ 1 and 4 of the Convention.

55. Following the Constitutional Court's decisions, the necessity of the first and second applicants' detention had been examined by the competent civil court (see paragraphs 13 and 21 above). Based on medical expert report, it established that the state of the applicants' health was not such as to warrant their continued compulsory confinement. However, despite these decisions, the first and second applicants' situation remains unchanged. They are still in the social care home based on the administrative decisions.

56. The Government contended that the applicants' continued placement in the social care home had been intended to protect their best interest in receiving social care. In this connection, the Court notes that the Constitutional Court already examined these arguments and found that the domestic authorities had failed to comply with the requirements of the relevant domestic law concerning compulsory admission to an institution: any such placement must be ordered by the competent court (see paragraph 29 above). The Court sees no reason to disagree with the findings of the Constitutional Court.

57. As a subsidiary consideration, the Court observes that the assessment of whether the disorders warranting the applicants' confinement still persisted was undertaken only after the decisions of the Constitutional Court. Although they appear to have been under the supervision of the psychiatrist in the institution, the aim of that supervision was not to provide an assessment at regular intervals of whether they still needed to be kept in

Drin for the purposes of Article 5 § 1 (e) (see *Stanev*, cited above, § 158, and *Mihailovs v. Latvia*, no. 35939/10, § 150, 22 January 2013).

58. As regards Mr Busovača, the Court notes that he is still detained in the Drin social care home on the basis of an administrative decision. The necessity of his compulsory admission, which has been lasting for more than 15 years, had never been examined by the competent court.

59. In view of the above considerations, the Court considers that the applicants' placement in the Drin social care home was not ordered in accordance with "a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention. There has therefore been a violation of that provision.

2. Alleged violation of 5 § 4 of the Convention

60. Having regard to its above finding under Article 5 § 1, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 5 § 4 of the Convention (see *David v. Moldova*, no. 41578/05, § 43, 27 November 2007, and *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04 *et al.*, § 70, 8 July 2008).

3. Alleged violation of 5 § 5 of the Convention

61. Having regard to its above finding under Article 5 § 1 and to its finding in respect of the non-exhaustion issue (see paragraph 46 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 5 § 5 of the Convention.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

62. The Court finds it appropriate in the present case to consider the application of Article 46 of the Convention, which provides, in so far as relevant:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution..."

63. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order

to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, Reports 1998-IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000 VIII and *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above, and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

64. However, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the Convention shortcoming it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V, and *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 148, 17 September 2009).

65. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 5, to indicate individual measures for the execution of this judgment (see *Stanev*, cited above, §§ 256 and 257). It observes that it has found a violation of that Article on account of the failure to comply with the requirement that any deprivation of liberty must be “in accordance with a procedure prescribed by law”. It has also noted deficiencies in the assessment of the presence and persistence of any disorders warranting placement in a social care home (see paragraphs 51 -59 above).

66. In view of the decisions of the competent civil court concerning the necessity of their continued detention (see paragraphs 13 and 21 above), the Court considers that the respondent State must secure Mr Crepulja’s and Ms Hadžimejlić’s release from the Drin social care home without further delay. As regards Mr Busovača, the respondent State should secure that the necessity of his continued placement is examined by the competent civil court without further delay.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicants did not submit any claim as regards pecuniary damage, but claimed the following amounts in respect of non-pecuniary damage: 100,000 euros (EUR) (Ms Hadžimejlić), EUR 150,000 (Mr Crepulja) and EUR 150,000 (Mr Busovača).

69. The Government considered the amounts claimed to be unjustified and excessive.

70. The Court accepts that the applicants suffered considerable distress as a result of the breach found which justifies an award of non-pecuniary damage. Having regard to the duration of each applicant's unlawful detention, the Court awards Ms Hadžimejlić EUR 21,250, Mr Crepulja EUR 27,500 and Mr Busovača EUR 32,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants. These amounts are to be paid to the applicants' guardians and are to be used in consultation with the applicants for their benefit.

B. Costs and expenses

71. The applicants did not submit any claims in respect of costs and expenses.

C. Default interest

72. 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. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
4. *Holds* that there is no separate issue under Article 5 § 4 of the Convention;

5. *Holds* that there is no separate issue under Article 5 § 5 of the Convention;
6. *Holds*,
 - (a) 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, EUR 21,250 (twenty one thousand two hundred fifty euros) to Ms Hadžimejlić, EUR 27,500 (twenty seven thousand five hundred euros) to Mr Crepulja and EUR 32,500 (thirty two thousand five hundred euros) to Mr Busovača, plus any tax that may be chargeable to the applicants, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
 - (c) the above amounts shall be paid to the applicants' guardians and shall be used in consultation with the applicants for their benefit;
7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 3 November 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Registrar

Guido Raimondi
President