



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

FOURTH SECTION

CASE OF N. v. ROMANIA (No. 2)

(Application no. 38048/18)

JUDGMENT

Art 8 • Private life • No possibility of tailor-made response in deprivation of legal capacity proceedings • Lack of legal safeguards allowing an incapacitated person to have a say in the proceedings leading to the change of a legal guardian
Art 46 • Respondent State invited to take general measures

STRASBOURG

16 November 2021

FINAL

16/02/2022

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

In the case of N. v. Romania (no. 2),

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

Yonko Grozev, *President*,

Tim Eicke,

Faris Vehabović,

Iulia Antoanella Motoc,

Armen Harutyunyan,

Pere Pastor Vilanova,

Jolien Schukking, *judges*,

and Andrea Tamietti, *Section Registrar*,

Having regard to:

the application (no. 38048/18) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr N. (“the applicant”), on 1 August 2018;

the decision to give notice to the Romanian Government (“the Government”) of the application;

the decision not to have the applicant’s name disclosed;

the parties’ observations;

Having deliberated in private on 6 July and 5 October 2021,

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

INTRODUCTION

1. The present application concerns proceedings in which the domestic courts, basing their decisions mainly on medical expert opinions, divested the applicant of his legal capacity and placed him under the full authority of a legal guardian. It also concerns the manner in which the domestic authorities subsequently proceeded to change the applicant’s legal guardian, and the procedural safeguards afforded to the applicant in that regard. The Government were given notice of the application under Articles 6, 8 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1959 and lives in Bucharest. He was represented by Mr C. Cojocariu, a lawyer practising in Orpington (United Kingdom).

3. The Government were represented by their Agent, Ms O.F. Ezer, of the Ministry of Foreign Affairs.

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

5. From 30 June 2006 until 29 May 2018 (see paragraph 21 below) the applicant was resident in the Săpoca Psychiatric Hospital (“the hospital”), situated within the administrative area of the Unguriu village local authorities, in Buzău county. The background to the case is described in the case of *N. v. Romania* (no. 59152/08, 28 November 2017) which was brought by the same applicant and concerned the lawfulness of his placement in psychiatric hospitals (Article 5 §§ 1 (e) and 4 of the Convention).

I. THE COURT’S JUDGMENT IN THE CASE OF *N. V. ROMANIA*, NO. 59152/08

6. On 28 November 2017 the Court gave judgment in the case of *N. v. Romania* (cited above). It found that, at least since 2007, the applicant’s detention had been devoid of any basis in law and had not been warranted under Article 5 § 1 (e) of the Convention (*ibid.*, § 161). Moreover, his continued detention after the adoption of the decision of the Buzău County Court of 29 August 2016 upholding the maintenance of the detention measure, had been arbitrary (*ibid.*, §§ 62 and 167). The Court further considered that the intervals at which the courts had decided on the necessity of maintaining the applicant’s detention had not met the “speediness” requirement set out in Article 5 § 4 of the Convention (*ibid.*, § 195) and that the applicant had not benefited from adequate legal assistance in the proceedings concerning the periodic judicial review of the necessity of his detention (*ibid.*, § 198).

7. It thus found a violation of Articles 5 §§ 1 (e) and 4 of the Convention (*ibid.*, §§ 168 and 199).

8. In addition, the Court indicated several individual and general measures with a view to helping the respondent State fulfil its obligations under Article 46 of the Convention (*ibid.*, §§ 216-19).

9. That judgment became final on 28 February 2018 and the Committee of Ministers of the Council of Europe (“the Committee of Ministers”) started the supervision of its execution. At its meeting no. 1331(CM-DH) which took place from 4 to 6 December 2018, the Committee of Ministers adopted the following decision:

“The Deputies

1. recalling that this case concerns the applicant’s unlawful prolonged psychiatric confinement as a security measure and the authorities’ failure to secure his immediate release in conditions meeting his needs, as well as shortcomings in the judicial review of the applicant’s continued deprivation of liberty;

As regards urgent individual measures

2. noted that in May 2018 the applicant was placed in a recovery centre, as a transitional step until suitable community-based accommodation could be found, and that the authorities have since found him accommodation which he will be able to

move to once the necessary staffing arrangements have been made; considered that the applicant's situation no longer calls for the taking of urgent individual measures;

3. encouraged the authorities to continue closely to monitor the situation to ensure that the applicant can move into the sheltered housing procured for his accommodation as soon as qualified staff have been assigned;

As regards individual measures

4. deeply regretted that the deficiencies in the current system of legal protection for adults left the domestic courts with no option but to place the applicant under guardianship and thus deprive him of the exercise of his civil and political rights;

5. recalled in this respect that the Committee is supervising the adoption by Romania of legislation establishing a new system of independent and effective legal protection, tailored to the specific needs of adults with mental disabilities, in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014];

6. pending the adoption of this legislation or until such time as the domestic courts terminate the applicant's guardianship, invited the authorities to take steps to ensure that the appointed guardian involves the applicant and takes his preferences into account in the decisions concerning him, if consistent with his best interests; also invited them to inform the Committee of the legal safeguards or any arrangements made or envisaged to ensure that the sum awarded as just satisfaction is used in the applicant's best interests;

7. invited the authorities to inform the Committee of relevant developments in the applicant's situation and the concrete general measures envisaged in response to the judgment by the end of February 2019 at the latest."

II. PROCEEDINGS FOR LEGAL INCAPACITATION

10. On 3 July 2014 the Government Agent before the Court asked the local authorities of Unguriu village to start the procedure for appointing a representative to represent the applicant in the proceedings before the Court in the case of *N. v. Romania* (cited above).

11. On 27 June 2014 the hospital lodged an action with the Pătârlagele District Court seeking to divest the applicant of his legal capacity and to appoint a legal guardian for him. The hospital requested that a temporary guardian (*curator special*) be appointed to represent the applicant's interests in those proceedings as well as in the proceedings before the Court. In the application, the hospital explained that the applicant suffered from paranoid schizophrenia and that the illness did not allow him to properly exercise his rights and comply with his obligations. On 7 July 2014, with the applicant's consent, the court appointed a temporary guardian, a lawyer from the Pătârlagele legal aid service of the Buzău Bar Association.

12. On 29 October 2015, at the court's request, the applicant was examined by a psychiatric commission of the Buzău County Forensic Medical Service. In its report of 2 December 2015 that service confirmed the diagnosis of paranoid schizophrenia and declared the applicant "psychologically incapable of managing himself and of taking decisions in

an informed and predictable manner concerning his civil obligations and rights and his own interests”. The report was added to the file.

13. The applicant was present at the hearings before the District Court, and was accompanied by a nurse from the hospital and by his guardian *ad litem*. Before the court he asked that the action concerning him lodged by the hospital be dismissed. He also submitted a series of written documents.

14. On 30 August 2016, in the light of the diagnosis and of the findings of the psychiatric report, and taking into account the applicant’s written submissions which “confirmed his mental situation”, the Pătârlagele District Court divested the applicant of his legal capacity and placed him under legal guardianship. Having postponed the hearing on several occasions in order to allow social services to find a family member or acquaintance willing to take on the role of guardian, and having failed to identify such a suitable person, the court, by the same decision, designated as his legal guardian the social welfare department of Unguriu village (“the Unguriu social welfare authority”) owing to its proximity to the hospital. Ms T.E.C., an employee of the Unguriu social welfare authority, was appointed as the applicant’s legal guardian.

15. The applicant appealed against that decision. He was assisted by the same lawyer who represented him in the present proceedings (see paragraph 2 above). He argued that the measure ordered by the court was not justified and had been taken in disregard of his procedural rights. He also urged the court to take into account the precarious situation of people with mental disabilities in the respondent State, who were marginalised, segregated and subjected to institutionalised abuse. He relied on Article 164 § 1 of the Civil Code (“the CC”, see paragraph 26 below), on the Articles of the Constitution concerning equality, the right to private and family life and protection of people with disabilities, and on Articles 8 and 14 of the Convention. He also requested that the court refer the case to the Court of Justice of the European Union (“the CJEU”) for a preliminary ruling, arguing that the decision contravened the requirements of the European Union (“EU”) legislation concerning the right to vote and the right to work of people with disabilities. He also raised an objection to the constitutionality of Article 164 § 1 of the CC concerning the guardianship procedure, which in his view discriminated against people with mental disabilities and deprived them of the exercise of their rights. On 5 December 2016 the County Court appointed a temporary guardian from the list of lawyers of the Buzău Bar Association.

16. On 9 January 2017 the County Court refused to refer the preliminary question to the CJEU, as it considered that the issues raised by the applicant in his request did not concern the interpretation or validity of EU law in the proceedings before it.

17. On 6 February 2017 the Buzău County Court referred the objection to the constitutionality of Article 164 § 1 of the CC to the Constitutional

Court, which rendered its decision on 16 July 2020 (see paragraph 31 below). At the same time, the County Court decided not to await the outcome of the constitutional proceedings and thus continued its examination of the appeal.

18. On 10 March 2017 the Mina Minovici Institute for Forensic Medicine confirmed the report of 2 December 2015 (see paragraph 12 above). In June 2017 a commission from that institute examined the applicant and on 19 December 2017 issued a new psychiatric report reaching the same conclusion as the Buzău County commission. It recommended that the applicant, who was “mentally incapable of caring for himself, of deciding on his best interests, and of acting in an informed manner in compliance with his civil rights and obligations” be divested of his legal capacity. The report also stated that even with appropriate medical treatment the applicant was unable to manage his personal and proprietary interests.

19. On 27 February 2018 the Buzău County Court upheld the decision rendered by the District Court on 30 August 2016 (see paragraph 14 above). It relied on the definition of insanity by Law no. 71/2011 (see paragraph 27 below) and also pointed out that the measure in question was not aimed at punishing the individuals concerned, but rather at protecting them and also third parties. The court noted that the legislation did not allow for a more nuanced response in the case of people with mental problems. The court further stated that in the absence of any suitable family member or acquaintance, appointing the local authority as guardian was the only sensible and legal solution.

20. The applicant, through counsel, appealed on points of law, but in a final decision of 25 September 2018 the Ploiești Court of Appeal dismissed the appeal on the grounds that the law did not provide for that means of appeal.

III. PROCEEDINGS WITH A VIEW TO REPLACING THE LEGAL GUARDIAN

21. On 29 May 2018 the applicant was transferred from the hospital to the U. Centre for Neuropsychiatric Recuperation and Rehabilitation, a closed care home situated in Bucharest (“the U. Centre”).

22. On 4 June 2019 the Bucharest Directorate General for Social Welfare and Child Protection (“the Bucharest social welfare authority”) lodged an application with the Bucharest District Court seeking to replace Ms T.E.C. in her role as the applicant’s legal guardian (see paragraph 14 above) with a new legal guardian, Mr B.V.G., a psychologist who worked in the U. Centre and who, at that time, was also the applicant’s therapist and the person in charge of his case (case manager). It argued that this change would reflect the residence arrangements concerning the applicant and

would optimise the decision-making process in his regard. Both Ms T.E.C. and Mr B.V.G. gave their consent to the proposed change. The applicant was not party to these proceedings, which took place between the Bucharest social welfare authority, Ms T.E.C. and Mr B.V.G.; the Unguriu social welfare authority was also notified of the proceedings.

23. In an interlocutory decision of 22 August 2019 the Bucharest District Court, relying on Article 173 of the CC (see paragraph 26 below), allowed the application and designated Mr B.V.G. as the applicant's new legal guardian, on the grounds that the applicant had been transferred to a place which was too far away from his present legal guardian and that the two guardians and the Unguriu social welfare authority had given their consent.

24. The Government added to their submissions in the present case a handwritten statement dated 11 February 2019 in which the applicant agreed that Ms T.E.C. be replaced as his legal guardian by Mr B.V.G. That statement was not mentioned in the application of 4 June 2019 (see paragraph 22 above) or in the interlocutory decision of 22 August 2019 (see paragraph 23 above).

25. The applicant alleged that he had learned of that decision on 17 October 2019, in the proceedings before the Constitutional Court, when it had been added to the file by the representative of the U. Centre.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Civil Code ("the CC")

26. The relevant provisions of the CC concerning legal incapacitation read as follow:

Article 164 § 1 Conditions

"Persons who do not have the necessary capacity to care for their interests, because of insanity or severe mental defect, shall be placed under guardianship."

Article 167 Appointment of special guardian

"In case of need and pending a decision on the request for legal incapacitation, the guardianship court may appoint a special guardian to care for and represent the person whose incapacitation has been requested and to manage his or her possessions."

Article 170 Appointment of legal guardian

"By the decision declaring a person legally incapable, the guardianship court immediately appoints a guardian for the protection of the person placed under legal guardianship. The provisions of Articles 114-120 [concerning the appointment of a legal guardian for a child] shall apply accordingly."

Article 171 Application of guardianship rules

“The rules concerning legal guardianship of children below the age of 14 shall apply to the guardianship of a person divested of legal capacity, unless otherwise prescribed by law.”

Article 173 Change of legal guardian

“(1) The legal guardian of a person divested of legal capacity may seek to be replaced three years after his or her appointment.

(2) The legal guardian may seek to be replaced before the time-limit of three years has elapsed, where there are compelling reasons.”

27. In addition, Law no. 71/2011 on the application of the CC defines insanity as follows:

Article 211

“For the purposes of the Civil Code and of the civil laws in force, the expressions insanity and severe mental defect are to be understood as a mental illness or a mental disability which results in the inability of a person to act critically and predictably with regard to the social and legal consequences that may arise from the exercise of civil rights and obligations.”

B. The Code of Civil Procedure (“the CCP”)

28. Articles 936-43 of the CCP regulate the procedure whereby a person is divested of legal capacity. This procedure takes place in the presence of the person concerned, from whom the court hears evidence in order to assess his or her mental abilities, having regard also to the evidence in the file.

C. Mental Health Act

29. The Mental Health Act (Law no. 487 of 11 July 2002 on mental health and the protection of people with mental disorders) provides for the rights of persons with mental disorders. In particular, under Article 41 of that Act, persons with mental disorders have the freedom to exercise their civil, political, economic, social and cultural rights guaranteed by the Universal Declaration of Human Rights and by other international conventions and treaties ratified by Romania. Article 42 states that any person with mental disorders has the right to be recognised as an individual and has the right to private life.

D. The Constitutional Court

30. In its decision no. 795/2020 (published in the Official Bulletin on 28 December 2020 and applicable from that date) the Constitutional Court ruled that legal guardians must be accountable for their acts before a court,

as it considered that the situation prevailing at that time, whereby their supervision was exercised exclusively by the social welfare authorities, was unconstitutional. In its decision the Constitutional Court also noted that, at that time, the only instance in which a person divested of legal capacity could apply to a court was to seek to have his or her incapacitation measure lifted (Article 177 § 2 of the CC).

31. Decision no. 601, adopted on 16 July 2020 and applicable since 27 January 2021 when it was published in the Official Bulletin, declared Article 164 § 1 of the CC unconstitutional in so far as it did not allow for an individualised periodic assessment of the situation. The relevant passages of this decision read as follows:

“30. The [Constitutional Court] notes that the legislation under review establishes a system of substitution under which the rights and obligations of a person divested of legal capacity are exercised by a legal guardian, regardless of the degree of impairment of the person’s discernment, to the detriment of a system of support characterised by a support mechanism to be provided by the State depending on the degree of impairment of discernment.

...

46. In conclusion, the [Constitutional Court] notes that the measure consisting in divesting a person of legal capacity, as regulated by Article 164 § 1 of the [CC], is not accompanied by sufficient safeguards to ensure respect for human rights and fundamental freedoms. It does not take into account the fact that there may be different degrees of incapacitation, or the diversity of a person’s interests, it is not limited in time and is not subject to periodic review. Any protective measure must be proportionate to the level of capacity of the person concerned, must be suited to the person’s lifestyle, be applied for the shortest time possible, must be periodically reviewed and must take into account the wishes and preferences of the disabled person. Moreover, when introducing a protective measure, the legislature must take into account the fact that there may be different degrees of incapacitation, and that mental deficiency may vary over time. Lack of mental capacity or discernment can take various forms, for instance, total/partial or reversible/irreversible, and this situation requires that the protective measures be appropriate to the reality; however, this is not taken into account in the legislative measures concerning legal incapacitation. Therefore, the different degrees of disability must be afforded corresponding degrees of protection, and the legislature must identify proportionate solutions. Legal incapacitation must not lead to the loss of the exercise of all civil rights, and must be assessed individually in each case.

47. Consequently, the [Constitutional Court] notes that in the absence of safeguards accompanying the protective measure of legal incapacitation, there is a breach of the corresponding constitutional provisions read in the light of Article 12 of the Convention on the Rights of Persons with Disabilities.

48. ... Based on the recommendations made by the Committee on the Rights of Persons with Disabilities ... to the member States, ... the National Authority for the Rights of People with Disabilities may make legislative proposals in this field, and the Parliament or the Government will have a responsibility to enact legislation which complies with the Constitution and the Convention on the Rights of Persons with Disabilities.”

II. RELEVANT INTERNATIONAL MATERIALS

32. The relevant provisions of international law concerning the right of people with disabilities to respect for their rights (notably the right to maximum preservation of their capacity, respect for their privacy on an equal basis with others, and the right to equality and non-discrimination), including the provisions of the United Nations Convention on the Rights of Persons with Disabilities (“the CRPD”), which was ratified by Romania on 31 January 2011, are described in *A.N. v. Lithuania* (no. 17280/08, §§ 68-69, 31 May 2016) as well as in *Cînta v. Romania* (no. 3891/19, §§ 27-34, 18 February 2020) and in *N. v. Romania* (no. 59152/08, §§ 101-108, 28 November 2017).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that the measure divesting him of legal capacity had breached his right to respect for his private life protected by Article 8 of the Convention. He also complained, relying on the same Article, about the manner in which the authorities had changed his legal guardian through proceedings in which he was not involved.

Article 8 of the Convention reads as follows:

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

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

A. Admissibility

1. *Non-exhaustion of domestic remedies*

(a) The parties’ submissions

34. The Government argued that the applicant should have appealed against the interlocutory decision of 22 August 2019 (see paragraph 23 above) within the thirty-day time-limit set by law which, in their view, had expired on 24 September 2019. The applicant, who at that time was already being represented by his present counsel, had been aware that the proceedings were ongoing, as on 11 February 2019 he had given his consent to the change of legal guardian (see paragraph 24 above).

35. The applicant reiterated that he had not been a party to those proceedings and for that reason had not been allowed by law to lodge an

appeal against the interlocutory decision. Moreover, the letter in question, signed four months previously, did not prove that he had been aware of the existence of those proceedings.

(b) The Court's assessment

36. In respect of the requirement to exhaust domestic remedies, the Court refers to the well-established principles of its case-law (as reiterated notably in *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 83-89, 9 July 2015, and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

37. The Court observes that the gravamen of the applicant's complaint concerning the change of legal guardian is his ability to participate in the relevant proceedings. Consequently, the answer to the objection raised by the Government is intrinsically linked to the examination of the merits of this complaint. The objection should therefore be joined to the merits (see, *mutatis mutandis*, *A.N. v. Lithuania*, no. 17280/08, § 82, 31 May 2016).

2. Incompatibility ratione materiae

(a) The parties' submissions

38. The Government averred that the issue of the applicant's legal incapacitation had already been assessed by the Committee of Ministers as part of the execution of the judgment rendered by the Court in the case of *N. v. Romania* (no. 59152/08, 28 November 2017 – see paragraph 9 above).

39. The applicant observed that the Government's assertions could be considered a plea of inadmissibility. In this vein, he pointed out that the two cases he had brought before the Court concerned separate facts and separate violations of the Convention. Moreover, on the date of submission of his observations in the present case, that is to say, three years after the adoption of the judgment in the case of *N. v. Romania* (cited above), the applicant's placement under legal guardianship had not yet been reviewed by the authorities, despite the Committee of Ministers' exhortations.

(b) The Court's assessment

40. Although not formulated as such, the Court considers that the Government's submissions on this point may be interpreted as a plea of inadmissibility of the complaint concerning the applicant's legal incapacitation. The Court will therefore examine it accordingly.

(i) General principles

41. The Court reiterates that the measures taken by a respondent State to remedy a violation found by the Court can raise a new issue undecided by the judgment and, as such, may form the subject of a new application that

may be dealt with by the Court (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 62, ECHR 2009).

42. Reference should be made in this context to the criteria established in the case-law concerning Article 35 § 2 (b), according to which an application is to be declared inadmissible if it “is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information” (ibid., § 63).

(ii) *Application of those principles to the facts of the present case*

43. The Court must thus ascertain whether the two applications brought before it by the applicant relate essentially to the same person, the same facts and the same complaints (see, *mutatis mutandis*, *Harkins v. the United Kingdom* (dec.) [GC], no. 71537/14, §§ 41-42, 15 June 2017).

44. While it is undisputed that both the applications in question were lodged by the same person, the Court considers that the factual situations and the complaints raised are different. The Court reiterates that the first application, in the case of *N. v. Romania*, cited above, concerned the lawfulness of the applicant’s psychiatric detention (see paragraph 6 above), whereas the present application concerns the applicant’s legal incapacitation and the choice of his legal guardian (see paragraph 33 above).

45. The Court thus concludes that the complaints raised in the present application are not substantially the same as those examined in *N. v. Romania* (cited above) for the purpose of Article 35 § 2 (b) of the Convention (see, *mutatis mutandis*, *Sadak v. Turkey*, nos. 25142/94 and 27099/95, §§ 32-33, 8 April 2004).

46. Furthermore, the Court notes that the supervision by the Committee of Ministers, in the context of execution of the judgment rendered by the Court in *N. v. Romania*, concerns exclusively the complaints under Article 5 of the Convention, as is clear from point no. 1 of the Committee of Ministers’ decision (see paragraph 9 above). The reference to deficiencies in the system of legal protection of persons with mental disabilities, inscribed in points nos. 4 to 6 of that decision, does not change this conclusion, in particular in the absence of a Court finding of a violation in that regard, in respect of the applicant.

47. It follows that the Government’s objection concerning the compatibility *ratione materiae* of the application must be dismissed.

3. *Other reasons for inadmissibility*

48. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

49. The applicant argued that he had been automatically placed under legal guardianship as the law had not allowed for an individualised assessment of his situation. Moreover, the measure had been taken based on his mental illness and lack of family support and no alternative solutions had been sought by the authorities.

50. The applicant also reiterated that the law itself had allowed the proceedings for the change of legal guardian to take place without any input from him. Moreover, the court had not subjected that request to any meaningful scrutiny, including by examining the performance of the outgoing guardian or the status of the incoming guardian, or the latter's unsuitability for the role owing to his position as the applicant's therapist and case manager and at the same time as an employee of the centre where the applicant was living. Moreover, the decision had been taken by the court without hearing the applicant or assessing his needs, wishes or preferences.

(b) The Government

51. The Government accepted that the applicant's legal incapacitation constituted interference with his right to respect for his private life. However, they argued that the system had provided sufficient safeguards during the proceedings in question: the applicant had participated fully and had been assisted by counsel; the courts had relied not only on his diagnosis but also on two medical expert examinations and had examined the applicant's personal circumstances (notably the absence of any family or acquaintance willing to help); and the courts had assessed the possibility of applying less intrusive measures. While accepting that a system which only provided for full capacity or total incapacitation was not Convention compliant, the Government argued that in the present case the issue did not arise, as the measure of legal incapacitation had been necessary and appropriate to the applicant's personal circumstances. In their view, the Constitutional Court's decision of 16 July 2020 (see paragraph 31 above) should not be interpreted as excluding the possibility of total legal incapacitation if that measure was necessary in the circumstances of a given case.

52. Lastly, the Government argued that both the applicant and the two legal guardians had given their express consent to the change of legal guardian and that the domestic court's role, under Article 173 of the CC (see paragraph 26 above), was limited to taking note of that change and assessing whether it complied with the applicant's best interests. Moreover,

the applicant had allowed that decision to become final by failing to appeal against it (see paragraph 34 above).

2. The Court's assessment

(a) General principles

53. The Court has already held that deprivation of legal capacity undeniably constitutes serious interference with the right to respect for a person's private life protected under Article 8. It reiterates that Article 8 secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality (see *Shtukaturov v. Russia*, no. 44009/05, § 83, ECHR 2008, and *A.N. v. Lithuania*, cited above, § 111). Any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it was "in accordance with the law", pursued a legitimate aim or aims under Article 8 § 2 and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought to be achieved (see *A.N. v. Lithuania*, cited above, § 113).

54. As a rule, in such a complex matter as determining somebody's mental capacity, the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with the people concerned and are therefore particularly well placed to determine such issues. The task of the Court is rather to review under the Convention the decisions taken by the national authorities in the exercise of their powers in this regard (*ibid.*, § 116, with further references).

55. However, the Court reiterates that if a restriction on fundamental rights applies to someone belonging to a particularly vulnerable group in society that has suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (see *A.N. v. Lithuania*, cited above, § 125, and *Cînta v. Romania*, no. 3891/19, § 41, 18 February 2020, with further references).

(b) Application of those principles to the facts of the present case

56. In the light of the above, and in the context of its examination of the present case, the Court does not propose to substitute its own assessment for that of the domestic courts. In this connection the Court reiterates that whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be

fair and such as to ensure due respect for the interests safeguarded by Article 8. The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see *A.N. v. Lithuania*, § 118, and, *mutatis mutandis*, *Cînta*, § 42 both cited above).

57. At the outset, the Court observes that the present complaint is twofold: on the one hand, the applicant challenges the measure consisting in his legal incapacitation, and on the other hand, he objects to the manner in which the change of legal guardian took place. The Court will examine these two aspects in turn.

(i) *Legal incapacitation*

58. The Court observes that it is undisputed between the parties that the decision of 30 August 2016 (see paragraph 14 above), upheld by the final decision of 27 February 2018 (see paragraph 19 above), amounted to interference with the applicant's private life (see paragraph 51 above).

59. The incapacitation proceedings concerning the applicant had a legal basis, namely Article 164 § 1 of the CC (see paragraph 26 above) and Articles 936-43 of the CCP (see paragraph 28 above). The Court also has no reason to doubt that the measure was taken in the applicant's interests, to protect his health as well as the rights and freedoms of others.

60. It thus remains to be examined whether the measure of full legal incapacitation was necessary and, in particular, whether the law providing such incapacitation as a general measure was compatible with the Convention requirements (see, *mutatis mutandis* and in the context of Article 10 of the Convention, *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, §§ 63-64, 20 June 2017).

61. In this connection the Court notes firstly that the consequences of that interference were very serious. As a result of his incapacitation, the applicant became fully dependent on his legal guardians, to whom the courts transferred the exercise of his rights (see paragraph 30 of Decision no. 601/2020 of the Constitutional Court, cited in paragraph 31 above).

62. Admittedly, in reaching their decision, the courts referred to medical expert reports prepared for the purposes of the proceedings in question after direct examination of the applicant (see paragraphs 12 and 18 above). Moreover, the applicant participated in the proceedings and benefited from the assistance of counsel (see paragraphs 13 and 15 above). He was also heard by the District Court (see paragraph 13 above).

63. However, it appears that the existing legislative framework did not leave the judges, or in this case the forensic experts, any room for an individualised assessment of the applicant's situation. The CC distinguishes between full capacity and full incapacity, but does not provide for a "tailor-made response" (see paragraphs 26 and 27 above; see also

*Shtukatur*ov, § 95, and *A.N. v. Lithuania*, § 124, both cited above). The Constitutional Court, in its recent Decision no. 601 of 16 July 2020, has also found that the applicable legislative provision is not accompanied by sufficient safeguards as it does not take into account the fact that there may be different degrees of incapacitation, or the diversity of a person's interests (see paragraph 31 above).

64. In its final decision of 27 February 2018, the Buzău County Court acknowledged the fact that the legislation did not allow for a more nuanced response to the applicant's problem (see paragraph 19 above). Furthermore, the Constitutional Court has recently declared the legal provisions in question to be unconstitutional and in violation of the State's international obligations with respect to the protection of the rights of people with disabilities (see paragraph 31 above). The Court notes with satisfaction that these recent findings are also consistent with the Court's case-law in the matter (see, among many other authorities, *Shtukatur*ov, cited above, § 95, and *Nikolyan v. Armenia*, no. 74438/14, §§ 122-23, 3 October 2019, with further references).

65. That said, the fact remains that in accordance with the applicable legal provisions, at the time when it was taken in respect of the applicant, that measure could not be modulated and the applicant's actual needs and wishes could not be factored into the decision-making process.

66. As a result, in those circumstances, the applicant's rights under Article 8 were restricted by law more than was strictly necessary. There has accordingly been a violation of Article 8 in respect of the applicant's legal incapacitation.

(ii) *Change of legal guardian*

67. The Court observes that the change of legal guardian is closely related to the applicant's lack of legal capacity, and reiterates its finding that the latter undeniably constituted serious interference with the applicant's right to respect for his private life as protected under Article 8 (see paragraphs 53, 58 and 61 above). It further notes that the legal guardian plays a significant role in the life of a person divested of legal capacity, as in practice the guardian exercises that person's rights on his or her behalf (see paragraph 61 above).

68. This complaint is, in essence, directed at the fact that the applicant had no say in the proceedings leading to the appointment of a new guardian. The Court observes that the applicant, on account of his legal incapacitation, was ultimately prevented from deciding for himself about who would protect his interests and exercise his rights. There has accordingly been interference with the applicant's right to respect for his private life under Article 8 of the Convention (see, *mutatis mutandis*, *A.-M.V. v. Finland*, no. 53251/13, § 77, 23 March 2017).

69. The change of legal guardian had a legal basis, namely Article 173 of the CC (see paragraph 26 above). The Court also has no reason to doubt that the measure was taken in the applicant's interests (see, *mutatis mutandis*, paragraph 59 above).

70. It thus remains to be ascertained whether the measure was necessary in the circumstances of the case. In this regard the Court observes that the proceedings before the Bucharest District Court took place between the social welfare authorities and the two legal guardians. The applicant was not present in court (see paragraph 22 *in fine* above).

71. Although, as pointed out by the Government, the applicant at one point appears to have given his consent to the change of legal guardian, his opinion did not feature in the court's reasoning (see paragraph 24 above). In fact, it appears that the applicant's statement was not even part of the court file (see paragraph 24 *in fine* above).

72. The applicant was excluded from those proceedings for the sole reason that he had been placed under guardianship, without any consideration for his actual condition or capacity to understand the matter and express his preferences. In this respect the case differs from *A.-M.V. v. Finland* (cited above, §§ 85-86), where the applicant was heard by the court and his wishes as to his choice of residence were taken into account along with expert evidence and witness testimony.

73. In this regard the Court is also not convinced that the applicant would have had a real opportunity to appeal against the impugned decision (see paragraphs 34 and 52 above), not least because it appears that the decision in question was never served on the applicant (see paragraphs 22 *in fine* and 25 above, and, *mutatis mutandis*, *X and Y v. Croatia*, cited above, § 66). The Court further reiterates that, at that time, the only instance in which a person divested of legal capacity could apply to a court was to seek to have his or her incapacitation measure lifted (see paragraph 30 above). The Court therefore dismisses the Government's objection of non-exhaustion of domestic remedies (see paragraphs 34-37 above).

74. In the light of the foregoing, the Court considers that the decision-making process leading to the impugned decision of 22 August 2019 (see paragraph 23 above) was not conducted so as to ensure that the applicant's current state of health was properly assessed and that all views and interests were duly taken into account (see the case-law quoted in paragraph 56 above; see also, *mutatis mutandis*, *Cința*, cited above, § 57, and contrast *A.-M.V. v. Finland*, cited above, § 89). The Court is thus not satisfied that the said procedure was accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake (see also, *mutatis mutandis* and in the context of Article 6 § 1 of the Convention, *Stanev v. Bulgaria* [GC], no. 36760/06, § 241, ECHR 2012).

75. For the above-mentioned reasons, the Court considers that it has not been shown that the decision on the change of legal guardian was based on relevant and sufficient reasons and was thus proportionate to the legitimate aim pursued.

76. There has accordingly been a violation of Article 8 in that regard.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

77. The applicant raised several complaints under Article 6 of the Convention concerning both the proceedings leading to his legal incapacitation and those for the change of his legal guardian.

78. Lastly, he complained that he had been discriminated against on the grounds of his health – notably his mental illness – and social status, in the proceedings in which he had been divested of his legal capacity. He relied on Article 14 of the Convention, taken together with Article 8.

79. Bearing in mind the nature and substance of the violations found in the present case on the basis of Article 8 (see paragraphs 66 and 76 above), the Court finds that it is not necessary to examine separately the admissibility and merits of the complaints under Articles 6 and 14 of the Convention (see, *mutatis mutandis*, *Ivinović v. Croatia*, no. 13006/13, § 50, 18 September 2014, and *Shtukatur*, § 134, cited above).

III. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

80. Article 46 of the Convention provides:

“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.”

81. The applicant requested that the Court indicate general measures to the respondent State, specifically to carry out urgent reform with a view to ensuring that persons with psychosocial disabilities benefit from special protection under the law in line with the international standards.

82. The Court reiterates that under Article 46 of the Convention the Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach 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 so far as possible the effects. The Court also reiterates 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 in order to discharge its obligation under Article 46 of the Convention (see *N. v. Romania*, cited above, § 215, with further references).

83. 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 situation it has found to exist (see, for instance, *Stanev*, cited above, § 255, with further references).

84. In the present case, the Court is of the view that the shortcomings identified are liable to give rise to further justified applications in the future. For this reason, in the light of its finding of a violation of Article 8 of the Convention (see paragraph 66 above), and regard being had to the Constitutional Court's findings in its decision of 16 July 2020 (see paragraph 31 above), the Court finds it crucial that the respondent State adopt the appropriate general measures with a view to bringing its legislation and practice into line with those findings of the Constitutional Court and with the international standards, including the Court's case-law, in the matter.

B. Article 41 of the Convention

85. 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.”

1. Damage

86. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

87. The Government considered the claim to be unrelated to the alleged violation and excessive, and argued that the finding of a violation should constitute sufficient just satisfaction.

88. The Court considers that the applicant must have sustained non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Having regard to the nature of the violation found and making its assessment on an equitable basis, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage.

89. If, at the moment of payment of the award, the applicant is legally incapacitated, the Government should ensure that the amount awarded is transferred to the legal guardian, on the applicant's behalf and in his best interests (see *Lashin v. Russia*, no. 33117/02, § 129, 22 January 2013).

2. *Costs and expenses*

90. The applicant also claimed EUR 9,480 for the costs and expenses incurred before the Court, to be paid directly into his representative's bank account.

91. The Government contested the claims and argued that the costs claimed in respect of legal representation before the Court were excessive.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 9,480 for the proceedings before the Court, plus any tax that may be chargeable to the applicant. This sum is to be paid directly into the applicant's representative's bank account (see, for instance, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 288, ECHR 2016 (extracts)).

3. *Default interest*

93. 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

1. *Joins* to the merits, unanimously, the preliminary objection of failure to exhaust domestic remedies in respect of the complaint under Article 8 of the Convention concerning the change of legal guardian and *dismisses* it;
2. *Declares* admissible, unanimously, the complaints concerning Article 8 of the Convention;
3. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention in respect of the legal incapacitation of the applicant;
4. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention in respect of the change of the applicant's legal guardian;
5. *Holds*, by five votes to two, that it is not necessary to examine the admissibility and merits of the complaints raised by the applicant under Article 6 of the Convention and under Article 14 taken together with Article 8 of the Convention;

6. *Holds*, unanimously,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 9,480 (nine thousand four hundred and eighty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Andrea Tamietti
Registrar

Yonko Grozev
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Motoc and Pastor Vilanova are annexed to this judgment:

Y.G.R.
A.N.T.

PARTLY DISSENTING OPINION OF JUDGE MOTOC

1. Article 14 of the Convention has often been considered the Cinderella of the system. Sometimes, Cinderella is compared to Hamlet: they share similar attributes but, equally, the storylines are very different. Cinderella and Hamlet are both the protagonists of their respective stories but are wronged by other characters. Cinderella loses both her parents and is at the mercy of her stepmother, while Hamlet, after losing his father, is at the mercy of his stepfather. If Article 14 has been compared with Cinderella, following this logic we can also compare it to Hamlet, with an emphasis on its famous phrase “to be or not to be”. Indeed, in the present case the Court found that there was no need to examine whether a violation has occurred.

2. The area of mental health is one in which human rights are frequently forgotten. Although relied upon by the applicants, the main case examined by the Court to date with regard to stereotyping is also overlooked. *Carvalho Pinto de Sousa Morais v. Portugal* (no. 17484/15, 25 July 2017) introduced for the first time in the Court’s case-law the concept of discrimination without a comparator, but stereotypes have not subsequently been used by the Court on a regular basis, making the above case look more like an exception than a rule.

3. One in four people will experience mental-health issues during their lifetime, according to current estimates. Yet nearly two-thirds of those with mental-health conditions will not seek treatment; individuals with mental-health conditions – and their families – are subjected to stigma, discrimination and victimisation, and are vulnerable to violations of their rights. Individuals living in long-term institutions are particularly vulnerable to human-rights violations.

4. The Court has noted on several occasions the emphasis placed by the international community on the need for better and more coherent protection for the rights of persons with mental illness and mental disabilities. The international standards and recommendations encourage respect for equality, dignity and equal opportunities for persons with mental disabilities.

5. The relevant principles established under Article 14 of the Convention were reiterated in *Molla Sali v. Greece* [GC] (no. 20452/14, 19 December 2018). In that case, the Court reiterated that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical.

6. For the purposes of Article 14, a difference in treatment is discriminatory if it “has no objective and reasonable justification”, that is, if

it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised (ibid., §§ 133 and 135).

7. The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, 5 September 2017). The Court has found that a distinction made on account of an individual’s mental health is covered – either as a disability or a form thereof – by the term “other status” in the text of Article 14 of the Convention (see *Cînta v. Romania*, no. 3891/19, 18 February 2020, §§ 66 and 70, with further references).

8. We must first determine whether the applicant was treated differently than persons in analogous or similar situations because of a personal characteristic. We note that the applicant was divested of his legal capacity because he suffered from a mental illness (see paragraphs 14 and 62-63 of the present judgment).

9. Consequently, we consider it established that the applicant experienced such treatment mainly because of his mental health, which falls within the ambit of “other status”. In this connection it is noted that only persons suffering from mental illness can be fully divested of their legal capacity on the ground of their illness alone. For this reason such a difference in treatment will amount to direct discrimination if it is not justified.

10. In assessing the applicant’s complaint under Article 8 of the Convention, the Court has found that the domestic decisions divesting him of legal capacity pursued a legitimate aim, namely the protection of his health and of the rights of others (see paragraph 59 of the present judgment). There is no reason to find otherwise in the context of Article 14. Consequently, it remains to be established whether the difference in treatment was justified (see, *mutatis mutandis*, *Cînta*, cited above, §§ 71-72).

11. The Court accepts that when assessing a person’s ability to protect his or her own interests and exercise his or her rights, mental illness is a relevant factor to be taken into account (see, *mutatis mutandis*, *Cînta*, cited above, § 68). However, the Court has already found that the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation (see paragraph 63 of the present judgment). In the present case, however, the applicant’s mental disability was found to have been the sole argument on which his full incapacitation was based (see paragraphs 64-66 of the present judgment).

12. Consequently, the Court had no choice but to find that, by acting in compliance with Article 164 § 1 of the CC read together with section 221 of Law no. 71/2011 (see paragraphs 26-27 of the present judgment), the domestic courts considered the applicant solely in terms of his mental

disorder, which they automatically equated with mental incapacity. The decision to divest him of his legal capacity and to place him under guardianship was based exclusively on his mental illness, without pertinent reasons being advanced and with no consideration for his actual abilities. It can be inferred that the prejudice the applicant thus suffered was caused by legislative stereotyping which prevented an individualised evaluation of his capacities and needs (see, *mutatis mutandis*, *Alajos Kiss v. Hungary*, no. 38832/06, § 42 *in fine*, 20 May 2010).

13. The legislative provisions in question are, however, at odds with other domestic requirements as well as with the respondent State's international obligations. The Mental Health Act recognises that persons with mental disorders have the right to private life and to the free exercise of all civil rights (see paragraph 29 of the present judgment). Moreover, the UN Convention on the Rights of Persons with Disabilities, to which the respondent State is a party, recognises persons with disabilities as full subjects of rights and as rights holders, and as persons whose rights require protection on equal basis with others (see *Cînta*, cited above, §§ 30 and 32). This is also the case for any person suffering from mental illness (*ibid.*, § 75).

14. In its case-law, the Court has also recognised that very weighty reasons must be adduced to justify restrictions of the rights of the mentally disabled, because of their condition of particular vulnerability (see *Alajos Kiss*, cited above, § 42, and the case-law cited at paragraph 55 of the present judgment). The Court has further held that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny (see *Alajos Kiss*, cited above, § 44). It can be inferred that mentally ill persons represent a vulnerable group in society, whose rights require special consideration from the State authorities.

15. In these circumstances, we should consider that a *prima facie* case of discrimination has been established by the applicant and that the Government, to whom the burden of proof shifted, have failed to put forward any convincing reasons to rebut the presumption of discrimination against the applicant on the grounds of his mental health (see, *mutatis mutandis*, *Cînta*, cited above, §§ 79-80).

16. There has accordingly been a violation of Article 14 of the Convention read in conjunction with Article 8.

PARTLY DISSENTING OPINION OF JUDGE
PASTOR VILANOVA

(Translation)

I regret that I am unable to agree with the majority's finding in point 5 of the operative provisions of the judgment, for the reasons already set out, in particular, in my dissenting opinion in the case of *Popov and Others v. Russia* (no. 44560/11, 27 November 2018). Consequently, I consider that this part of the application should have been declared inadmissible.