

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

FIRST SECTION

DECISION

Application no. 4446/10
by Branka BAJČETIĆ
against Croatia

The European Court of Human Rights (First Section), sitting on 11 October 2011 as a Chamber composed of:

Anatoly Kovler, *President,*
Nina Vajić,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 21 December 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Branka Bajčetić, is a Croatian national who was born in 1954 and lives in Zagreb. The present application was lodged by the applicant's guardian and daughter, G.B., on behalf of her mother – the applicant. She was represented before the Court by Ms Lovorka Kušan and Mr Zlatko Kušan, lawyers practising in Ivanić Grad. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

By a decision of the Zagreb Municipal Court (*Općinski sud u Zagrebu*) of 10 July 2003 the applicant was divested of her legal capacity on account of her mental illness. She did not participate in those proceedings but was represented by her father.

By a decision of the Zagreb Welfare Centre, Peščenica Office (*Centar za socijalnu skrb Zagreb, Ured Peščenica* – "the Centre") of 16 September 2003 the applicant's mother, J.S., was appointed her legal guardian. On 28 August 2006 the Centre appointed the applicant's brother M.S. her new legal guardian. The change was due to M.S.'s statement that their mother, J.S., was no longer able to take care of the applicant's interests owing to her own illness.

On 1 October 2006 the applicant's father died and inheritance proceedings were instituted before a public notary in Zagreb. The applicant did not participate in these proceedings in person, but was represented by her brother, M.S. The written record of a hearing held on 29 November 2006 states that the present heirs, that is, the applicant's mother J.S. and her brother M.S., agreed that J.S. would inherit all movables from her husband, while M.S. and the applicant would inherit a flat in Zagreb, Ivanićgradska Street, so that M.S. would become the owner of two-thirds of the flat and the applicant of one-third. On the same day a decision on inheritance was issued confirming that agreement.

On 27 August 2007 the applicant's daughter, G.B., submitted a request with the Centre, asking that she be appointed her mother's legal guardian. She explained that for the past five years she had been studying in France and had now returned to Croatia and was willing to care for her mother and fully capable of doing so. She added that all the family members supported her request.

On 2 October 2007 G.B. informed the Centre that on 1 October 2007 M.S. had thrown the applicant out of the flat where she had been living up to then (the one left by her late father) and changed the lock. G.B. asked the Centre to take urgent measures to protect the interests of the applicant. She reiterated this request again on 4 October and on an unspecified date. She requested the Centre to bring a civil action against M.S. for disturbance of possessions.

On 4 October 2007 G.B. also lodged a request for supervision of the Centre's work with the Ministry of Health and Social Care (*Ministarstvo zdravstva i socijalne skrbi* – the "Ministry"). She complained that her request of 27 August 2007 to be appointed the applicant's legal guardian had not been registered or processed. A lawyer of the Centre had kept the request in a drawer and had only handed it back to G.B. on 1 October 2007

at G.B.'s insistence; G.B. had then had it recorded in the Centre's incoming mail register. She further alleged that M.S. had thrown the applicant out of the flat where she had been living, had moved into the flat himself and had been showing it to potential buyers. G.B. also maintained that the Centre had not protected the applicant's interests but on the contrary had already sent an expert to estimate the value of the flat.

On 5 October 2007 the Centre employees visited the flat and found the applicant and M.S there. The applicant said that she had no problems with her brother.

On 11 October 2007 the Ministry asked the Centre to reply to G.B.'s allegations.

On 17 October 2007 the Centre asked M.S. to reply to G.B.'s allegations.

On 8 January 2008 G.B. again urged the Centre to take measures to protect the applicant's interests. She alleged that the applicant had been released from a psychiatric hospital on 13 December 2007. Although M.S. had given the applicant the keys to the flat in mid December 2007, he continued to take the keys away and give them back to her as he wished. He had also locked all but one of the rooms of the flat, including those where items necessary for the applicant's daily life were kept, such as her clothes, the washing machine and the switch that regulated the heating. Furthermore, he had prevented G.B. from living in the flat with the applicant, despite the applicant not being capable of taking care of herself because of her mental condition. Since M.S. no longer lived in the flat, the applicant lived alone. Thus, she had lived in the flat for a week with no supervision, after which her condition had worsened and she had had to be hospitalised again.

G.B. further maintained that M.S. had been shouting at and threatening the applicant, which had caused her intense fear and worsened her condition. He had forbidden the applicant to visit their mother, J.S., in an old people's home, threatening to beat her up if she did otherwise. G.B. continued that on 3 January 2008, on the applicant's birthday, M.S. had forbidden the applicant to invite her for lunch, and after that had again taken the keys to the flat from the applicant and had not returned them to her.

He had also been receiving the applicant's pension payments and spending them as he wished. G.B. asked as a matter of urgency that he be dismissed as the applicant's legal guardian.

On 10 January 2008 a hearing was held in the Centre on the subject of changing the applicant's legal guardian. On the same day G.B. made a statement in the Centre that she objected to the sale of the flat where the applicant had lived unless M.S. provided another, smaller flat for the applicant.

On 4 February 2008 the Centre appointed G.B. the applicant's legal guardian. On the same day the Centre appointed an attorney, B.L., the applicant's guardian *ad litem* in the proceedings concerning the sale of the

flat in Ivanićgradska Street. He was expressly authorised to take all actions in order to sell the flat.

At a hearing held on 3 March 2008 in the Centre G.B. said that the applicant had been discharged from a psychiatric hospital on 20 February 2008 and that since then they had been living together in a rented flat, because M.S. had prevented them from living in the flat in Ivanićgradska Street. She also stated that M.S. was still receiving the applicant's pension payments and asked that they be paid to her and her mother.

An appeal lodged by G.B. against the decision of 4 February 2008 concerning the authorisation given to B.L. as regards the sale of the flat in Ivanićgradska Street was dismissed on 17 April 2008 by the Ministry.

At a hearing held on 21 May 2008 in the Centre, G.B. was informed that in the meantime M.S. had returned a bank card for the bank account into which he had been receiving the applicant's pension payments. The card was handed over to G.B. However, M.S. had not handed over the applicant's pension for October, November and December 2007 and January 2008.

At a hearing held in the Centre on 23 June 2008 an offer made by M.S. to buy the applicant's share of the flat in Ivanićgradska Street was accepted by the Centre.

By a decision of 27 June 2008 the Centre authorised B.L. to conclude a sale agreement with M.S. and to deposit the sum of 24,000 euros (EUR) in the applicant's bank account. On 3 August 2008 G.B. lodged an appeal against that decision, arguing that a decision on inheritance had already been adopted unlawfully, since M.S. had represented the applicant in these proceedings although he was an interested party. She further argued that the price did not correspond to the market value of the applicant's share of the flat.

On 20 May 2009 the Ministry dismissed the appeal. On 27 July 2009 G.B. lodged an administrative action with the Administrative Court (*Upravni sud Republike Hrvatske*) against the Ministry's decision.

At a hearing held on 11 November 2009 in the Centre G.B. was informed that M.S. had paid an amount of 174,250 Croatian kunas (HRK) into the applicant's bank account.

The proceedings concerning the sale of the flat are still pending before the Administrative Court.

B. Relevant domestic law

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

Section 159

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

..."

Section 162

"The competent social welfare centre shall place under guardianship a person ... divested of his or her legal capacity ..."

Section 179

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

..."

Section 184

"(1) The guardian represents the ward.

..."

Section 185

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

COMPLAINTS

Under Article 6 of the Convention the applicant complained that she had no access to court in order to lodge a civil action against M.S. for disturbance of possessions, for repayment of her pension and for the protection of her ownership rights. She also complained that the inheritance proceedings and the proceedings on the sale of her flat had been conducted unfairly.

The applicant complained under Article 8 of the Convention of the continued failure on the part of the competent State authorities to ensure respect for her private and family life and her home.

The applicant further complained under Article 13 of the Convention that she had no effective remedy in respect of her Convention complaints.

She also complained under Article 1 of Protocol No. 1 that her property rights had been violated by the sale of the flat.

Lastly, the applicant complained that she had been discriminated against on the basis of her mental illness.

THE LAW

The applicant argued that the national authorities had failed to ensure that her rights, as a person divested of legal capacity, had been properly protected throughout a longer period of time. In that connection she alleged that the competent national authorities allowed her brother, M.S., to represent her in the proceedings concerning the inheritance after the death of their father and to secure for himself the ownership of two thirds of the flat previously owned by their father and also to receive her pension and dispose of it as he wished. The same authorities had further allowed the applicant's brother to buy her part of the flat where she had lived and thus render her homeless.

The applicant also argued that, as a person divested of legal capacity, she had no right of access to a court in order to protect her rights and thus also had no remedy at her disposal for the protection of her Convention rights. She further claimed discrimination on the basis of her mental illness.

As to the admissibility of the applicant's complaints, the Government argued firstly that the applicant had failed to exhaust domestic remedies because the proceedings concerning the sale of the flat at issue were pending.

Furthermore, the application had been lodged out of the six-month time-limit as regards all complaints concerning the inheritance proceedings after the death of the applicant's father.

As to the exhaustion issue, the applicant argued that she, as a person divested of her legal capacity, was not in a position to exhaust any remedies.

As to the compliance with the six-month time-limit, the applicant argued that she had lodged her application with the court within the six months from the time when she had finally lost any chance to protect her rights before the national authorities.

The Court notes at the outset that the applicant invoked various provisions of the Convention and its Protocols. However, all her complaints concern three separate issues that the Court shall examine as follows.

A. Complaints concerning the period between 28 August 2006 and 4 February 2008

The Court takes note of the situation complained of by the applicant - namely that the Zagreb Welfare Centre, Peščenica Office, in the period between 28 August 2006 and 4 February 2008, when her brother M.S. had been her guardian, failed to protect her various interests as a person divested of legal capacity. The Court also notes that the situation complained of by the applicant in that respect does not concern a single isolated event but various alleged deficiencies which accumulated through a longer period of time. Against that background the Court shall examine them as a whole.

The Court notes that the situation of the alleged violation ceased to exist on 4 February 2008 when the applicant's daughter, G.B., was appointed as her guardian. However, the present application was lodged with the Court on 21 December 2009.

The Court notes also that the applicant is a person divested of legal capacity and that as regards such persons the conditions of compliance with the six-month rule might be seen differently than in a situation concerning applicants with full legal capacity.

In this connection the Court also notes that the present application was lodged by G.B. on behalf of her mother, the applicant. The facts of the file do not reveal that there has ever been any conflict of interest between the applicant and her daughter as her guardian and that it appears that G.B. has adequately protected the rights and interests of her mother in all proceedings before the domestic authorities.

In this situation, the Court considers that, as regards any complaints concerning the failure of the relevant domestic authorities to adequately protect the applicant's interests during the period when her brother was the applicant's guardian, the application with this Court should have been brought within six months from the time when the applicant's daughter, G.B., was appointed the applicant's guardian.

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

B. Complaints concerning the sale of the flat at issue

The Court takes note of the applicant's allegations of various deficiencies in the proceedings concerning the sale of the flat at issue.

However, the proceedings in respect of the sale of the flat in issue are currently pending before the Administrative Court. In this situation the Court considers that the deficiencies alleged by the applicant may still be properly addressed by the national authorities. In accordance with the principle of subsidiarity, before these authorities adopt a final decision, any complaints connected with the sale of the flat in issue are premature.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Complaints concerning the applicant's right of access to court

The applicant complained under Article 6 § 1 of the Convention that she, as a person divested of legal capacity, had not been able to institute any proceedings against M.S. before a civil court in order to protect her rights. Thus, she was not able to lodge a civil action for disturbance of possessions when M.S. had thrown her out of the flat and taken the keys from her. She

was also not able to lodge a civil action against M.S. for payment of her pension.

As regards the impossibility of lodging a civil action against M.S. in order to protect her rights, the Court notes that it is true that the applicant herself could not bring any civil action. However, the Court considers that the fact that a person divested of legal capacity is not able to institute any court proceedings is not *per se* irreconcilable with the right of access to court under Article 6 § 1 of the Convention, provided that the rights and interests of such person are adequately protected, including the possibility of bringing a civil action on his or her behalf.

In this connection the Court reiterates that Article 6 § 1 embodies the "right to court", of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, 21 February 1975, §§ 28-36, Series A no. 18, and *Dubinskaya v. Russia*, no. 4856/03, § 39, 13 July 2006). The right is not absolute, however; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an application are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see, among other authorities, *Levages Prestations Services v. France*, 23 October 1996, § 40, *Reports* 1996-V; *Yagtzilar and Others v. Greece*, no. 41727/98, § 23, ECHR 2001-XII; and *Biondić v. Croatia*, no. 38355/05, § 24, 8 November 2007).

Therefore, establishing whether an applicant's right of access to court has been impaired to the extent that it amounts to a violation of Article 6 of the Convention depends on all the relevant circumstances of a given case.

As to the present case, the Court notes that M.S. was the applicant's legal guardian in the period between 28 August 2006 and 4 February 2008. In order to institute any civil proceedings against M.S., the applicant had to apply to the Centre. The requests made to that end by her daughter were all ignored by the Centre.

However, this situation changed on 4 February 2008 when the applicant's daughter was appointed her legal guardian.

As regards the civil action for disturbance of possessions, the Court notes that the applicant alleged that M.S. had denied her access to the flat on 1 October 2007 and that a time-limit for lodging such an action is thirty days from the day the applicant learnt of the disturbance. It is true that as a person divested of legal capacity the applicant was not able to lodge any action.

However, when on 4 February 2008 G.B. was appointed as the applicant's legal guardian, she made no attempt to lodge such an action and argue before the national courts that the thirty-day time-limit should be counted only from the time when she had been appointed the applicant's guardian – an argument which might well have been accepted by the national courts.

As regards any other civil action the applicant may wish to bring against M.S. which is not limited by such short time-limits, since 4 February 2008 it has been possible for the applicant's daughter to do so on her behalf.

In view of the above considerations, the Court is satisfied that the applicant's right of access to court is ensured by the possibility for her daughter to institute proceedings on her behalf aimed at protecting her rights and interests. In this connection the Court notes that the facts of the case do not disclose any conflict of interests between the applicant and her daughter.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen
Registrar

Anatoly Kovler
President