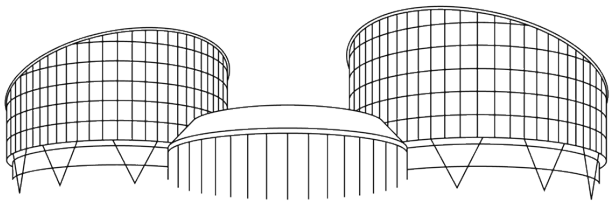

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 18095/11
A.L. against Russia
lodged on 8 March 2011

STATEMENT OF FACTS

The applicant, Mr A.L., is a Russian national, who was born in 1975 and is being confined in a psychiatric hospital in St Petersburg. He is represented before the Court by Mr D. Bartenev, a lawyer practising in St Petersburg.

A. The circumstances of the case

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

In 1997 a court in St Petersburg declared the applicant incapable of exercising his rights (*недееспособный*) on account of a mental illness, schizophrenia. Following this court decision, the applicant's mother became his legal guardian (*опекун*). After she had died, the applicant's brother fulfilled the guardian function. In 2004 the applicant's brother died. His ex-wife Ms L. was appointed as the applicant's guardian and started to live in the applicant's flat in St Petersburg.

In August 2009 the applicant was admitted to a psychiatric hospital where he got acquainted with Ms S., a hospital attendant. They developed a close relationship. Soon thereafter Ms S. quit her job after having been reprimanded for her relationship with the applicant. However, she continued to visit the applicant at the hospital and decided to become his guardian. The applicant supported her decision.

In December 2009 the applicant wrote to the municipal authority stating that he no longer wished to have Ms L. as his guardian. He mentioned that she did not properly discharge her duties, inter alia, because she did not visit him on a regular basis. The applicant sought appointment of Ms S. as his new guardian.

Later on, Ms S. made a formal application before the municipal authority seeking her appointment as the applicant's guardian. Her application was examined and dismissed in February 2010 (see below).

On 5 January 2010 the applicant was discharged from the hospital on his guardian's consent. He left his flat in St Petersburg and started to live with Ms S.

On 18 January 2010 the municipal authority requested the local psychiatric hospital to readmit the applicant because his guardian had been discharged and on account of the applicant's inability to live alone.

On 20 January 2010 the applicant was examined by a panel of medical professionals in the psychiatric hospital. The panel considered that the applicant's mental illness disclosed his inability to take care of himself in everyday life. The panel decided that the applicant should be admitted to the hospital. Taking its decision the panel referred to section 29 of the Psychiatric Care Act (see below) and noted that the applicant was unable to consent to or oppose his admission since he had been incapacitated.

The hospital lodged an application with the Gatchina Town Court of the Leningrad Region seeking authorisation of the applicant's admission to the hospital.

A court hearing was held on 22 January 2010 in the premises of the hospital. The judge heard the hospital's representative and a public prosecutor. The applicant did not participate in the hearing. A lawyer, who was appointed to represent the applicant during this hearing, made a short statement disagreeing with the hospital's application. By a judgment of 22 January 2010, the Town Court authorised the applicant's confinement in the psychiatric hospital. As can be seen from a statement of appeal signed by the applicant, he complained of the non-notification in respect of the first-instance hearing and sought restoration of the time-limit for lodging an appeal against the first-instance judgment.

In the meantime, on 3 February 2010 the municipal authority examined an application for guardianship by Ms S. The authority refused her application. Ms S. challenged this refusal before the Nevskiy District Court of St Petersburg. On 21 April 2010 the court upheld the refusal.

In appears from the available material that in April 2010 the Social office of the town administration issued a certificate stating that the applicant would not be admitted to a boarding home (*интернат*) for persons suffering from neurological diseases because he suffered from an "ordinary" schizophrenia, it was characterised as a constant and psychopathic condition and the applicant was prone to fleeing.

In July 2010 the psychiatric hospital inquired with the municipal authority as to the possibility of or need for continuing the applicant's involuntary confinement in the hospital.

By a letter of 6 July 2010 the municipal authority noted that the applicant had no guardian and stated that they would not object to the continuation of his involuntary confinement in the hospital.

On the same day, the applicant was examined by a panel of medical professionals. The panel's report reads as follows:

> "... [The applicant's] admission to the hospital relates to the social considerations, namely that the patient has no guardian, is unable to live alone and take care of himself or take alone decisions on matter of everyday life ..."

On 22 July 2010 the Town Court held a hearing. The court heard the hospital's representative, the applicant and Mr Bartenev.

By a judgment of 22 July 2010, the court authorised the applicant's continued confinement in the hospital. The applicant appealed.

In the meantime, on 8 September 2010 the Town Court restored the time-limit for an appeal against the judgment of 22 January 2010.

On 9 September 2010 the Leningrad Regional Court upheld the judgment of 22 July 2010.

On 4 October 2010 Mr Bartenev submitted a written statement to the Regional Court, which was the appeal court in respect of the judgment of 22 January 2010. The lawyer presented a detailed legal argument and sought annulment of the first-instance judgment in respect of the applicant. It does not transpire from the available material that the lawyer sought the applicant's own participation in the appeal hearing. On 7 October 2010 the Regional Court held an appeal hearing. For unspecified reasons, Mr Bartenev did not participate in the hearing. Having heard the hospital's representative and the prosecutor, the appeal court upheld the judgment of 22 January 2010.

On 5 January 2011 the hospital issued a new report justifying an extension of the applicant's confinement in the hospital. Mr Bartenev, acting on behalf of the applicant, brought court proceedings seeking annulment of the hospital report, release from confinement and provision of social services (see below).

It appears from the available material that in early 2011 the municipal authorities lodged a call for candidates to serve as the applicant's guardian. No applications were lodged.

On 4 March 2011 the applicant was examined by a panel of the Independent Psychiatric Commission. It follows from its report that there were no grounds for the applicant's involuntary confinement whereas his "antisocial inclinations" and his lack of critical attitude to his situation showered that it was not possible for him to live without a guardian's control. The panel concluded that the applicant could be discharged from the hospital, subject to control and supervision by a guardian.

By a judgment of 22 June 2011 the Town Court dismissed the applicant's challenge to the hospital panel's report of 5 January 2011. On 28 July 2011 the Regional Court upheld the judgment.

In the meantime, a new extension decision was issued by the Town Court on 8 July 2011. It was upheld on appeal on 8 September 2011.

On 19 June 2012 the hospital, acting as the applicant's guardian, informed the local guardianship authority as follows:

> "... In view of the stable mental condition [of the applicant] and the relative efficiency of the treatment, there is a growing likelihood that the ensuing assessment [of the applicant] will result in the discontinuation of the involuntary confinement in the hospital ... In such situation, [the applicant] will be released for outpatient treatment ... In this connection, we request you to make arrangement for his subsequent residence, taking into account his personal situation and needs relating to social care. If such arrangements prove impracticable, we request you to give reasons and arrange for a meeting between social care workers and the hospital."

On 5 July 2012 the applicant was examined by a medical panel for the purpose of seeking an extension of his confinement in the hospital. The panel report reads as follows:

> "... The patient participated in training sessions aimed at strengthening his cognitive functions and social skills which are necessary for living outside the hospital. He was active during the training sessions. Every six months he was examined by a medical panel for the purpose of extending his confinement. Once per year the hospital sought extension of involuntary confinement ... The patient agrees that he will be unable, alone, to fully satisfy his everyday needs or to adapt himself in the society ..."

The report concluded in the following terms:

> "[The applicant's] condition requires involuntary confinement and treatment in the psychiatric hospital. His mental condition is serious and discloses his inability to satisfy, alone, his vital needs; it discloses the reduction of his skills to live alone, his inability to receive his allowance or to dispose of his money."

The guardianship authority and the hospital representative met on 27 July 2012 but reached no agreement as the guardianship authority declined any statutory or other authority to act as the applicant's guardian.

Referring to the report of 5 July 2012, the hospital sought extension of the applicant's confinement. At a court hearing on 27 July 2012 the guardianship authority stated that should the guardianship question be resolved, there would be no obstacle to the applicant's release from the hospital. The court dismissed as unfounded the applicant's argument that the absence of a guardian was the only actual reason for confinement. The court stated that the guardianship issue should be decided in separate proceedings and had no bearing on the determination of the extension issue. The applicant's lawyer provided his own interpretation of the notion of "vital needs" and argued that the applicant was able to satisfy their in an autonomous way. However, considering that the lawyer has not proven that the patient's condition no longer required confinement, the court granted the hospital's request.

On 4 October 2012 the Regional Court upheld the judgment. The appeal court stated as follows:

> "The person's legal incapacity entails his inability to understand his or her own actions and direct them. Thus, the court dismisses as unsubstantiated the appellant's argument that the guardianship authority or the social care office would support [the applicant] ...
>
> Noting prevents [the applicant] from seeking, as prescribed by law, a solution for the guardianship issue which, in the court's view, is a priority issue ..."

The applicant remains confined in the hospital.

B. Relevant domestic law and practice

1. Civil Code

Article 29 of the Russian Civil Code provides that a person may be declared incapable of exercising his rights, on account of a mental illness preventing him from understanding his actions or from acting upon his will. Such person should be placed under the guardian protection; the guardian is competent to conclude transactions on behalf of this person. After the reasons for the guardianship ceased to exist, a court may declare the person concerned capable of exercising his or her rights; the court also annuls guardianship.

Articles 31 and 32 of the Code provide that a guardian may act in the interest of the person concerned without any special authority.

A municipal authority should, within a month, appoint a guardian to an incapable person (Article 35 of the Code). If no guardian has been appointed, the guardianship function should be temporarily carried out by the municipal authority. No guardian is required when an incapable person has been placed in a hospital or an orphanage. The guardianship function should be, *ex officio*, carried out by these specialised institutions.

In its ruling of 27 June 2012 the Russian Constitutional Court considered that the existing guardianship regime in relation to an incapable person deprived him of any possibility to dispose of property or money, even in respect of small transactions of everyday life. The existing incapacity regime included a number of other broad restrictions relating to his legal status for an indefinite period of time. At the same time, the Court noted that, depending on the nature and gravity of a mental illness, the degree of one's incapacity could vary in relation to "some elements relating to the legal status" and did not always exclude ability to deal with small everyday transactions.

The Constitutional Court also made several observations in relation to the Psychiatric Care Act 1992. The Court stated that no differentiation could be justified between valid persons and incapable persons suffering from a mental illness, solely with reference to their illness or admission to a hospital or a specialised institution. The Court reminded that before having recourse to the incapacity/guardianship regime there may be other (less intrusive) means of social adaptation, for instance a patronage on the part of the municipal authority (Article 41 of the Civil Code).

In view of the above, the Constitutional Court required the legislature to amend, by 1 January 2013, the relevant provisions of the Russian legislation to provide for a better protection scheme for persons suffering from mental illnesses.

2. Psychiatric Care Act 1992

Section 29 of the Psychiatric Care Act provides that an involuntary admission to a psychiatric hospital may be ordered, before obtaining a court order, in respect of a person suffering from a mental disorder. Such admission is acceptable if (i) examination and treatment of this person can only be carried out within a hospital; and (ii) the person's mental disorder is serious and (iii) entails his immediate danger to himself or others or his helplessness (inability to satisfy autonomously his basic needs), or entails a substantial health damage due to the deteriorating condition and when otherwise the person would not receive psychiatric care.

In its decision no. 544-O-P of 5 March 2009, the Russian Constitutional Court considered that the above-mentioned judicial order should be issued within forty-eight hours after the person's admission to a hospital.

Relying on the Court's judgment in *Rakevich v. Russia* (no. 58973/00, § 32, 28 October 2003), the Constitutional Court stated that the notion of "substantial damage" in section 29 of the Act could not be subjected to an exhaustive definition since it is hardly possible to embrace in the law the whole diversity of conditions which involve psychiatric hazards. Furthermore, the Act requires the courts to review all cases of compulsory

confinement on the basis of medical evidence, and this is a substantial safeguard against arbitrariness (decision no. 511-O-O of 17 July 2007).

3. Code of Civil Procedure

Article 303 § 1 of the Russian Code of Civil Procedure stipulates that an application for involuntary hospitalisation in a psychiatric facility should be submitted to a court within forty-eight hours after the patient is hospitalised. When the application is received by the judge and the proceedings are initiated, the period of the patient's placement to the psychiatric facility is extended until the merits of the application are considered by court.

An application for involuntary placement to a psychiatric facility, or extension of a period of involuntary placement, of a citizen who is suffering from a psychiatric disorder shall be considered by a judge within five days from the date on which the proceedings were initiated. The citizen has the right to personally participate in the court hearing (Article 304 of the Code; see also section 34 of the Psychiatric Care Act).

C. International instruments concerning legal capacity and confinement to a psychiatric institution

On 23 February 1999 the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The relevant provisions of these Principles read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal responses to be made to different degrees of incapacity and various situations. ...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportionate to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ...”

Principle 13 – Right to be heard in person

“The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.”

Principle 14 – Duration review and appeal

“1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews. ...

3. There should be adequate rights of appeal.”

The United Nations Convention on the Rights of Persons with Disabilities (the “CRPD”), which Russia ratified on 25 September 2012, provides in Article 12 (3) that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. Article 12 (4) stipulates:

“States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity ... are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. ...”

Article 23 (a) of the CRPD establishes that “the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised.”

COMPLAINTS

The applicant complains that his placement and continued confinement in the psychiatric hospital against his will were and remain both unlawful under Russian law and arbitrary, in breach of Article 5 of the Convention. The domestic law, as extensively interpreted and wrongly applied at the material time by the Russian courts, allowed deprivation of liberty on “social grounds” rather than on account of the circumstances falling within subparagraph (e) or another subparagraph under Article 5 § 1 of the Convention. The applicant argues that the unavailability of a guardian, other than the hospital, was and remains the only real reason for his continued confinement in the hospital. The national courts, in particular in the judgment of 22 July 2012, failed to assess measures which would be less intrusive than a deprivation of liberty. The applicant also complains that the court proceedings and his admission to the hospital were unlawful because he was not taken to the hearing on 22 January 2010 whereas the court-appointed lawyer provided no adequate legal representation.

The applicant alleges a violation of Article 8 of the Convention on account of the situation in which the guardianship function in respect of the incapacitated person was and remains carried out by the hospital who asked

for his confinement. This guardianship was by operation of the law, that is without any appointment by a competent public authority or the applicant's consent; he has no protection against eventual abuses by the guardian in situations disclosing a conflict of interest. So, the applicant had/has no possibility to choose a guardian or otherwise influence the authorities' decisions on the guardianship issue.

QUESTIONS TO THE PARTIES

1. Has the applicant been deprived of his liberty against him will, in particular since January 2010? If yes, has there been a breach of Article 5 § 1 of the Convention?

The parties are requested to deal in their submissions, inter alia, with the following issues:

- Does the deprivation of liberty in the present case fall within the exceptions under subparagraphs (a)-(e) of Article 5 § 1 of the Convention?

- Has it been convincingly shown at the national level since 2010 that the applicant's mental disorder was and remains of a *kind or degree* warranting confinement in a psychiatric hospital? Has it been substantiated that the applicant needed/needs therapy, medication or other clinical treatment to cure or alleviate his condition?

- Alternatively, is it appropriate to justify, under Article 5 § 1 of the Convention, confinement in a hospital with reference to the persisting seriousness of a mental condition in the interests of ensuring the person's own protection or that of others (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 157, ECHR 2012)? If yes, has the applicant's confinement been justified by the considerations of this nature? Was the applicant's welfare (so-called "social grounds") taken into consideration when deciding on his confinement in the hospital? Was it the main or sole reason for his confinement? Were the notions of "helplessness" and "basic needs" under section 29 of the Psychiatric Care Act interpreted and applied in the applicant's case in a clear, reasonable and non-arbitrary manner?

- Did the authorities discuss and dismiss as inappropriate other, less intrusive measures, before ordering and extending the applicant's confinement in the hospital?

- Did the authorities make a sufficient effort to provide the applicant with a guardian, other than the hospital? Did the declaration of legal incapacity make it legally unnecessary to take into account the applicant's will as to his confinement?

- Has the applicant's confinement complied with the substantive and procedural requirements of Russian law, as interpreted by the Constitutional Court?

2. (a) Did the period of the applicant's confinement following the judgment of 22 January 2010 violate Article 5 § 1 of the Convention because, in breach of Article 304 of the Code of Civil Procedure, the applicant had not been afforded an opportunity to be present at the hearing on 22 January 2010 (see, by way of comparison, *Romanova v. Russia*, no. 23215/02, §§ 108-112, 11 October 2011; *Riccardi v. Romania*, no. 3048/04, § 54, 3 April 2012, and *Simons v. Belgium* (dec.), no. 71407/10, §§ 32-34, 28 August 2012)? Was it a minor procedural irregularity which did not affect the lawfulness of the applicant's ensuing confinement in the hospital both in terms of national law and under the Convention?

(b) Was Article 5 § 4 of the Convention applicable to the proceedings on 22 January 2010 which were "taken" at the initiative of the hospital (see *Lebedev v. Russia*, no. 4493/04, § 76, 25 October 2007, and *Knebl v. the Czech Republic*, no. 20157/05, § 76, 28 October 2010)? If yes, was there a violation of Article 5 § 4 on account of the applicant's absence from the hearing on 22 January 2010? Was his presence at this hearing indispensable in order to respect the fairness of the proceedings, the principle of equality of arms and the adversarial nature of the proceedings? Was the presence of a lawyer on behalf of the applicant at the hearing suffisient to comply with the requirements of Article 5 § 4 of the Convention (see, for comparison, *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; *Sokurenko v. Russia*, no. 33619/04, § 104, 10 January 2012; *Soliyev v. Russia*, no. 62400/10, §§ 63-67, 5 June 2012; and *mutatis mutandis Shtukaturov v. Russia*, no. 44009/05, §§ 71-76, ECHR 2008)?

3. Did the scope of judicial review in the present case encompass compliance with the procedural and substantive conditions which are essential for the "lawfulness" of deprivation of liberty in respect of persons of unsound mind in terms of Article 5 § 1 (e) of the Convention? If not, was there a violation of Article 5 § 4 of the Convention?

4. Did the application of the statutory incapacity and guardianship regimes in respect of the applicant give rise to a violation of Article 8 of the Convention?

The parties are requested to deal in their submissions, inter alia, with the following issues:

- In 2010-12 did Russian law clearly envisage any intermediary solution between declaring a person legally capable or legally incapable on account of a mental illness, as in the present case? Has the applicant's situation evolved, in view of the Constitutional Court's ruling of 27 June 2012?

- Did the medical reports in the present case explain what kind of actions the applicant was unable of understanding and controlling?

- Did the applicant, a lawyer (for instance, Mr Bartenev as in the proceedings related to involuntary confinement in the hospital) or an independent authority have any opportunity of challenging the applicant's incapacity status? Was there any attempt to have his capacity restored? Was there any "automatic" periodic review of the incapacity decision?

- Did the applicant, a lawyer or an independent authority have a realistic opportunity to seek removal of the hospital from its guardian function and seek appointment of another guardian? Did the authorities make a sufficient effort to provide the applicant with a guardian, other than the hospital? If not, did this state of affairs and the double function of the hospital (guardian and detaining authority) violate Article 8 of the Convention? Did the circumstances of the case give rise to any positive obligation on the national authorities to make arrangements which would allow that the applicant to remain at liberty, albeit under the supervision by a guardian or alike, as recommended by the report of 4 March 2011?