correct basis for the calculation of fees under the Austrian law in respect of lawyer's fees, only an amount of EUR 3,243.92 was justified.
56. 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 have been 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 5,000, covering costs under all heads, plus any tax that may be chargeable to the applicants on this amount.

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

For these reasons, the Court unanimously
1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention as regards the duty of the domestic courts to deal diligently with the applicants' request for visiting rights;
3. *Holds*
(a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicants, 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;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

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Europees Hof voor de Rechten van de Mens
17 januari 2012, nr. 36760/06
(Bratza (president), Costa, Tulkens, Casadevall, Vajić, Spielmann, Garlicki, Hajiyev, Myer, Berro-Lefévre, López Guerra, Lazarova Trajkovska, Kalaydjieva, Yudkivska, De Gaetano, Nußberger, Laffranque)
Noot mr. dr. L. Arends

Ongeoorloofde vrijheidsbeneming. Vrijheidsbeperking. Curatele. Ontbreken rechterlijke toets. Ontbreken actueel en objectief medisch oordeel. Schadevergoeding. Grote Kamer.

[EVRM art. 3, 5 lid 1 en 5, 6, 13, 41, 46]

Stanev (1956) wordt door de Bulgaarse rechterlijke instanties in 2000 en 2001 gedeeltelijk handelingsonbekwaam verklaard, omdat hij vanaf zijn 22e jaar zou lijden aan schizofrenie en niet in staat zou zijn om zijn eigen belangen naar behoren te behartigen en hij evenmin de gevolgen van zijn handelingen zou kunnen overzien. In 2002 wordt hij vanwege die onbekwaamheid onder gedeeltelijke curatele geplaatst. Volgens de rechterlijke instantie die de curatele uitspreekt is van een volledige handelingsonbekwaamheid geen sprake. Omdat zijn familieleden (een halfzuster en zijn stiefmoeder) geen curator willen zijn, wordt er een professionele vertegenwoordiger aangesteld. Deze curator, een overheidsfunctionaris, plaatst hem op 10 december 2002 in een sociaal verzorgingshuis ('social care home') voor mannen met psychiatrische stoornissen, 8 km buiten het (dichtstbijzijnde) dorp Pastra, 400 kilometer van zijn oorspronkelijke woonplaats waar ook zijn familie woont. Aan Stanev wordt geen toestemming voor de plaatsing gevraagd. Evenmin vindt er een rechterlijke beoordeling plaats van de noodzaak van de opneming. Nadat hij in het verzorgingshuis is opgenomen, wordt de directeur van het verzorgingshuis tot zijn curator benoemd.
In dit verzorgingshuis verblijft Stanev nadien. Hij mag het verzorgingshuis alleen (tijdelijk) verlaten na toestemming van de directeur. Eenmaal keert Stanev na een verlof niet terug. De directeur neemt vervolgens contact op met de politie die hem weet op te sporen. Medewerkers van het verzorgingshuis brengen hem daarop terug naar het verzorgingshuis. De leefomstandigheden in het verzorgingshuis zijn erbarmelijk. Er is geen fatsoenlijke

voeding, de cliënten worden niet of nauwelijks behandeld en er worden amper activiteiten met hen ontplooid. Pas in 2009 vindt verbetering in de leefomstandigheden plaats.
Op 25 november 2004 verzoekt Stanev het Bulgaarse OM de bevoegde rechtbank te vragen om weer volledig handelingsbekwaam te worden verklaard. Het Bulgaarse OM wijst zijn verzoek echter af. Het OM baseert zijn afwijzing op twee zaken. Allereerst op een medisch rapport dat werd vervaardigd op 15 juni 2005. Uit dit rapport zou onder meer blijken dat Stanev tekenen van schizofrenie vertoont en geagiteerd, gespannen en achterdochtig is. Zijn communicatieve vaardigheden zouden beperkt zijn en hij zou geen ziekte-inzicht hebben. In het rapport worden overigens geen uitspraken gedaan over de vraag in hoeverre Stanev in staat zou zijn om voor zichzelf te zorgen en over de noodzaak om hem (verder) in het sociaal verzorgingshuis te houden. In de tweede plaats zou Stanev volgens zijn behandelaars, de directeur en de maatschappelijk werker van het verzorgingshuis niet in staat zijn om voor zichzelf te zorgen en zou het verzorgingshuis voor hem de meest geschikte verblijfplaats zijn. Vervolgens wendt Stanev zich tot de burgemeester om zijn zaak voor de rechter te brengen. Deze weigert echter eveneens het verzoek in te willigen. Hij baseert zich bij zijn afwijzing eveneens op het rapport van 15 juni 2005, de mening van de directeur en de maatschappelijk werkende van het verpleeghuis, en daarnaast op de conclusies van het OM.
Daarop richten Stanev en zijn advocaat zich tot de bevoegde rechterlijke instantie ('Dupnitsa District Court') om het oordeel van de burgemeester te herzien. Deze instantie overweegt dat het verzoek normaal gesproken niet-ontvankelijk zou zijn omdat de curator voor een dergelijk verzoek toestemming moet geven door een formulier te tekenen. Dit had de curator niet gedaan. Aangezien de curator echter ook ter zitting aanwezig was en verklaard had dat hij op zichzelf niet tegen het voeren van de procedure was, oordeelde de rechtbank dat alle procedurele stappen door de advocaat van Stanev rechtmatig genomen waren en het verzoek van Stanev daarom ontvankelijk was. Toch wordt het verzoek afgewezen, omdat de curator geen rechtens te respecteren belang had om de weigering van de burgemeester te betwisten. De curator kan zich immers namens de verzoeker onafhankelijk en rechtstreeks tot de rechter wenden om de gedeeltelijke curatele af te wijzen. Tegen deze uitspraak stond geen hoger beroep open.

Op 31 augustus 2006 stellen onderzoekers in een psychiatrisch rapport, dat wordt opgesteld op verzoek van de advocaat van Stanev, vast dat Stanev ten onrechte schizofreen werd bevonden. Wel is hij is volgens het rapport vatbaar voor alcoholverslaving. De symptomen hiervan kunnen volgens de opstellers van dit rapport worden verward met die van schizofrenie. Uit het rapport blijkt verder dat de geestelijke gezondheidstoestand van Stanev op dat moment verbeterd is, terwijl niet verwacht wordt dat die weer zal verslechteren.
Bij het Europees Hof voor de Rechten van de Mens (EHRM) klaagt Stanev over de slechte leefomstandigheden in het verzorgingshuis (art. 3 en 13 EVRM), over het feit dat de vrijheidsbeneming onwettig en willekeurig was, dat hij zonder rechterlijke procedure in een instelling werd geplaatst en dat er geen rechterlijke procedure is om de vrijheidsbeneming aan de orde te stellen (art. 5 lid 1, 2 en 4 en art. 6 EVRM). Stanev klaagt op grond van art. 5 lid 5 tevens dat hij ten onrechte geen schadevergoeding kon claimen voor zijn onterechte vrijheidsbeneming. Tot slot klaagt hij over schending van het recht op privéleven (art. 8 en 13 EVRM).
Het EHRM oordeelt dat hoewel Stanev formeel in een open instelling verbleef, de omstandigheden van het geval meebrengen dat in dit geval toch sprake is van vrijheidsbeneming in de zin van art. 5 lid 1 EVRM. Het Hof komt onder meer tot dit oordeel omdat Stanev geen enkele inspraak had bij de opneming, het gehanteerde verlofsysteem dusdanig zwaar was opgetuigd dat Stanev feitelijk niet kon gaan en staan waar hij wilde, de duur van de opneming onbepaald en onzeker was, en de instelling zeer afgelegen was en ruim 400 km van zijn eigenlijke woonplaats af lag. De opnemingsprocedure die werd gevolgd voldeed niet aan art. 5 lid 1 EVRM. In het Bulgaarse recht kan een curator niet zelfstandig rechtshandelingen verrichten als de betrokkene slechts gedeeltelijk onder curatele is gesteld. Rechtshandelingen moeten dan door de betrokkene en de curator worden gedaan. In het geval van Stanev hadden zowel de curator als Stanev voor opname moeten tekenen. Omdat Stanev niet bij de opnemingsbeslissing werd betrokken, is niet voldaan art. 5 lid 1 EVRM.
Verder werd Stanev opgenomen op grond van een medisch rapport dat van niet-recente datum was. Dit rapport was bovendien niet bedoeld om de noodzaak van de opneming te beoordelen maar om bezien of Stanev onder curatele moest worden gesteld. Op grond hiervan is in strijd gehandeld met art. 5 lid 1 onder 4 EVRM. Er was geen rechter betrokken bij de opnemingsprocedure, die in het

Bulgaarse recht bovendien niet als vrijheidsbeneming werd erkend. Stanev kon bovendien niet (zelfstandig) de beslissingen van zijn curator laten toetsen door een rechter. Ook op grond hiervan acht het EHRM art. 5 lid 4 van het EVRM geschonden.
Vanwege de schending van art. 5 lid 1 en 4 EVRM heeft Stanev op grond van art. 5 lid 5 tevens recht op schadevergoeding. Omdat Stanev deze schadevergoeding op grond van het Bulgaarse recht niet zelfstandig kon claimen oordeelt het Hof dat Bulgarije ook deze bepaling heeft geschonden.
Daarnaast oordeelt het Hof dat ook in strijd is gehandeld met art. 13 in verbinding met art. 3 EVRM. Vaststaat dat de condities in het verzorgingshuis waarin Stanev opgenomen was erbarmelijk waren. Weliswaar konden gevangenen in Bulgarije schadevergoeding claimen wanneer zij onder slechte condities gedetineerd waren, maar omdat de opneming van Stanev onder het Bulgaarse recht niet als vrijheidsbeneming werd beschouwd, kon hij hierop geen beroep doen.
Op grond van art. 6 lid 1 EVRM moet het voor personen die handelingsonbekwaam zijn verklaard mogelijk zijn om via een rechterlijke procedure hun bekwaamheid te herkrijgen. Volgens het EHRM voorziet de Bulgaarse wetgeving hier onvoldoende in. Bulgarije heeft daarom ook art. 6 lid 1 EVRM geschonden.
Stanev vond dat de omstandigheden waaronder hij in het verzorgingshuis verbleef zodanig waren dat zijn persoonlijke levenssfeer onvoldoende werd geëerbiedigd en aldus sprake was van een schending van art. 8 EVRM (alleen en in combinatie met art. 13 EVRM). Omdat de leefomstandigheden al voldoende bij de andere klachten aan bod zijn gekomen, vindt het Hof echter dat deze klacht geen afzonderlijke beoordeling behoeft.
Voorts overweegt het Hof dat in deze zaak dusdanige schendingen van het EVRM hebben plaatsgevonden dat het Bulgarije op grond van art. 46 EVRM veroordeelt maatregelen te treffen om de schendingen van art. 5 EVRM jegens Stanev weg te nemen. In ieder geval zal Bulgarije Stanev moeten vragen of hij in het verzorgingshuis wil blijven. Als dat niet het geval is zullen de daartoe bevoegde Bulgaarse autoriteiten zijn situatie met inachtneming van de uitspraak opnieuw moeten beoordelen. Tot slot veroordeelt het EHRM Bulgarije op grond van art. 41 EVRM tot het betalen van € 15.000,- schadevergoeding aan Stanev.

Stanev
tegen
Bulgarije

The Law

I. Alleged violation of Article 5 § 1 of the Convention

96. The applicant submitted that his placement in the Pastra social care home was in breach of Article 5 § 1 of the Convention.
Article 5 § 1 provides:
"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Preliminary remarks

97. The Grand Chamber observes that the Government maintained before it the objection they raised before the Chamber alleging failure to exhaust domestic remedies in respect of the complaint under Article 5 § 1.
98. The objection was based on the following arguments. Firstly, the applicant could at any time have applied personally to a court for restoration

of his legal capacity, under Article 277 of the CCP, and release from guardianship would have allowed him to leave the home of his own accord. Secondly, his close relatives had not availed themselves of the possibility open to some of them, under Articles 113 and 115 of the FC, of asking the guardianship authority to replace his guardian. According to the Government, in the event of a refusal the applicants' relatives could have applied to a court, which would have considered the merits of the request and, if appropriate, appointed a new guardian, who would then have been able to terminate the placement agreement. The Government also submitted in substance that the applicant's close relatives could have challenged the contract signed between the guardian R.P. and the Pastra social care home. Lastly, they indicated that the applicant himself could have requested the guardianship authority to appoint an *ad hoc* representative on account of his alleged conflict of interests with his guardian, with a view to requesting to leave the institution and establish his home elsewhere (Article 123, paragraph 1, of the FC).

99. The Grand Chamber observes that in its admissibility decision of 29 June 2010 the Chamber found that this objection raised questions that were closely linked to those arising in relation to the applicant's complaint under Article 5 § 4 and therefore joined the objection to its examination of the merits under that provision.

100. In addition, finding that the question whether there had been a "deprivation of liberty" within the meaning of Article 5 § 1 in the present case was closely linked to the merits of the complaint under that provision, the Chamber likewise joined that issue to its examination of the merits. The Grand Chamber sees no reason to call into question the Chamber's findings on these issues.

B. Whether the applicant was deprived of his liberty within the meaning of Article 5 § 1

1. The parties' submissions

(a) The applicant

101. The applicant contended that although under domestic law, placement of people with mental disorders in a social care institution was regarded as "voluntary", his transfer to the Pastra social care home constituted a deprivation of liberty. He maintained that, as in the case of *Storck v. Germany* (no. 61603/00, ECHR 2005 V), the objective and subjective elements of detention were present in his case.

102. With regard to the nature of the measure, the applicant submitted that living in a social care home in a remote mountain location amounted to physical isolation from society. He could not have chosen to leave on his own initiative since, having no identity papers or money, he would soon have faced the risk of being stopped by the police for a routine check, a widespread practice in Bulgaria.

103. Absences from the social care home were subject to permission. The distance of approximately 420 km between the institution and his home town and the fact that he had no access to his invalidity pension had made it impossible for him to travel to Ruse any more than three times. The applicant further submitted that he had been denied permission to travel on many other occasions by the home's management. He added that, in accordance with a practice with no legal basis, residents who left the premises for longer than the authorised period were treated as fugitives and were searched for by the police. He stated in that connection that on one occasion the police had arrested him in Ruse and that, although they had not taken him back to the home, the fact that the director had asked for him to be located and transferred back had amounted to a decisive restriction on his right to personal liberty. He stated that he had been arrested and detained by the police pending the arrival of staff from the home to collect him, without having been informed of the grounds for depriving him of his liberty. Since he had been transferred back under duress, it was immaterial that those involved had been employees of the home.

104. The applicant further noted that his placement in the home had already lasted more than eight years and that his hopes of leaving one day were futile, as the decision had to be approved by his guardian.

105. As to the consequences of his placement, the applicant highlighted the severity of the regime to which he was subject. His occupational activities, treatment and movements had been subject to thorough and practical supervision by the home's employees. He had been required to follow a strict daily routine, getting up, going to bed and eating at set times. He had had no free choice as to his clothing, the preparation of his meals, par-

ticipation in cultural events or the development of relations with other people, including intimate relationships as the home's residents were all men. He had been allowed to watch television in the morning only. Accordingly, his stay in the home had caused a perceptible deterioration in his well-being and the onset of institutionalisation syndrome, in other words the inability to reintegrate into the community and lead a normal life.

106. With regard to the subjective element, the applicant submitted that his situation differed from that examined in *H.M. v. Switzerland* (no. 39187/98, ECHR 2002 II), in which the applicant had consented to her placement in a nursing home. He himself had never given such consent. His guardian at the time, Ms R.P. (see paragraph 12 above), had not consulted him on the placement and, moreover, he did not even know her; nor had he been informed of the existence of the placement agreement of 10 December 2002 (see paragraph 14 above), which he had never signed. Those circumstances reflected a widespread practice in Bulgaria whereby once people were deprived of legal capacity, even partially, they were deemed incapable of expressing their wishes. In addition, it was clear from the medical documents that the applicant's desire to leave the home had been interpreted not as a freely expressed wish, but rather as a symptom of his mental illness.

107. Lastly, in the case of *H.M. v. Switzerland* (cited above) the authorities had based their decision to place the applicant in a nursing home on a thorough examination showing that the living conditions in her own home had severely deteriorated as a result of her lack of cooperation with a social welfare authority. By contrast, the applicant in the present case had never been offered and had never refused alternative social care at home.

(b) The Government

108. In their written observations before the Chamber, the Government accepted that the circumstances of the case amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. However, at the hearing and in the proceedings before the Grand Chamber, they contended that Article 5 was not applicable. They observed in that connection that the applicant had not been compulsorily admitted to a psychiatric institution by the public authorities under the Public Health Act, but had been housed in a social care home at his guardian's request, on the basis of a civil-law agreement and in accordance with the rules on social assistance. Thus, persons in need of assistance, including those with mental disorders, could request various social and medical services, either directly or through their representatives, under the Social Assistance Act 1998 (see paragraphs 57-60 above). Homes for adults with mental disorders offered a wide range of services of this kind and placement in such institutions could not be seen as a deprivation of liberty.

109. As to the particular circumstances of the case, the Government emphasised that the applicant had never expressly and consciously objected to his placement in the home, and it could not therefore be concluded that the measure had been involuntary. Furthermore, he had been free to leave the home at any time.

110. In addition, the applicant had been encouraged to work in the village restaurant to the best of his abilities and had been granted leave of absence on three occasions. The reason why he had twice returned from Ruse before the end of his authorised period of leave (see paragraph 27 above) was his lack of accommodation. The Government further submitted that the applicant had never been brought back to the home by the police. They acknowledged that in September 2006 the director had been obliged to ask the police to search for him because he had not come back (see paragraph 28 above). However, it was clear from the case of *Dodov v. Bulgaria* (no. 59548/00, 17 January 2008) that the State had a positive obligation to take care of people housed in social care homes. In the Government's submission, the steps taken by the director had formed part of this duty of protection.

111. The Government further observed that the applicant had lacked legal capacity and had not had the benefit of a supportive family environment, accommodation or sufficient resources to lead an independent life. Referring in that connection to the judgments in *H.M. v. Switzerland* (cited above) and *Nielsen v. Denmark* (28 November 1988, Series A no. 144), they submitted that the applicant's placement in the home was simply a protective measure taken in his interests alone and constituted an appropriate response to a social and medical emergency; such a response could not be viewed as involuntary.

(c) The third party

112. Interights made the following general observations. It stated that it had carried out a survey of practices regarding placement of people with mental disorders in specialised institutions in central and east European countries. According to the conclusions of the survey, in most cases placement in such institutions could be regarded as amounting to a de facto deprivation of liberty.

113. Social care homes were often located in rural or mountainous areas which were not easily accessible. Where they were situated near urban areas, they were surrounded by high walls or fences and the gates were kept locked. As a rule, residents were able to leave the premises only with the express permission of the director of the home, and for a limited period. In cases of unauthorised leave, the police had the power to search for and return the persons concerned. The same restrictive regime applied to all residents, without any distinction according to legal status – whether they had full, partial or no legal capacity – and in the view of Interights, this was a decisive factor. No consideration at all was given to whether the placement was voluntary or involuntary.

114. Regarding the analysis of the subjective aspect of the placement, Interights submitted that the consent of the persons concerned was a matter requiring careful attention. Thorough efforts should be made to ascertain their true wishes, notwithstanding any declaration of legal incapacity that might have been made in their case. Interights contended that in reality, when faced with a choice between a precarious, homeless existence and the relative security offered by a social care home, incapable persons in central and east European countries might opt for the latter solution, simply because no alternative services were offered by the State's social welfare system. That did not mean, however, that the persons concerned could be said to have freely consented to the placement.

2. The Court's assessment

(a) General principles

115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by Article 2 of Protocol No. 4, is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39). In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Storck*, cited above, § 71, and *Guzzardi*, cited above, § 92).

116. In the context of deprivation of liberty on mental-health grounds, the Court has held that a person could be regarded as having been "detained" even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 42, Series A no. 93).

117. Furthermore, in relation to the placement of mentally disordered persons in an institution, the Court has held that the notion of deprivation of liberty does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see *Storck*, cited above, § 74).

118. The Court has found that there was a deprivation of liberty in circumstances such as the following: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital (see *Shtukaturov v. Russia*, no. 44009/05, § 108, 27 March 2008); (b) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape (see *Storck*, cited above, § 76); and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave (see *H.L. v. the United Kingdom*, no. 45508/99, §§ 89-94, ECHR 2004 IX).

119. The Court has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention

protection for the single reason that he may have given himself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §§ 64-65, Series A no. 12), especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action (see *H.L. v. the United Kingdom*, cited above, § 90).

120. In addition, the Court has had occasion to observe that the first sentence of Article 5 § 1 must be construed as laying down a positive obligation on the State to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see *Storck*, cited above, § 102). Thus, having regard to the particular circumstances of the cases before it, the Court has held that the national authorities' responsibility was engaged as a result of detention in a psychiatric hospital at the request of the applicant's guardian (see *Shtukaturov*, cited above) and detention in a private clinic (see *Storck*, cited above).

(b) Application of these principles in the present case

121. The Court observes at the outset that it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a "deprivation of liberty" within the meaning of Article 5 § 1. In some cases, the placement is initiated by families who are also involved in the guardianship arrangements and is based on civil-law agreements signed with an appropriate social care institution. Accordingly, any restrictions on liberty in such cases are the result of actions by private individuals and the authorities' role is limited to supervision. The Court is not called upon in the present case to rule on the obligations that may arise under the Convention for the authorities in such situations.

122. It observes that there are special circumstances in the present case. No members of the applicant's family were involved in his guardianship arrangements, and the duties of guardian were assigned to a State official (Ms R.P.), who negotiated and signed the placement agreement with the Pastra social care home without any contact with the applicant, whom she had in fact never met. The placement agreement was implemented in a State-run institution by the social services, which likewise did not interview the applicant (see paragraphs 12-15 above). The applicant was never consulted about his guardian's choices, even though he could have expressed a valid opinion and his consent was necessary in accordance with the Persons and Family Act 1949 (see paragraph 42 above). That being so, he was not transferred to the Pastra social care home at his request or on the basis of a voluntary private-law agreement on admission to an institution to receive social assistance and protection. The Court considers that the restrictions complained of by the applicant are the result of various steps taken by public authorities and institutions through their officials, from the initial request for his placement in an institution and throughout the implementation of the relevant measure, and not of acts or initiatives by private individuals. Although there is no indication that the applicant's guardian acted in bad faith, the above considerations set the present case apart from *Nielsen* (cited above), in which the applicant's mother committed her son, a minor, to a psychiatric institution in good faith, which prompted the Court to find that the measure in question entailed the exercise of exclusive custodial rights over a child who was not capable of expressing a valid opinion.

123. The applicant's placement in the social care home can therefore be said to have been attributable to the national authorities. It remains to be determined whether the restrictions resulting from that measure amounted to a "deprivation of liberty" within the meaning of Article 5.

124. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive (see *Ashingdane*, cited above, § 42). While it is true that the applicant was able to go to the nearest village, he needed express permission to do so (see paragraph 25 above). Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

125. The Court further notes that between 2002 and 2009 the applicant was granted leave of absence for three short visits (of about ten days) to

Ruse (see paragraphs 26-28 above). It cannot speculate as to whether he could have made more frequent visits had he asked to do so. Nevertheless, it observes that such leave of absence was entirely at the discretion of the home's management, who kept the applicant's identity papers and administered his finances, including transport costs (see paragraphs 25-26 above). Furthermore, it would appear to the Court that the home's location in a mountain region far away from Ruse (some 400 km) made any journey difficult and expensive for the applicant in view of his income and his ability to make his own travel arrangements.

126. The Court considers that this system of leave of absence and the fact that the management kept the applicant's identity papers placed significant restrictions on his personal liberty.

127. Moreover, it is not disputed that when the applicant did not return from leave of absence in 2006, the home's management asked the Ruse police to search for and return him (see paragraph 28 above). The Court can accept that such steps form part of the responsibilities assumed by the management of a home for people with mental disorders towards its residents. It further notes that the police did not escort the applicant back and that he has not proved that he was arrested pending the arrival of staff from the home. Nevertheless, since his authorised period of leave had expired, the staff returned him to the home without regard for his wishes.

128. Accordingly, although the applicant was able to undertake certain journeys, the factors outlined above lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home without permission whenever he wished. With reference to the *Dodov* case (cited above), the Government maintained that the restrictions in issue had been necessary in view of the authorities' positive obligations to protect the applicant's life and health. The Court notes that in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb.

129. As regards the duration of the measure, the Court observes that it was not specified and was thus indefinite since the applicant was listed in the municipal registers as having his permanent address at the home, where he still remains (having lived there for more than eight years). This period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him.

130. As to the subjective aspect of the measure, it should be noted that, contrary to the requirements of domestic law (see paragraph 42 above), the applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it. Instead, he was taken to Pastra by ambulance and placed in the home without being informed of the reasons for or duration of that measure, which had been taken by his officially assigned guardian. The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation (see *Shtukaturov*, cited above, § 108). In the present case, domestic law attached a certain weight to the applicant's wishes and it appears that he was well aware of his situation. The Court notes that, at least from 2004, the applicant explicitly expressed his desire to leave the Pastra social care home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from guardianship (see paragraphs 37-41 above).

131. These factors set the present case apart from *H.M. v. Switzerland* (cited above), in which the Court found that there had been no deprivation of liberty as the applicant had been placed in a nursing home purely in her own interests and, after her arrival there, had agreed to stay. In that connection the Government have not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there. That being so, the Court is not convinced that the applicant consented to the placement or accepted it tacitly at a later stage and throughout his stay.

132. Having regard to the particular circumstances of the present case, especially the involvement of the authorities in the decision to place the applicant in the home and its implementation, the rules on leave of absence, the duration of the placement and the applicant's lack of consent, the Court concludes that the situation under examination amounts to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. Accordingly, that provision is applicable.

C. Whether the applicant's placement in the Pastra social care home was compatible with Article 5 § 1

1. The parties' submissions

(a) The applicant

133. The applicant submitted that, since he had not consented to his placement in the Pastra social care home and had not signed the agreement drawn up between his guardian and the home, the agreement was in breach of the Persons and Family Act. He added that he had not been informed of the agreement's existence at the time of his placement and that he had remained unaware of it for a long time afterwards. Nor had he had any opportunity to challenge this step taken by his guardian. Although the guardian had been required by Article 126 of the Family Code to report on her activities to the guardianship authority (the mayor), the latter was not empowered to take any action against her. Furthermore, no report had ever been drawn up in respect of the applicant, and his guardians had never been called to account for that shortcoming.

134. The applicant further argued that his placement in a home for people with mental disorders did not fall within any of the grounds on which deprivation of liberty could be justified for the purposes of Article 5. The measure in question had not been justified by the need to ensure public safety or by the inability of the person concerned to cope outside the institution. In support of that contention, the applicant argued that the director of the home had deemed him capable of integrating into the community and that attempts had been made to bring him closer to his family, albeit to no avail. Accordingly, the authorities had based their decision to place him in the home on the simple fact that his family were not prepared to take care of him and he needed social assistance. They had not examined whether the necessary assistance could be provided through alternative measures that were less restrictive of his personal liberty. Such measures were, moreover, quite conceivable since Bulgarian legislation made provision for a wide range of social services, such as personal assistance, social rehabilitation centres and special allowances and pensions. The authorities had thus failed to strike a fair balance between the applicant's social needs and his right to liberty. It would be arbitrary, and contrary to the purpose of Article 5, for detention to be based on purely social considerations.

135. Should the Court take the view that the placement fell within the scope of Article 5 § 1 (e), by which persons of unsound mind could be deprived of their liberty, the applicant submitted that the national authorities had not satisfied the requirements of that provision. In the absence of a recent psychiatric assessment, it was clear that his placement in the home had not pursued the aim of providing him with medical treatment and had been based solely on medical documents produced in the context of the proceedings for his legal incapacitation. The documents had been issued approximately a year and a half beforehand and had not strictly concerned his placement in an institution for people with mental disorders. Relying on *Varbanov v. Bulgaria* (no. 31365/96, § 47, ECHR 2000-X), the applicant stated that he had been placed in the Pastra social care home without having undergone any assessment of his mental health at that time.

(b) The Government

136. The Government submitted that the applicant's placement in the home complied with domestic law as the guardian had signed an agreement whereby the applicant was to receive social services in his own interests. She had therefore acted in accordance with her responsibilities and had discharged her duty to protect the person under partial guardianship.

137. Bearing in mind that the sole purpose of the placement had been to provide the applicant with social services under the Social Assistance Act and not to administer compulsory medical treatment, the Government submitted that this measure was not governed by Article 5 § 1 (e) of the Convention. In that connection, the authorities had taken into account his financial and family

situation, that is to say, his lack of resources and the absence of close relatives able to assist him on a day-to-day basis.
138. The Government noted at the same time that the applicant could in any event be regarded as a "person of unsound mind" within the meaning of Article 5 § 1 (e). The medical assessment carried out during the proceedings for his legal incapacitation in 2000 showed clearly that he was suffering from mental disorders and that it was therefore legitimate for the authorities to place him in an institution for people with similar problems. Lastly, relying on the *Ashingdane* judgment (cited above, § 44), the Government submitted that there was an adequate link between the reason given for the placement, namely the applicant's state of health, and the institution in which he had been placed. Accordingly, they contended that the measure in issue had not been in breach of Article 5 § 1 (e).

(c) The third party
139. On the basis of the study referred to in paragraphs 112-114 above, Interights submitted that in central and east European countries, the placement of mentally disordered persons in a social care home was viewed solely in terms of social protection and was governed by contractual law. Since such placements were not regarded as a form of deprivation of liberty under domestic law, the procedural safeguards available in relation to involuntary psychiatric confinement were not applicable.
140. Interights contended that situations of this nature were comparable to that examined in the case of *H.L. v. the United Kingdom* (cited above), in which criticism had been levelled at the system prior to 2007 in the United Kingdom, whereby the common-law doctrine of necessity had permitted the "informal" detention of compliant incapacitated persons with mental disorders. The Court had held that the lack of any fixed procedural rules on the admission and detention of such persons was striking. In its view, the contrast between this dearth of regulation and the extensive network of safeguards applicable to formal psychiatric committals covered by mental health legislation was significant. In the absence of a formalised admission procedure, indicating who could propose admission, for what reasons and on what basis, and given the lack of indication as to the length of the detention or the nature of treatment or care, the hospital's health-care professionals had assumed full control of the liberty and treatment of a vulnerable incapacitated person solely on the basis of their own clinical assessments completed as and when they saw fit. While not doubting that those professionals had acted in good faith and in the applicant's best interests, the Court had observed that the very purpose of procedural safeguards was to protect individuals against any misjudgments and professional lapses (*H.L. v. the United Kingdom*, cited above, §§ 120 121).
141. Interights urged the Court to remain consistent with that approach and to find that in the present case the informal nature of admission to and continued detention in a social care home was at odds with the guarantees against arbitrariness under Article 5. The courts had not been involved at any stage of the proceedings and no other independent body had been assigned the task of monitoring the institutions in question. The lack of regulation coupled with the vulnerability of mentally disordered persons facilitated abuses of fundamental rights in a context of extremely limited supervision.
142. The third party further submitted that in most cases of this kind, placements were automatic as there were few possibilities of alternative social assistance. It contended that the authorities should be under a practical obligation to provide for appropriate measures that were less restrictive of personal liberty but were nonetheless capable of ensuring medical care and social services for mentally disordered persons. This would be a means of applying the principle that the rights guaranteed by the Convention should not be theoretical or illusory but practical and effective.

2. The Court's assessment

(a) General principles
143. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244). Further-

more, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000 III).

144. In addition, sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds of deprivation of liberty; such a measure will not be lawful unless it falls within one of those grounds (ibid., § 49; see also, in particular, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, 29 January 2008, and *Jendrowiak v. Germany*, no. 30060/04, § 31, 14 April 2011).

145. As regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Shtukaturov*, cited above, § 114; and *Varbanov*, cited above, § 45).

146. As to the second of the above conditions, the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003 IV).

147. The Court further reiterates that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose (see *Ashingdane*, cited above, § 44, and *Pankiewicz v. Poland*, no. 34151/04, §§ 42-45, 12 February 2008). However, subject to the foregoing, Article 5 § 1 (e) is not in principle concerned with suitable treatment or conditions (see *Ashingdane*, cited above, § 44, and *Hutchison Reid*, cited above, § 49).

(b) Application of these principles in the present case

148. In examining whether the applicant's placement in the Pastra social care home was lawful for the purposes of Article 5 § 1, the Court must ascertain whether the measure in question complied with domestic law, whether it fell within the scope of one of the exceptions provided for in sub paragraphs (a) to (f) of Article 5 § 1 to the rule of personal liberty, and, lastly, whether it was justified on the basis of one of those exceptions.

149. On the basis of the relevant domestic instruments (see paragraphs 57-59 above), the Court notes that Bulgarian law envisages placement in a social care institution as a protective measure taken at the request of the person concerned and not a coercive one ordered on one of the grounds listed in sub-paragraphs (a) to (f) of Article 5 § 1. However, in the particular circumstances of the instant case, the measure in question entailed significant restrictions on personal freedom giving rise to a deprivation of liberty with no regard for the applicant's will or wishes (see paragraphs 121 132 above).

150. As to whether a procedure prescribed by law was followed, the Court notes firstly that under domestic law, the guardian of a person partially lacking legal capacity is not empowered to take legal steps on that person's behalf. Any contracts drawn up in such cases are valid only when signed together by the guardian and the person under partial guardianship (see paragraph 42 above). The Court therefore concludes that the decision by the applicant's guardian R.P. to place him in a social care home for people with mental disorders without having obtained his prior consent was invalid under Bulgarian law. This conclusion is in itself sufficient for the Court to establish that the applicant's deprivation of liberty was contrary to Article 5.

151. In any event, the Court considers that that measure was not lawful within the meaning of Article 5 § 1 of the Convention since it was not justified on the basis of any of sub-paragraphs (a) to (f).

152. The applicant accepted that the authorities had acted mainly on the basis of the arrangements governing social assistance (see paragraph 134 above). However, he argued that the restrictions imposed amounted to a deprivation of liberty which had not been warranted by any of the exceptions provided for in sub-paragraphs (a) to (f) of Article 5 § 1 to the rule of personal liberty. The Government contended that the applicant's placement in the home had been intended solely to protect his interest in receiving social care (see paragraphs 136-137 above). However, they stated that should the Court decide that Article 5 § 1 was applicable, the measure in question should be held to comply with sub-paragraph (e) in view of the applicant's mental disorder (see paragraph 138 above).

153. The Court notes that the applicant was eligible for social assistance as he had no accommodation and was unable to work as a result of his illness. It takes the view that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny.

154. The Court is prepared to accept that the applicant's placement in the home was the direct consequence of the state of his mental health, the declaration of his partial incapacity and his placement under partial guardianship. Some six days after being appointed as the applicant's guardian, Ms R.P., without knowing him or meeting him, decided on the strength of the file to ask the social services to place him in a home for people with mental disorders. The social services, for their part, likewise referred to the applicant's mental health in finding that the request should be granted. It seems clear to the Court that if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty. Therefore, the present case should be examined under sub-paragraph (e) of Article 5 § 1.

155. It remains to be determined whether the applicant's placement in the home satisfied the requirements laid down in the Court's case-law concerning the detention of mentally disordered persons (see the principles outlined in paragraph 145 above). In this connection, the Court reiterates that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain discretion since it is in the first place for them to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40, and *Luberti v. Italy*, 23 February 1984, § 27, Series A no. 75).

156. In the instant case it is true that the expert medical report produced in the course of the proceedings for the applicant's legal incapacitation referred to the disorders from which he was suffering. However, the relevant examination took place before November 2000, whereas the applicant was placed in the Pastra social care home on 10 December 2002 (see paragraphs 10 and 14 above). More than two years thus elapsed between the expert psychiatric assessment relied on by the authorities and the applicant's placement in the home, during which time his guardian did not check whether there had been any change in his condition and did not meet or consult him. Unlike the Government (see paragraph 138 above), the Court considers that this period is excessive and that a medical opinion issued in 2000 cannot be regarded as a reliable reflection of the state of the applicant's mental health at the time of his placement. It should also be noted that the national authorities were not under any legal obligation to order a psychiatric report at the time of the placement. The Government explained in that connection that the applicable provisions were those of the Social Assistance Act and not those of the Health Act (see paragraphs 57-60 and 137 above). Nevertheless, in the Court's view, the lack of a recent medical assessment would be sufficient to conclude that the applicant's placement in the home was not lawful for the purposes of Article 5 § 1 (e).

157. As a subsidiary consideration, the Court observes that the other requirements of Article 5 § 1 (e) were not satisfied in the present case either. As regards the need to justify the placement by the severity of the disorder, it notes that the purpose of the 2000 medical report was not to examine whether the applicant's state of health required his placement in a home for people with mental disorders, but solely to determine the issue of his legal protection. While it is true that Article 5 § 1 (e) authorises the confinement of a person suffering from a mental disorder even where no medical treatment is necessarily envisaged (see *Hutchison Reid*, cited above, § 52), such a measure must be properly justified by the seriousness of the person's condition in the interests of ensuring his or her own protection or that of others. In the present case, however, it has not been established that the applicant posed a danger to himself or to others, for example because of his psychiatric condition; the simple assertion by certain witnesses that he became aggressive when he drank (see paragraph 10 above) cannot suffice for this purpose. Nor have the authorities reported any acts of violence on the applicant's part during his time in the Pastra social care home.
158. The Court also notes deficiencies in the assessment of whether the disorders warranting the applicant's confinement still persisted. Although he was under the supervision of a psychiatrist (see paragraph 31 above), the aim of such supervision was not to provide an assessment at regular intervals of whether he still needed to be kept in the Pastra social care home for the purposes of Article 5 § 1 (e). Indeed, no provision was made for such an assessment under the relevant legislation.
159. Having regard to the foregoing, the Court observes that the applicant's placement in the home was not ordered "in accordance with a procedure prescribed by law" and that his deprivation of liberty was not justified by subparagraph (e) of Article 5 § 1. Furthermore, the Government have not indicated any of the other grounds listed in sub paragraphs (a) to (f) which might have justified the deprivation of liberty in issue in the present case.
160. There has therefore been a violation of Article 5 § 1.

II. Alleged violation of Article 5 § 4 of the Convention

161. The applicant complained that he had been unable to have the lawfulness of his placement in the Pastra social care home reviewed by a court. He relied on Article 5 § 4 of the Convention, which provides:
"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The applicant

162. The applicant submitted that domestic law did not provide for any specific remedies in respect of his situation, such as a periodic judicial review of the lawfulness of his placement in a home for people with mental disorders. He added that, since he was deemed incapable of taking legal action on his own, domestic law did not afford him the possibility of applying to a court for permission to leave the Pastra social care home. He stated that he had likewise been unable to seek to have the placement agreement terminated, in view of the conflict of interests with his guardian, who at the same time was the director of the home.
163. The applicant further noted that he had not been allowed to apply to the courts to initiate the procedure provided for in Article 277 of the CCP (see paragraph 51 above) and that, moreover, such action would not have led to a review of the lawfulness of his deprivation of liberty but solely to a review of the conditions justifying partial guardianship in his case.
164. He further submitted that the procedure provided for in Articles 113 and 115 of the FC (see paragraphs 49-50 above) in theory afforded his close relatives the right to ask the mayor to replace the guardian or to compel the mayor to terminate the placement agreement. However, this had been an indirect remedy not accessible to him, since his half-sister and his father's second wife had not been willing to initiate such a procedure.

2. The Government

165. The Government submitted that, since the purpose of the applicant's placement in the home had been to provide social services, he could at any time have asked for the placement agreement to be terminated without the courts needing to be involved. In their submission, in so far as the applicant alleged a conflict of interests with his guardian, he could have relied on Article 123, paragraph 1, of the FC (see paragraph 50 above) and requested the guardianship authority to appoint an *ad hoc* representative, who could then have consented to a change of permanent residence.

166. The Government further contended that the applicant's close relatives had not availed themselves of the possibility open to some of them under Articles 113 and 115 of the FC of requesting the guardianship authority to replace his guardian or of challenging steps taken by the latter. They added that in the event of a refusal, his relatives could have appealed to a court, which would have considered the merits of the case and, if appropriate, appointed a new guardian, who could then have terminated the placement agreement. This, in the Government's submission, would have enabled them to challenge in substance the agreement signed between Ms R.P. and the Pastra social care home.

167. Lastly, the Government submitted that an action for restoration of legal capacity (under Article 277 of the CCP – see paragraph 51 above) constituted a remedy for the purposes of Article 5 § 4 since, if a sufficient improvement in the applicant's health had been observed and he had been released from guardianship, he would have been free to leave the home.

B. The Court's assessment

1. General principles

168. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that a detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *E. v. No*rway, 29 August 1990, § 50, Series A no. 181-A). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v. the United Kingdom*, 15 November 1996, § 130, *Reports of Judgments and Decisions* 1996 V; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, 19 February 2009).

169. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court's task to inquire into what would be the most appropriate system in the sphere under examination (see *Shtukaturov*, cited above, § 123).

170. Nevertheless, Article 5 § 4 guarantees a remedy that must be accessible to the person concerned and must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of Article 5 § 1 (e) (see *Ashingdane*, cited above, § 52). The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals and their personal security (see *Varbanov*, cited above, § 58). In the case of detention on the ground of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see, among other authorities, *Winterwerp*, cited above, § 60).

171. Among the principles emerging from the Court's case-law under Article 5 § 4 concerning "persons of unsound mind" are the following:
(a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;
(b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;
(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A).

2. Application of these principles in the present case
172. The Court observes that the Government have not indicated any domestic remedy capable of affording the applicant the direct opportunity to challenge the lawfulness of his placement in the Pastra social care home and the continued implementation of that measure. It also notes that the Bulgarian courts were not involved at any time or in any way in the placement and that the domestic legislation does not provide for automatic periodic judicial review of placement in a home for people with mental disorders. Furthermore, since the applicant's placement in the home is not recognised as a deprivation of liberty in Bulgarian law (see paragraph 58 above), there is no provision for any domestic legal remedies by which to challenge its lawfulness in terms of a deprivation of liberty. In addition, the Court notes that, according to the domestic courts' practice, the validity of the placement agreement could have been challenged on the ground of lack of consent only on the guardian's initiative (see paragraph 54 above).
173. In so far as the Government referred to the procedure for restoration of legal capacity under Article 277 of the CCP (see paragraph 167 above), the Court notes that the purpose of this procedure would not have been to examine the lawfulness of the applicant's placement per se, but solely to review his legal status (see paragraphs 233-246 below). The Government also referred to the procedures for reviewing steps taken by the guardian (see paragraphs 165-166 above). The Court considers it necessary to determine whether such remedies could have given rise to a judicial review of the lawfulness of the placement as required by Article 5 § 4.
174. In this connection, it notes that the 1985 FC entitled close relatives of a person under partial guardianship to challenge decisions by the guardianship authority, which in turn was required to review steps taken by the guardian – including the placement agreement – and to replace the latter in the event of failure to discharge his or her duties (see paragraphs 48-50 above). However, the Court notes that those remedies were not directly accessible to the applicant. Moreover, none of the persons theoretically entitled to make use of them displayed any intention of acting in Mr Stanev's interests, and he himself was unable to act on his own initiative without their approval.
175. It is uncertain whether the applicant could have requested the mayor to demand explanations from the guardian or to suspend the implementation of the placement agreement on the ground that it was invalid. In any event, it appears that since he had been partially deprived of legal capacity, the law did not entitle him to apply of his own motion to the courts to challenge steps taken by the mayor (see paragraph 49 above); this was not disputed by the Government.
176. The same conclusion applies as regards the possibility for the applicant to ask the mayor to replace his guardian temporarily with an ad hoc representative on the basis of an alleged conflict of interests and then to apply for the termination of the placement agreement. The Court observes in this connection that the mayor has discretion to determine whether there is a conflict of interests (see paragraph 50 above). Lastly, it does not appear that the applicant could have applied of his own motion to the courts for a review on the merits in the event of the mayor's refusal to take such action.

177. The Court therefore concludes that the remedies referred to by the Government were either inaccessible to the applicant or were not judicial in nature. Furthermore, none of them can give rise to a direct review of the lawfulness of the applicant's placement in the Pastra social care home in terms of domestic law and the Convention.
178. Having regard to those considerations, the Court dismisses the Government's objection of failure to exhaust domestic remedies (see paragraphs 97-99 above) and finds that there has been a violation of Article 5 § 4 of the Convention.

III. Alleged violation of Article 5 § 5 of the Convention
179. The applicant submitted that he had not been entitled to compensation for the alleged violations of his rights under Article 5 §§ 1 and 4 of the Convention.
He relied on Article 5 § 5, which provides:
"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions
180. The applicant submitted that the circumstances in which unlawful detention could give rise to compensation were exhaustively listed in the State Responsibility for Damage Act 1988 (see paragraphs 62-67 above) and that his own situation was not covered by any of them. He further complained that there were no legal remedies by which compensation could be claimed for a violation of Article 5 § 4.
181. The Government maintained that the compensation procedure under the 1988 Act could have been initiated if the applicant's placement in the home had been found to have no legal basis. Since the placement had been found to be consistent with domestic law and with his own interests, he had not been able to initiate the procedure in question.

B. The Court's assessment
182. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A, and *Houtman and Meeus v. Belgium*, no. 22945/07, § 43, 17 March 2009). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions. In this connection, the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Ciulla v. Italy*, 22 February 1989, § 44, Series A no. 148; *Sakık and Others v. Turkey*, 26 November 1997, § 60, *Reports* 1997-VII; and *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002 X).
183. Turning to the present case, the Court observes that, regard being had to its finding of a violation of paragraphs 1 and 4 of Article 5, paragraph 5 is applicable. It must therefore ascertain whether, prior to the present judgment, the applicant had an enforceable right at domestic level to compensation for damage, or whether he will have such a right following the adoption of this judgment.
184. The Court reiterates in this connection that in order to find a violation of Article 5 § 5, it has to establish that the finding of a violation of one of the other paragraphs of Article 5 could not give rise, either before or after the Court's judgment, to an enforceable claim for compensation before the domestic courts (see *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 66-67, Series A no. 145 B).
185. Having regard to the case-law cited above, the Court considers that it must first be determined whether the violation of Article 5 §§ 1 and 4 found in the present case could have given rise, before the delivery of this judgment, to an entitlement to compensation before the domestic courts.
186. As regards the violation of Article 5 § 1, the Court observes that section 2(1) of the State Responsibility for Damage Act 1988 provides for compensation for damage resulting from a judicial decision ordering certain types of detention where the decision has been set aside as having no legal basis (see paragraph 62 above). However, that was not the case in this instance. It appears from the case file that the Bulgarian judicial authorities have not at any stage found the measure to have been unlawful or otherwise in breach of Article 5 of the Convention. Moreover, the Government's line of argument has been that the applicant's placement in the home was in accordance with domestic law. The Court therefore concludes that the applicant was unable to claim any compensa-

tion under the above-mentioned provision in the absence of an acknowledgment by the national authorities that the placement was unlawful.
187. As to the possibility under section 1 of the same Act of claiming compensation for damage resulting from unlawful acts by the authorities (see paragraph 63 above), the Court observes that the Government have not produced any domestic decisions indicating that that provision is applicable to cases involving the placement of people with mental disorders in social care homes on the basis of civil-law agreements.
188. Furthermore, since no judicial remedy by which to review the lawfulness of the placement was available under Bulgarian law, the applicant could not have invoked State liability as a basis for receiving compensation for the violation of Article 5 § 4.
189. The question then arises whether the judgment in the present case, in which violations of paragraphs 1 and 4 of Article 5 have been found, will entitle the applicant to claim compensation under Bulgarian law. The Court observes that it does not appear from the relevant legislation that any such remedy exists; nor, indeed, have the Government submitted any arguments to prove the contrary.
190. It has therefore not been shown the applicant was able to avail himself prior to the Court's judgment in the present case, or will be able to do so after its delivery, of a right to compensation for the violation of Article 5 §§ 1 and 4.
191. There has therefore been a violation of Article 5 § 5.

IV. Alleged violations of Article 3 of the Convention, taken alone and in conjunction with Article 13

192. The applicant complained that the living conditions in the Pastra social care home were poor and that no effective remedy was available under Bulgarian law in respect of that complaint. He relied on Article 3, taken alone and in conjunction with Article 13 of the Convention. These provisions are worded as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Preliminary objection of failure to exhaust domestic remedies

193. In their memorial before the Grand Chamber the Government for the first time raised an objection of failure to exhaust domestic remedies in respect of the complaint under Article 3 of the Convention. They submitted that the applicant could have obtained compensation for the living conditions in the home by bringing an action under the State Responsibility for Damage Act 1988.
194. The Court reiterates that, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *N.C. v. Italy*, cited above, § 44). Where an objection of failure to exhaust domestic remedies is raised out of time for the purposes of Rule 55, an estoppel arises and the objection must accordingly be dismissed (see *Velikova v. Bulgaria*, no. 41488/98, § 57, ECHR 2000 VI, and *Tanrıbilir v. Turkey*, no. 21422/93, § 59, 16 November 2000).
195. In the present case the Government have not cited any circumstances justifying their failure to raise the objection in question at the time of the Chamber's examination of the admissibility of the case.
196. That being so, the Court observes that the Government are estopped from raising this objection, which must accordingly be dismissed.

B. Merits of the complaint under Article 3 of the Convention

1. The parties' submissions

197. The applicant submitted that the poor living conditions in the Pastra social care home, in particular the inadequate food, the deplorable sanitary conditions, the lack of heating, the enforced medical treatment, the overcrowded bedrooms and the absence of therapeutic and cultural activities, amounted to treatment prohibited by Article 3.

198. He observed that the Government had already acknowledged in 2004 that such living conditions did not comply with the relevant European standards and had undertaken to make improvements (see paragraph 82 above). However, the conditions had remained unchanged, at least until late 2009.
199. In their observations before the Chamber, the Government acknowledged the deficiencies in the living conditions at the home. They explained that the inadequate financial resources set aside for institutions of this kind formed the main obstacle to ensuring the requisite minimum standard of living. They also stated that, following an inspection by the Social Assistance Agency, the authorities had resolved to close the Pastra social care home and to take steps to improve living conditions for its residents. In the Government's submission, since the living conditions were the same for all the home's residents and there had been no intention to inflict ill-treatment, the applicant had not been subjected to degrading treatment.
200. Before the Grand Chamber the Government stated that renovation work had been carried out in late 2009 in the part of the home where the applicant lived (see paragraph 24 above).

2. The Court's assessment

(a) General principles
201. Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 90, ECHR 2000-XI, and *Poltoratskiy v. Ukraine*, no. 38812/97, § 130, ECHR 2003 V).
202. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Kudła*, cited above, § 91, and *Poltoratskiy*, cited above, § 131).
203. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000 IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or driving them to act against their will or conscience (see *Jalloh v. Germany* [GC], no. 54810/00, § 68, ECHR 2006 IX). In this connection, the question whether such treatment was intended to humiliate or debase the victim is a factor to be taken into account, although the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see *Peers v. Greece*, no. 28524/95, §§ 67, 68 and 74, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).
204. The suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that deprivation of liberty in itself raises an issue under Article 3 of the Convention. Nevertheless, under that Article the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see *Kudła*, cited above, §§ 92-94).
205. When assessing the conditions of a deprivation of liberty under Article 3 of the Convention, account has to be taken of their cumulative effects and the duration of the measure in question (see *Kalashnikov*, cited above, §§ 95 and 102; *Kehayov v. Bulgaria*, no. 41035/98, § 64, 18 January 2005; and *Iovchev v. Bulgaria*, no. 41211/98, § 127, 2 February 2006). In this connection, an important factor to take into account, besides the material conditions, is the detention regime. In assessing whether a restrictive regime may amount to

treatment contrary to Article 3 in a given case, regard must be had to the particular conditions, the stringency of the regime, its duration, the objective pursued and its effects on the person concerned (see *Kehayov*, cited above, § 65).

(b) Application of these principles in the present case

206. In the present case the Court has found that the applicant's placement in the Pastra social care home – a situation for which the domestic authorities must be held responsible – amounts to a deprivation of liberty within the meaning of Article 5 of the Convention (see paragraph 132 above). It follows that Article 3 is applicable to the applicant's situation, seeing that it prohibits the inhuman and degrading treatment of anyone in the care of the authorities. The Court would emphasise that the prohibition of ill-treatment in Article 3 applies equally to all forms of deprivation of liberty, and in particular makes no distinction according to the purpose of the measure in issue; it is immaterial whether the measure entails detention ordered in the context of criminal proceedings or admission to an institution with the aim of protecting the life or health of the person concerned.

207. The Court notes at the outset that, according to the Government, the building in which the applicant lives was renovated in late 2009, resulting in an improvement in his living conditions (see paragraph 200 above); the applicant did not dispute this. The Court therefore considers that the applicant's complaint should be taken to refer to the period between 2002 and 2009. The Government have not denied that during that period the applicant's living conditions corresponded to his description, and have also acknowledged that, for economic reasons, there were certain deficiencies in that regard (see paragraphs 198-199 above).

208. The Court observes that although the applicant shared a room measuring 16 square metres with four other residents, he enjoyed considerable freedom of movement both inside and outside the home, a fact likely to lessen the adverse effects of a limited sleeping area (see *Valašinas v. Lithuania*, no. 44558/98, § 103, ECHR 2001-VIII).

209. Nevertheless, other aspects of the applicant's physical living conditions are a considerable cause for concern. In particular, it appears that the food was insufficient and of poor quality. The building was inadequately heated and in winter the applicant had to sleep in his coat. He was able to have a shower once a week in an unhygienic and dilapidated bathroom. The toilets were in an execrable state and access to them was dangerous, according to the findings by the CPT (see paragraphs 21, 22, 23, 78 and 79 above). In addition, the home did not return clothes to the same people after they were washed (see paragraph 21 above), which was likely to arouse a feeling of inferiority in the residents.

210. The Court cannot overlook the fact that the applicant was exposed to all the above-mentioned conditions for a considerable period of approximately seven years. Nor can it ignore the findings of the CPT, which, after visiting the home, concluded that the living conditions there at the relevant time could be said to amount to inhuman and degrading treatment. Despite having been aware of those findings, during the period from 2002 to 2009 the Government did not act on their undertaking to close down the institution (see paragraph 82 above). The Court considers that the lack of financial resources cited by the Government is not a relevant argument to justify keeping the applicant in the living conditions described (see *Poltoratskiy*, cited above, § 148).

211. It would nevertheless emphasise that there is no suggestion that the national authorities deliberately intended to inflict degrading treatment. However, as noted above (see paragraph 203), the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.

212. In conclusion, while noting the improvements apparently made to the Pastra social care home since late 2009, the Court considers that, taken as a whole, the living conditions to which the applicant was exposed during a period of approximately seven years amounted to degrading treatment.

213. There has therefore been a violation of Article 3 of the Convention.

C. Merits of the complaint under Article 13 in conjunction with Article 3

1. The parties' submissions

214. The applicant submitted that no domestic remedies, including the claim for compensation envisaged in the State Responsibility for Damage Act 1988, had been accessible to him without his guardian's consent. He pointed out in that connection that he had not had a guardian for a period

of more than two years, between the end of Ms R.P.'s designated term on 31 December 2002 (see paragraph 12 above) and the appointment of a new guardian on 2 February 2005 (see paragraph 17 above). Moreover, his new guardian was also the director of the social care home. There would therefore have been a conflict of interests between the applicant and his guardian in the event of any dispute concerning the living conditions at the home and the applicant could not have expected the guardian to support his allegations.

215. In the Government's submission, an action for restoration of legal capacity (see paragraphs 51-52 above) constituted a remedy by which the applicant could have secured a review of his status, and in the event of being released from partial guardianship, he could have left the social care home and ceased to endure the living conditions of which he complained.

216. The Government added that the applicant could have complained directly about the living conditions at the Pastra social care home by bringing an action under section 1 of the State Responsibility for Damage Act 1988 (see paragraphs 62-67 above).

2. The Court's assessment

217. The Court refers to its settled case-law to the effect that Article 13 guarantees the existence of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 62, ECHR 2003 V).

218. Where, as in the present case, the Court has found a breach of Article 3, compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies (ibid., § 63; and *Iovchev*, cited above, § 143).

219. In the instant case the Court observes that section 1(1) of the State Responsibility for Damage Act 1988 has indeed been interpreted by the domestic courts as being applicable to damage suffered by prisoners as a result of poor detention conditions (see paragraphs 63-64 above). However, according to the Government's submissions, the applicant's placement in the Pastra social care home is not regarded as detention under domestic law (see paragraphs 108-111 above). Therefore, he would not have been entitled to compensation for the poor living conditions in the home. Moreover, there are no judicial precedents in which this provision has been found to apply to allegations of poor conditions in social care homes (see paragraph 65 above), and the Government have not adduced any arguments to prove the contrary. Having regard to those considerations, the Court concludes that the remedies in question were not effective within the meaning of Article 13.

220. As to the Government's reference to the procedure for restoration of legal capacity (see paragraph 215 above), the Court considers that, even assuming that, as a result of that remedy, the applicant had been able to have his legal capacity restored and to leave the home, he would not have been awarded any compensation for his treatment during his placement there. Accordingly, the remedy in question did not afford appropriate redress.

221. There has therefore been a violation of Article 13 of the Convention, taken in conjunction with Article 3.

V. Alleged violation of Article 6 § 1 of the Convention

222. The applicant alleged that Bulgarian law had not afforded him the possibility of applying to a court for restoration of his legal capacity. He relied on Article 6 § 1 of the Convention, the relevant parts of which read:

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

A. Preliminary remarks

223. The Grand Chamber observes that the Government have maintained before it the objection they raised before the Chamber alleging failure to exhaust domestic remedies. The objection was based on Article 277 of the CCP, which, according to the Government, entitled the applicant to apply personally to the courts for restoration of his legal capacity.

224. The Grand Chamber notes that in its admissibility decision of 29 June 2010 the Chamber observed that the applicant disputed the accessibility of the remedy which, according to the Government, would have enabled him to obtain a review of his legal status and that that argument underpinned his complaint under Article 6 § 1. The Chamber thus joined the Government's objection to its examination of the merits of the complaint in question. The Grand Chamber sees no reason to depart from the Chamber's conclusion.

B. Merits

1. The parties' submissions

225. The applicant maintained that he had been unable personally to institute proceedings for restoration of his legal capacity under Article 277 of the CCP and that this was borne out by the Supreme Court's decision no. 5/79 (see paragraph 51 above). In support of that argument, he submitted that the Dupnitsa District Court had declined to examine his application for judicial review of the mayor's refusal to bring such proceedings, on the ground that the guardian had not countersigned the form of authority (see paragraphs 39-40 above).

226. In addition, although an action for restoration of legal capacity had not been accessible to him, the applicant had attempted to bring such an action through the public prosecutor's office, the mayor and his guardian (the director of the home). However, since no application to that end had been lodged with the courts, all his attempts had failed. Accordingly, the applicant had never had the opportunity to have his case heard by a court.

227. The Government submitted that Article 277 of the CCP had offered the applicant direct access to a court at any time to have his legal status reviewed. They pointed out that, contrary to what the applicant alleged, the Supreme Court's decision no. 5/79 had interpreted Article 277 of the CCP as meaning that persons partially deprived of legal capacity could apply directly to the courts to be released from guardianship. The only condition for making such an application was the production of evidence of an improvement in their condition. However, as was indicated by the medical assessment carried out at the public prosecutor's request (see paragraph 37 above), which had concluded that the applicant's condition still persisted and that he was incapable of looking after his own interests, it was clear that the applicant had not had any such evidence available. The Government thus concluded that the applicant had not attempted to apply to the court on his own because he had been unable to substantiate his application.

228. The Government further observed that the courts regularly considered applications for restoration of legal capacity submitted, for example, by a guardian (see paragraph 52 above).

2. The Court's assessment

(a) General principles

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

230. The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" (see *Ashingdane*, cited above, § 57). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed

and the aim sought to be achieved (ibid.; see also, among many other authorities, *Cordova v. Italy (no. 1),* no. 40877/98, § 54, ECHR 2003-I, and the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

231. Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under that Article (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII).

232. Lastly, the Court observes that in most of the cases before it involving "persons of unsound mind", the domestic proceedings have concerned their detention and were thus examined under Article 5 of the Convention. However, it has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 of the Convention are broadly similar to those under Article 6 § 1 (see, for instance, *Winterwerp*, cited above, § 60; *Sanchez-Reisse v. Switzerland*, 21 October 1986, §§ 51 and 55, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B; and *Ilijkov v. Bulgaria*, no. 33977/96, § 103, 26 July 2001). In the *Shtukaturov* case (cited above, § 66), in determining whether or not the incapacitation proceedings had been fair, the Court had regard, *mutatis mutandis*, to its case-law under Article 5 §§ 1 (e) and 4 of the Convention.

(b) Application of these principles in the present case

233. The Court observes at the outset that in the present case, none of the parties disputed the applicability of Article 6 to proceedings for restoration of legal capacity. The applicant, who has been partially deprived of legal capacity, complained that Bulgarian law did not afford him direct access to a court to apply to have his capacity restored. The Court has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of "civil rights and obligations" (see *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999). Article 6 § 1 of the Convention is therefore applicable in the instant case.

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

235. The Court notes firstly that the parties differed as to whether a legally incapacitated person had *locus standi* to apply directly to the Bulgarian courts for restoration of legal capacity; the Government argued that this was the case, whereas the applicant maintained the contrary.

236. The Court accepts the applicant's argument that, in order to make an application to a Bulgarian court, a person under partial guardianship is required to seek the support of the persons referred to in Article 277 of the 1952 CCP (which has become Article 340 of the 2007 CCP). The list of persons entitled to apply to the courts under Bulgarian law does not explicitly include the person under partial guardianship (see paragraphs 45 and 51 above).

237. With regard to the Supreme Court's 1980 decision (see paragraph 51 above), the Court observes that although the fourth sentence of paragraph 10 of the decision, read in isolation, might give the impression that a person under partial guardianship has direct access to a court, the Supreme Court explains further on that where the guardian of a partially incapacitated person and the guardianship authority refuse to institute proceedings for restoration of legal capacity, the person concerned may request the public prosecutor to do so. In the Court's view, the need to seek the intervention of the public prosecutor is scarcely reconcilable with direct access to court for persons under partial guardianship in so far as the decision to intervene is left to the prosecutor's discretion. It follows that the Supreme Court's 1980 decision cannot be said to have clearly affirmed the existence of such access in Bulgarian law.

238. The Court further notes that the Government have not produced any court decisions showing that persons under partial guardianship have been able to apply of their own motion to a court to have the measure lifted; however, they have shown that at least one application for restoration of legal capacity has been successfully brought by the guardian of a fully incapacitated person (see paragraph 52 above).

239. The Court thus considers it established that the applicant was unable to apply for restoration of his legal capacity other than through his guardian or one of the persons listed in Article 277 of the CCP.
240. The Court would also emphasise that, as far as access to court is concerned, domestic law makes no distinction between those who are entirely deprived of legal capacity and those who, like the applicant, are only partially incapacitated. Moreover, domestic legislation does not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remain valid. Lastly, in the applicant's case the measure in question was not limited in time.
241. Admittedly, the right of access to the courts is not absolute and requires by its very nature that the State should enjoy a certain margin of appreciation in regulating the sphere under examination (see *Ashingdane*, cited above, § 57). In addition, the Court acknowledges that restrictions on a person's procedural rights, even where the person has been only partially deprived of legal capacity, may be justified for the person's own protection, the protection of the interests of others and the proper administration of justice. However, the importance of exercising these rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see also *Shtukaturov*, cited above, § 71). The Court therefore considers that this right is one of the fundamental procedural rights for the protection of those who have been partially deprived of legal capacity. It follows that such persons should in principle enjoy direct access to the courts in this sphere.
242. However, the State remains free to determine the procedure by which such direct access is to be realised. At the same time, the Court considers that it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications. Nevertheless, it seems clear that this problem may be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the frequency with which applications may be made or introducing a system for prior examination of their admissibility on the basis of the file.
243. The Court further observes that eighteen of the twenty national legal systems studied in this context provide for direct access to the courts for any partially incapacitated persons wishing to have their status reviewed. In seventeen States such access is open even to those declared fully incapable (see paragraphs 88-90 above). This indicates that there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity.
244. The Court is also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible. It refers in this connection to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and to Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, which recommend that adequate procedural safeguards be put in place to protect legally incapacitated persons to the greatest extent possible, to ensure periodic reviews of their status and to make appropriate remedies available (see paragraphs 72-73 above).
245. In the light of the foregoing, in particular the trends emerging in national legislation and the relevant international instruments, the Court considers that Article 6 § 1 of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable, as is the applicant's case, has direct access to a court to seek restoration of his or her legal capacity.
246. In the instant case the Court has observed that direct access of this kind is not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation. That finding is sufficient for it to conclude that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant.

247. The above conclusion dispenses the Court from examining whether the indirect legal remedies referred to by the Government provided the applicant with sufficient guarantees that his case would be brought before a court.
248. The Court therefore dismisses the Government's objection of failure to exhaust domestic remedies (see paragraph 223 above) and concludes that there has been a violation of Article 6 § 1 of the Convention.

VI. Alleged violation of Article 8 of the Convention, taken alone and in conjunction with Article 13

249. The applicant alleged that the restrictive guardianship regime, including his placement in the Pastra social care home and the physical living conditions there, had amounted to unjustified interference with his right to respect for his private life and home. He submitted that Bulgarian law had not afforded him a sufficient and accessible remedy in that respect. He relied on Article 8 of the Convention, taken alone and in conjunction with Article 13.
Article 8 provides:
"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."
250. The applicant maintained in particular that the guardianship regime had not been geared to his individual case but had entailed restrictions automatically imposed on anyone who had been declared incapable by a judge. He added that the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits.
251. The Government contested those allegations.
252. Having regard to its conclusions under Articles 3, 5, 6 and 13 of the Convention, the Court considers that no separate issue arises under Article 8 of the Convention, taken alone and/or in conjunction with Article 13. It is therefore unnecessary to examine this complaint.

VII. Articles 46 and 41 of the Convention

A. Article 46 of the Convention

253. The relevant parts of Article 46 of the Convention read as follows:
"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. ..."
254. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, *Reports* 1998 IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005 IV).
255. 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 Bro*niowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, ECHR 2009 ...).

256. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 5, to indicate individual measures for the execution of this judgment. It observes that it has found a violation of that Article on account of the failure to comply with the requirement that any deprivation of liberty must be "in accordance with a procedure prescribed by law" and the lack of justification for the applicant's deprivation of liberty under sub-paragraph (e) or any of the other sub paragraphs of Article 5 § 1. It has also noted deficiencies in the assessment of the presence and persistence of any disorders warranting placement in a social care home (see paragraphs 148-160 above).

257. The Court considers that in order to redress the effects of the breach of the applicant's rights, the authorities should ascertain whether he wishes to remain in the home in question. Nothing in this judgment should be seen as an obstacle to his continued placement in the Pastra social care home or any other home for people with mental disorders if it is established that he consents to the placement. However, should the applicant object to such placement, the authorities should re-examine his situation without delay in the light of the findings of this judgment.

258. The Court notes that it has also found a violation of Article 6 § 1 on account of the lack of direct access to a court for a person who has been partially deprived of legal capacity with a view to seeking its restoration (see paragraphs 233-248 above). Having regard to that finding, the Court recommends that the respondent State envisage the necessary general measures to ensure the effective possibility of such access.

B. Article 41 of the Convention

259. 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

260. The applicant did not submit any claims in respect of pecuniary damage but sought EUR 64,000 for non-pecuniary damage.

261. He asserted in particular that he had endured poor living conditions in the social care home and claimed a sum of EUR 14,000 on that account. In respect of his placement in the Pastra social care home, he stated that he had experienced feelings of anxiety, distress and frustration ever since that measure had begun to be implemented in December 2002. His enforced placement in the home had also had a significant impact on his life as he had been removed from his social environment and subjected to a very restrictive regime, making it harder for him to reintegrate into the community. He submitted that although there was no comparable case-law concerning unlawful detention in a social care home for people with mental disorders, regard should be had to the just satisfaction awarded by the Court in cases involving unlawful detention in psychiatric institutions. He referred, for example, to the judgments in *Gajcsi v. Hungary* (no. 34503/03, §§ 28-30, 3 October 2006) and *Kayadjieva v. Bulgaria* (no. 56272/00, § 57, 28 September 2006), while noting that he had been deprived of his liberty for a considerably longer period than the applicants in the above-mentioned cases. He submitted that a sum of EUR 30,000 would constitute an equitable award on that account. Lastly, he added that his lack of access to the courts to seek a review of his legal status had restricted the exercise of a number of freedoms in the sphere of his private life, causing additional non pecuniary damage, for which an award of EUR 20,000 could provide redress.

262. The Government submitted that the applicant's claims were excessive and unfounded. They argued that if the Court were to make any award in respect of non-pecuniary damage, it should not exceed the amounts awarded in judgments against Bulgaria concerning compulsory psychiatric admission. The Government referred to the judgments in *Kayadjieva* (cited above, § 57), *Varbanov* (cited above, § 67), and *Kepenerov v. Bulgaria* (no. 39269/98, § 42, 31 July 2003).

263. The Court observes that it has found violations of several provisions of the Convention in the present case, namely Articles 3, 5 (paragraphs 1, 4 and 5), 6 and 13. It considers that the applicant must have endured suffering as a result of his placement in the home, which began in December

2002 and is still ongoing, his inability to secure a judicial review of that measure and his lack of access to a court to apply for release from partial guardianship. This suffering undoubtedly aroused in him a feeling of helplessness and anxiety. The Court further considers that the applicant sustained non-pecuniary damage on account of the degrading living conditions he had to endure for more than seven years.

264. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court considers that the applicant should be awarded an aggregate sum of EUR 15,000 in respect of non-pecuniary damage.

2. Costs and expenses

265. The applicant did not submit any claims in respect of costs and expenses.

3. Default interest

266. 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. *Dismisses*, unanimously, the Government's preliminary objections of failure to exhaust domestic remedies;
2. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention;
4. *Holds*, unanimously, that there has been a violation of Article 5 § 5 of the Convention;
5. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention, taken alone and in conjunction with Article 13;
6. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;
7. *Holds*, by thirteen votes to four, that it is not necessary to examine whether there has been a violation of Article 8 of the Convention, taken alone and in conjunction with Article 13;
8. *Holds*, unanimously,

(a) that the respondent State is to pay the applicant, within three months, EUR 15,000 (fifteen thousand euros) in respect of non pecuniary damage, to be converted into Bulgarian levs at the rate applicable at the date of settlement, plus any tax that may be chargeable;

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

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

Joint partly dissenting opinion of Judges Tulkens, Spielmann and Laffranque

(*Translation*)

We had no hesitation in voting in favour of finding a violation of Article 5 and of Article 3, taken alone and in conjunction with Article 13. We also voted in favour of finding a violation of Article 6 of the Convention, and we believe that the judgment is likely to strengthen considerably the protection of persons in a similarly vulnerable situation to the applicant. However, we do not agree with the majority's finding that no separate issue arises under Article 8 of the Convention, taken alone and/or in conjunction with Article 13, and that it is therefore unnecessary to examine this complaint (see paragraph 252 of the judgment and point 7 of the operative provisions).

We wish to point out that the applicant alleged that the restrictive guardianship regime, including his placement in the Pastra social care home and the physical living conditions there, amounted to unjustified interference with his right to respect for his private life and home (see paragraph 249 of the judgment). He submitted that Bulgarian law had not afforded him a sufficient and accessible remedy in that respect. He also maintained that the guardianship regime had not been geared to his individual case but had entailed restrictions automatically imposed on anyone who had been declared incapable by a judge. He added that the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits (see paragraph 250 of the judgment).

In our opinion, these are genuine issues that deserved to be examined separately. Admittedly, a large part of the allegations submitted under Article 8 are similar to those raised under Articles 3, 5 and 6. Nevertheless, they are not identical and the answers given in the judgment in relation to those provisions cannot entirely cover the complaints brought under Articles 8 and 13.
More specifically, an issue that would also have merited a separate examination concerns the scope of a periodic review of the applicant's situation. He submitted that domestic law did not provide for an automatic periodic assessment of the need to maintain a measure restricting legal capacity. It might have been helpful to consider whether States have a positive obligation to set up a review procedure of this kind, especially in situations where the persons concerned are unable to comprehend the consequences of a regular review and cannot themselves initiate a procedure to that end.

Partly dissenting opinion of Judge Kalaydjieva
I had no hesitation in reaching the conclusions concerning Mr Stanev's complaints under Articles 5, 3 and 6 of the Convention. However, like Judges Tulkens, Spielmann and Laffranque, I regret the majority's conclusion that in view of these findings it was not necessary to examine separately his complaints under Article 8 concerning "the [partial guardianship] system, including the lack of regular reviews of the continued justification of such a measure, the appointment of the director of the Pastra social care home as his [guardian] and the alleged lack of scrutiny of the director's decisions, and also about the restrictions on his private life resulting from his admission to the home against his will, extending to the lack of contact with the outside world and the conditions attached to correspondence" (see paragraph 90 of the decision as to admissibility of 29 June 2010). In my view the applicant's complaints under Article 8 of the Convention remain the primary issue in the present case.
In its earlier case-law the Court has expressed the view that an individual's legal capacity is decisive for the exercise of all the rights and freedoms, not least in relation to any restrictions that may be placed on the person's liberty (see *Shtukaturov v.Russia*, no. 44009/05, § 71, 27 March 2008; *Salontaji-Drobniak v. Serbia*, no. 36500/05, §§ 140 et seq.; and the recent judgment in *X and Y v. Croatia*, no. 5193/09, §§ 102-104).
There is hardly any doubt that restrictions on legal capacity constitute interference with the right to private life, which will give rise to a breach of Article 8 of the Convention unless it can be shown that it was "in accordance with the law", pursued one or more legitimate aims and was "necessary" for their attainment.
Unlike the situation of the applicants in the cases mentioned above, Mr Stanev's capacity to perform ordinary acts relating to everyday life and his ability to validly enter into legal transactions with the consent of his guardian were recognised. The national law and the domestic courts' decisions entitled him to request and obtain social care in accordance with his needs and preferences if he so wished, or to refuse such care in view of the quality of the services offered and/or any restrictions involved which he was not prepared to accept. There was nothing in the domestic law or the applicant's personal circumstances to justify any further restrictions, or to warrant the substitution of his own will with his guardian's assessment of his best interests.
However, once declared partially incapacitated, he was divested of the possibility of acting in his own interests and there were insufficient guarantees to prevent his *de facto* treatment as a fully incapacitated individual. It has not been contested that he was not consulted as to whether he wished to avail himself of placement in a social care institution and that he was not even entitled to decide independently how to spend his time or the remaining part of his pension, and whether and when to visit his friends or relatives or other places, to send and receive letters or to otherwise communicate with the outside world. No justification was offered for the fact that Mr Stanev was stripped of the ability to act in accordance with his preferences to the extent determined by the courts and the law and that, instead of due assistance from his officially appointed guardian, the pursuit of his best interests was made completely dependent on the good will or neglect shown by the guardian. In this regard the lack of respect for the applicant's recognised personal autonomy violated Mr Stanev's right to personal life and dignity as guaranteed by Article 8 and failed to meet

contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing.
The applicant's situation was further aggravated by his inability to trigger any remedy for the independent protection of his rights and interests. Any attempt to avail himself of such remedies depended on the initial approval of Mr Stanev's guardian, who also acted as the director and representative of the social care institution. In this regard the majority's preference not to consider separately the applicant's complaints under Article 8 resulted in a failure to subject to separate scrutiny the absence of safeguards for the exercise of these rights in the face of a potential or even evident conflict of interests, a factor which appears to be of central importance for the requisite protection of vulnerable individuals against possible abuse and is equally pertinent to the applicant's complaints under Article 8 and Article 6.
While both parties submitted information to the effect that proceedings for the restoration of capacity were not only possible in principle, but had also been successful in a reasonable percentage of cases, Mr Stanev rightly complained that the institution of such proceedings in his case depended on his guardian's approval. It appears that the guardian's discretion to block any attempt to take proceedings in court affected not only the applicant's right of access to court for the purposes of restoration of capacity, but also prevented the institution of any proceedings in pursuit of the applicant's interests and rights, including those protected under Article 5 of the Convention. As was also submitted by his representatives before the national authorities, Mr Stanev "should have had the opportunity to assess by himself whether or not, having regard to the living conditions at the home, it was in his interests to remain there" (see paragraph 38 of the judgment).

NOOT

1. Een oppervlakkig lezer van dit arrest zal wellicht al snel kunnen oordelen dat het hier Oost-Europese toestanden betreft, dat dit arres dus geen spiegel voorhoudt ter beantwoording van de vraag in hoeverre de Nederlandse wetgeving met betrekking tot psychiatrische patiënten en andere wilsonbekwame patiënten "EVRM-proof" is. En inderdaad zijn er nogal wat omstandigheden die Oost-Europese toestanden (lees: achterstand in zorg en wetgeving) doen vermoeden. Het verzorgingshuis bevindt zich op een zeer afgelegen bergachtige plek ruim 400 km van de woonplaats van Stanev. Er verblijven ongeveer 75 personen in drie gebouwen. Stanev deelt een kamer van 16 m^2 met vier andere personen. In de winter moet hij met zijn jas aan slapen, omdat het gebouw amper verwarmd wordt. Hij heeft nauwelijks eigen kleren. De gewassen kleren worden niet zonder meer naar de rechtmatige eigenaar teruggebracht. Het eten is van erbarmelijke kwaliteit. Stanev mag maar eens per week gebruik maken van de badkamer en de toiletten zijn zeer onhygiënisch.
2. In Nederland kennen wij geen afgelegen 'social care homes' die 420 km gelegen zijn van de eigen woonplaats van een cliënt. Nog minder zijn wij bekend met erbarmelijke omstandigheden zoals beschreven met betrekking tot het verzorgingshuis in Bulgarije. Ook het vernietigende oordeel van het EHRM bevestigt het vermoeden van een "typisch" Oost-Europese situatie die niet te vergelijken is met het Nederlandse wettelijke kader (Wet bijzondere opnemingen in psychiatrische ziekenhuizen, en afdeling 5, titel 7 boek 7 BW inzake de geneeskundige behandelingsovereenkomst). De Bulgaarse procedure om de (gedeeltelijke) curatele aan de kaak te stellen "rammelt". Bij de procedure om Stanev in het verzorgingshuis op te nemen is geen rechter betrokken en Stanev heeft ook geen enkele mogelijkheid om de (vermeende) vrijheidsbeneming bij een rechter aan de kaak te stellen. Er ontbreken fundamentele zaken waarover het Europese Hof voor de Rechten van de Mens herhaalde malen stevige uitspraken heeft gedaan.
3. Toch zou het te snel afdoen van deze uitspraak met de kwalificatie "Oost-Europese toestanden" de merites van deze uitspraak tekort doen. Met name verdient aandacht het oordeel van het EHRM over de plaatsingsprocedure en de gebrekkige toegangsmogelijkheden tot de rechter. Hierna ga ik allereerst in op de bijzonderheden van deze uitspraak en de wijze waarop het EHRM in deze zaak toetst aan de zogenaamde *Winterwerp*-criteria (*Winterwerp* t. *Nederland*, EHRM 24 oktober 1979, nr. 6301/73, *NJ* 1980/114 m.nt. Alkema). Met name is daarbij de vraag relevant of in deze zaak eigenlijk wel sprake was van werkelijke vrijheidsbeneming in de zin van art.

5 EVRM. Vervolgens maak ik een vergelijking met de Nederlandse wetgeving, waarbij ik tevens inga op de wetsvoorstellen verplichte ggz en zorg en dwang.
4. Centraal in deze uitspraak staat zoals gezegd de vraag of hier sprake is van vrijheidsbeneming in de zin van art. 5 EVRM. Alvorens deze vraag te beantwoorden herhaalt het Hof in het *Stanev*-arrest zijn inmiddels vaste rechtspraak dat het verschil tussen vrijheidsbeneming en een beperking van de bewegingsvrijheid (oftewel een vrijheidsbeperking, het laatste wordt geregeld in art. 2 van het Vierde Protocol) gradueel van aard is, en afhankelijk is van aard, duur, effecten en wijze van tenuitvoerlegging van die maatregel (zie hierover onder meer *H.M.* t. *Zwitserland*, EHRM 26 februari 2002, nr. 39187/98, *BJ* 2002/1 m.nt. Dijkers; «EHRC» 2002/32 m.nt. Van der Velde; zie ook *H.L.* t. *VK,* EHRM 4 oktober 2004, nr. 45508/99, *BJ* 2005/1 m.nt. Arends).
5. Uit voornoemde jurisprudentie blijkt dat het opnemen van een wils- of handelingsonbekwame patiënt in een zorgvoorziening zonder dat deze daarvoor expliciet toestemming heeft gegeven afhankelijk van de omstandigheden van het geval kan worden beschouwd als vrijheidsbeperking in de zin van art. 2 van het Vierde Protocol bij het EVRM of als vrijheidsbeneming in de zin van art. 5 EVRM. Als sprake is van vrijheidsbeperking, dan moet de nationale wetgeving op grond van art. 2 lid 3 van het Vierde Protocol hiervoor een wettelijke basis bevatten en dient er bovendien een noodzaak te zijn voor die beperking. Die noodzaak kan bijvoorbeeld gelegen zijn in de bescherming van de gezondheid van de betrokkene of in de bescherming van de rechten en vrijheden van anderen. Is daarentegen sprake van vrijheidsbeneming, dan moet worden voldaan aan art. 5 EVRM en de hierna te bespreken *Winterwerp*-criteria (zie hierover uitgebreider L.A.P. Arends, *Psychogeriatrische patiënt en recht. Zorg voor vrijheidsbeperking*. Sdu Uitgevers: 2005).
6. In het *Winterwerp*-arrest (*Winterwerp* t. *Nederland*, EHRM 24 oktober 1979, nr. 6301/73, *NJ* 1980/114, m.nt. Alkema) werd de Nederlandse procedure, zoals vastgelegd in de destijds geldende Krankzinnigenwet, scherp veroordeeld. De in dit arrest neergelegde criteria vormen voor het EHRM nog steeds de graadmeter voor procedures die zien op onvrijwillige opneming in een psychiatrisch ziekenhuis van personen met een geestelijke stoornis. Sinds het *Winterwerp*-arrest moet een dergelijke procedure aan de volgende criteria voldoen:
1) er moet sprake zijn van een geestelijke stoornis, die is vastgesteld op basis van een objectief medisch oordeel;
2) de vrijheidsbeneming moet worden uitgevoerd in overeenstemming met een wettelijke procedure;
3) de betrokkene wiens vrijheid is ontnomen heeft het recht onverwijld voorziening te vragen aan een rechterlijke instantie, die vervolgens spoedig moet beslissen over de rechtmatigheid van de vrijheidsbeneming en onmiddellijk de invrijheidstelling van betrokkene dient te bevelen indien de vrijheidsbeneming onrechtmatig is.
7. Uit het *Winterwerp*-arrest volgt verder dat de procedure niet alleen procedureel (dus op papier), maar ook *feitelijk* gewaarborgd behoort te zijn.
8. De criteria die zijn ontwikkeld in het *Winterwerp*-arrest zijn in de loop van de jaren door het EHRM uitgebouwd en verder verfijnd. Zo is bijvoorbeeld sinds *Varbanov* t. *Bulgarije* (EHRM 5 oktober 2000, nr. 31365/96, *Reports* 2000-X, *BJ* 2001/64 m.nt. Dijkers) duidelijk dat met "objectief medisch oordeel" wordt bedoeld een onafhankelijk en actueel oordeel van een ter zake deskundig arts. Met "actueel" wordt bedoeld dat de deskundige onderzoek moet doen naar de feitelijke geestelijke gezondheidstoestand van de cliënt en niet enkel mag afgaan op gebeurtenissen uit het verleden.
9. In het geval van Stanev acht het Hof de *Winterwerp*-criteria alle geschonden. Aan de opneming ging geen rechterlijke procedure vooraf. Ook werd Stanev niet opgenomen op basis van een "actueel" oordeel van een onafhankelijke psychiater. De langdurige procedure om uiteindelijk (vergeefs) toegang te krijgen tot een rechter laat zien dat het onmogelijk voor Stanev was om zijn onrechtmatige opneming door een rechter te laten toetsen. Er lijkt dus evident strijd met het EVRM. De vraag die eerst moet worden beantwoord is echter of de *Winterwerp*-criteria wel toepasbaar zijn op deze casus. Was er in het geval van Stanev überhaupt wel sprake van vrijheidsbeneming?
10. Volgens de Bulgaarse wetgeving werd Stanev niet onvrijwillig in een psychiatrisch ziekenhuis opgenomen. Het EHRM oordeelt echter dat

niet ter zake doet hoe de Bulgaarse wetgever de opneming kwalificeert. Of er in een concrete situatie sprake is van vrijheidsbeneming is afhankelijk van de omstandigheden van het geval. De beantwoording van die vraag ligt gecompliceerder dan het enkel nagaan of iemand zich achter gesloten deuren bevindt of niet. Zelfs als iemand in een open setting is opgenomen en zich zonder begeleiding buiten het terrein van het ziekenhuis kan begeven, kan toch sprake zijn van vrijheidsbeneming (*Ashingdane* t. *VK*, EHRM 28 mei 1985, nr. 8225/78, *Series A,* Vol. 93, *NJ* 1991 m.nt. Alkema). In de beoordeling door het EHRM worden niet alleen objectieve elementen betrokken, maar ook subjectieve elementen. Van belang is bijvoorbeeld de vraag of de betrokkene op enigerlei wijze heeft kunnen instemmen met de vrijheidsbeneming (*Storck* t. *Duitsland*, EHRM 16 juni 2005, nr. 61603/00, «EHRC» 2005/82 m.nt. Van der Velde).

11. Het Hof oordeelt in het *Stanev*-arrest dat er in ieder geval sprake kan zijn van vrijheidsbeneming in de volgende gevallen:

1) Als de cliënt op grond van een wettelijke procedure handelingsonbekwaam is verklaard, op verzoek van zijn vertegenwoordiger wordt opgenomen in een psychiatrisch ziekenhuis en zonder succes heeft geprobeerd het ziekenhuis te verlaten.

2) Als de cliënt toestemming heeft gegeven voor opname in een instelling, maar vervolgens heeft geprobeerd te ontsnappen.

3) Als de patiënt weliswaar niet in staat was om toestemming te geven voor opname, maar zich daartegen ook niet verzet heeft (de "geen bereidheid, geen verzet"-patiënten).

12. In dit geval is volgens het EHRM sprake van vrijheidsbeneming in de zin van art. 5 lid 1 EVRM. Het Hof komt tot dit oordeel op basis van het volgende.

1) De staat is verantwoordelijk voor de beslissing om Stanev in een instelling te plaatsen, op grond van de volgende omstandigheden:

a. bij de curatele was geen familie betrokken. Een vertegenwoordiger van de staat was verantwoordelijk voor de uitvoering van de curatele;

b. deze vertegenwoordiger van de staat nam haar beslissing om Stanev in een instelling op te nemen zonder dat zij Stanev gezien had;

c. de plaatsing geschiedde in een overheidsinstelling ("a State-run institution by the social services");

d. Stanev werd hier bovendien opgenomen zonder dat de instelling hem had gezien of gesproken;

e. Aan Stanev werd nooit gevraagd wat hij van de keuze van zijn curator vond. Hij had dus geen inspraak in de opneming, hoewel hij hiertoe bekwaam was en zijn toestemming bovendien nodig was op grond van de in Bulgarije geldende "Persons and Family Act 1949".

2) Weliswaar verbleef Stanev niet in een gesloten instelling en kon hij "zelfstandig" naar het nabijgelegen dorp gaan, maar het beslissingssysteem dat in de instelling gehanteerd werd, bracht grote beperkingen mee voor zijn persoonlijke vrijheid. Het EHRM baseert dit oordeel op de volgende omstandigheden:

a. Stanev had uitdrukkelijke toestemming nodig voordat hij de instelling mocht verlaten.

b. Stanev moest bovendien toestemming vragen voor de *periode* waarin hij afwezig was en de *plaats* waar hij naartoe ging.

c. Ook overigens had het management van de instelling volledige controle, omdat het in het bezit was van de identiteitspapieren van Stanev en zijn financiën beheerde, en dus ook volledige zeggenschap had over de kosten die aan reizen werden gespendeerd.

d. De eigenlijke woonplaats van Stanev was ver weg (ruim 400 km), waardoor reizen moeilijk was en duur in verhouding tot zijn inkomen.

Deze omstandigheden beperkten de mogelijkheden voor Stanev om zelfstandig reisplannen te maken.

3) Er was ook *feitelijk* sprake van een beperking van de vrijheden, hetgeen blijkt uit het feit dat Stanev, toen hij een keer langer dan afgesproken bij zijn familie bleef, met behulp van de politie werd teruggehaald en zonder dat met zijn wensen rekening werd gehouden.

4) De duur van de opneming was onbepaald en onzeker, wat onder meer blijkt uit het feit dat Stanev was ingeschreven op het adres van de instelling en uit het gegeven dat hij al meer dan acht jaar in de instelling verbleef.

5) De autoriteiten en de instelling hadden Stanev nooit naar diens mening gevraagd over het verblijf hoewel dit volgens de nationale procedure wel had behoren te gebeuren en er in deze zaak geen gegronde redenen waren om Stanev niet om toestemming te vragen.

6) Stanev heeft – anders dan het geval was in het arrest *H.M.* t. *Zwitserland* (reeds aangehaald) – nooit toestemming voor plaatsing in de instelling gegeven, en ook niet later voor het verblijf in deze instelling.
13. Met deze uitspraak gaat het EHRM verder op de weg die het met het arrest *Nielsen* t. *Denemarken* (EHRM, 28 november 1988, nr. 10929/84, *Series A*, Vol. 144, *NJ* 1991/541 m.nt. Alkema) is ingeslagen en heeft voortgezet met onder meer de arresten *H.M.* t. *Zwitserland* en *H.L.* t. *UK* (reeds aangehaald). Al eerder oordeelde het Hof dat het enkele feit dat de instelling waarin de handelingsonbekwame persoon verbleef formeel een open instelling betrof, niet meebracht dat geen sprake kon zijn van vrijheidsbeneming (*Ashingdane* t. *UK* (reeds aangehaald)). Nieuw is echter dat Stanev ook daadwerkelijk verschillende malen de instelling voor een verlof had verlaten. Het Hof achtte de omstandigheden waaronder deze verloven werden gecontroleerd echter zodanig dat dit geen vrijheidsbeperking meer genoemd kon worden, maar geconcludeerd moest worden dat het een vrijheidsbeneming betrof.
14. In het Nederlandse stelsel bepaalt, net als in Bulgarije, feitelijk de wetgever welke opneming wordt beschouwd als vrijheidsbeneming en dus bescherming behoeft. De Wet bijzondere opnemingen in psychiatrische ziekenhuizen (hierna: Wet Bopz) regelt namelijk dat (slechts) een onvrijwillige opneming in een *psychiatrisch* ziekenhuis onder de reikwijdte van deze wet valt. Een psychiatrisch ziekenhuis is een instelling die als zodanig door de minister van VWS is aangewezen. Instellingen voor psychiatrie, verstandelijk gehandicaptenzorg, psychogeriatrie of afdelingen daarvan kunnen als zodanig worden aangewezen (art. 1 onder h Wet Bopz). Als iemand niet de nodige bereidheid toont om in een dergelijke instelling te willen worden opgenomen, is een rechterlijke machtiging of een inbewaringstelling noodzakelijk.
15. Voor patiënten in de verstandelijk gehandicaptenzorg en psychogeriatrie die niet goed in staat zijn hun mening te uiten maar zich tegen verblijf in de instelling ook niet verzetten, is de opnemingsprocedure via een Bopz-indicatiecommissie bedacht (art. 60 Wet Bopz). In de praktijk is deze taak toebedeeld aan het Centrum voor Indicatiestelling Zorg (CIZ), die ook de AWBZ-indicaties verricht. Een opnemingsbesluit van het CIZ heeft eveneens tot gevolg dat iemand onvrijwillig kan worden opgenomen. Pas als een cliënt zich tegen opname of verblijf in een instelling voor verstandelijk gehandicaptenzorg of psychogeriatrie verzet, is in deze sectoren een rechterlijke machtiging noodzakelijk.
16. De Wet Bopz sluit niet uit dat iemand op grond van een beslissing van een (wettelijk) vertegenwoordiger – dus zonder tussenkomst van een rechter – wordt opgenomen en verblijft in een instelling die *niet* als psychiatrisch ziekenhuis in de zin van de Wet Bopz is aangemerkt. Er zijn dus tal van plaatsen, zoals kleinschalige woonvoorzieningen, somatische (afdelingen van) verzorgingshuizen en verpleeghuizen, waar cliënten met toestemming van een vertegenwoordiger op basis van afdeling 5, titel 7 boek 7 BW inzake de geneeskundige behandelingsovereenkomst (ook wel: Wgbo) kunnen verblijven, zonder dat de betrokkene zelf het daar echt mee eens hoeft te zijn. Het is zelfs (zeer) de vraag of er iets gebeurt als een cliënt hierover zijn ongenoegen zou uiten. Ook in de psychiatrie is er een grote groep cliënten die niet duidelijk voor zijn eigen rechten opkomt, en dus ook geen verzet tegen het verblijf in een instelling uit. Deze groep verblijft deels in psychiatrische ziekenhuizen, maar ook wel in kleinschalige woonvoorzieningen of andere faciliteiten die in de loop van de jaren voor deze groep ontwikkeld zijn en waar de Wet Bopz niet op van toepassing is.
17. De vraag is of het geldende Nederlandse wettelijke kader voor opname en verblijf in niet-psychiatrische ziekenhuizen "EVRM-proof" is, nu ook in Nederland zoals gezegd een niet-vrijwillige opname in deze instellingen zonder tussenkomst van de rechter mogelijk is. Deze instellingen zijn alle AWBZ-gefinancierd en net als in de Bulgaarse situatie kan niet worden gesteld dat het om volstrekt private instellingen gaat waarop de overheid geen invloed zou hebben. In deze instellingen is doorgaans weliswaar geen sprake van "gesloten deuren", maar voor de betrokken cliënten zal het moeilijk, zo niet ondoenlijk zijn om zelfstandig de instelling tijdelijk of definitief te verlaten. Denkbaar is dat de wijze waarop de betrokken zorgverleners en managers van deze instellingen toezicht houden op verlof, overplaatsing of zelfs ontslag zich laat vergelijken met de situatie in het sociale verzorgings-

huis in Bulgarije. Beschouwd in het licht van het *Stanev*-arrest voldoet de huidige Nederlandse wetgeving dus niet zonder meer aan het EVRM.
18. De bedoeling is dat de Wet Bopz binnen afzienbare tijd wordt vervangen door twee nieuwe wetten, te weten een Wet zorg en dwang voor de psychogeriatrie en verstandelijk gehandicaptenzorg (*Kamerstukken II*, 2008/2009, 31 996, nr. 2) en een Wet verplichte ggz voor de psychiatrie (*Kamerstukken II* 2009/2010, 32 399, nr. 2).
19. De Wet zorg en dwang gaat uit van onvrijwillige zorg die in beginsel overal geïndiceerd kan zijn en opgelegd kan worden, maar waarvoor wél zeer goede gronden moeten bestaan en die slechts onder de in de wet neergelegde voorwaarden kan worden toegepast. Een onvrijwillige opneming wordt beschouwd als een *ultimum remedium* en mag uitsluitend worden aangewend als andere vormen van (onvrijwillige) zorg niet toereikend zijn. In de kern blijft de onvrijwillige opnemingsprocedure voor psychogeriatrie en verstandelijk gehandicaptenzorg hetzelfde als onder de Wet Bopz. Voor deze sectoren geldt dus als uitgangspunt dat cliënten die niet in staat zijn tot de nodige bereidheid tot opneming maar zich tegen die opneming ook niet verzetten, via een indicatiebesluit van het CIZ kunnen worden opgenomen (mits uiteraard ook aan de andere voorwaarden is voldaan). Overigens is dan volgens het voorstel geen sprake van een *onvrijwillige* maar van een *niet-vrijwillige* opneming. Indien er wél sprake is van verzet kan de cliënt met een rechterlijke machtiging worden opgenomen. In dat geval gaat het wel om een *onvrijwillige* opneming. De opname op basis van de Wet zorg en dwang vindt plaats in een geregistreerde accommodatie, hetgeen volgens het voorstel een bouwkundige voorziening is met het daarbij behorende terrein, bestemd voor huisvesting van een cliënt in verband met diens behoefte aan zorg en het verlenen van zorg door een zorgaanbieder (art. 1 lid 1 onder b van het voorstel Wet zorg en dwang). Een accommodatie kan zich laten registreren door opgave aan de minister van VWS van de naam en het adres van de accommodatie, de naam en de rechtsvorm van de zorgaanbieder en de vormen van zorg die worden verleend. Instellingen die al "psychiatrisch ziekenhuis" zijn in de zin van de Wet Bopz hoeven zich niet opnieuw te laten registreren (art. 16 lid 1 en 2 voorstel Wet zorg en dwang). Uit de memorie van toelichting bij het voorstel blijkt dat een ruime werking wordt beoogd en dat bijvoorbeeld ook kleinschalige woonvoorzieningen en gezinsvervangende tehuizen zich als accommodatie kunnen laten registreren (*Kamerstukken II,* 2008/2009, 31 996, nr. 3, p. 26)
20. De kern van de Wet verplichte ggz is dat het huidige stelsel van verschillende vormen van rechterlijke machtigingen wordt vervangen door één zorgmachtiging. Anders dan de rechterlijke machtiging ziet deze machtiging niet louter op onvrijwillige opneming, maar in de eerste plaats op verplichte zorg. Een opneming is daarin één van de vormen van verplichte zorg die opgelegd kunnen worden. Opneming dient te geschieden in een accommodatie die op grond van het voorstel een door de minister van VWS aangewezen bouwkundige voorziening is met het daarbij behorende terrein, waar zorg en verplichte zorg kunnen worden verleend door of namens een zorgaanbieder. In de Wet verplichte ggz blijft er dus net als in de Wet Bopz een vergunningenstelsel bestaan, zij het dat het ook hier nadrukkelijk de bedoeling is dat meer zorgvoorzieningen in aanmerking komen voor een aanwijzing (*Kamerstukken II* 2009/2010, 32 399, nr. 3 p. 26). Volgens de memorie van toelichting kan ook een gebouw dat in stand wordt gehouden door een woningcorporatie maar dat bestemd is voor personen aan wie (thuis)zorg wordt verleend als accommodatie worden aangemerkt (*Kamerstukken II* 2009/2010, 32 399, nr. 3 p. 44).
21. Beide wetten creëren dus ruimere mogelijkheden voor (nieuwe) zorgvoorzieningen om in aanmerking te komen om cliënten op te nemen door middel van een onvrijwillige opname. Daarmee wordt de kans op onvrijwillige opnames op plaatsen waar de wet niet van toepassing is (veel) kleiner. Geen van beide voorgestelde regelingen sluit echter volledig uit dat een wilsonbekwame cliënt op grond van een beslissing van diens vertegenwoordiger wordt opgenomen in een zorgvoorziening die buiten de reikwijdte van de wet valt. In de Wet zorg en dwang is dit risico overigens kleiner dan in de Wet verplichte ggz, omdat een instelling zich op grond van de eerste wet eenvoudig kan registreren en de Inspectie voor de gezondheidszorg erop zou kunnen toezien dat dit voor alle zorgvoorzieningen waar een opname mogelijk is ook daadwerkelijk gebeurt. Omdat in de Wet verplichte ggz sprake is van een vergunningenstelsel, is

het hier minder gemakkelijk te realiseren dat alle instellingen waar ook een opname mogelijk is onder de reikwijdte van de wet vallen.
22. Het verdient tegen de achtergrond van het *Stanev*-arrest daarom aanbeveling dat de wetgever in de voorgestelde wetten alsnog aandacht schenkt aan deze problematiek en kritisch beschouwt op welke wijze de voorgenomen wettelijke kaders de toets die het EHRM in dit arrest heeft gehanteerd kunnen doorstaan. Dat zou bijvoorbeeld kunnen door wettelijk uit te sluiten dat iemand vanwege diens geestelijke stoornis of beperking anders dan door diens nadrukkelijke en weloverwogen toestemming kan worden opgenomen in welke voorziening dan ook, zonder dat daar een rechterlijke toets (hieronder kan ook worden begrepen een toets door een orgaan als het CIZ – zie hiervoor *H.M.* t. *Zwitserland*, reeds aangehaald) aan vooraf is gegaan.

L. Arends
Advocaat bij Dirkzwager advocaten en notarissen, sectie gezondheidszorg

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Europees Hof voor de Rechten van de Mens
24 Januari 2012, nr. 23592/07
(Björgvinsson (President), Garlicki, Hirvelä, Nicolaou, Bianku, Kalaydjieva, Vucinic)
Noot mr. dr. M. van den Brink

Bewegingsvrijheid. Recht om land te verlaten. Reisverbod. Europees burgerschap. Europese strafrechtelijke samenwerking.

[EVRM Vierde Protocol art. 2 lid 2]

De in Polen geboren maar in Frankrijk woonachtige Fransman Edmond Miażdżyk wordt in 2004 gearresteerd. Na een jaar voorarrest wordt hij weliswaar op vrije voeten gesteld, maar krijgt hij als preventieve maatregel in afwachting van zijn proces onder andere een verbod opgelegd om Polen te verlaten. De advocaat van Miażdżyk verzoekt negen maal tot opheffing van dit verbod, op de grond dat hij zo zijn drie kinderen, die in Frankrijk wonen, niet kan bezoeken. Elk van deze verzoeken wordt door de rechter verworpen. Volgens de rechter zou dit de toekomstige procesgang kunnen bemoeilijken. Bovendien, zo vindt de rechter, kunnen zijn kinderen hem ook in Polen bezoeken. In januari 2011 heft de rechter de beperking dan toch op. In juni 2011 verschijnt Miażdżyk na een bezoek aan Frankrijk voor de rechter.
Miażdżyk brengt in dit verband een klacht tegen Polen. Hij claimt dat de maatregel ten gevolge waarvan hij meer dan zes jaar Polen niet mocht verlaten, art. 2 lid 2 van Protocol 4 EVRM schendt. Dit artikel bevat ieders recht om welk land dan ook te verlaten. De Poolse overheid beweert dat het verbod om Polen te verlaten een rechtmatige en proportionele maatregel was gezien de complexiteit van de zaak en het algemene belang van de noodzaak dat een verdachte bij zijn proces aanwezig is. De advocaat van de verzoeker betwist de complexiteit van de zaak en wijst erop dat Miażdżyk meer dan zes jaar in een ander land moest blijven dan waar hij eigenlijk woonde. Het EHRM concludeert op basis van de context van de zaak dat het verbod om Polen te verlaten inderdaad art. 2 lid 2 van Protocol 4 EVRM schendt. Hoewel de duur van de maatregel op zichzelf niet voldoende is om vast te stellen dat er inbreuk is gemaakt op art. 2 lid 2 van Protocol 4, maakt het feit dat de verzoeker de Franse nationaliteit heeft en dat zijn kinderen en vrienden in Frankrijk wonen, evenals het feit dat het proces uiteindelijk kon plaatsvinden zonder de aanwezigheid van dhr. Miażdżyk, dat de door Polen ingestelde maatregelen buitenproportioneel zijn.

Miażdżyk
tegen
Polen

The Law

I. Alleged violation of Article 2 § 2 of Protocol No. 4 to the Convention
25. The applicant complained that a preventive measure imposed on him, namely a prohibition on his leaving Poland, which was in place for five years and two months (six years and two months when the one year of pre-trial detention prior to the prohibition on leaving Poland is taken into account) constituted a disproportionate restriction on his liberty of movement safeguarded in Article 2 § 2 of Protocol No. 4 to the Convention, which reads as follows:
"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.