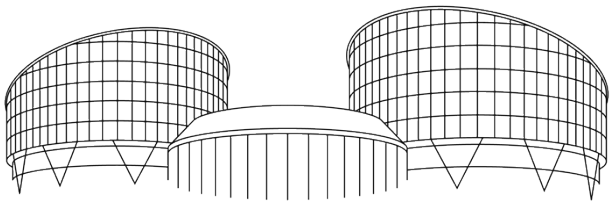

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33117/02
by Aleksandr Petrovich LASHIN
against Russia

The European Court of Human Rights (First Section), sitting on 6 January 2011 as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Giorgio Malinverni,
George Nicolaou, *judges,*
Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 29 July 2002,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Aleksandr Petrovich Lashin, is a Russian national who was born in 1960 and lives in Omsk. He is represented before the Court by Mr D. Bartenev, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr P. Laptev, former

Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

1. Deprivation of legal capacity

The applicant suffers from schizophrenia, which was first diagnosed in 1987. Between 1989 and 17 July 2000 he was hospitalised nine times in a psychiatric clinic. According to the Government, during that period the applicant lodged numerous complaints before various state bodies challenging his diagnosis and complaining of his confinement and the treatment he had received in the hospital.

On 5 April 2000 the applicant underwent an examination in the psychiatric hospital by a panel of doctors, who confirmed the previous diagnosis and concluded that the applicant was incapable of understanding the meaning of his actions and was unable to control them.

On 16 June 2000, following an application by the public prosecutor, the Kouybyshevskiy District Court of Omsk declared the applicant legally incapacitated due to his illness. The hearing took place in the absence of the applicant.

On 30 August 2000 the Omsk Regional Court upheld the decision of the District Court.

On an unspecified date the Public Health Department of the Omsk town municipality appointed the applicant's father as his guardian.

2. Attempts to restore legal capacity

On 2 October 2000 the applicant's daughter brought court proceedings seeking to return legal capacity to the applicant. Her request was supported by the applicant's father, his guardian. They claimed that the applicant's mental state had significantly improved. They requested that the court conduct a new psychiatric examination of the applicant's health and make a video recording of the examination.

On 27 October 2000 the court commissioned a psychiatric examination of the applicant. However, it refused to conduct a video recording of the examination procedure. As a result, the examination was not conducted due to the failure of the applicant to show up at the hospital.

On 19 March 2001 the Sovetskiy District Court of Omsk decided to confirm the status of legal incapacity and maintain the applicant's guardianship. The court noted that because the new expert examination could not be conducted due to the applicant's refusal to come to the

hospital, the results of the old examination were still in force. It appears that the decision of 19 March 2001 was not appealed against.

On 9 July 2001 the applicant's father (as guardian) instituted court proceedings challenging the medical report which served as grounds for declaring the applicant legally incapacitated, and seeking to declare the applicant *capax*. He also requested that the court commission a new psychiatric examination of the applicant's health and entrust the examination to an independent private medical institution.

On 26 February 2002 the District Court held a hearing in the absence of the applicant, having decided that:

> "... [the applicant's] mental condition prevented him from taking part in the hearing, and, moreover [the applicant's] presence would be prejudicial to his health".

The court also refused to commission a new expert examination by a private psychiatric clinic, on the ground that only State-run institutions were allowed by law to conduct such examinations and issue reports. The relevant part of the District Court judgment reads as follows:

> "... under Section 1 of the Psychiatric Care Act ... state forensic examination activity within the judicial proceedings is carried out by state forensic examination institutions, and consists of organisation and implementation of the forensic examination".

In conclusion the court found that the previous expert report was still valid, that the applicant continued to suffer from the mental disorder and that, therefore, his status of a legally incapacitated person should be maintained.

The applicant's guardian appealed to the Omsk Regional Court. According to him, he had had to introduce his appeal without having studied the materials of the case file kept in the District Court. On 24 January, 11 and 18 February 2002 the court had invited him to come to the court building to study the file. However, the court had refused to make photocopies of the documents in the case file, as requested by the applicant's guardian.

On 15 May 2002 the Omsk Regional Court upheld the judgment of 26 February 2002.

3. Confinement of the applicant in the psychiatric hospital

In 2002 the applicant's father, as guardian of the applicant, delivered a power of attorney to a third person, mandating that person to act in the name of the applicant. However, a notary public refused to certify the power of attorney, on the grounds that under domestic law a guardian should represent his ward personally and cannot entrust his duties to a third person. The applicant's father brought proceedings against the notary public before the court, but to no avail: on 10 October 2002 the Sovetskiy District Court of Omsk confirmed the lawfulness of the refusal.

On 2 December 2002 the applicant and his fiancée requested that the municipality register their marriage. According to the applicant, they received no reply from the municipality.

On 4 December 2002 the applicant was examined by a sector psychiatrist who concluded that the applicant suffered from "paranoid schizophrenia with paraphrenic delusion of reformism". The sector psychiatrist delivered a hospitalisation order, which strongly relied on the "nonsensical" complaints lodged by the applicant's representatives.

On 6 December 2002 the Guardianship Authority of the Omsk Region decided to strip the applicant's father of his status as the applicant's guardian. The decision was taken by the Guardianship Authority without hearing or seeing the applicant or his father.

On 9 December 2002 the applicant was taken to a psychiatric hospital, on the basis of the hospitalisation order. It is unclear how the hospitalisation was implemented; according to the applicant, he and his father opposed to the hospitalisation.

On the same day a panel of three doctors examined him and concluded that he should stay in the hospital. In their report, they mostly based their conclusions on the previous medical incidents involving the applicant which had led to his numerous hospitalisations and finally to the deprivation of legal capacity. The report stated that the worsening of the applicant's mental condition was demonstrated by his numerous complaints by which he had tried to reinstate his legal capacity and challenge the actions of the hospital.

On 10 December 2002, by order no. 329, the Public Health Authority of the Omsk town municipality approved the decision of the Guardianship Authority taken on 6 December 2002. From that moment on the applicant's father ceased to be his guardian. The applicant's father appealed against that decision, but to no avail – for more details about the appeal proceedings see below.

On 11 December 2002 the psychiatric hospital requested that the Kouybyshevskiy District Court authorise the further confinement of the applicant. On the same day the judge, in accordance with Section 33 of the Psychiatric Care Act, ordered that the applicant should be held in the hospital for such time as was necessary for the examination of his case. The provisional order issued by the judge was a one-sentence resolution on the hospitalisation order of 4 December 2002: "I hereby authorise detention [in hospital] pending the examination [of the case] on the merits".

Having been informed about that ruling, the applicant asked the hospital staff to release him for home treatment. However, the hospital staff refused to do so and prohibited him from seeing or talking to his relatives.

On 15 December 2002 the applicant lodged an application for release from the psychiatric hospital with the court. However, the judge informed the applicant by letter that the temporary placement of a patient in a

psychiatric hospital for a period of examination further to a hospital's request for extended confinement was not subject to judicial review.

On 17 December 2002 the District Court held a hearing in the presence of the applicant, the applicant's father, two representatives of the applicant, the public prosecutor, and a representative of the hospital. From the case file it appears that the participants and the judge himself were not aware that the applicant's father was no longer the applicant's guardian.

The applicant and his father opposed the hospitalisation. They insisted that the hospital had not proved the medical necessity for such a measure. The applicant and his father referred to a report of 1 July 2002 made by Doctor S., a psychiatrist, who, having examined the applicant, had found that his mental illness was not as serious as had been claimed by the doctors of the hospital. In order to clarify the matter, the applicant asked the court to commission a third medical examination of his mental health, in order to establish whether there was any aggravation of his mental state. The court, however, refused to grant that motion and conduct a new psychiatric examination. At the same time, the court admitted the applicant's medical file in evidence. At the end of the day the hearing was adjourned to 24 December 2002.

On 20 December 2002 the Guardianship Authority appointed the Omsk psychiatric hospital as the applicant's guardian and delivered an authorisation for extended confinement of the applicant in the hospital.

On 24 December 2002 the District Court, without holding a hearing, closed the proceedings on the grounds that the hospital, as the applicant's guardian, had revoked its request for authorisation of his confinement. The applicant's confinement was thus considered to be "voluntary", which did not require a court approval.

On the same day, the applicant's father and the applicant's fiancée asked the court to give them a copy of the decision in order to lodge an appeal. The judge refused on the grounds that the applicant's father, who was no longer the applicant's guardian, could not act on behalf of the applicant. As for the applicant's fiancée, the court also refused to consider her to be the applicant's representative.

Nevertheless, the applicant's father brought an appeal against the decision. On 10 February 2003 the Regional Court refused to examine the appeal on the grounds that the applicant's father had no right to represent his son and that no decision on the merits of the case had been taken by the first-instance court.

On 2 February 2003 the applicant's fiancée lodged a supervisory review appeal on the same grounds, which was returned to her without examination on 13 February 2003 on the basis that she had no power to represent the applicant.

In the following months the applicant's father and fiancée lodged several criminal-law complaints against the hospital and its doctors with various state authorities and the courts.

On 16 July 2003 the Kouybyshevskiy District Court of Omsk upheld the decision of the Guardianship Authority of 6 December 2002, as approved by the municipality on 10 December 2002. The District Court referred to the fact that the applicant's father had neglected his duties on many occasions and had tried to entrust the guardianship to a third party. The court also noted that the applicant's father had failed to secure appropriate medical treatment of the applicant, as prescribed by the applicant's doctors, as a result of which his condition had worsened.

According to the applicant, he lodged an appeal against that decision.

On 10 October 2003 the Guardianship Authority decided to appoint the applicant's daughter as his guardian. That decision was approved by the town municipality on 17 September 2003.

On 10 December 2003 the applicant was released from the town hospital. The medical report issued on the applicant's discharge (the "epicrisis") indicated that his mental health during his confinement had been predominantly characterised by similar "litigious" ideas as had presented at the time of his admission.

It appears that in 2006 the applicant's relatives brought court proceedings seeking to return the status of full capacity to the applicant. The Court has not been provided with any information about the outcome of those proceedings.

B. Relevant domestic law and practice

1. Legal capacity

(a) Substantive provisions

Under Article 21 of the Civil Code of the Russian Federation of 1994, any individual aged 18 or more has, as a rule, full legal capacity (*дееспособность*), which is defined as "the ability to acquire and enjoy civil rights, [and] create and fulfil civil obligations by his own acts". Under Article 22 of the Civil Code, legal capacity can be limited, but only on the grounds defined by law and within a procedure prescribed by law.

Under Article 29 of the Civil Code, a person who cannot understand or control his or her actions as a result of a mental disease may be declared legally incapacitated by a court and placed in the care of a guardian (*опека*). All legal transactions on behalf of the incapacitated person are concluded by his guardian. The incapacitated person can be declared fully *capax* if the grounds on which he or she was declared incapacitated cease to exist.

Article 30 of the Civil Code provides for the partial limitation of legal capacity. If a person's addiction to alcohol or drugs is creating serious

financial difficulties for his family, he can be declared partially incapacitated. That means that he is unable to conclude large-scale transactions. He can, however, dispose of his salary or pension and make small transactions, under the control of his guardian.

(b) Incapacitation proceedings

Article 258 of the Code of Civil Procedure of 1964, as in force at the material time (hereinafter "the old CCP"), established that members of the family of the person concerned, a prosecutor, a guardianship authority, and a psychiatric hospital, as well as "trade unions and other organisations", might apply to a court seeking to deprive a person of his legal capacity. The court, if there was evidence of a mental disorder, was required to commission a forensic psychiatric examination of the person concerned (Article 260). The case was required to be heard in presence of the person concerned, provided that his presence was compatible with his state of health, and also in the presence of the prosecutor and a representative of the guardianship authority (*орган опеки и попечительства*, Article 261 paragraph 2 of the old CCP). Under Article 263 of the old CCP, it was possible for legal capacity to be restored by a court decision upon an application of the guardian or the persons listed in Article 258, but not upon an application of the person declared incapacitated.

Article 75 of the old CCP provided that an expert examination had to be entrusted to "experts of the appropriate expert institutions or to other specialists appointed by the court. Any person having the appropriate knowledge to make [an expert determination] might be called [to testify before the court]."

Article 32 of the old CCP provided that a person declared incapacitated could not bring an action before the courts. His guardian was entitled to bring an action before the courts in order to protect the rights of the incapacitated person.

2. Confinement to a psychiatric hospital

The Psychiatric Care Act of 2 July 1992, as amended (hereinafter – "the Act"), provides that any recourse to psychiatric aid should be voluntary. However, a person declared fully incapacitated may be subjected to psychiatric treatment at the request or with the consent of his official guardian (Section 4 of the Act).

Section 5 (3) of the Act provides that the rights and freedoms of persons with mental illnesses cannot be limited solely on the grounds of their diagnosis or the fact that they have been subjected to treatment in a psychiatric hospital.

Under Section 5 of the Act, a patient in a psychiatric hospital can have a legal representative. However, pursuant to point 2 of Section 7, the interests

of a person declared fully incapacitated are represented by his official guardian.

Section 28 (3) and (4) of the Act ("Grounds for hospitalisation") provides that a person declared incapacitated can be subjected to hospitalisation in a psychiatric hospital at the request of his guardian. This hospitalisation is regarded as voluntary and does not require approval by the court, as opposed to non-voluntary hospitalisation (Sections 39 and 33 of the Act).

Section 37 (2) of the Act establishes the rights of a patient in a psychiatric hospital. In particular, the patient has the right to communicate with his lawyer without censorship. However, under Section 37 (3) the doctor may limit the patient's rights to correspond with other persons, have telephone conversations and meet visitors.

Section 47 of the Act provides that the doctors' actions can be appealed against before a court.

COMPLAINTS

Under Article 5 § 1 of the Convention the applicant complained that his confinement in a psychiatric hospital in 2002-03 had been unlawful in terms of domestic law and arbitrary in terms of the Convention.

Under Article 5 § 4 of the Convention the applicant complained that he had been unable to challenge his continuing confinement in the psychiatric hospital.

Under Article 8 of the Convention the applicant complained, in substance, about his incapacitation and the inability for him to have obtained an effective review of his status.

Under Article 12, taken in conjunction with Article 13 of the Convention, the applicant complained that he had been barred from registering a marriage with his fiancée and that he had not had effective remedies in this regard.

The applicant also presented other complaints, referring to Articles 2, 3, 4, 9, 10, 14 of the Convention and to Articles 2 and 3 of Protocol no. 4 to the Convention. These complaints related to the previous hospitalisation of the applicant, the alleged unfairness and outcome of the court proceedings initiated by the applicant and his relatives in connection with his treatment and his legal status, and about various limitations connected to his incapacitation and hospitalisations.

THE LAW

I. ARTICLE 5 OF THE CONVENTION

The applicant complained that his confinement in a psychiatric hospital was contrary to Article 5 §§ 1 (e) and 4 of the Convention, which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (e) the lawful detention of persons ... of unsound mind ...;
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The Government's submissions

The Government claimed that the applicant's rights under Article 5 of the Convention had not been violated.

1. Compliance with Article 5 § 1 of the Convention

As to the placement of the applicant in a psychiatric hospital in December 2002, the Government indicated that the applicant had been taken there on the request of the sector psychiatrist. Upon his arrival at the hospital the applicant had been immediately examined by a doctor who had been on duty. In the following forty-eight hours he had been examined by a panel of three psychiatrists. Following that examination the hospital had sent a hospitalisation request to the court. Consequently, his confinement had been requested and authorised in accordance with the domestic procedural rules established in the Psychiatric Care Act of 1992.

Furthermore, his further hospitalisation had been ordered in connection with the state of his health. The applicant's mental illness had been diagnosed on many occasions. Thus, according to the letter of the Ministry of Public Health and Social Development, the applicant had suffered from severe schizophrenia. The applicant had thus been incapable of understanding his actions or controlling them. Occasionally the applicant had been in remission, which, however, had not led to a stable improvement in his health. Towards the end of 2002 the applicant had suffered yet another deterioration of his mental condition. He had stopped taking his medicine and visiting the sector psychiatrist regularly. In such circumstances there had been a risk of further deterioration of his health without proper medical supervision and treatment. In such circumstances

the doctors, in accordance with the Psychiatric Care Act of 1992, had ordered the applicant's confinement against his will.

2. Compliance with Article 5 § 4 of the Convention

As to the legal remedies which had existed at the material time in connection with the applicant's confinement, the Government's submissions can be summarised as follows. The applicant's father had been stripped of his guardianship in accordance with the law. The further hospitalisation of the applicant had been requested by the hospital, which, as from 20 December 2002, had been appointed to act as the applicant's guardian. The proceedings concerning the applicant's confinement had been terminated because, after the appointment of the hospital as the applicant's guardian, his confinement had become, in domestic terms, voluntary. The first-instance court had examined the case on the merits because the judge had not been made aware by the parties of the decision of the Guardianship Authority by which the applicant's father had been stripped of his guardianship. Under the domestic law, the applicant had been able to act, including before the courts, albeit only through his guardian.

B. The applicant's submissions

1. Compliance with Article 5 § 1 of the Convention

The applicant maintained that he had been admitted to the mental hospital on 9 December 2002 against his will and against the will of his guardian. His psychiatric confinement on 9 December 2002 had probably been lawful in the sense of the formal compatibility with the procedural requirements of the domestic law, since he indeed suffered from a mental disorder. However, his disorder had not been of a kind or degree warranting compulsory confinement. It appears from the hospitalisation order that the psychiatrist had decided to forcibly confine the applicant in order to prevent him from lodging nonsensical complaints or even to punish him for doing so. The Government had provided no explanation as to why the applicant's reformist behaviour indicated a real threat of further worsening of the state of the applicant's mental health, if he is left without prescribed treatment. The hospital's psychiatric report had never considered other, less restrictive measures such as the possibility and efficacy of treating the applicant as an out-patient. The applicant had been detained in the mental hospital for a year. According to the medical report issued upon the applicant's discharge, his mental health during his detention had been predominantly characterised by the same litigious ideas as at the time of his admission. The Government had provided no explanation as to why the applicant had needed to remain in detention for a year against his will.

The applicant noted that as from 11 December 2002 his confinement had been authorised by the provisional detention order. However, the Russian Constitutional Court had held that a provisional detention order is not a judicial decision in constitutional terms, as a judge who issues it is not obliged to establish the validity of the grounds for hospitalisation. The judge had had no other option but to prolong the detention at that stage (decision of the Constitutional Court of the Russian Federation of 5 March 2009 no. 544-0-*P*). Furthermore, that order had not been subject to procedural guarantees. In particular, it had been issued by a court without hearing the applicant or his representative. Lastly, under Russian law its validity had been limited to five days, however, the applicant had been detained pursuant to that provisional order at least until 20 December 2002, when his further confinement had been authorised by the Guardianship Authority.

As regards the applicant's detention from 20 December 2002 onwards, the applicant noted that, formally speaking, the applicant's hospitalisation had become voluntary: it had henceforth been based on the decision of his guardian. However, in the applicant's view, a consent by an administrative body such as the Guardianship Authority could not substitute for a judicial decision because, firstly, it would have been issued without hearing the applicant, and, secondly, its effect would have been unclear under the legislative framework in force at the material time. Accordingly, the applicant submitted that his detention had not been authorised by a court and, therefore, had clearly been arbitrary: his objection to the hospital placement had been ignored and the consent of the hospital – the detaining authority – had been considered sufficient for indefinite detention by domestic law.

The applicant further submitted that, under the Russian law, if the hospitalisation is continued beyond six months, the examination should take place at least once every six months. It is not evident from the Government's submissions and from the documents appended thereto that the applicant had been regularly examined by a panel of psychiatrists in order to decide on the need for his continued confinement, and thus that the procedure prescribed by domestic law had been followed in this regard.

2. Compliance with Article 5 § 4 of the Convention

The applicant noted that, even though he had expressly objected to his hospitalisation, he had been detained in the hospital without a court order on the basis of the consent of his guardian – the mental hospital itself. He could have applied for release or complained about the actions of the medical staff only through his guardian. In other words, the detaining authority had become the applicant's guardian by virtue of law and had thus acquired an unrestricted discretion to decide on the continuation of the applicant's detention in the hospital. As for the procedures available under Sections 47 and 48 of the Psychiatric Care Act regarding complaints against the actions

of medical professionals, they could not have been regarded as effective remedies for the same reasons.

C. The Court's assessment

The Court considers, in the light of the parties' submissions, that the above complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court therefore concludes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

II. ARTICLE 8 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 13 THEREOF

Under Article 8 of the Convention, the applicant complained, in substance, about his incapacitation and his inability to obtain an effective review of his status. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Court deems it appropriate to examine this complaint also under Article 13 of the Convention, which reads as follows:

> "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. The Government's submissions

The Government indicated that the applicant had been deprived of his capacity on 30 August 2000, whereas his application with the Court had been lodged on 29 July 2002. Therefore, in the opinion of the Government, the applicant had missed the six-month time-limit provided for by Article 35 § 1 of the Convention.

On the merits, the Government admitted that a deprivation of legal capacity would constitute an interference with the private life of the person concerned. However, in the applicant's case it had been done in order to protect the interests of other people. Such a limitation of his rights had been provided for by Article 29 of the Civil Code and had therefore been

"lawful". The court decision by which the applicant had been recognised as legally incapacitated had been taken on the basis of the psychiatric report of 5 April 2000. The decision to deprive him of legal capacity had been taken *in absentia* because the applicant had been in a psychiatric clinic at that time and his appearance before the court could therefore have been prejudicial to his health. The option of taking a decision without seeing the person concerned had been provided for by Article 261 of the Code of Civil Procedure. The case had been heard by courts at two levels of jurisdiction, which had both concluded that the applicant's illness warranted the deprivation of his legal capacity.

B. The applicant's submissions

The applicant admitted that the issue of compliance with the Convention of the original incapacity decision of 16 June 2000 as upheld on appeal on 30 August 2000 fell outside the scope of the present application on the basis of the "six-month rule". However, the Russian Civil Code provides in Article 29 point 3 that if the grounds causing a citizen to have been recognised as legally incapacitated have ceased to exist, the court shall recognise him as *capax*. The final decision in this respect had been the decision of the Omsk Regional Court of 15 May 2002 upholding the judgment of the Kouybyshevskiy District Court of 26 February 2002. Thus, the applicant's arguments had been limited to the proceedings concerning the restoration of his capacity.

On the merits, the applicant's submissions can be summarised as follows.

1. Procedural safeguards

The applicant argued that the decision of 26 February 2002 had been procedurally flawed from both the point of view of domestic law and the Convention.

Thus, the judge had made the decision to remove the applicant from the hearing without giving any explanation as to why the applicant's mental health prevented him from participating in the hearing in person. There had been no indication that the applicant was aggressive or incapable of understanding the nature of the proceedings.

The applicant further stressed that the original incapacity judgment of 16 June 2000 had been devoid of any legal reasoning as to why the district court had decided to deprive the applicant of his legal capacity. The 16 June 2000 judgment bluntly stated that the court had agreed to the expert report, which had concluded that the applicant had schizophrenia and therefore could not understand the meaning of his actions and control them. The applicant acknowledged that he had suffered from some psychiatric problems in the past. However, it had been evident from the case documents that despite his diagnosis he had been a relatively independent person.

Therefore, it had been especially important for the judge who was required to decide on the restoration of the applicant's capacity in the 2002 proceedings to form a personal opinion about the applicant's mental capacity.

The applicant further noted that during the 2002 proceedings the applicant's representatives had requested that the district court commission a panel of experts from the Independent Psychiatric Association of Russia in order to conduct an assessment of the applicant's mental capacity. The court had dismissed this application because in the court's view the law did not allow private entities to perform such assessments. In this regard, the court had referred to the Federal Law on State Forensic Expert Activities in the Russian Federation. However this Act had explicitly stated in Section 41 that "in accordance with the norms of the procedural legislation of the Russian Federation, a forensic expert assessment may be performed outside state forensic institutions by persons possessing special knowledge... and who are not state experts". Moreover, Article 75 of the old CCP had provided that an expert assessment should be performed by experts of the relevant institutions or by other specialists appointed by the court.

The applicant also stressed that, having rejected the request to commission an independent panel of experts, the district court had not instituted any other expert assessment of the applicant's mental capacity. The only state expert psychiatric institution in the Omsk Regional had been the Omsk Regional Clinical Mental Hospital – whose actions the applicant had challenged in the proceedings in question and which had previously sought the incapacity judgment in 2000 by applying to the prosecutor's office. Thus it would have been contrary to the principle of equality of arms to appoint experts from the respondent hospital to assess the applicant's mental capacity. However the court could have appointed a different state institution.

2. Substantive findings of the domestic courts; legislative framework

As to the substance of the domestic decisions, the applicant claimed that the district court had failed to assess an actual improvement in his mental capacity and tailor the measure of protection according to the individual needs of the applicant. His full incapacitation had not been justified in the circumstances, even though he had been suffering from a mental disorder.

The applicant recalled that he had been entirely deprived of his legal capacity according to Article 29 of the Civil Code, i.e. on the sole basis that he had suffered from a mental disorder. In the 2002 proceedings the judge had simply restated the conclusion of the 2000 expert report and the incapacity judgment without establishing the actual mental capacity of the applicant at the time of the hearing concerning the restoration of his legal capacity. Thus, in the court's view, a mere diagnosis of mental disability had been enough to strip the applicant of all his fundamental rights. The

judge had not examined the actual capacity of the applicant in any meaningful way in order to establish whether his mental health still prevented him from understanding the meaning of his actions and from controlling them. In any event, the existing legislative framework had not left the judge any other choice than to declare the person concerned fully incapacitated. The Russian Civil Code had distinguished between full capacity and full incapacity, but had not provided for any borderline situation, other than for drug or alcohol addicts.

As regards the issue of exhaustion of domestic remedies for obtaining redress for an alleged violation of Article 8 of the Convention, the applicant reiterated that, as a person deprived of his legal capacity, he had been and still is prohibited by law from directly applying to the courts, including for the purpose of restoring his legal capacity. Since an application to the courts in order to have his capacity restored had not been an effective remedy, the applicant was not required to use it in accordance with Article 35 of the Convention. In this regard, the applicant submitted that his inability to initiate a court hearing in order to have his legal capacity restored is a continuous violation and therefore that the six-month time-limit does not apply. Nevertheless the applicant's guardian had appealed against the 26 February 2002 judgment but with to avail, as the appeal had been rejected by the Omsk Regional Court on 15 May 2002.

C. The Court's assessment

Having examined the Government's plea that the application in this respect is out of time, the Court recalls the following. The six-month time-limit, established in Article 35 § 1 of the Convention, starts running from the date of a "final decision" in the case. Where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (*Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Nonetheless it has been said that the six-month time-limit does not apply as such to continuing situations (see, for example, *Agrotexim Hellas S.A. and Others v. Greece*, no. 14807/89, Commission decision of 12 February 1992, DR 71, p. 148, and *Cone v. Romania*, no. 35935/02, § 22, 24 June 2008); this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end.

The Court notes that, indeed, the incapacitation decision of 2000 was taken outside the six-month time-limit, and henceforth, the Court cannot examine that decision as such. However, as follows from the applicant's submissions, he was aware of that fact and did not ask the Court to review the decision of 2000. The applicant's main concern was the ensuing

continuing situation which persists to the present date. In particular, the applicant claimed that he had been and remained unable to institute proceedings aimed at the restoration of his capacity by himself, and that, in any event, the Russian law in its current state could not provide him with another solution that would be more adapted to his personal situation. The applicant also complained about the defects in the proceedings ended with the decision of the Omsk Regional Court of 15 May 2002, in which his father had tried to restore the applicant's capacity.

In such circumstances it is possible to conclude that insofar as the applicant's complaint concerned the proceedings ended in 2002 and the continuing situation of his legal incapacity and inability to review his status, the application was introduced within the six-month time-limit. The Government's objection should, therefore, be dismissed.

The Court considers, in the light of the parties' submissions, that the complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that the complaints under Article 8 and 13 are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

III. ARTICLE 12 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 13 THEREOF

The applicant complained that he had not been able to register a marriage with his fiancée and had not had effective remedies in this regard. Article 12 (right to marry) of the Convention, referred to by the applicant, reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

A. The Government's submissions

As to the impossibility of the applicant forming a family and registering a marriage with his fiancée, the Government noted that the right under Article 12 of the Convention can be exercised only in compliance with domestic law. The Family Code of the Russian Federation of 1995 provides that legally incapacitated people cannot form a family. That limitation is justified by two reasons: firstly, it is impossible to establish the genuine will of an incapacitated person who wants to marry; and secondly, mentally ill people often give birth to mentally ill children. Therefore, the law defends the interests of other people. The Government also indicated that the applicant's fiancée could have challenged the refusal to register her marriage with the applicant if she had considered that it had been unlawful.

The Government also indicated that there had been no record that the applicant had ever lodged a request for the registration of his marriage with the municipal authorities. The Government further submitted that the applicant had not exhausted domestic remedies as required by Article 35 of the Convention in order to challenge the denial of marriage license to him. The Government concluded that the applicant had not exhausted domestic remedies in respect of his complaint under Article 12, whether alone or taken in conjunction with Article 13 of the Convention.

B. The applicant's submissions

The applicant maintained that he and his fiancée had demonstrated their intention to exercise their right to marry. Thus, on 2 December 2002 they had applied to the Omsk City Administration in order to register their marriage. In her letter to the guardianship council on 27 January 2003, the applicant's fiancée had requested that the council appoint her as a guardian for her husband Mr. Lashin. In their letters of 28 July 2002 and 25 July 2003, the applicant and his fiancée had informed the Court of their desire to enter into marriage. However, Article 14 of the Russian Family Code places a blanket prohibition on the right to marry between people if one of them has been declared legally incapacitated due to a mental disorder. The applicant submitted that a blanket ban on the right to marry imposed under Russian law on a category of individuals who are formally legally incapacitated is arbitrary and disproportionate.

The applicant disagreed with the Government's assertion that any person under guardianship is, in general, unable to make responsible choices about his or her matrimonial relations.

Firstly, guardianship affects a large number of the Russian population of marriageable age. However a distinction ought to be made between full legal incapacity as a formal status – which is based on a judicial decision – and full legal incapacity as a factual status. The applicant submitted that his case demonstrated that although he had suffered from a mental disorder potentially warranting some measure of support or protection, he had obviously had the factual capacity to understand complex issues and make personal decisions in the sphere of family relations.

Secondly, in incapacity proceedings, courts in Russia are not required to assess the capacity of the individual concerned to enter into family relations, and prohibition of marriage automatically follows any finding of legal incapacity.

With regard to the second argument of the Government, regardless of the ethical implications of such a suggestion, the applicant submitted that it was hard to see how a legal prohibition on marriage would prevent disabled people from procreating.

In the applicant's case the Government had referred to the need to protect the rights and interests of others as a sufficient reason for prohibiting all persons under guardianship from entering into marriage. However, in the applicant's view, this had not been a sufficiently weighty reason for the blanket restriction, as the aim of protecting the rights of others may be achieved by means of less restrictive measures already incorporated in the finding of legal incapacity, such as restrictions on managing property or finances.

The applicant also claimed that there had been no effective remedy available to him with regard to the violation of his right to marry because, firstly, such a prohibition existed in the law and, therefore, it could not have been challenged through ordinary court proceedings; and secondly, the applicant as a legally incapacitated person had been prohibited by law from applying to the courts. The applicant's guardian had had the right to apply to the court on the applicant's behalf. However, for the reasons explained above, that could not have been regarded as an effective remedy because it had not been directly accessible to the applicant and had depended on the discretion of another person.

C. The Court's assessment

The Court notes that the Government forwarded an objection on non-exhaustion and, at the same time, claimed that the applicant had had an effective remedy within the meaning of Article 13 of the Convention in connection with his claim that the impossibility for him to conclude a marriage breached Article 12 of the Convention. The Government's formal objection under Article 35 § 1 is therefore closely linked to their objections on the merits of the application in this part. It is therefore more appropriate to consider them together. The Court therefore decides to join this objection to the merits.

The Court considers, in the light of the parties' submissions, that the complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

IV. OTHER COMPLAINTS

Lastly, the Court notes that the applicant presented a number of other complaints under the Convention, summarised in the "Complaints" section above. Having examined the materials in its possession, and insofar as the matters complained of are within its competence, the Court finds that those complaints have not been sufficiently made out and do not disclose any

appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Joins to the merits the Government's objection concerning non-exhaustion of domestic remedies by the applicant in respect of his complaints under Articles 12 and 13 of the Convention;

Declares admissible, without prejudging the merits, the applicant's complaints under Article 5 §§ 1 and 4 of the Convention, relating to his confinement in a psychiatric hospital in 2002 – 2003; under Article 8 of the Convention, taken in conjunction with Article 13 thereof, relating to his legal incapacity and the court's refusal to restore his legal capacity in 2002 and his inability to obtain a review of his incapacity status; under Articles 12 of the Convention, taken in conjunction with Article 13 thereof, relating his inability to register a marriage with his fiancée and the absence of effective remedies in this regard;

Declares inadmissible the remainder of the application.

Søren ***Nielsen***
Registrar

Christos ***Rozakis***
President