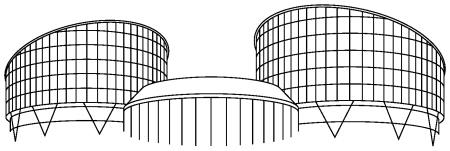

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ČERVENKA v. THE CZECH REPUBLIC

(Application no. 62507/12)

JUDGMENT

STRASBOURG

13 October 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Červenka v. the Czech Republic,

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

Mirjana Lazarova Trajkovska, *President,*
Ledi Bianku,
Kristina Pardalos,
Aleš Pejchal,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 20 September 2016,

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

PROCEDURE

1. The case originated in an application (no. 62507/12) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Jaroslav Červenka ("the applicant"), on 29 September 2012.

2. The applicant was represented by Ms Z. Durajová and Mr R. Cholenský, lawyers practising in Brno. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm.

3. The applicant alleged, in particular, that his right to liberty and to respect for his private life had been violated on account of his involuntary placement in a social care institution.

4. On 10 December 2012 the application was communicated to the Government. The applicant and the Government each submitted observations on the admissibility and merits. In addition, third-party submissions were received from the Bazelon Center for Mental Health Law and the Centre for Disability Law and Policy, which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Prague.

A. The applicant's legal capacity

6. In a judgment of 25 January 2005 the Prague 4 District Court (*obvodní soud*), relying on Article 10 § 1 of the Civil Code, deprived the applicant of legal capacity. Based on an expert opinion and the testimony of the applicant's father, the court concluded that the applicant was suffering from alcoholic dementia, which was a permanent mental disability, and that he was unable to perform any legal acts on his own. The applicant was represented by a guardian *ad litem* and was therefore not heard by the court, which found that it appeared from the expert opinion that he was unable to understand the relevance of the proceedings. For the same reason, the court dispensed with the delivery of the judgment to the applicant.

7. In a decision of 21 April 2009, which became final on 21 July 2009, the District Court appointed the Prague 11 Municipality Office (*městská část*) as the applicant's public guardian (*veřejný opatrovník*).

8. The applicant has attempted to regain his legal capacity several times, but his requests have always been refused. On 4 March 2010, refusing another request to restore legal capacity to the applicant, the District Court banned him from lodging further requests for one year because there was no possibility of his condition changing within that period. It relied on an expert opinion of 5 January 2010, which stated, *inter alia*:

> "[the applicant] presents a picture of a chronic alcoholic in the terminal stage of alcoholism, with complete loss of control over drinking, complete lack of awareness of his illness, severe and irreversible damage to his health fully or partially caused by alcohol abuse and social and economic downfall which, in addition to his complete lack of awareness, also indicates serious personality changes objectively caused by detected brain atrophy.
>
> ...
>
> [I]t is a long-lasting disorder which cannot be completely repaired even by treatment that is fully successful. ...
>
> [L]oss of control over drinking and complete lack of awareness regarding alcohol abuse and its consequences result in a high probability of the repetition of previous relapses and, therefore, in behaviour which could, for similar reasons, pose a threat to the financial, social and personal stability of the person examined."

9. In a judgment of 16 October 2012 the District Court, having examined an expert report and heard the expert and the applicant, decided to limit the latter's legal capacity to act. It restricted his legal capacity so that he was not entitled to dispose of funds and conclude contracts exceeding 500 korunas (CZK) (18 euros (EUR)) per month. The court noted that according to the expert report, the applicant was suffering from mixed organic dementia up to intermediate level and with a continued lack of awareness of his state of health. In addition, he was unable to make more complex legal decisions independently. The applicant lodged appeals on 1 and 13 November 2012.

10. The Prague Municipal Court (*městský soud*) scheduled a hearing for 4 April 2013 and summoned the applicant. However, his lawyer was not informed about the hearing because his public guardian had refused to sign the power of attorney and so none of the courts recognised the lawyer as the applicant's legal representative. The court subsequently cancelled the hearing and remitted the case to the District Court, which on 3 June 2013 assigned a new guardian to the applicant. The new guardian granted the power of attorney to a lawyer to represent the applicant in the proceedings on legal capacity.

11. On 8 August 2013 the Municipal Court quashed the judgment of 16 October 2012 and sent the case back to the District Court which in a judgment of 12 June 2014 decided to limit the legal capacity of the applicant, for a period of twelve months, so that he was not entitled to dispose of funds exceeding 1,500 CZK (EUR55) per week.

12. On 30 July 2015 the District Court initiated *ex officio* the proceedings on legal capacity and guardianship. At the same time, it ordered an expert opinion in psychiatry. It appears that the proceedings are still ongoing.

B. The applicant's state of health, his transfer to the social care home in Letiny and court proceedings instituted by his lawyers

13. The applicant was admitted to the Prague-Bohnice psychiatric hospital seven times: in 2004 (for two weeks); in 2005 (for two weeks); in 2006 (for four and a half months); in 2007 (for two months); in 2008 and 2009 (for six and a half months); in 2009 (for three weeks); and during 2009 and 2010 (for thirteen months).

14. The applicant's hospital discharge report of 11 October 2010 stated, *inter alia*, that he had been suffering from a mental and behavioural disorder caused by alcohol, that he was an alcoholic and that he had repeatedly experienced *deliria tremens*.

15. In the record of a telephone conversation between the applicant's public guardian and a neighbour on 11 November 2011 it was noted, *inter alia*, that complaints about the applicant had been escalating, as he had been causing disturbance at night as a result of his excessive drinking and had been urinating on the stairs.

16. Another record of a telephone conversation between the public guardian and the applicant on 6 December 2010 stated, in particular, that the applicant had confirmed that he had not taken any of the medication prescribed to him by the psychiatrist.

17. During a conversation with the applicant's public guardian on 10 January 2011 the applicant's son said that his father had always kept many animals and that his treatment of them was bordering on cruelty because he did not feed them. He also allowed them in his bed, and as a

result the bed was drenched and smelled foul. Moreover, the carpets and other furnishings in the flat were dirty and badly damaged.

18. On 17 January 2011 the public guardian urged the applicant not to yell at passers-by. The applicant replied that he was a psychologist and teacher, and practised communication with people in that way.

19. On 19 January 2011 Dr M.P. mentioned that the applicant was suffering from repeated alcohol abuse, alcohol-related cognitive impairment and alcoholic dementia. He was an alcoholic who did not cooperate and was unaware of his alcohol abuse.

20. On 21 January 2011 the applicant's neighbours complained to the public guardian that the applicant was disturbing them at night, that an unbearable smell was exuding from his flat, that he had been urinating on the stairs and kept falling down when drunk, and that the situation was continuously getting worse.

21. On 31 January 2011 the public guardian received another telephone call from the applicant's neighbour complaining about the behaviour of the applicant, who had been drunk, towards herself and her child. The neighbour said that she was afraid of him. On the same day, the applicant's parents visited his public guardian to try to resolve the problematic situation relating to the applicant's inappropriate behaviour. They expressed the view that the best solution would be their son's placement in a specialised institution, such as the social care home in Letiny, as other institutions in Terezín or Sýrovice were not available. The social care home in Letiny is a private institution.

22. On the same day, the applicant, in a state of drunkenness, visited his public guardian. From the record of the visit it appears that the applicant was unable to express himself coherently.

23. In his report of 4 February 2011 the treating psychiatrist noted, in particular, that the applicant was suffering from a psychosomatic disorder, namely alcoholic dementia.

24. On 7 February 2011 the applicant's guardian accompanied the applicant to the social care home in Letiny, a limited liability company. There she signed an agreement on the provision of residential social services to the applicant for an unlimited period of time and the applicant was admitted to the home.

25. The applicant's guardian noted on the same day that the applicant's parents could no longer take care of him; his mother had apparently talked to her son about his placement in the institution in advance, and after some hesitation, the applicant had agreed to be transferred there. It was noted, however, that he did not want to go to the institution, but having talked with his guardian about rehabilitation and medical care, he eventually agreed.

26. In a letter of the same date received by the District Court on 10 February 2011, the Municipal Office informed the court about the applicant's placement in the social care home. They maintained that the

placement had been necessary because he had been spending most of his money on alcohol, he had spent most of his time sitting on a bench in front of his house verbally harassing passers-by, he had been unable to dress appropriately and sometimes he had been too drunk to receive his lunch, which had been brought to his door every day. Moreover, he had been making an excessive number of visits to doctors, requesting various examinations of his brain, thumb, knee, eyes and so on. He had also been sending confusing allegations to various institutions, such as courts, ministries and animal rights organisations.

27. The applicant disagreed with his placement and contacted a number of authorities, including his public guardian. On 28 March 2011 he also called an emergency line and contacted the police, who dismissed his complaint, not finding any unlawfulness.

28. On an unspecified date the District Court telephoned the Municipal Office for more information about the applicant's placement in the social care home. The Municipal Office answered by letter on 2 May 2011, repeating the reasons set out in its submission of 7 February 2011 and informing the District Court that the applicant had been placed there for an indefinite period as he was no longer able to live on his own.

29. On 11 February, 6 May and 1 June 2011 the applicant informed the District Court that he was being held in the social care home against his will and demanded his release. In his application to the court of 5 May 2011 he complained against his public guardian and asked that she be replaced by another person living near his domicile. The District Court did not react to any of his requests.

30. On 19 May 2011 the applicant sent a letter to the director of the social care home and to his public guardian alleging that he had been placed in the social care home involuntarily. The applicant's guardian did not react to the letter. The director replied that given that the public guardian and the doctor had consented to his placement in the social care home, he had to remain there.

31. On 21 July 2011, after having been contacted by the applicant, a lawyer from the Mental Disability Advocacy Centre (*Centrum advokacie duševně postižených*) (hereinafter "the MDAC") in Brno visited him in the social care home. The applicant signed a power of attorney authorising the lawyer to act on his behalf. On 25 July 2011 the lawyer sent a request for the applicant's immediate release to the director of the social care home and to the public guardian. The director replied on 28 July 2011 that the applicant's placement was legal as he had been deprived of legal capacity and his guardian had given consent to it. On 3 August 2011 the applicant received a similar answer from his public guardian, who considered the power of attorney signed by the applicant as invalid, given that he had been deprived of his legal capacity.

32. On the same date, the applicant's lawyer requested the Plzeň-jih District Court (*okresní soud*) to issue a decision on the lawfulness of his client's involuntary hospitalisation under Article 191a of the Code of Civil Procedure. As the court did not react, on 16 August 2011 the applicant's lawyer lodged a request with the Plzeň Regional Court (*krajský soud*) to set a time-limit for a procedural measure under section 174a of the Courts and Judges Act (no. 6/2002).

33. From 2 to 16 August 2011 the applicant was hospitalised at the Mulačova hospital in Plzeň for planned orthopedic surgery.

34. The public guardian's records of 17 and 18 August 2011, respectively, indicated the following:

> "I talked on the phone with [the senior nurse]. She stated that she would try to transfer [the applicant] to a rehabilitation institution but afterwards they do not want to take him back. She informed me about it in order to give us the possibility to look intensively for another institution."

> "The director of the [social care] institution ... informed me on the phone that he had been in touch with the legal department about how to cancel the agreement and he had established that it was not possible. He is therefore sending me a letter informing me that [the applicant] is unhappy and that they want to discharge him. He stated that they were worried that [the applicant] might jeopardise the functioning of the whole institution because he lied and verbally attacked employees and constantly annoyed them by sending sms. In answer to the question what the position of the psychiatrist is..., he said that she had not allowed [the applicant] to go for walks without assistance and she considered his state of health poor."

35. On 23 August 2011 the applicant was transferred to the Horažďovice Convalescent Home – Long-term Care Hospital (*Nemocnice následné péče – Léčebna dlouhodobě nemocných*).

36. On 23 August 2011 the applicant's lawyer lodged a request with the Municipal Court through the Prague 4 District Court arguing that the guardianship court, namely the Prague 4 District Court, had been inactive in the matter of his client's detention and had not initiated guardianship proceedings (*opatrovnické řízení*) seeking to solve the conflict of interests between the applicant and his public guardian. He argued that the guardianship court should have informed the relevant court, namely the Plzeň-jih District Court, about the applicant's involuntary hospitalisation so that proceedings on its lawfulness could have been instituted. Furthermore, the guardianship court itself should have instituted proceedings to supervise the applicant's public guardian under Articles 178 § 1 and 193 § 3 of the Code of Civil Procedure.

37. On the same day, the applicant lodged a constitutional appeal (*ústavní stížnost*) alleging that his rights to respect for his private life, to liberty, freedom from discrimination and a fair trial had been violated by the procedure pursued by the Municipal Office and the Prague 4 District Court on account of his detention in the social care home. He argued that the Municipal Office had violated those rights by placing him in the social care

home without his consent and the District Court by remaining inactive in the face of the situation. He also requested the Constitutional Court (*Ústavní soud*) to issue an interim order for his release from detention.

38. On 19 September 2011 the Municipal Court decided not to undertake any action on the applicant's request of 23 August 2011 because the power of attorney submitted by his lawyer was invalid on account of the applicant's lack of legal capacity to sign it and because his public guardian had informed the court, on 16 September 2011, that she would not join the proceedings.

39. On 27 September 2011 the public guardian terminated the agreement with the social care home. The applicant was not informed about this in advance. The applicant, who was at that time hospitalised in the Horažďovice Convalescent Home – Long-term Care Hospital (see paragraph 35 above), was discharged from the hospital on the same day. The discharge report issued by the hospital also contained information about his mental state:

> "Current mental state:
>
> ...
>
> Suspicion – but in his case legitimate – indicated paranoia in respect of his guardian and her behaviour, or family members ...
>
> [His] mood reactively depressive, ...
>
> Intellect abilities [are] entirely without signs of degradation, humiliation let alone a sign of dementia! ...
>
> From the current mental state of the applicant, it does not appear that there is any need to continue limiting him in his fundamental human rights and limiting his capacity to act.
>
> Conclusion:
>
> Behaviour disorder when using alcohol – psychotic residual disorder and later on ethylic encephalopathy, dementia ...
>
> The 55 year old patient, who has a history of behavioural disorders when drinking alcohol, was admitted for rehabilitation after surgery to his right foot. ... As he repeatedly demands a review of his situation and refuses to stay in Letiny, a psychiatric consultation was carried out. The problems were discussed with his guardian ... according to whose recommendation [the applicant] told workers in Letiny, upon [their] information, his discharge is planned with home care, and psychiatric supervision is ensured.
>
> ..."

40. On 4 October 2011 the Regional Court rejected the applicant's request of 16 August 2011, holding that his lawyer had not been authorised to lodge such a request. The applicant's signature on the power of attorney was invalid as he had been deprived of legal capacity (see also paragraph 32 above). The court added:

"Even if there were not those reasons to reject the claim, it would not be possible to grant [it]. ... It is not possible to set a time-limit to carry out an act – the issuance of a decision on the commencement of the proceedings – if that act depends on the discretion of a court which is not obliged to decide on the commencement of proceedings but is doing so on the basis of a motion. ..."

41. On 12 October 2011 the Ombudsman (*Veřejný ochránce práv*) issued a report in response to a letter from the applicant dated 29 April 2011. The report stated, *inter alia*:

"The applicant was also prescribed psychiatric medication, both regular and in the event of 'unease' ... It appears however that the medication 'in the event of unease' has not yet been administered to the applicant. In answer to a question concerning medication in general, the applicant stated that before his admission to the institution, he had not taken any medication. In reply to a question as to what would happen if he refused to take the medication, he answered that he had asked this question to a male nurse, who had said that in that case the medication would be administered to him by injection. For this reason the applicant did not refuse the medication. Only on one occasion did he express the wish not to take a certain medicine and the doctor of the institution prescribed him another drug, which he had not taken before either.

...

The public guardian ... made a mistake when she 'placed' the applicant in the institution without having previously received the approval of the guardianship court.

...

If the court does not approve an act as legal, the act is void *ab initio*. In respect of some acts that have already been carried out, a subsequent 'disapproval' by the court could not lead to an effective reparation, and it is evident that [those acts] require the approval of the court before [their accomplishment] ...

In my opinion, legal acts connected with the involuntary placement of an incapacitated person in a social care institution are of such character and thus require prior approval, provided that there is enough time.

...

Apart from the fact that the provisions of the civil law require that the legal act – the conclusion of the contract on provision of residential social services – be approved by the court, another requirement of generally binding rules, or more precisely the commitments of the Czech Republic under international law, cannot be overlooked, i.e. Article 5 § 4 of the Convention ...

...

[In the applicant's case], in order to comply with the Convention, the Czech Republic ... guarantees ... the right to institute proceedings in which the court would speedily decide on the lawfulness of the deprivation of liberty and order the [applicant's] release if the deprivation of liberty is unlawful.

...

Accordingly, in the case of admission of a person who is deprived of legal capacity to a medical institution, which he is not allowed to leave, the detention procedure should be initiated as provided for by Article 191a of the Code of Civil Procedure, despite the possible approval of the guardian. ..."

42. On 25 October 2011 the Prague 11 Municipal Office, in reaction to the findings of the Ombudsman, requested the District Court to approve the agreement signed by the public guardian on the provision of residential social services of 7 February 2011.

43. In a judgment of 10 November 2011 the District Court approved *ex post facto* the agreement signed by the public guardian and the termination of the applicant's confinement in the social care home. The reasoning merely stated that the approval of those legal acts was in accordance with the law and in the interests of the applicant. The decision became final as the guardian *ad litem*, the Prague 4 Municipal Office, waived its right of appeal. The applicant was not summoned to appear before the court in those proceedings, which lasted only ten minutes; nor was he informed about them.

44. On 28 November 2011 the applicant lodged a second constitutional appeal challenging the decisions of the Prague Municipal Court of 19 September 2011 and the Plzeň Regional Court of 4 October 2011, the procedural measures taken by the Prague 4 District Court and the Plzeň-jih District Court and, lastly, the practice of the Prague 11 Municipal Office. He developed, in the reasoning of the constitutional appeal, his complaints regarding the alleged interference with his rights to respect for his private life, home and correspondence during his stay in the social care home without, however, mentioning them in his final plea (*žalobní petit*).

45. On 28 March 2012 the Constitutional Court rejected the applicant's first constitutional appeal. Regarding his request for an interim order, it held that as he was no longer being detained, it had no power to assess the alleged violations because they had already ceased. The same applied in respect of the procedural steps taken by the Prague 11 Municipal Office and by the Prague 4 District Court, as the District Court, in its judgment of 10 November 2011, had approved the agreement concluded with the social care home by the public guardian and the latter's termination of the agreement. The Constitutional Court referred to a previous decision (no. IV. ÚS 1348/09) in which it had declared manifestly ill-founded a complaint that a court had not carried out a review of lawfulness under Article 191a of the Code of Civil Procedure when a legally incapacitated person had been detained with the consent of his guardian. The Constitutional Court's decision was notified to the applicant's lawyers on 30 March 2012.

46. In a report of 4 April 2012 by I.K., the psychiatrist treating the applicant, it is noted, *inter alia*, that since the applicant's discharge from the social care home he had not been attending for regular check-ups and had refused to take any medication with the exception of hypnotics. He had been visited by a nurse who had occasionally found him drunk. According to the psychiatrist, the applicant had behaved inappropriately, the neighbours had complained about him because he shouted at them and threatened them, at

night he played loud music, he was meeting with the homeless, he soiled the common premises – he poured water on them and urinated there – and he drank alcohol. The psychiatrist concluded that the applicant was dangerous to others and was not able to lead an independent life.

47. On 17 April 2012 the Constitutional Court declared inadmissible also the applicant's second appeal. It held that the applicant had failed to challenge both decisions addressed in his constitutional appeal by lodging a plea of nullity under Article 229 § 1(c) of the Code of Civil Procedure. It added that as he was no longer detained, it was not appropriate to apply section 75(2) of the Constitutional Court Act by which it could waive the obligation to exhaust other effective remedies if the significance of the appeal extended substantially beyond the personal interests of the appellant.

48. In a letter of 4 December 2012 the Prague 11 Municipal Office, having sumarised the legal situation, stated that:

> "On the basis of the aforementioned documents, the public guardian considers unsubstantiated your allegation that your rights were violated on 7.2.2011 and, therefore, the filing of an action for protection of your personal rights by a lawyer of your choice ... [is found] irrelevant. For this reason, the public guardian will not conclude a contract on your legal representation in order to introduce the action for protection of your personal rights with an attorney-in-law [Ch.].
>
> [Taking into account the judgment of 16 October 2012] and provided that your agreement with the lawyer ... will not exceed CZK 500 per month you can conclude it on your own. ..."

49. On 13 February 2013, in reply to a letter from the Government Agent, the Municipal Office informed him that the public guardian had talked to the applicant about his placement. She had also informed his family, staff of the Prague-Bohnice psychiatric hospital and his psychiatrist.

C. Regime in the social care home and the applicant's care

50. The Government stated that the regime in the social care home allowed patients to leave the institution either accompanied by a staff member, family member or guardian, or alone on the approval of a psychiatrist. According to the institution's psychiatrist, the applicant never asked to leave the premises as he had problems with his knee. Visits to patients were not limited.

51. The applicant's personal belongings were deposited in a lockable cupboard in his room. Since his arrival, he had had a mobile phone, which was repeatedly recharged. A coin-operated phone box was also accessible without any restrictions. Any post was sent to the applicant's guardian, who always forwarded it to the addressee according to the applicant's instructions. The applicant received pocket money on request.

52. The social care home provided accommodation, meals and health care, including care provided by specialist doctors, assistance with ordinary

self-care, and assistance with personal hygiene or provision of conditions for personal hygiene. It also provided educational, training and stimulation activities, mediation of contact with the social environment, social and therapeutic activities and other services.

53. According to the applicant, the social care home provided residential social services primarily for patients with Alzheimer's disease and dementia. Most of the patients were elderly and severely physically and mentally disabled. It was a closed institution, which he could not leave. The only possibility for outdoor activities was in a small garden with a high fence. Patients shared rooms. The applicant could not send any correspondence independently, but had to do so through employees of the home who sent some letters to his public guardian instead of to the address indicated by him, based on an assessment of whether it was official or private correspondence. Some letters that the applicant received had been opened. Furthermore, his state of health was allegedly not assessed before admission to the social care home or on his arrival. Once there, he was prescribed medication. When he refused to take it, he was threatened that it would be administered by injection.

54. According to the Government, the medication that had been prescribed to the applicant on his discharge from the Prague-Bohnice psychiatric hospital was modified by the institution's psychiatrist on the basis of repeated examinations. The applicant's medical check-ups performed by the psychiatrist took place on 1 March, 5 April and 31 May 2011. Moreover, his psychiatrist was informed about his health on 4 and 24 March, 9 May, 28 June and 29 July 2011.

55. From the information provided by the applicant's psychiatrist, which was confirmed by the director of the institution, it appears that during his stay in the social care home, the applicant took the medication voluntarily.

D. Proceedings for damages against the State

56. On 27 March 2012 the applicant lodged a claim for damages against the State under the State Liability Act (no. 82/1998). He alleged that his rights had been violated by his public guardian on account of his unlawful detention. The Ministry of Justice rejected his claim.

57. On 30 March 2012 the applicant lodged a similar claim, arguing that the Plzeň-jih District Court and the Plzeň Regional Court had erred in not instituting proceedings to determine the lawfulness of his detention under Article 191b of the Code of Civil Procedure and that the Prague 4 District Court and the Prague Municipal Court had remained inactive despite his numerous submissions describing his detention.

58. On 27 September 2012 the Ministry of Justice rejected the applicant's second claim, holding that under the State Liability Act, the State was liable only for damage caused either by a final unlawful decision,

which had been later quashed, or by irregular official conduct. Regarding the latter, it held that the alleged shortcomings in the proceedings did not constitute irregular official conduct for which the State could be held responsible because the conduct had resulted in a decision. The former situation did not arise in the present case either, as there had been no final decision that was later quashed as illegal. Furthermore, the Ministry did not find that the applicant had suffered any damage. It considered that his own behaviour had been at the origin of the facts, because of his excessive drinking. It added that in any case the applicant's lawyer had no right to submit those claims to the Ministry, as the applicant had been deprived of his legal capacity and a guardian had been appointed to act on his behalf.

59. On 28 September 2012, following the rejection of his claim for damages by the Ministry of Justice, the applicant brought an action against the Czech Republic seeking damages for the incorrect procedure followed by the courts. He argued in particular that the courts had refused to institute proceedings following his claims concerning his detention and that the court procedure on guardianship had been erroneous.

60. In letters of 8 April 2013 the Prague 2 District Court informed the applicant's representatives that given that the applicant had been deprived of his legal capacity, he could not have granted them power of attorney. Accordingly, the court had decided not to accept them as the applicant's legal representatives. On the same day, the court appointed a guardian *ad litem*, the Prague 2 Municipal Office, to represent the applicant.

61. In a letter of 28 June 2013 the Prague 2 Municipal Office informed the Prague 2 District Court that as the Prague 4 District Court had approved the agreement with the social care home, they would not join the proceedings for damages.

62. In a decision of 11 July 2013 the District Court discontinued the proceedings for damages on the grounds that, as the applicant was fully legally incapacitated, the power of attorney that he had given to his representatives was null and void, and that in a letter of 28 June 2013 the guardian *ad litem* had informed the court that it would not join the proceedings. According to the applicant, he was unaware of the court's decision as his guardian *ad litem* failed to inform him. Consequently, the statutory period to file an appeal lapsed to no effect, and the decision became final.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil Code (Act no. 40/1964), in force at the material time

63. Under Article 10 § 1, if a natural person is totally unable to make legal decisions because of a mental disorder which is not temporary, the court will deprive him of legal capacity.

64. Under Article 26, if a natural person has been deprived of legal capacity, a guardian will be appointed to act in his or her name.

65. Under Article 28, guardians are required to acquire the consent of a court for any act, which is not a common matter, undertaken on their ward's behalf. The provision, however, does not stipulate, and legal opinion seems to be divided, whether the consent must be sought prior to the act or whether *ex post* consent suffices. In practice it seems that *ex post* consent is accepted.

B. Code of Civil Procedure (Act no. 99/1963), in force at the relevant time)

66. Article 30 provides, *inter alia*, that if there is a conflict of interests between a legal representative and a person who is represented by him or her, the court must appoint a special representative.

67. Under Article 104 § 1 the court must stay the proceedings if there is an irregularity in the proceedings which cannot be removed. If the irregularity can be removed, the court must take appropriate measures to do so. In principle, the court will pursue the proceedings but will not decide on the merits. If it does not succeed in removing the irregularity in the proceedings, it must stay the proceedings.

68. Under Article 191a, a health-care facility that admits a patient without his or her written consent must inform the competent court within twenty-four hours.

69. Under Article 191b § 1, a court has to initiate proceedings to review the lawfulness of an involuntary admission to a health-care facility. Article 191b § 2 provides that the patient has a right to be represented by counsel of his or her own choosing. If the patient does not have counsel, the court must appoint him or her an attorney. In accordance with Article 191b § 3, the court will assess evidence, hear the detained person, his or her treating doctor and other persons at the detained person's request unless it considers it unnecessary. Under Article 191b § 4 the court must decide, within seven days, whether the admission is in accordance with the law.

70. Under Article 191c, the decision adopted under Article 191b § 4 will be served on the person admitted to the health-care facility unless, in the opinion of a treating doctor, he cannot understand the content of such a decision, on his or her counsel or guardian *ad litem* and on the institution. The court must deliver the decision within seven days of the date of admission to the health-care facility.

71. Article 191d § 1 provides that if the court finds that the admission was lawful, it must continue to review the lawfulness of the continued confinement. Pursuant to paragraph 2, the court must appoint an expert to assess the necessity of the confinement. That expert must not be working in the health-care facility where the person is detained. In accordance with

paragraph 3 the court must hold a hearing and summon the patient and his or her counsel (provided that, according to the treating doctor or a written expert opinion, the patient is able to follow and understand the meaning of the proceedings). At the hearing, the court must hear the expert, the treating doctor if needed and the patient, and assess any other relevant evidence. Its decision must be issued no later than three months from the date of the decision approving the admission to the health-care facility.

72. Under Article 191f, the patient, his or her counsel, guardian and other persons close to him may, before the expiry of the time for which his or her admission to the health-care facility was approved, request a new medical examination and release, if there is a substantiated presumption that continued confinement is not necessary.

73. Article 178 in conjunction with Article 193 § 3 provides that guardianship courts will guide guardians in the proper fulfilment of their duties towards their wards and in taking appropriate actions in that regard.

74. Under Article 229 § 1 (c) a final court decision may be challenged by means of a plea of nullity on the grounds that a party to the proceedings lacked legal capacity to act or could not attend the court hearing and was not properly represented. Paragraph 4 provides that a plea of nullity may also be lodged against a final decision of an appellate court by which an appeal was dismissed or the appellate proceedings were terminated.

C. Act no. 402/2012 amending the Code of Civil Procedure and some other regulations (entry into force on 1 January 2013)

75. The Act introduced amendments to Article 191b of the Code of Civil Procedure, which now provides that the approval of the guardian of a person who has been fully or partially deprived of his or her legal capacity may not substitute for the consent of the person to be placed in a health-care facility. If the facility does not inform the competent court within twenty-four hours as provided for in Article 191a, the person concerned or his legal representative is empowered to institute proceedings to review the lawfulness of an involuntary admission to the health-care facility.

D. Public Health Care Act (no. 20/1966) in force at the material time

76. Under section 23(4)(b) a person may be compulsorily medically treated and even hospitalised if he or she appears to show signs of mental illness and poses a danger to himself or to others.

E. State Liability Act (no. 82/1998)

77. This Act provides for State liability for damage caused in the exercise of public authority by an irregularity in a decision or in the conduct

of proceedings. Under sections 7 and 8 individuals, who suffer loss because of a final unlawful decision that is later quashed or changed, are entitled to claim just satisfaction.

78. Section 13 provides that the State is also liable for damage caused by an irregularity in the conduct of proceedings.

F. Case-law of the Constitutional Court

79. In its opinion no. Pl. ÚS-st. 25/08 of 6 May 2008, the Constitutional Court found the following:

> "There always exists an interference with fundamental rights, within the meaning of Article 87 § 1 (d) of the Constitution of the Czech Republic and section 71(2)(a) of Act no. 182/1993 on the Constitutional Court, if an interference – and therefore also the Constitutional Court's potential subsequent decision to accept it – can affect the applicant's legal situation. Therefore, the protection of the fundamental right to personal liberty, which is provided for in Article 8 of the Charter of Fundamental Rights and Freedoms and which suggests that a person can be placed in detention only on the grounds and for the period laid down by the law and on the basis of a court decision (Article 8 § 5 of the Charter of Fundamental Rights and Freedoms), requires that an unlawful detention decision must always be reversed, even if the claimant is no longer in detention at the time of the Constitutional Court's decision."

80. In Constitutional Court decisions nos. IV. ÚS 203/06 of 19 January 2010, III. ÚS 3776/11 of 6 April 2012, III. ÚS 1026/12 of 31 July 2012, III. ÚS 549/12 of 2 October 2012, and III. ÚS 1453/13 of 13 September 2013 the Constitutional Court held that where a claimant alleged that he or she lacked legal capacity to act or could not attend the court hearing and was not properly represented, a plea of nullity should be lodged before introducing a constitutional appeal (Article 229 § 1 c) of the Code of Civil Procedure).

81. In its decision no. IV. ÚS 1348/09 of 11 January 2012 the Constitutional Court held, *inter alia*:

> "By the decision challenged [by the applicant]... the court dismissed the applicant's request to set a time-limit for the commencement of proceedings to review the lawfulness of his involuntary admission to, and continued confinement in, the health-care facility. The ... court concluded that in a situation where the individual, whose placement [is the subject matter of the proceedings] under Article 191a of the Code of Civil Procedure, is released, the grounds for the proceedings cease to exist. The Constitutional Court has examined similar questions in the past ... for example in decision no. II. ÚS 2508/09 ... where it found that Article 5 of the Convention did not require a review of the lawfulness of confinement ... once it was terminated and the internee was at liberty. Article 5 is to be perceived in its entirety and the guarantees contained in its paragraph 5, which provides that 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', should not be overlooked. Accordingly, while the guarantees contained in paragraph 4 focus on a situation where the person concerned is still detained, paragraph 5 guarantees ... that when the lawful conditions for deprivation of liberty are not complied with, he or she is entitled to claim damages.

The procedure for review of the lawfulness of involuntary admission to a health-care facility under Article 191a of the Code of Civil Procedure applies only to those cases where the health-care facility restricts the personal liberty of individuals who have not given written consent to [their confinement]. The very form of the consent demonstrates the seriousness of such a legal act which entirely corresponds to the severity of the restriction of the internee's fundamental rights and freedoms. In a situation where a person does not give his or her written consent to his or her placement in a health-care facility, it is entirely appropriate that a court, considering the case independently and impartially, should enter into the relationship between the health-care facility and the person concerned. It is to be stressed that the court acts as an [official body reviewing] the steps undertaken by the health-care facility. In other words, the substance of the procedure under Article 191a of the Code of Civil Procedure is to guarantee the rights of those persons who cannot exercise them [due] to their placement in the health-care facility. As soon as the person is released from the care of the health-care facility, his or her rights are no longer prejudiced and the court no longer has a role. However, this [situation] does not [have any impact] on the fact that the person placed in the health-care facility contrary to the law may claim damages within the framework of private-law proceedings [in which the court] retroactively examines the question of the lawfulness of the steps undertaken by the health-care facility. [This procedure differs from that] ... initiated under Article 191a of the Code of Civil Procedure. Although the applicant's request that a time-limit be set for commencement of review proceedings to examine the lawfulness of his involuntary admission to, and continued confinement in the health-care facility, was rejected, [his] fundamental rights could not be interfered with because he had sought to initiate proceedings for which the conditions were not satisfied. First, the applicant had been released from the health-care facility and, secondly, during his confinement his guardian had consented to the above-mentioned [procedural] steps."

82. The Constitutional Court in its decision no. IV. ÚS 3439/11 of 4 March 2013 stated:

"26. Act no. 160/2006 introduced new section 31a [of the State Liability Act], which provides for compensation for non-pecuniary damage caused by an unlawful decision or irregular administrative proceedings. As stated in the explanatory report, Parliament was clearly motivated by deficiencies in domestic law in relation to Article 5 § 5 of the Convention and by the endeavour to bring domestic law into conformity with the Convention requirements. In the opinion of the Constitutional Court, it is undeniable that the new provision does not constitute an entitlement to compensation but only declares its existence on a domestic level. The entitlement was established by Article 5 § 5 of the Convention, which is a self-executing provision, applicable with precedence over the law.

28. ... If an applicant seeks compensation for non-pecuniary damage and his entitlement to it originated after Act no. 160/2006 came into force, it is necessary to proceed in accordance with Article 5 § 5 of the Convention and sections 31a and 32(3) of Act no. 82/1998, as amended by Act no. 160/2006 ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION

83. The applicant complained that his involuntary placement in the social care home had violated his right to liberty and that he had been unable to institute any court proceedings to have the lawfulness of his detention examined and his release ordered. He relied on Article 5 §§ 1 and 4 of the Convention, which provides, in so far as relevant, as follows:

> "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 for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> 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. Admissibility

1. The parties' submissions

(a) Non-exhaustion of domestic remedies

84. The Government argued that the applicant had failed to exhaust domestic remedies. They pointed out that the Constitutional Court had dismissed his constitutional appeal because he had failed to lodge a plea of nullity. In this connection, they referred to the findings of the Court in the case of *Bureš v. the Czech Republic* (no. 37679/08, §§ 141-48 and 156, 18 October 2012).

85. The Government further contended that the applicant should have lodged a plea of nullity under Article 229 § 1 (c) of the Code of Civil Procedure against the Prague 4 District Court's decision of 10 November 2011 by which the agreement between his public guardian and the social care home had been approved. According to the Government, he still had that option, as the three-year time-limit set out in Article 234 § 2 of the Code of Civil Procedure had not expired. The obstacle to legal representation – the applicant's lack of legal capacity – had therefore not yet ceased to exist.

86. The Government were convinced that following the Prague 4 District Court's judgment of 10 November 2011, the applicant had had a new opportunity at the domestic level to have the merits of his complaint

that his involuntary placement in a social care home had violated his right to liberty and security of person reviewed. Had he not succeeded before the ordinary courts, he could have resorted to the Constitutional Court. Since he would have met the requirement of a previous lodging of a plea of nullity, the Constitutional Court could have been expected to examine the merits of his appeal. The Government referred in this connection to Constitutional Court opinion no. Pl. ÚS-st. 25/08 of 6 May 2008 (see paragraph 79 above) from which it can be deduced that the Constitutional Court would have reversed the ordinary court's judgment if it concluded that it had violated the applicant's right to liberty and personal security, despite the fact that at the time of the Constitutional Court's decision, the applicant would no longer have been in the social care home.

87. The applicant disputed the Government's arguments. He stated that he had lodged his first constitutional appeal on 23 August 2011, when it had been clear that the Plzeň-jih District Court would not initiate any proceedings that could lead to his release from the social care home. At the same time, he had requested the Constitutional Court to issue an interim order for his release. According to him, it was the only remedy that could have directly resulted in his release. However, his constitutional appeal had been dismissed on the grounds that he had no longer been staying in the social care home. Moreover, his second constitutional appeal, challenging the decisions of the Plzeň Regional Court and the Prague Municipal Court in the proceedings to set a time-limit under section 174a of the Courts and Judges Act (no. 6/2002), had been dismissed because he had not lodged a plea of nullity.

88. In respect of the Government's argument that he could and should have lodged a plea of nullity against the decision of the Prague 4 District Court by which the conclusion and termination of the contract with the social care home by his guardian had been approved, the applicant underlined that that decision had been adopted *ex post facto*. Moreover, in those proceedings, the court had had no power to examine the question of the lawfulness of his deprivation of liberty. The applicant added that even if his plea of nullity had succeeded, it would not have resolved his situation as the court could only quash the decision of the Prague 4 District Court. The case would have remained before that court and the court would only have to ensure his representation in the proceedings. According to the applicant, the court could not have decided differently because under the domestic law, his detention had been lawful. Furthermore, given the finding of the Constitutional Court of 28 March 2012, the applicant doubted that that court would have examined his new constitutional appeal on the merits. Indeed, the Constitutional Court had explicitly stated that it would not assess the merits of his second constitutional appeal because he had already been released from the social care home.

89. Lastly, the applicant disputed the effectiveness of a claim for damages against the State.

(b) Six-month time-limit

90. The Government submitted that should the Court conclude that for some of his complaints, the applicant did not have at his disposal an effective domestic remedy, they would plead that his application had been filed outside the six-month time-limit. They observed that the period for filing the application had started to run on the date of the violation complained of, namely on 23 August 2011 when he had left the social care home and had been transferred to the Convalescent Home – Long-term Care Hospital. In any case it was on 27 September 2011 at the latest, when the applicant had been moved back to his flat in Prague. However, he did not introduce his application with the Court until 29 September 2012.

2. The Court's assessment

91. The Court finds that the Government's objections are closely linked to the substance of the applicant's complaint and must therefore be joined to the merits of the application.

92. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. Having reserved the examination of the question of the exhaustion of domestic remedies and the respect of the six-month time-limit to a later stage, it declares the complaint admissible.

B. Merits

1. Article 5 § 1 of the Convention

(a) The parties' submissions

93. The applicant maintained that he had been deprived of his liberty against his will. He had only been allowed to leave the social care home with a supervisor. He had strongly disagreed with his placement in the institution, had approached the management of the social care home several times to that effect, and had also submitted a request to leave to the court. Moreover, he had contacted the Ombudsman and lawyers from the MDAC to assist him. According to him, his guardian should not have concluded the agreement without his consent.

94. The applicant further argued that involuntary placement by a guardian did not come within the scope of the exceptions to Article 5 § 1 of the Convention. He stated that the domestic law made a distinction between placement in a social care institution, which was contractual and considered

voluntary, and involuntary admission to a psychiatric hospital, which was subject to specific criteria meant to bring the law into line with Article 5 § 1 (e). The applicant attempted to initiate proceedings to have his involuntary placement in the social care home reviewed, but Czech law did not provide for proceedings to challenge "voluntary" placement. He further argued that the reasons which had led to his confinement had not been directly related to his being a person of unsound mind but had arisen directly as a result of the powers given to the guardian, as the domestic law did not require that guardians seek less restrictive alternatives to placement in an institution.

95. Referring to the *Winterwerp* criteria, the applicant argued that it had not been disputed by the Government that there had been no major change in his condition before, during and after his institutionalisation. The only substantial change noticeable in his condition had been in his medication regime. According to him, the only reasonable explanation for his situation was that it was easier for the public guardian to place him in the institution. Anyhow, whatever measures of a subsidiary nature had been considered, he had been unable to express his view about their choice. The applicant doubted that members of his family had been consulted on the measures, given that they had no obligation to participate under the domestic law. Moreover, confidential medical information had been disclosed to unauthorised persons without the applicant's consent.

96. The Government submitted that although at the beginning it appeared that the applicant had consented to his admission to the social care home, in a letter sent during his confinement he had clearly indicated to his guardian and the courts that he had not been admitted to the institution voluntarily. The Government therefore left that question to the Court's discretion. Provided that the Court concluded that the applicant had been deprived of liberty, his situation was governed by Article 5 § 1 (e) of the Convention.

97. As to the lawfulness of the applicant's confinement in the social care home, the Government noted that under the domestic law in force at the material time, the guardian's consent to the confinement of a person deprived of legal capacity was sufficient. Thus the course of action followed by the guardian in the present case had a basis in the domestic law.

98. The Government maintained that the applicant had a serious and long-term disorder, specifically alcoholic dementia. His guardian had had sufficient evidence from her own experience with the applicant, from complaints addressed to her by the applicant's neighbours and from interviews with members of the applicant's family that the applicant's condition was serious enough to require intervention. The applicant had presented a real danger not only to others but also to himself.

99. The Government added that given the applicant's situation and the opinions expressed by members of his family, his hospitalisation had been

seen as an appropriate measure. Once his condition had no longer warranted his stay in the social care home, he had been transferred to his home environment.

(b) The third party's observations

100. The Bazelon Center for Mental Health Law described the background to the Americans with Disabilities Act (hereinafter "the ADA"), which constituted the basis for the right to community integration. It also mentioned the U.S. Supreme Court's landmark decision in *Olmstead v. L.C.* in which the court had found that the principles enshrined in the U.S. Constitution, the ADA and other U.S. laws mandated the integration of people with mental disabilities in the community. As for the relevance of *Olmstead* and the ADA for the Court, the Bazelon Center stated that the right to community integration and freedom from unnecessary institutionalisation had also been recognised in the Court's case-law. According to the Bazelon Center, community integration was absolutely fundamental to combating discrimination against people with mental disabilities and could be inferred from both the Convention and the ADA. Lastly, it pointed out that the isolation and segregation of mentally disabled individuals who were able to live independently would only ensure continued discrimination against people with mental disabilities and fundamentally undermined the Court's objectives.

101. The Centre for Disability Law and Policy stated in particular that it would be fully in keeping with the case-law of the Court and in conformity with the UN Convention on the Rights of Persons with Disabilities (hereinafter "the UN CRPD") if the Court stated that where deprivation of legal capacity and involuntary institutionalisation had arisen because the State had failed to make reasonable accommodation for persons with disabilities, this constituted a discriminatory interference with the rights guaranteed by Articles 5 and 8 of the Convention.

(c) The Court's assessment

102. The Court notes that it has already had opportunities to examine the placement of mentally incapacitated individuals in social care homes, and found that it amounted to deprivation of liberty within the meaning of Article 5 § 1 of the Convention (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 132, ECHR 2012; *Shtukaturov v. Russia*, no. 44009/05, §§ 104-10, 27 March 2008; *D.D. v. Lithuania*, no. 13469/06, § 152, 14 February 2012; and *Sýkora v. the Czech Republic*, no. 23419/07, § 47, 22 November 2012).

103. In the present case, the applicant was declared fully incapacitated at the relevant time and the Government admitted that he could not leave the social care home on his own during the day without being accompanied or without the psychiatrist's approval. He was compulsory placed in the social care home on the basis of an agreement signed by his public guardian.

While he did not show clear disagreement on the day of his admission to the social care home or shortly beforehand, from his subsequent conduct it was obvious that he had not consented to his placement there. The Court further notes that although the applicant was placed in a private social care institution (see paragraph 24 above), his confinement was requested by his public guardian, the Prague 11 Municipal Office, which had been appointed by the court (see paragraph 7 above). Therefore, the responsibility of the authorities for the situation complained of was engaged.

104. In the light of the foregoing, the Court concludes that the applicant was "deprived of his liberty", within the meaning of Article 5 § 1 of the Convention, from 7 February to 23 August 2011 with a fifteen-day interruption (see paragraphs 24, 34 and 40 above).

105. 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. Any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Furthermore, 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 *Stanev*, cited above, § 143). Moreover, detention cannot be considered "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness (see *Shtukaturov*, cited above, § 113, and *L.M. v. Latvia*, no. 26000/02, § 54, 19 July 2011).

106. Turning to the present case, the Court observes that the lawfulness of the applicant's detention was not reviewed by a domestic court, as would be the normal procedure in cases of involuntary hospitalisation (see paragraphs 67-71 above). The reason was that since the guardian had consented to the applicant's placement, the applicant was considered, as a matter of domestic law, to be in the social care institution voluntarily. The requirements for involuntary hospitalisation, both substantive in section 23(4)(b) of the Public Health Care Act and procedural in the Code of Civil Procedure, did not apply. Accordingly, the applicant's placement could be considered to be "lawful", if that term is construed narrowly, in the sense of the formal compatibility of his detention with the procedural and material requirements of the domestic law.

107. In the *Sýkora* case (cited above) the Court referred to the opinions and reports issued by the various international bodies indicating a trend in international standards to require that the detention of incapacitated persons

be accompanied by the requisite procedural safeguards, namely by way of judicial review. Judicial review – instituted automatically or brought about by the ward or some other suitable person – of a guardian's consent to deprivation of liberty of their ward could provide, in the view of the Court, a relevant safeguard against arbitrariness (ibid., § 67). The Czech legislator acted as suggested by amending the Code of Civil Procedure with effect from 1 January 2013 (see paragraph 74 above) which was, however, long time after the applicant's release from the social care home (see paragraph 40 above).

108. The Court observes that the applicant's admission to the social care home fully depended on the consent of his public guardian, who was an employee of the Prague 11 Municipal Office. Before his admission, he was examined by two psychiatrists, on 11 October 2010 and 4 February 2011, and by a doctor on 19 January 2011. They established that he was suffering from alcoholic dementia and other mental disorders (see paragraphs 14, 19 and 23 above). While those medical examinations were not carried out for the purposes of or in connection with the applicant's confinement, the Court considers that they constituted sufficient objective medical expertise on the basis of which the guardian took the decision in this respect.

109. The Court notes, however, that while the applicant's public guardian formally talked to him prior to his transfer to the social care home, it does not appear from the record of their conversation that she clearly explained to him the real character of his placement, but led him to believe that he would receive medical treatment and undergo rehabilitation (see paragraph 25 above). Moreover, the Government did not submit any convincing evidence that the applicant had been aware that an agreement on social care had been concluded for an indefinite period of time. That was confirmed by the Municipal Office in its letter to the District Court (see paragraph 29 above). Consequently, the Court cannot disregard the fact that the applicant had doubts about his guardian's competence and wished to replace her (see paragraphs 30, 36 and 37 above).

110. In these circumstances, the Court considers that a procedure which merely required the public guardian's consent to the admission of the applicant to the social care home does not provide a sufficient safeguard against arbitrariness.

111. The Court further notes that the social care home did not contact the Plzeň-jih District Court, as the competent local court within the meaning of Article 191a of the Code of Civil Procedure, in connection with the applicant's placement, even though it became aware that the applicant was being confined against his will (see paragraph 30 above). Moreover, the court received a request from the applicant's lawyer to institute proceedings on the lawfulness of the applicant's admission and confinement in the social care home, but transferred the request to the Plzeň Regional Court. In a decision adopted more than three months later, the Regional Court left the

matter undecided, dismissing the lawyer's further request to set a time-limit for a procedural measure pursuant to section 174a of the Courts and Judges Act (no. 6/2002), merely holding that the lawyer was not empowered to act on behalf of the applicant as the latter had been deprived of his legal capacity and his guardian had not approved the power of attorney (see paragraphs 33 and 41 above).

112. Moreover, the Prague 4 District Court, acting as the guardianship court, did not take any procedural measures to determine the lawfulness of the applicant's detention, despite the requests submitted by the applicant (see paragraph 30 above). It was merely satisfied with the explanation given by the Municipal Office about the purpose, character and other details of the applicant's confinement (see paragraphs 26 and 29 above). It was not until 10 November 2011, almost two and a half months after the applicant's discharge from the social care home, that the District Court, at the Ombudsman's initiative, approved *ex post facto* both the applicant's admission to the social care home and the termination of his stay there (see paragraphs 42-44 above).

113. The Court is also concerned by the very formalistic approach of the Constitutional Court which dismissed, more than one month after the applicant had been discharged from the social care home and about seven months after its introduction, his first constitutional appeal together with the request for an interim order, mainly on the grounds that the applicant was no longer in the social care home and that the lawfulness of his placement had meanwhile been approved (see paragraphs 38 and 46 above).

114. Considering further the issues of legal procedures, the Court does not find that the remedies referred to by the Government in their objections as to the admissibility of the present complaint on the grounds of non-exhaustion were effective for the purposes of the Convention. In addition, the necessity of courts' involvement into the limitation of liberty of incapacitated persons was also raised by the Constitutional Court (see paragraph 81 above).

115. The Court reiterates in this respect that one of the principal issues in examining the effectiveness of a remedy is whether it could offer adequate redress. Where the complaint is, as in the present case, about the deprivation of liberty of a fully incapacitated person, based on an agreement signed by his guardian whose competence has been put in doubt and where it is clear that the deprivation was carried out against the person's will, an adequate remedy is primarily one capable of immediately terminating the continued violation by ordering the person's release. The specific requirements of Article 5 § 4 of the Convention concerning the judicial character of a necessary procedure, including guarantees of an independent and impartial review based on the adversarial nature of the procedure and the principle of equality of arms, are inherent in such a remedy. Moreover,

retrospective compensatory relief could be supplementary to that remedy (see *M. v. Ukraine*, no. 2452/04, § 84, 19 April 2012).

116. The Court observes that the applicant's second constitutional appeal was dismissed for non-exhaustion of remedies, namely, for failing to lodge a plea of nullity, without a decision on its merits (see paragraph 48 above). It notes, however, that contrary to the *Bureš* case referred to by the Government, the national courts did not carry out a judicial review on the lawfulness of the applicant's admission to and confinement in the social care home. Moreover, unlike *Bureš*, the applicant in the present case was fully legally incapacitated, and did not therefore have any independent standing before the domestic courts. Indeed, as it clearly appears from the relevant facts, his public guardian systematically disagreed with any procedural measure initiated by him.

117. The Court notes that the District Court appointed the new guardian chosen by the applicant on 3 June 2013. It considers, however, that any procedural steps which the guardian could have undertaken in order to have the lawfulness of the applicant's confinement in the social care home reviewed seem to be purely theoretical and speculative given that he was appointed one and a half years after the court had approved, ex post facto, both the applicant's admission to the social care home and the termination of his stay there (see paragraphs 10 and 40-42 above).

118. Against this background, the Court considers that none of the remedies suggested by the Government could have ensured in due time that the applicant had direct access to a court which would have decided on the lawfulness of his placement in the social care home.

119. In addition, any legal action, including a plea of nullity, leading to the reversal of the Prague 4 District Court's judgment of 10 November 2011 would have been relevant only for the proceedings for damages. That legal action constitutes, however, a purely compensatory remedy and would not have offered appropriate protection in respect of the applicant's complaint. Accordingly, such a way of proceeding seems to be, in any event, purely theoretical and speculative having regard to the outcome of the proceedings for damages brought by the applicant (see paragraphs 56-62 above).

120. In the light of these considerations the Court rejects the Government's contention concerning non-exhaustion of domestic remedies.

121. The Court notes that it was not clear from the outset (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009, with further references) that the constitutional appeals would be ineffective in the applicant's case. Taking also into account that in the doubt about its effectiveness, the remedy in question should be tried, the Court cannot blame the applicant for having tried to exhaust it.

122. The Court considers that, even after the applicant's placement became voluntary under the domestic law, it was not lawful as it was not

accompanied by sufficient guarantees against arbitrariness. It is thus not necessary to consider the applicant's other arguments.

123. Having regard to the foregoing, the Court considers that the applicant's deprivation of liberty was not justified by sub-paragraph (e) of Article 5 § 1.

124. There has therefore been a violation of Article 5 § 1 of the Convention.

2. Article 5 § 4 of the Convention

(a) The parties' observations

125. The applicant maintained that at the time of his placement in the social care home, there was no remedy to ensure respect for his rights guaranteed by Article 5 § 4 of the Convention. The fact that the law had subsequently been amended was inconsequential to his situation.

126. He further maintained that the police had set aside his criminal complaint, and that the Prague 4 District Court and the Plzeň-jih District Court had both refused to hear his case.

127. According to the applicant, there should have been a mechanism for automatic judicial review, similar to the one that applied to detention in health-care institutions under Article 191a of the Civil Procedure Code. He argued that that procedure should have been initiated. The courts had refused his requests on the grounds that the social care home was not considered as an institution providing health-care services under Article 191a of the Civil Procedure Code. The applicant referred to *Gorshkov v. Ukraine* (no. 67531/01, 8 November 2005) in which the Court held that the right of access to the courts could not be dependent on the good will of the authority which had deprived the applicant of his liberty, on the discretion of doctors or on the management of a hospital. The State should therefore be under an obligation to enshrine such a measure in legislation and guarantee the right of access to the courts.

128. The Government noted that the applicant had applied for the initiation of proceedings under Articles 191a of the Code of Civil Procedure but that the courts had discontinued the proceedings on the grounds that the applicant, as a legally incapacitated person, had not been entitled to lodge such an application.

129. The Government left the assessment of the merits of the complaint regarding a violation of Article 5 § 4 of the Convention to the Court's discretion.

130. The Government pointed out, however, that amendment no. 404/2012 to the Code of Civil Procedure had inserted, as of 1 January 2013, in Article 191b § 1 a new rule that the consent of a guardian of a person whose legal capacity had been fully or partly denied did not replace the consent of that person. Moreover, if an institution did not notify the

courts under Article 191a of the Code of Civil Procedure, the person concerned was entitled to apply for the initiation of proceedings. The explanatory notes state that the proceedings under Article 191a et seq. of the Code of Civil Procedure provide for the possibility of court protection not only at health-care institutions, but wherever the person is in institutional care, within the meaning of Article 8 § 6 of the Charter of Fundamental Rights and Freedoms and Article 5 § 1 (e) of the Convention, without his consent, including in social care institutions. Lastly, on 28 December 2012 the Ministry of Justice submitted to the Government a bill on special court proceedings, which included special provisions governing proceedings seeking to declare inadmissible detention in social care institutions.

(b) The Court's assessment

131. The Court reiterates that Article 5 § 4 of the Convention deals only with those remedies which must be made available during a person's detention with a view to that person obtaining a speedy judicial review of the lawfulness of the detention, leading, where appropriate, to his or her release (see *Slivenko v. Latvia* [GC], no. 48321/99, § 158, ECHR 2003-X).

132. As to the substantive content of the provision, 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" of their deprivation of liberty (see *Stanev*, cited above, § 168). The remedy must be accessible to the detained person 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). 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. In the case of detention on the grounds of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental illness, are not fully capable of acting for themselves (see *Stanev*, cited above, § 170, with further references). In the case of *Shtukaturov v. Russia* (no. 44009/05, ECHR 2005), the Court found that a remedy which could only be initiated through the applicant's mother – who was opposed to his release – did not satisfy the requirements of Article 5 § 4 (ibid. § 124).

133. Turning to the present case, the Court notes that the applicant's detention lasted more than six months, which cannot be considered too short a period to initiate judicial review (see *Sýkora*, cited above, § 83). Accordingly, Article 5 § 4 is applicable in the present case.

134. The Court observes that the domestic courts were not empowered to intervene in the applicant's confinement in the social care home because the applicant was considered to be there voluntarily on account of his

guardian's consent (see paragraphs 43, 45 and 61 above). The Government did not indicate any other adequate remedy available to the applicant which would have led to his discharge.

135. The Court therefore concludes that there were no proceedings in which the lawfulness of the applicant's detention could have been determined and his release ordered. Moreover, the Government did not make any submissions in respect of this complaint, and did not indicate any procedure that could have given rise to a judicial review of the lawfulness of his placement, as required by Article 5 § 4 of the Convention.

136. Consequently, the Court dismisses the Government's objection of failure to exhaust domestic remedies, and finds that there has been a violation of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

137. The applicant complained that under domestic law he did not have any enforceable right to compensation for his unlawful detention. He relied on Article 5 § 5 of the Convention, which reads as follows:

> "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. Admissibility

138. In their original observations submitted on 4 April 2013 and their complementary observations of 31 July 2013, the Government maintained that the proceedings for damages against the State had been pending before the Prague 2 District Court and that, therefore, the applicant's complaint was inadmissible for non-exhaustion of domestic remedies.

139. In their complementary observations of 29 October 2015, the Government maintained that when the applicant was only partially incapacitated, he could have instituted proceedings for compensation for detention contrary to Article 5 § 5 of the Convention directly, without being represented by his guardian. The Government referred in this connection to Article 55 of the Civil Code, which provides that any limitation on legal capacity must have the aim of protecting the person concerned against serious harm.

140. The Court observes that the proceedings for damages ended on 11 July 2013 (see paragraph 62 above). It therefore dismisses this part of the Government's objection. The Court further finds that the remaining part of the Government's objection is closely linked to the substance of the applicant's complaint and must therefore be joined to the merits of the application.

141. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further finds

that it is not inadmissible on any other grounds. Having reserved the examination of the question of the exhaustion of domestic remedies to a later stage, it declares the complaint admissible.

B. Merits

142. In his original observations in reply to those submitted by the Government, the applicant had maintained that given how the domestic courts had proceeded in the proceedings for damages, the action for damages could not be regarded as effective in respect of his right to compensation within the meaning of Article 5 § 5 of the Convention.

143. In his complementary observations of 30 October 2015, the applicant referred to the Constitutional Court's judgment of 23 March 2015 (no. I. ÚS 1974/14) and stated that a plea of nullity was not an effective remedy in cases of deprivation of liberty of persons with mental disabilities.

144. The Government were of the opinion that the applicant had had at his disposal a remedy under the State Liability Act (no. 82/1998). Had he used it, he could have sought compensation for pecuniary and non-pecuniary damage.

145. In their complementary observations submitted on 29 October 2015, the Government pointed out that on 3 June 2013 a new guardian had been appointed to represent the applicant. The guardian should have contacted the Prague 2 District Court and informed it that he would support the applicant's action for damages. The court would then have examined the applicant's action on the merits and would not have discontinued those proceedings. Moreover, even if the guardian *ad litem* had not represented the applicant effectively before the District Court and had not informed the applicant about either the progress of the proceedings for damages or about the decision to discontinue the proceedings, the applicant could have challenged that decision once he had learnt about it. He could have lodged an appeal through his new guardian, seeking an extension of the statutory time-limit for appeal. Alternatively, he could have introduced a plea of nullity, alleging that the guardian *ad litem* had failed to represent him effectively.

146. In its Grand Chamber judgment in the case of *Stanev* (cited above, § 182), the Court summarised its Article 5 § 5 case-law in relation to the right to compensation where detention has been effected contrary to the guarantees enshrined in Article 5 of the Convention.

147. Turning to the present case, the Court observes that, in the light of 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. 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 *Stanev*, cited above, §§ 183-184 above).

148. In the instant case the applicant was not successful with his action for damages brought under the State Liability Act. The District Court did not accept the power of attorney he had given his representatives because of his full legal incapacitation and as the guardian *ad litem* – the Prague 2 Municipal Office – had not joined the applicant's action for damages (see paragraph 62 above).

149. The Court further observes that sections 7 and 8 of the State Liability Act provide for compensation for damage resulting from an unlawful judicial decision (see paragraph 76 above). However, that was not the case in this instance: the Czech courts found the measure to have been lawful. Moreover, the Government's line of argument was that the applicant's placement in the care home had been in accordance with domestic law. The Court therefore concludes that the applicant was unable to claim any compensation under the above-mentioned provision in the absence of acknowledgment by the national authorities that the placement was unlawful.

150. As to the Government's argument that the new guardian in whom the applicant had placed his trust could and should have intervened in the proceedings for damages, thus enabling the court to examine the applicant's claim for damages on the merits, the Court finds this assertion unconvincing. It notes that the new guardian, who was not contested by the applicant, was appointed on 3 June 2013, more than one month before the proceedings for damages were discontinued. However, it is not clear from the case file when the decision appointing the new guardian became final, whether it was notified to the applicant, whether the former public guardian explained to the new guardian the details of the proceedings for damages, including the fact that the guardian *ad litem* had been appointed for those proceedings, and whether, accordingly, the new guardian was enabled to get involved in the case with due diligence.

151. The Government referred to Constitutional Court decision no. IV. ÚS 3439/11, which confirmed that Article 5 § 5 of the Convention was considered as directly applicable ("self-executing") and that it was necessary to proceed also in accordance with domestic law, namely sections 31a and 32(3) of the State Liability Act (see paragraph 82 above). The Court considers, however, that that decision is not relevant for the instant case as far as it confirms that the applicant would have been expected to pursue a remedy under the State Liability Act, which provides for compensation for damage resulting from an unlawful decision or irregular administrative proceedings. In the circumstances of this case, not

only did the applicant attempt to bring proceedings which failed because he had been deprived of legal capacity, but it is evident from the case file that the Czech judicial authorities did not at any stage find the measure to have been unlawful or otherwise in breach of Article 5 of the Convention.

152. As to the possibility, under section 13 of the same Act, of claiming compensation for damage resulting from unlawful acts by the authorities (see paragraph 77 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 fully incapacitated individuals in social care homes on the basis of civil-law agreements signed by their guardians.

153. As it has already noted, the Court cannot disregard the fact that the manner in which the relevant provisions of the State Liability Act were applied in the present case precluded the applicant from obtaining compensation – whether before or after the Court's findings in the present judgment – for the detention that was imposed in breach of Article 5 § 1 of the Convention (see *Makhmudov v. Russia*, no. 35082/04, § 104, 26 July 2007). Having rejected the applicant's compensation claim on essentially formal grounds, the Czech courts did not interpret or apply the domestic law in the spirit of Article 5 of the Convention (see *Abashev v. Russia*, no. 9096/09, § 42, 27 June 2013). Accordingly, the Court dismisses this part of the Government's objection in relation to non-exhaustion of domestic remedies.

154. The applicant did not therefore have an enforceable right to compensation as is required under Article 5 § 5 of the Convention. There has accordingly been a violation of this provision.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

155. The applicant complained under Article 8 of the Convention that his confinement in the social care home had violated his rights to home, correspondence and private life on account of the limitation arising from his detention and involuntary medication. Furthermore, under Article 13 of the Convention he complained that he had had no effective remedy for violations of his rights under Article 5 §§ 1, 4 and 5 and Article 8 of the Convention. Lastly, relying on Article 14 in conjunction with Articles 5 and 8 of the Convention, the applicant complained that he had been discriminated against on grounds of his mental disability and that he had been denied reasonable accommodation, as he had been placed in the social care home instead of being provided with services in the community.

156. The Government requested the Court to declare the complaints raised under Articles 8, 13 and 14 of the Convention inadmissible on grounds of non-exhaustion of domestic remedies, as the applicant had not raised them in compliance with the procedural requirements of domestic law before the Constitutional Court. They pointed out that in accordance with its

established case-law, the Constitutional Court was bound not by the reasoning of a constitutional appeal but only by the final plea in the appeal (they referred to the domestic judgments in I. ÚS 89/09 of 29 November 1994 and Pl. ÚS 16/93 of 24 May 1994). In addition, the Constitutional Court could only decide on an interference which the appellant had explicitly specified in the final plea in his constitutional appeal (see ÚS 3336/09 of 18 February 2010). They maintained that it appeared from the final plea in both the applicant's constitutional appeals that he had properly raised only his complaint under Article 5 of the Convention. The Government emphasised that the Constitutional Court had constantly allowed legally incapacitated persons to resort to it independently and had not dismissed their constitutional appeals on the grounds that they had not been entitled to lodge them (they referred to ÚS 412/04 of 7 December 2003; II. ÚS 303/05 of 13 September 2007; II. ÚS 2630/07 of 13 December 2007; and II. ÚS 1191/08 of 14 April 2009).

157. Moreover, in respect of the applicant's complaints of interference with his right to respect for his private life on account of the allegedly involuntary administration of medication and his right to respect for his correspondence, the Government argued that he should have brought an action against the social care home seeking protection of his personal rights. Had his action not been successful, he could have resorted to the Constitutional Court.

158. The applicant maintained that he had raised his complaints in his second constitutional appeal. As for bringing an action for the protection of his personal rights, he maintained that he had been and continued to be under guardianship and did not have the requisite standing before the domestic courts.

159. The Court reiterates that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided for by the national legal system (see, among other authorities, *Vučković and Others v. Serbia* [GC], no. 17153/11, § 70, 25 March 2014). Moreover, the Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 61, 15 March 2012).

160. Turning to the present case, the Court observes – like the Government – that the applicant's constitutional appeals duly addressed only the issues concerning his deprivation of liberty (see paragraphs 38

and 45 above). The fact that the Constitutional Court is bound by the content of the final plea in constitutional appeals is well known and constitutes a well-established practice of this high judicial instance, which pursues the principle of good administration of justice. As information on that practice is available to the public, the Court considers that the applicant's legal representative should have been aware of it and acted accordingly.

161. In the light of these circumstances, this part of the application must be rejected under Article 35 §§ 1, 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

162. 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."

A. Damage

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

164. The Government, referring to the Court's case-law (*Stanev*, cited above; *Kędzior*, cited above; and *Mihailovs v. Latvia*, no. 35939/10, 22 January 2013) considered the applicant's claim excessive.

165. The Court is of the view that as a result of the circumstances of the case, the applicant must have experienced considerable anguish and distress which cannot be made good by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on an equitable basis, the Court awards the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

166. The applicant also claimed EUR 16,625 for the costs and expenses incurred before the Court. Of this sum, EUR 8,600 was to be paid to his representative and EUR 8,025 to the MDAC.

167. The Government argued that the claim for EUR 8,600 was not supported by any documentary evidence and that the amount claimed by the MDAC was excessive.

168. 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 8,025 covering costs under all heads.

C. Default interest

169. 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, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objections of non-exhaustion of domestic remedies and of non-compliance with the six-month time-limit concerning the applicant's complaints under Article 5 §§ 1, 4 and 5 of the Convention, and dismisses them;

2. *Declares* the complaints under Article 5 §§ 1, 4 and 5 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement :
      (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 8,025 (eight thousand and twenty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 13 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Mirjana Lazarova Trajkovska
Registrar	President