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Communication from Croatia concerning the case of M.S. (No. 2) against Croatia (Application No. 75450/12)

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Communication de la Croatie concernant l'affaire M.S. (n° 2) contre Croatie (Requête n° 75450/12)
(anglais uniquement)

06 June 2016



ACTION REPORT

M. S. (2) v. Croatia

Application number 75450/12

Judgment of 19 February 2015

Final on 19 May 2015

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I. CASE DESCRIPTION

1. The case concerns violation of the substantive and procedural aspects of Article 3 and a violation of Article 5 § 1 (e) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) which occurred during 2012 in relation to the procedure applied during the applicant's involuntary placement (*prisilni smještaj*) into a psychiatric hospital.
2. In 2012 the applicant went to a hospital emergency room complaining of severe lower-back pain. She was diagnosed with lumbago and psychiatric disorders and admitted against her will to a psychiatric clinic where she was forcibly tied to a bed in an isolation room and kept in that position for 15 hours. The domestic court subsequently ordered her continued placement in the clinic, despite her request for discharge. The applicant's complaints of ill treatment were not examined by hospital authorities or by the domestic court. The applicant was discharged a month after her involuntary placement was ordered.
3. The European Court identified the cause of violation of the Convention on the account of the following:
 - *violation of substantive aspect of Article 3*: the unjustified use of physical restraint on the applicant during involuntary placement (in terms of its necessity, proportionality or proof that any other less burdensome measure had been tried, (§ 110)). Furthermore, the applicants' condition during the use of physical restraint was not effectively and adequately monitored (§ 111).
 - *violation of procedural aspect of Article 3*: the applicant's complaints of ill-treatment, although sufficiently brought to the attention of domestic authorities, notably to the domestic court, were never examined by that court or forwarded to competent authorities for further investigation even though a requirement for an *ex officio* investigation was mandated by relevant domestic law (§ 81-82)
 - *violation of Article 5 § 1 (e)*: the legal aid lawyer appointed to the applicant in the involuntary placement proceedings failed to effectively represent her (he did not meet with her, provide her with legal advice or make submissions or appeals on her behalf but acted as a passive observer, (§ 156)). Moreover, the domestic court failed to secure the applicant's effective access to justice (it failed to inform her of her rights, to provide her with effective legal representation and to ensure for her to be heard, (§ 157-159)).

II. INDIVIDUAL MEASURES

4. The Government deems that the violation has been brought to an end. In particular, the European Court indicated that the applicant's involuntary placement ended on 29 November 2012 when she was discharged from the hospital (§ 34 of the judgment). The violation therefore ceased on that date.
5. Pursuant to the applicable national legislation, following to the European Court's findings it was opened to the applicant to request reopening of the impugned proceedings before the domestic courts in respect of her allegations on her ill-treatment in the hospital within 30 days. This deadline has however expired on 18 June 2016. As far as the Croatian authorities are aware, the applicant has not availed herself of this opportunity. However, the authorities would like to highlight that she had a concrete and practical avenue available to obtain reopening of the domestic proceedings.
6. Furthermore, the Government would like to indicate that following the European Court's judgment, further involuntary placement has not been ordered against the applicant. Moreover, following the European Court's judgement the applicant is regularly receiving medical therapy regarding her psychiatric disorders and has made no complaints to relevant domestic authorities in relation thereto.
7. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considered that there was no call to award her any sum on that account (§166).

III. GENERAL MEASURES

8. The Government has thoroughly analysed the judgment in both factual and legal aspects, and determined that the violation of the Convention in this case was a direct consequence of the insufficient clarity of domestic law which caused (a) the applicant's ill-treatment in the psychiatric hospital (b) an ineffective access to justice followed by inadequate legal representation and (c) ineffective investigation into the applicant's complaints of ill-treatment.
9. Accordingly, the authorities considered that that legislative measures and appropriate awareness-raising measures are required to execute this judgment. These measures are set out below.

A. Measures aimed at preventing ill-treatment in psychiatric hospitals (*violation of Article 3 in substantive limb*)

10. The Government recalls that the violation under this head resulted from the unjustified use of restraints on the applicant in the psychiatric hospital. The Court noted in this respect that it was not conclusively established that the use of restraints was to prevent the alleged attacks and that other means of trying to calm the applicant down, or less restrictive means, had been unsuccessfully tried (§110 of the judgment).
11. The Court also pointed to the unsupportive and passive position of the hospital staff concerning the applicant's repeated complaints of pain in her back, of which the hospital was or should have been aware and concluded that was not satisfied that the applicant's condition during the use of the measure of physical restraint was effectively and adequately monitored (§111 of the judgment). The Government therefore took measures to prevent similar violations.

(i) *Measures aimed at ensuring adequate application of compulsory measures*

12. In response to the European Court's findings in this case, the Government took measures to ensure that psychiatric institutions apply compulsory measures in line with the relevant domestic legislation and thus prevent similar violations.
13. In particular, in 2015 the Ministry of Health (*Ministarstvo zdravlja*) issued a secondary legislation¹ prescribing types of compulsory measures within the context of psychiatric institutions and conditions and modalities for their application. The purpose of this secondary regulation is to codify the rules regarding the conduct of the medical staff when applying compulsory measures and to establish a standard procedure to be followed in all psychiatric institutions in such cases.
14. The Government would like to highlight that the secondary legislation provides that compulsory measures may only be applied in exceptional cases, i.e. if less burdensome measures remain unsuccessful. They are therefore to be employed as a matter of last resort and when their application is the only available mean to prevent immediate or imminent harm to the patient or other individuals. Accordingly, prior to applying compulsory measures, the medical staff has an obligation to use de-escalation measures (e.g. verbal communication, persuasion, transfer to another ward, etc.). Verbal communication with the patient is to be conducted in an isolated room, without the presence of other patients. Simple and understandable language is to be used, enabling the patient to express his problems, feelings, aggression, etc.
15. As regards the use of physical restraint, secondary legislation sets out a list of cases when such a measure may be applied (e.g. in cases of self-destructive or manic behaviour or to

¹ Pravilnik o vrstama i načinu primjene mjera prisile prema osobi s duševnim smetnjama (NN, br. 16/15)

prevent self-harm). The Government would however like to highlight that a maximum duration of physical restraint is limited to 4 hours, after which the psychiatrist evaluates the need to extend the measure. The measure may under no circumstances be applied for more than 24 hours in total. The secondary legislation also gives detailed instructions on how to apply this measure (i.e. how to approach a patient, how to massage the patient in order to keep the circulation going, how to prevent injuries). It also stipulates that the patient against whom a compulsory measure had been applied shall be placed in a room with video surveillance, and that his vital signs (blood pressure, pulse, body temperature) shall be regularly checked and his needs attended to (food, water, use of toilet).

16. Secondary legislation also stipulates an obligation of all psychiatric institutions to issue internal guidelines describing in detail methods and procedure to be applied by their medical staff when the need for compulsory measures arises. The Government would like to highlight in this respect that most psychiatric institutions in Croatia have already issued such guidelines, whereas others apply guidelines issued by the Croatian Medical Association (*Hrvatski liječnički zbor*) and the Croatian Society for Clinical Psychiatry (*Hrvatsko društvo za kliničku psihijatriju*). Furthermore, the Government deems important to highlight that the Rijeka Clinical Hospital Centre (in which the applicant was placed) has amended its internal guidelines on the use of compulsory measures in order to ensure their compliance with the European Court's findings in the instant case.
17. Lastly, the Government would like to highlight that in response to the present judgment, the Ministry of Health is continuously conducting educational programs for medical staff on how to successfully apply the above-mentioned de-escalation measures, how to assess the need for compulsory measures and how to appropriately apply them. The Government also ensured that the hospitals are now aware of the European Court's findings in the present case and the need to comply with the Convention as regards the use of compulsory measures in the psychiatric institutions.
18. The Government deems that the implementation of the above mentioned secondary ordinance designed to be applied in a standard manner is capable of preventing similar violations.
 - (ii) *Measures aimed at ensuring that patients' conditions are effectively and adequately monitored during the use of compulsory measures*
19. As regards the measures aimed at ensuring appropriate manner in which the patients' conditions are being monitored during the use of compulsory measures, the Government would like to indicate that it had ensured that the legislative measures have been taken to

this end. In particular, in 2014 the new Protection of Individuals with Mental Disorders Act² (hereinafter: PIMDA 2014) has been adopted.

20. Provisions of the PIMDA 2014 significantly broaden the scope of rights of persons with mental disorders in the involuntary placement proceedings, first and foremost the right to be informed. At the time of admittance into a psychiatric institution, every patient must be promptly informed in a manner which he/she will understand on the reasons and the purpose of admittance as well as on the nature, consequences, benefits and risks of the proposed medical treatment.
21. The person with mental disorder is furthermore entitled to actively participate in the planning and the implementation of the medical treatment she/he will receive. The person may also propose avenues to make rehabilitation more efficient.
22. Thus, PIMDA 2014 allows for the patients' needs to be heard, and also establishes better cooperation between the person with a mental disorder and a psychiatrist prescribing and monitoring the medical treatment. Accordingly, by taking into account the patient's wishes, the psychiatric institution prescribes a medical treatment that is best suited to the person's needs. Such an active cooperation will be capable of preventing similar violations as in the present case where the applicant's complaints of severe lower-back pain were met by the unsupportive and passive position of the hospital staff, who perceived them simply as her uncooperativeness to the treatment (§ 101, §111).

(iii) *Assessment of the measures taken to prevent ill-treatment in psychiatric hospitals*

23. Additionally, the Government would like to draw the attention of the Committee of Ministers to the Report on the Performance of Activities of the National Preventive Mechanism for 2014 regarding the protection of persons with mental disorder, drafted by the Ombudswoman of the Republic of Croatia. The Report contains the findings of the Ombudswoman from her visits to various psychiatric institutions in the Republic of Croatia. The Report indicates that the largest number of persons in the inspected psychiatric institutions were placed there on the basis of their own voluntary consent - voluntary placement (82%), whereas only 18% of persons were involuntarily placed. This clearly indicates that involuntary placement is ordered exceptionally, in most serious cases when the type of mental disorder and the existing imminent harm to the patient and/or others so warrant. Moreover, the Report concludes that the conduct of medical staff towards persons with mental disorders is essentially very professional. The

² Zakon o zaštiti osoba s duševnim smetnjama, Narodne novine br. 76/14

Ombudswoman did not identify inappropriate use of compulsory measures that would constitute torture or inhuman treatment.

B. Measures aimed at preventing ineffective access to justice followed by inadequate legal representation (*violation of Article 5 § 1 (e)*)

24. The Government recalls that the legal aid lawyer appointed to the applicant in the involuntary placement proceedings failed to effectively represent her (he did not meet with her, provide her with legal advice or make submissions or appeals on her behalf, but acted as a passive observer (§ 156)).

25. Moreover, the domestic court failed to secure the applicants' effective access to justice (it failed to inform her of her rights, to provide her with effective legal representation and to ensure her to be heard, (§ 157-159)).

26. Therefore, the Government took appropriate measures to ensure a more effective access to justice and to ensure effective representation and participation of the persons concerned in the proceedings concerning their involuntary placement. These measures include legislative changes as well as appropriate training and awareness raising measures.

(i) Legislative measures

27. In the *M. S. (2)* judgment the European Court *inter alia* noted that the applicant had not actively participated in the involuntary placement proceedings (§157-159). Therefore, the PIMDA 2014 calls for a more active role of persons with mental disorders in these proceedings. In this respect the Government would like to highlight that:

- all hearings have to take place in the psychiatric institution in which the person is placed.³ During the first hearing the court has an obligation to inform the person with mental disorder on her/his procedural rights in a manner which this person will understand;
- the presence of the person with a mental disorder is mandatory at all hearings, whilst only in exceptional cases (if the persons' health conditions so require) hearings may be held without the presence of the person in question. This allows the person with a mental disorder to participate in the proceedings; the person may present her/his own

³ Such a novelty is also in line with the Court's leading case law in cases dealing with protection of persons with mental disabilities, namely the *Shtukurov v. Russia* case.

views on the case at hand and if necessary the person may put forward complaints regarding the medical treatment that she/he receives.

28. The Government would also like to highlight that pursuant to the provisions of the PIMDA 2014, the presence of the legal representative of a person with a mental disorder is mandatory at all hearings in the proceedings concerning his/her involuntary placement. Moreover, in order to secure an effective legal representation of the persons concerned (as warranted in the *M.S. (2)* judgement, (§ 156)), the PIMDA 2014 also requires that when appointing a legal representative, the court must take into consideration her/his knowledge and experience in the field of forensic psychiatry.

29. Lastly, the Government deems important to pinpoint that the PIMDA 2014 introduced changes regarding the appointment of judges competent for conducting proceedings for involuntary placement. These judges are appointed by the president of the Supreme Court of the Republic of Croatia (*Vrhovni sud Republike Hrvatske*) for a term of 5 years. Only judges with knowledge of forensic psychiatry and those showing interest for the protection of persons with mental disorders may be appointed. Thereby, a decision on involuntary placement is delivered by the most competent judges possessing both necessary legal and medical knowledge and being sensitive to the rights of persons with mental disorders.

(ii) *Training and awareness raising measures*

30. The Government would like to indicate that in response to the European Court's findings in this case, a large number of trainings have been organised for persons included in the process of involuntary placement, in order to prevent similar violations.

31. In particular, the Croatian Bar Association (*Hrvatska odvjetnička komora*) has held several educational programs for attorneys interested in forensic psychiatry, in order to train them for effective representation in these proceedings. Accordingly, there are currently 296 attorneys trained in providing efficient legal aid to persons with mental disorders. The list with details of those attorneys has been delivered to the Supreme Court of the Republic of Croatia, county courts, and other relevant bodies in the Republic of Croatia. The list is not final, since educational programs are open to other attorneys who are inclined to providing legal assistance to persons with mental disorders.

32. During 2015 the Ministry of Justice (*Ministarstvo pravosuđa*) in cooperation with the Judicial Academy (*Pravosudna akademija*) has carried out an educational program for judges conducting the involuntary placement proceedings. The program was held by renowned experts in the field of forensic psychiatry, with the aim of acquainting judges

who conduct involuntary placement proceedings with the above-mentioned novelties introduced by the 2014 PIMDA as well as the European Court's findings in this case.

C. Measures aimed at preventing lack of an effective investigation into the allegations of ill-treatment in psychiatric hospitals (*violation of Article 3 in procedural limb*)

33. At the outset, the Government would like to recall that the violation occurred as the applicant's letter containing complaints of her ill-treatment in the hospital had never been forwarded to hospital authorities nor examined by the domestic court even though a requirement for an *ex officio* investigation into her complaints was mandated by relevant domestic law (§81 of the judgment).
34. In relation to the obligation of forwarding complaints to hospital authority, the PIMDA 2014 (unlike the PIMDA 1997 applied in the applicants' case) introduced a strict time frame in which complaints of ill-treatment made by the person with a mental disorder to the head of psychiatric institution or to the head of the ward have to be examined and answered. If the person filed an oral complaint, it must be examined immediately. In case of a written complaint, the psychiatric institution must reply within 8 days at the latest.
35. As to the obligation of examining complaints of ill-treatment by domestic courts, the Government recalls that the proper legal framework has been in place at the time when the facts of this particular case took place. In particular, Section 163 of the Court's Rules, provides that if the envelope contains a submission addressed to another court, body or legal entity, a relevant note shall be made next to the receipt note (such as "wrongly submitted") and the submission shall be forwarded to the addressee. The problem therefore occurred due to the omission of the domestic court which was contrary to the relevant legislation.
36. In relation thereto, the Government ensured that the Court's judgment has been translated into Croatian and published on the official web page of the Office of the Representative of the Republic of Croatia before the European Court of Human Rights (hereinafter: the Office of the Representative).⁴
37. The Office of the Representative also drew up an analysis of the judgment highlighting the Courts' findings, which was disseminated to all members of the national Council of Experts for the Execution of the Judgments of the European Court of Human Rights⁵ as

⁴ <https://uredzastupnika.gov.hr/sudska-praksa/clanak-3-zabrana-mucenja/155/doc/1132>

⁵ Stručni savjet za izvršenje presuda i odluka Europskog suda za ljudska prava

well as to domestic courts and other authorities directly involved in the proceedings, notably to the County Court in Rijeka (*Županijski sud u Rijeci*), the Rijeka Clinical Hospital Centre (*KBC Rijeka*) and the Croatian Bar Association (*Hrvatska odvjetnička komora*), along with the Croatian translation of the judgment.

38. Additionally, a short summary of the Court's judgment has been published in the *Review of the jurisprudence of the European Court of Human Rights (Pregled prakse Europskog suda za ljudska prava)*.⁶ The Review was disseminated to all relevant domestic authorities and published on the official website of the Office of the Representative.

39. Lastly, the Faculty of Law of the University of Rijeka has published *Comments on the PIMDA 2014*.⁷ The Comments include the PIMDA 2014, the pertaining secondary legislation, templates of decisions rendered in proceedings of involuntary placement and excerpts from relevant international documents. It is important to highlight that the Comments also contain summaries of the Court's relevant judgments in the field of protection of persons with mental disorders, notably *M. S. (2) v. Croatia*, *Bureš v. the Czech Republic*, *Shtukaturv v. Russia*, *Winterwerp v. the Netherlands*, *Aerts v. Belguim*, *Stanev v. Bulgaria*, etc. The Comments aim at raising awareness of all domestic authorities dealing with persons with mental disorders, particularly judges.

IV. CONCLUSIONS

40. The Government considers that the individual measures taken ensured that the violation at hand has been brought to an end and that the applicant had concrete and practical avenues at her disposal in the national legislation to obtain redress if she wished.

41. The Government furthermore deems that the general measures taken are capable of preventing similar violations.

42. The Government is therefore of the opinion that the Republic of Croatia has fully complied with its obligation under Article 46 § 1 of the Convention.

⁶ The Review contains summaries of selected Courts' judgments published quarterly by the Office of the Agent

⁷ Komentar Zakona o zaštiti osoba s duševnim smetnjama