U-I-294/12
10 June 2015

**DECISION**

At a session held on 10 June 2015 in proceedings to review constitutionality initiated upon the request of the Human Rights Ombudsman, the Constitutional Court

decided as follows:

**1. The third sentence of the second paragraph and the third sentence of the third paragraph of Article 74 of the Mental Health Act (Official Gazette RS, No. 77/08) are abrogated.**

**2. The abrogation shall take effect one year following the publication of the present Decision in the Official Gazette of the Republic of Slovenia.**

**3. Until a different statutory regulation is adopted or, at the latest, until the expiry of the time limit referred to in the preceding Point, judicial supervision over the deprivation of liberty of persons deprived of legal capacity must be ensured. A person deprived of legal capacity shall be committed to a secure ward of a social care institution with the permission of his or her legal representative. Within eight days of a person's committal to a secure ward, the social care institution must submit to a court the proposal [for the person's committal] in accordance with the procedure determined by Article 75 of the Mental Health Act.**

**4. In cases where persons deprived of legal capacity have been committed to secure wards on the basis of the regulation referred to in**

**Point 1 of the operative provisions of this Decision and are [still] committed thereto on the day of the publication of this Decision, social care institutions must submit to a court, within 30 days from the publication of this Decision in the Official Gazette of the Republic of Slovenia, the proposal [for the person's committal] in accordance with the procedure determined by Article 75 of the Mental Health Act.**

## REASONING

### A

1. The applicant challenges the second and third paragraphs of Article 74 of the Mental Health Act (hereinafter referred to as the MHA) in the part in which it regulates the procedure for committing a person deprived of legal capacity to a secure ward of a social care institution. It is of the opinion that the challenged regulation is inconsistent with the third and fourth paragraphs of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, Nos. 33/94, MP, and 7/94 – hereinafter referred to as the ECHR), as well as with Articles 14, 19, 22, and 23 of the Constitution, because it does not ensure judicial protection to a person deprived of legal capacity in the event he or she is committed to a secure ward of a social care institution with the consent of his or her legal representative. It underlines that the challenged regulation does not even enable a person deprived of legal capacity to participate in the procedure for committal to a secure ward. The committal of a person deprived of legal capacity to a secure ward is namely deemed, in accordance with Article 74 of the MHA, to entail committal by consent, although it is only the legal representative who gives his or her consent to the committal. In connection therewith, the MHA also does not determine any form of supervision over the decision made by the person's legal representative. Legal protection is allegedly completely excluded in such cases. Such a regulation allegedly differs significantly from the previous regulation determined by the Non-litigious Civil Procedure Act (Official Gazette SRS, Nos. 30/86, etc. – hereinafter referred to as the NLCPA), which determined, in Article 71, that the detention of a person deprived of legal capacity entailed non-consensual detention, and provided for judicial supervision of such. With regard to the above, the applicant is of the opinion that in comparison with the regulation previously in force, the MHA substantially worsened the position of such persons and exposed them to the risk of possible abuses. Any person who

with the consent of his or her legal representative is committed to a secure ward should be ensured the procedural guarantees determined by the third and fourth paragraphs of Article 5 of the ECHR. Since this is not so, the challenged regulation is allegedly inconsistent with Article 5 of the ECHR and Article 8 of the Constitution. The applicant is also of the opinion that the challenged regulation is inconsistent with Article 19 of the Constitution, as it concerns a *de facto* deprivation of liberty and an interference with the right to personal liberty (the first paragraph of Article 19 of the Constitution), with regard to which the MHA does not determine a procedure in which, after the procedure for taking evidence is carried out, an appropriate (judicial) authority would decide on a proposal for the limitation of the right to personal liberty of a person deprived of legal capacity. Allegedly, the challenged regulation does not provide such a person even the basic guarantees that would allow the procedure to be fair and adversarial, i.e. the right to a defence counsel and the right that a court-appointed expert witness who is not bound (e.g. contractually) by the institution in which the person is to be detained to give his or her opinion on the person's health condition. Such a person is thus allegedly put in a position that is worse than that of a person not deprived of legal capacity. The applicant is of the opinion that in cases where what is at issue is the question of the personal liberty of an individual, the legal representative should only be empowered to assist the person deprived of legal capacity to make a decision and should not be empowered to represent such a person in expressing his or her will or even to substitute for the will of such person. The applicant draws attention to the fact that this interference with personal liberty has no limitations and that there is no supervision over it. Only the legal representative of such a person can withdraw [his or her consent to] the committal thereof to a secure ward. Such an interference with personal freedom is thus allegedly arbitrary and unacceptable. Allegedly, in *Shtukaturov v. Russia*, dated 27 March 2008 and in *Stanev v. Bulgaria*, dated 17 January 2012, also the European Court of Human Rights (hereinafter referred to as the ECtHR) expressly drew attention to the need for judicial supervision in such cases. Furthermore, various legal acts of the Council of Europe, as well as the Convention on the Rights of Persons with Disabilities (Official Gazette RS, No. 37/08, MP, No. 10/08 – hereinafter referred to as the CRPD), express the need to ensure the protection of the human rights and dignity of persons with mental disorders, especially those who are being hospitalised or treated against their will. The challenged regulation is allegedly also inconsistent with Article 23 of the Constitution, as judicial protection regarding the lawfulness of their detention is not ensured to such persons. Since the challenged regulation also does not determine the possibility of their (active) participation before a court and, hence, does not ensure effective

exercise of their rights, it is, allegedly, also inconsistent with Article 22 of the Constitution. Persons deprived of legal capacity who with the consent of their legal representative are committed to a secure ward are allegedly also in an unequal position in comparison with other persons detained in conformity with the MHA, which allegedly also constitutes a violation of Article 14 of the Constitution. Namely, only in a situation concerning the former does their legal representative exclusively decide on both committal to and discharge from such a ward.

2. In its reply to the applicant's request, the National Assembly alleges that the challenged regulation is based on the presumption that such a person is not capable of forming an intention and therefore cannot give his or her consent. Since a person deprived of legal capacity is allegedly incapable of consenting, his or her will is substituted for by the will of his or her guardian. The Marriage and Family Relations Act (Official Gazette RS, No. 69/04 – official consolidated text – hereinafter referred to as the MFRA), which regulates the tasks of the guardian of a person deprived of legal capacity, also introduced mechanisms designed to ensure the protection of a ward’s interests and determined the obligation of supervision over the guardian’s work and his or her obligation to report to a social work centre. For such reason, the National Assembly is of the opinion that in proceedings for depriving such a person of legal capacity, as well as in the procedure in which he or she is placed under guardianship, in the procedure for appointing or discharging a guardian, and in the determination of the scope of the guardian’s tasks, such a person is ensured legal, i.e. judicial, protection. Due to the protection of the rights of persons in the field of mental health, the MHA also provided for the institute of a representative. According to the National Assembly, although the challenged regulation interferes with personal liberty, it cannot be equated with the deprivation of liberty within the meaning of the fourth paragraph of Article 5 of the ECHR and Articles 19, 32, 34, and 35 of the Constitution. It is also of the opinion that the other alleged inconsistencies of the challenged regulation with the Constitution do not exist.

3. Also the Government submitted an opinion, in which it draws attention to the fact that in order to commit a person deprived of legal capacity to a secure ward the conditions set out in the first paragraph of Article 74 of the MHA must be fulfilled and the consent of his or her legal representative must be given. The conditions determined by the first paragraph allegedly entail the principal grounds for committal to a secure ward. The existence of these grounds must allegedly be monitored and verified throughout the stay of the person concerned in a secure ward. The social care institution should therefore

establish by itself that with regard to a certain person there exists a need for permanent care and protection that cannot be provided in any other manner. If during the provision of services to a person in such a ward it is established that the grounds for the placement of this person in such a ward have ceased, i.e. that the conditions determined by the first paragraph of Article 74 of the MHA have ceased, then such a person should allegedly be transferred, i.e. discharged, from the secure ward without the necessity to also obtain the consent of his or her legal representative. The Government also disagrees with the allegation of the applicant that the MHA substantially worsened the position of persons deprived of legal capacity. In its opinion, the NLCPA did not regulate the procedure for committing such persons to a secure ward of a social care institution.

4. The reply of the National Assembly and the opinion of the Government were sent to the applicant. In its reply to the allegations of the National Assembly and the Government, the applicant continues to pursue the request and maintains all the allegations contained therein. Concerning the allegations of the Government that the legal representative merely substitutes for the consent of the person in the procedure for committal to a secure ward of a social care institution after the conditions set out in the first paragraph of Article 74 of the MHA have been fulfilled, it adds that this is precisely where the key disputable part of the challenged regulation lies. Allegedly, it is precisely for this reason (because it is deemed that the matter concerns committal by consent) that a person deprived of legal capacity may not even participate in such a procedure. Furthermore, with regard to the allegation of the Government that the challenged regulation follows the line of the regulation of guardianship in the MFRA, the applicant replies that in a study entitled "*Daleko od očiju*", the Mental Disability Advocacy Centre already drew attention to the disputability of a similar regulation of guardianship in the Republic of Croatia. This study is accessible on the website of that organisation. With regard to the opinion of the Government that before the adoption of the MHA the procedure for committing persons to a secure ward was not statutorily regulated, the applicant states that according to its findings presented in the 2008 Annual Report of the Ombudsman the case law of various local courts differed as regards detention in social care institutions and retirement homes.

**B**

5. The MHA determines the system of health care and social care in the field of mental health, who performs this activity, and the rights of persons during their treatment in a ward under the special supervision of a psychiatric hospital, care in a secure ward of a social care institution, and supervised care (the first paragraph of Article 1 of the MHA). The programmes and services[1] determined by the MHA are carried out as a public service (Article 4 of the MHA).[2]

6. One of the services or programmes determined by the MHA is the provision of care for persons in a secure ward of a social care institution. This entails a form of assistance offered to persons with mental health difficulties whose (psychiatric) treatment has been concluded and with regard to whom the need for acute hospital treatment no longer exists, whose needs, however, do necessitate round-the-clock care, as they are not capable of satisfying by themselves or with the assistance of a home care assistant or relatives their basic life needs (due to which their health might be in danger, and possibly their life as well). Hence, this service covers not only treatment, but also a social care mechanism, due to which care for a person in a secure ward must be deemed to entail a service in which the right to social security determined by the first paragraph of Article 50 of the Constitution and the right to health care determined by the first paragraph of Article 51 of the Constitution are intertwined.

7. A person is committed to a secure ward of a social care institution if all of the following conditions are fulfilled:
– acute hospital treatment has been concluded or is not necessary;
– the person needs round-the-clock care that cannot be provided in a domestic environment or otherwise;
– the person poses a threat to his or her own life or to the life of others, he or she poses a severe threat to his or her own health or to the health of others, or he or she causes substantial material damage to him- or herself, or to others;
– the threat referred to in the preceding indent is a consequence of a mental disorder due to which the person has a severely disturbed assessment of reality and the capacity to control his or her own actions;
– the stated causes and threats referred to in the third and fourth indents of this paragraph cannot be prevented by other forms of assistance (outside of the social care institution, in supervised care);
– the person fulfils the other conditions for committal to a social care institution determined by the regulations in the field of social care (the first paragraph of Article 74 of the MHA).

8. If all of the mentioned conditions are fulfilled cumulatively, a person is committed to a secure ward with or without his or her consent (Article 73 of the MHA). Committal to a secure ward without a person's consent is only admissible on the basis of a court order following a procedure in which Articles 40 through 52 of the MHA are applied *mutatis mutandis*; these articles regulate committal to treatment in a psychiatric hospital without consent, namely in a ward under special supervision, on the basis of a court order (Article 75 of the MHA).[3] In the procedure, obligatory representation by an authorised representative who is an attorney is prescribed (the first paragraph of Article 31 of the MHA). The person concerned is examined on the basis of a court order by a court-appointed expert witness, namely a psychiatric expert, who submits his or her opinion on the person's health condition (the first paragraph of Article 43 of the MHA). A court decides on the committal of the person on the basis of direct contact with him or her so that, before issuing the order, it sees the person and, if his or her health condition allows it, talks to him or her (the second paragraph of Article 46 of the MHA). If the person does not have legal capacity, the court allows him or her to carry out procedural actions by him- or herself if he or she is able to comprehend the meaning and the legal consequences of such actions (the second paragraph of Article 32 of the MHA). As concerns the discharge of a person from a secured ward, Article 71 of the MHA, which regulates the discharge of a person from a ward under special supervision, applies. In the event a person is committed to a secure ward with his or her consent, such consent must be an expression of the person's free will based on comprehension of the situation and formed on the basis of an appropriate explanation regarding the nature and purpose of care for him or her. The consent must be given in written form (the second paragraph of Article 74 of the MHA). A person who has consented to being committed to a secure ward can, at any time, expressly or by actions from which such can be inferred, withdraw his or her consent and request that he or she be discharged from the secured ward.

9. The consent [in the name] of a person deprived of legal capacity[4] to be committed to a secure ward of a social security institution is given by his or her legal representative.[5] The latter can also request that his or her ward be discharged, namely by withdrawing his or her consent (the second and third paragraphs of Article 74 of the MHA). In such manner, the legal representative substitutes for the will of the person deprived of legal capacity. For such reason, it is deemed that such a person is being treated and cared for in a secure ward of a social care institution of his or her own volition.

10. The subject of review in the case at issue is the procedure for committing a person deprived of legal capacity to care in a secure ward of a social care institution[6] with the consent of his or her legal representative, as regulated by the third sentence of the second paragraph and the third sentence of the third paragraph of Article 74 of the MHA. The applicant's fundamental allegation is that the challenged regulation, although it is statutorily defined as "committal by consent", unconstitutionally interferes with the right of the person deprived of legal capacity to personal liberty determined by the first paragraph of Article 19 of the Constitution and the first paragraph of Article 5 of the EHCR.

11. In the first paragraph of Article 19, the Constitution guarantees the right to personal liberty. The Constitution prescribes special guarantees for all instances of limitations of personal liberty. The general guarantee relating to the limitation of the right to personal liberty is determined by the second and third paragraphs of Article 19 of the Constitution. The second paragraph of Article 19 of the Constitution determines that no one may be deprived of his or her liberty except in such cases and pursuant to such procedures as are provided by law. An interference with the right to personal liberty is thus only admissible in statutorily determined cases and in accordance with statutorily determined procedures for the deprivation of liberty.[7] The third paragraph of Article 19 of the Constitution then determines further guarantees that apply to persons at the moment of being deprived of their liberty (the instruction regarding the grounds for the deprivation of liberty and the instruction regarding certain rights). These procedural guarantees must be taken into account *mutatis mutandis* in any procedure for the deprivation of liberty.[8] Hence, it does not follow from the Constitution that regardless of the nature and purpose of the deprivation of liberty the decisions regarding such a measure should (only) be adopted in a criminal procedure or in a procedure that satisfies the guarantees of a criminal procedure.[9]

12. By the second paragraph of Article 19 of the Constitution, the constitution-framers determined that the cases in which it is admissible to interfere with the right to personal liberty and the determination of the procedure in accordance with which competent state authorities must act in such instances shall be regulated by law. In doing so, the legislature must observe other constitutional provisions, in particular, the third paragraph of Article 15 of the Constitution, in accordance with which human rights and fundamental freedoms may be limited only due to the rights of others and in such cases as are provided by the Constitution. It also must observe the principles of a state governed by the rule of law determined by Article 2 of the Constitution, including, *inter alia*, the

general principle of proportionality, which binds the legislature when determining limitations of human rights. The Constitutional Court stressed already in Decision No. U-I-18/93 that the two mentioned fundamental conditions (i.e. that the law must determine the instances and the procedure for the deprivation of liberty) for an interference with the right to personal liberty to be admissible are determined in more detail in the provisions of the Constitution that follow, in particular, those that regulate constitutional procedural guarantees (i.e. Articles 22, 23, and 25 of the Constitution). Hence, liberty may only be limited in instances expressly determined by law, and in accordance with a procedure that is, taking into account the constitutional procedural guarantees, determined by law. The fundamental prerequisite of a constitutionally consistent limitation of liberty is the right to be the subject of such a procedure.

13. Similarly as the Constitution, the right to personal liberty is also guaranteed by the first paragraph of Article 5 of the ECHR. The latter provision contains the same obligation as is determined by the second paragraph of Article 19 of the Constitution, with the only difference being that it exhaustively determines the instances in which it is admissible to deprive an individual of his or her liberty. Among them, in point (e)[10] of the first paragraph of Article 5 it provides for the lawful detention of persons of unsound mind (*aliénés*). The second paragraph of Article 5 determines that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. The third and fourth paragraphs of Article 5 then determine the procedural guarantees that must be ensured in the procedure for the deprivation of liberty (i.e. bringing the person promptly before a judge; a trial within a reasonable time or his release pending trial; the right to initiate proceedings by which the lawfulness of his detention is decided speedily by a court and his release ordered if the detention is not lawful). The latter guarantee, i.e. the right to judicial protection (judicial supervision) regarding the lawfulness of detention, is one of the fundamental rights of a person suffering from a mental disorder. The requirement stated in the fourth paragraph of Article 5 of the ECHR is fulfilled if a person with a mental disorder is ensured the possibility to propose that a court verify whether the statutory grounds for detention (still) exist or, if automatic periodic verification is ensured, to verify whether grounds for forced detention still exist.[11] This position of the ECtHR follows from its judgment in *Winterwerp v. Netherlands*, dated 24 October 1979, in which the Court stated that it is of essential importance that persons are ensured access to a court and the possibility to make a statement, either by him- or herself, or, whenever this is not possible, by means of some form of representation. Hence, also in such procedures the

ECtHR requires that the right to an adversarial procedure be observed. In proceedings before a court the so-called “equality of arms” must be ensured.[12] In such context, it is important that a person who has been forcefully detained has the possibility to consult the documentation containing the information on the basis of which he or she has been detained, and to present evidence to his or her benefit.[13]

14. In *Winterwerp v. Netherlands*, the ECtHR introduced three fundamental requirements that must be fulfilled in order for the detention of persons with a mental disorder [i.e. committal] to be lawful.[14] In accordance with the position of the ECtHR, the forced detention of persons with a mental disorder is only admissible if on the basis of objective health standards a mental disorder *(troubles mentaux)* is demonstrated and if due to the nature or severity of the mental disorder the patient poses a serious threat to others or to him- or herself. The third requirement refers to the duration of detention. The detention may only last as long as the mental disorder that justifies it persists. The ECtHR stresses that psychiatric detention must be medically indicated.[15] However, in cases of emergency it does allow that a person with a mental disorder be forcefully detained even without a prior exhaustive medical examination.[16] In accordance with the case law of the ECtHR, these requirements do not apply only to instances of detention on the basis of a decision by a court, but also (even more so) to instances where the detention of a person is a consequence of the decision or proposal of another natural person, i.e. a guardian of the person detained, with regard to which the authorities in power are in different ways included or involved in the procedure for detention.[17]

15. With regard to the fact that the MHA treats the committal of a person deprived of legal capacity to a secure ward of a social care institution in the same manner as the committal of a person who gave his or her consent by him- or herself, i.e. as committal by consent, it is first necessary to answer the question of whether the case at issue concerns an interference with personal liberty. A person who is committed to a secure ward by the consent of his or her legal representative and not by his or her own consent also cannot leave such ward of his or her own volition. He or she may only leave such in the event the social care institution establishes that the conditions determined by the first paragraph of Article 74 of the MHA are no longer fulfilled or if [the consent for] placement in a secure ward is withdrawn by the person’s legal representative. In such context, it must furthermore be noted that the MHA does limit the length of time that a person committed to a secure ward by the consent of his or her legal representative may be placed therein, which differs

from the [regulation concerning the] placement of persons in such a ward on the basis of a court order. The length of detention in a secure ward on the basis of a court order can be determined to be up to one year at most. Prolongation of detention is only possible on the basis of a court order and under the conditions determined by Article 70 of the MHA. It undoubtedly follows from the above that the challenged regulation interferes with the right of these persons to personal liberty, which is determined by the first paragraph of Article 19 of the Constitution.[18]

16. The first requirement for the admissibility of the deprivation of liberty in accordance with the second paragraph of Article 19 of the Constitution is that the case concerns a situation provided by law. The ECHR expressly determines the cases in which it is admissible to deprive an individual of his or her liberty. The ECHR classifies among such cases the lawful detention of persons of unsound mind (point (e) of the first paragraph of Article 5). Both the ECHR and the Constitution provide equal protection of the right to personal liberty. Therefore, the Constitutional Court carried out the assessment of the challenged regulation within the framework of the Constitution.[19] The first paragraph of Article 74 of the MFRA determines the substantive conditions for the committal of a person to a secure ward. By defining the conditions (cited in paragraph 7 of the present reasoning) for the deprivation of the liberty of persons with regard to whom the circumstances set out by the first paragraph of Article 74 of the MHA do exist, the legislature satisfied the requirement to statutorily regulate the interference with the personal liberty of persons suffering from a mental disorder.

17. The second requirement that follows from the second paragraph of Article 19 of the Constitution is that the deprivation of liberty is only carried out “pursuant to such procedures as are provided by law”. In Decision No. U-I-18/93 the Constitutional Court stressed that the Constitution determines the framework of the legislature’s regulation of the procedure. Also the procedure has to be determined in advance and in accordance with the constitutional procedural requirements. Concerning the requirement of the lawfulness of the procedure for the deprivation of liberty, the ECtHR requires not only that the procedure for the deprivation of liberty is to be regulated by law and that each individual deprivation of liberty is to be carried out in accordance with these rules, but also that the statutory regulation is in conformity with the ECHR, including with the general principles expressed or contained therein.[20] It underlines that the “procedure for the deprivation of liberty prescribed by law” must be a fair and proper procedure, i.e. any measure depriving a person of his or her liberty should issue from and be executed by an appropriate

authority and should not be arbitrary.[21] The key purpose of the first paragraph of Article 5 of the ECHR is the protection of individuals from arbitrary actions.[22] The ECtHR also stresses that in order for the deprivation of liberty to be "non-arbitrary" within the meaning of the first paragraph of Article 5 of the ECHR, the possibility of an *ex post* judicial review of the lawfulness of the deprivation of liberty as required by the fourth paragraph of Article 5 of the ECHR does not suffice. The guarantees that follow from the first paragraph of Article 5 of the ECHR cannot be equated with the guarantees that follow from the fourth paragraph of Article 5 of the ECHR. Namely, the first paragraph strictly delimits the circumstances in which a person may be deprived of his or her liberty, whereas the fourth paragraph requires *ex post* judicial review of the lawfulness of the deprivation of liberty.[23] It is thus necessary to equally ensure the fulfilment of the conditions for the deprivation of liberty and the conditions for the *ex post* review thereof.

18. Also the Constitution guarantees the mentioned constitutional procedural guarantees. The right to the equal protection of rights determined by Article 22 of the Constitution and the procedural guarantees that follow therefrom must be ensured in all procedures relating to decision-making on the rights, duties, and legal interests of individuals. The right to make a statement is a direct and the most important expression thereof.[24] It guarantees that everyone has the possibility to make a statement in a procedure that affects his or her rights and interests and thus prevents a person from becoming merely an object of the procedure.[25] The procedure for the committal of a person to a secure ward of a social care institution does not give such person the right to make a statement or any possibility whatsoever to participate in the procedure for the deprivation of his or her liberty. The fact that in such a procedure persons deprived of legal capacity are denied the rights determined by Article 22 of the Constitution is a consequence of the erroneous presumption (see the reply of the opposing party, paragraph 2 of the reasoning) that persons without legal capacity[26] also do not have the capacity to give consent to a medical procedure or another similar measure or to refuse such. The assessment of whether an individual (not only a person suffering from a mental disorder) has the capacity to give consent is reserved for a doctor or some other [authorised] provider of medical care. Since a person's consent is required for each individual medical procedure or treatment, a doctor assesses such consent in each individual case of treatment separately. The legislature must expressly prescribe any exceptions to this rule. A necessary precondition for so-called informed consent[27] to be given is that the duty of explanation has been fulfilled, to which a doctor is bound (also) by the third paragraph of Article 51 of

the Constitution, in accordance with which no one may be compelled to undergo medical treatment except in cases provided by law.[28] When giving an explanation, a doctor must always proceed from the circumstances of the individual case and must always adapt the explanation to each individual patient.[29] In order for the consent to be legally valid, (merely) the fact that the person has mental capacity – i.e. a certain level of maturity[30] that allows the person to comprehend the meaning of the explanation and to appropriately decide on the basis thereof – suffices.[31] On the other hand, this means that even a person who has been deprived of legal capacity (and placed under guardianship) due to his or her mental health problems might be able to give consent to a medical or similar procedure, and also that a person might not be able to give valid consent to a medical procedure although he or she has not been deprived of legal capacity.[32] Hence, the mere fact that a person has been deprived of legal capacity cannot entail that the person is not capable of comprehending the importance and consequences of his or her decision in other fields where legal capacity is not required in order for his or her decisions to be valid.[33]

19. (In fact,) the MHA derives the criteria for [assessing] the capacity to give or reject consent from the Patient Rights Act (Official Gazette RS, No. 15/08 – hereinafter referred to as the PRA),[34] which in relation to the MHA is a general regulation. When determining the measure at issue, the legislature neglected the positions adopted in legal theory and case law that were stated in the preceding paragraph (and which also the PRA is based on). Therefore, due to the presumption that a person deprived of legal capacity is also incapable of giving or refusing consent to his or her treatment and care in a secure ward, the challenged regulation introduces an automatism that renders the assessment of whether a person is capable of giving or refusing his or her consent completely impossible, and thereby prevents him or her from being included in the procedure for the deprivation of his or her liberty. The will of such person and thereby all the guarantees of a fair procedure that are guaranteed to him or her within the framework of Article 22 of the Constitution are replaced by a statement of the person's legal representative. The care that is exercised by the legal representative or guardian for his or her ward in accordance with the express statutory definition (Article 207 of the MFRA) cannot be interpreted as meaning that it also includes decision-making on the deprivation of the person's liberty for the purpose of his or her treatment or placement in a social care institution. The deprivation of liberty concerns a value so important that it must be a consequence of a decision adopted in a fair procedure. In such context, it must be underlined that when persons with mental disorders and thus possibly also with difficulties with the exercise of

their (free) will are at issue, a fair procedure must, despite this fact, ensure such persons as comprehensive and complete participation in the procedure as possible and thereby also the exercise of their human rights and fundamental freedoms. Also the first paragraph of Article 52 of the Constitution, which guarantees persons with disabilities special protection in accordance with the law, obliges the legislature to adopt such (adapted) regulation of the procedure.[35] In such a procedure also a legal representative (a guardian of a person deprived of legal capacity) can be included in an appropriate manner, as care for his or her ward is his or her fundamental task. He or she must thereby also observe the CRPD, by signing of which the Republic of Slovenia committed itself to ensuring and promoting the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability and to adopting all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the [mentioned] Convention (Article 4 of the CRPD).[36] In such context, also the positions of the UN Committee on the Rights of Persons with Disabilities with regard to the general obligations of the Member States under the CRPD must be underlined.[37] The Committee draws attention to the fact that the CRPD requires signatory states to abolish guardianship systems (including the deprivation of legal capacity) and their replacement with systems of support during the decision-making.[38]

20. The challenged regulation of the committal of persons deprived of legal capacity to a secure ward of a social care institution does not fulfil the requirements that follow, with regard to the procedure in accordance with which such persons can be deprived of their liberty, from the second paragraph of Article 19 of the Constitution (and which are defined in more detail by other constitutional provisions). Due to their inconsistency with the second paragraph of Article 19 of the Constitution (Point 1 of the operative provisions), the Constitutional Court abrogated the third sentence of the second paragraph of Article 74 of the MHA, which reads as follows: “Consent for a person deprived of legal capacity shall be given by his or her legal representative,” and the third sentence of the third paragraph of Article 74 of the MHA, which reads as follows: “In the event the person’s legal representative withdraws his or her consent, the social care institution shall proceed in the same manner.”

21. The Constitutional Court decided that the abrogation shall take effect one year following the publication of the present Decision in the Official Gazette of the Republic of Slovenia (Article 161 of the Constitution and Article 43 of the

Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA)). The reason why it opted for such a solution is that the complexity of the regulated content renders an immediate abrogation impossible. In order to provide the legislature with enough time to regulate the procedure for the committal of persons deprived of legal capacity to secure wards of social care institutions in a constitutionally consistent manner, and by observing the reasons stated in this Decision, the Constitutional Court deferred the entry into effect of the abrogation for the longest period possible, i.e. for one year (Point 2 of the operative provisions).

22. In order to ensure, during the period of deferment, at least the essential procedural guarantees when limiting the personal freedom of persons deprived of legal capacity, the Constitutional Court determined, on the basis of its authorisation determined by the second paragraph of Article 40 of the CCA, the manner of the implementation of its Decision. It determined that, during this period, *ex post* judicial supervision over the committal of persons deprived of legal capacity to secure wards of social care institutions shall be ensured. To this end, social care institutions must submit to a court, within eight days of the committal of a person deprived of legal capacity to a secure ward, a proposal to carry out the procedure determined by Article 75 of the MHA (Point 3 of the operative provisions). In order to ensure persons deprived of legal capacity who on the day of the publication of this Decision are [still] committed to secure wards of social care institutions equal fundamental constitutional procedural guarantees, the Constitutional Court determined, also as regards these persons, the manner of the implementation of this Decision. It determined that social care institutions must submit to a court, within 30 days of the publication of this Decision in the Official Gazette of the Republic of Slovenia, a proposal to initiate a procedure in accordance with Article 75 of the MHA (Point 4 of the operative provisions). In such manner, *ex post* judicial control as determined by Article 75 of the MHA will be ensured to both persons deprived of legal capacity who are placed in secure wards, and to persons who have yet to be committed to secure wards during the time period until a constitutionally consistent statutory regulation is adopted or until the expiry of the period of deferment referred to in Point 2 of the operative provisions of this Decision.

**C**

23. The Constitutional Court adopted this Decision on the basis of Article 43 and the second paragraph of Article 40 of the CCA, composed of: Mag. Miroslav Mozetič President, and Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Dr. Ernest Petrič, Jasna Pogačar, and Dr. Jadranka Sovdat. The decision was reached unanimously.

Mag. Miroslav Mozetič
President

Notes:
[1] In such manner it regulates the procedures for the committal of persons (individuals with a mental disorder who are treated or cared for within the framework of the network of providers of mental health programmes and services; point 13 of Article 2 of the MHA) to treatment in a ward under the special supervision of a psychiatric hospital, to care in a secure ward of a social care institution, to supervised care, or to care in a community.
[2] The MHA was intended to determine the legal framework for long-term and comprehensively conceived mental health protection (Bulletin of the National Assembly, No. 61/08, p. 4). It superseded Articles 70 through 81 of the NLCPA, which regulated the procedure for the detention of persons in psychiatric health care institutions. By Decision No. U-I-60/03, dated 4 December 2003 (Official Gazette RS, No. 131/03, and OdlUS XII, 93), the Constitutional Court established that the regulation of forced detention in a closed ward of a psychiatric hospital was (for various reasons) inconsistent with the Constitution.
[3] A person deprived of legal capacity is committed to a psychiatric hospital for treatment in a ward under special supervision on the basis of a court order (Articles 40 through 52 of the MHA). Also the legal representative of such a person may submit a proposal for the committal thereof to such ward (the second paragraph of Article 40 of the MHA).
[4] Persons who due to their mental illness, mental retardation, alcohol or drug dependence, or any other reason that affects their psychophysical condition, are not capable of taking care of themselves and of securing their own rights and interests, shall be partially or entirely deprived of their legal capacity (Article 44 of the NLCPA).
[5] Social work centres assign a person deprived of legal capacity a guardian (the first paragraph of Article 206 of the MFRA). A guardian represents his or

her ward (the first paragraph of Article 192 of the MFRA). A guardian must in particular foster his or her ward's personality and, in doing so, take into account the reasons due to which the person concerned was deprived of legal capacity. He or she must also strive to eliminate these reasons so as to enable the ward to learn how to live and work independently (Article 207 of the MFRA). In accordance with the MHA, a guardian as the legal representative of a person deprived of legal capacity can participate in the procedures and measures regulated by that Act in different ways. For instance, he or she can submit a proposal for such a person to be committed without his or her consent, on the basis of a court order, to treatment in a ward under special supervision (the second paragraph of Article 40 of the MHA), a proposal for treatment in supervised care (Article 81 of the MHA), or a proposal to carry out administrative supervision over the ordering and implementation of a special security measure (the eighth paragraph of Article 29 of the MHA).

[6] A social care institution is a general or special public social care institution or holder of a concession that provides services within the framework of a network of a public service and is intended for the protection, accommodation, and life [in general] of persons whose acute hospital treatment related to a mental disorder has concluded or is not necessary.

[7] The Constitutional Court defined the conditions under which an interference with the personal liberty of an individual is constitutionally admissible already in Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40), which referred to the deprivation of liberty in criminal proceedings. It stressed that the Constitution differentiates between [two different expressions for] liberty. No one can be deprived of his or her [liberty in the broader sense], but it is possible to temporarily limit his or her liberty. An individual may be deprived of his or her liberty, but this must at all times be envisaged and legally regulated from both the substantive and procedural aspects.

[8] *Cf.* Decisions of the Constitutional Court No. U-I-60/03, dated 4 December 2003 (Official Gazette RS, No. 131/03, and OdlUS XII, 93, Para. 12 of the reasoning), and No. Up-153/05, dated 12 May 2005 (Official Gazette RS, No. 53/05, and OdlUS XIV, 42, Para. 5 of the reasoning).

[9] *Cf.* Decisions of the Constitutional Court No. U-I-60/03; No. U-I-344/06, dated 20 November 2008 (Official Gazette RS, No. 113/08, and OdlUS XVII, 61); and No. Up-1116/09, dated 3 March 2011 (Official Gazette RS, No. 22/11).

[10] This provision refers to very diverse groups of persons. From the case law of the ECtHR it follows that the reason for the deprivation of the liberty of persons referred to therein can be of a medical and/or social nature (Judgment of the ECtHR in *Witold Litwa v. Poland*, dated 4 April 2000).

[11] *Cf.* the Decision of the Grand Chamber of the ECtHR in *Stanev v. Bulgaria*.
[12] See Decision of the Constitutional Court No. U-I-60/03.
[13] In *Nikolova v. Bulgaria*, dated 25 March 1999, the ECtHR stated that equality of arms is not ensured if a court denies a party access to those documents which are essential in order for a decision on detention to be made.
[14] The ECtHR keeps reiterating and underlining these requirements over and over again. See, e.g. the Judgments in *Shtukaturov v. Russia*, *Stanev v. Bulgaria*, and *Zagidulina v. Russia*, dated 2 May 2013.
[15] In *Varbanov v. Bulgaria*, dated 5 October 2000, the ECtHR stressed that an expert medical opinion (assessment) regarding a patient must be based on the current health condition of the person and not merely on past events.
[16] Judgment of the ECtHR in *X v. the United Kingdom,* dated 5 November 1981.
[17] See also the Judgments of the ECtHR in *Shtukaturov v. Russia* (concerning an individual who had been committed to a psychiatric hospital); *Mihailovs v. Latvia*, dated 22 January 2013 (concerning an individual who had been committed to a state social care centre); *Storck v. Germany*, dated 16 June 2005 (regarding which the police returned a woman who had escaped from a private clinic). In *D. D. v. Lithuania*, dated 14 February 2012, a guardian proposed that his ward be committed to a social care institution and his proposal was granted by the competent city and social care authorities. These cases are similar to the case at issue.
[18] *Cf*. what was stated above with the Judgments of the ECtHR in *Shtukaturov v. Russia*, *Stanev v. Bulgaria, and Kędzior v. Poland*, dated 16 October 2012.
[19] *Cf*. Decision of the Constitutional Court No. U-I-12/12, dated 11 December 2014 (Official Gazette RS, No. 92/14).
[20] See the Judgments of the ECtHR in *Winterwerp v. Netherlands*, *Kędzior v. Poland*, and *Zagidulina v. Russia*.
[21] See, e.g., the Judgment of the ECtHR in *Kędzior v. Poland*.
[22] The ECtHR stresses in its case law that lawfulness cannot be interpreted narrowly, as it does not concern only legality in the sense of a (mere) regulation by law but something more than that. One can only speak of a lawful deprivation of liberty where a person is deprived thereof in accordance with a procedure upon which not even a shadow of a doubt may be cast regarding its [non-]arbitrariness. See, e.g., the Judgments of the ECtHR in *Winterwerp v. Netherlands*; *D. D. v. Lithuania; Shtukaturov v. Russia*; *Sýkora v. the Czech Republic*, dated 22 November 2012; and *L. M. v. Slovenia*, dated 12 June 2014.

[23] See the Judgment of the ECtHR in *H. L. v. the United Kingdom*, dated 5 October 2004.
[24] See A. Galič in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, pp. 276–277.
[25] See also Decision of the Constitutional Court No. U-I-60/03.
[26] Legal capacity is a legally recognised capacity to express one's intention to be legally bound and to thereby form, amend, or terminate legal relations by one's own actions (see Z. Krušič Matè, *Pravica do zasebnosti v medicini* [The Right to Privacy in Medicine], GV Založba, Ljubljana 2010, p. 54).
[27] Consent regarding a medical procedure is only legally valid if the patient is fully informed regarding such procedure. The doctor must explain to the patient, in a manner he understands, everything that is necessary for him or her to be appropriately informed of the medical procedure and treatment. Only when the doctor fulfils this obligation can the consent be attributed real meaning, as only the informedness ensures the possibility to decide; once the doctor fulfils this obligation, the patient can shape his or her will in a legally valid manner (A. Polajnar Pavčnik, *Varstvo človekovih pravic med zdravljenjem* [The Protection of Human Rights During Treatment], (Part 1), Podjetje in delo, No. 6 (1998)). For more on informed consent, see Z. Krušič Matè, *op. cit*., pp. 44–108.
[28] *Cf.* B. Ivanc in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, pp. 852–853.
[29] See A. Žmitek, *Zakon o duševnem zdravju: problemi v praksi* [The Mental Health Act: Problems in Practice], Pravna praksa, No. 33 (2009), pp. 6–9. The author states that from both the human side as well as due to the better cooperation of the patient during the treatment, voluntary hospitalisation is significantly more appropriate than hospitalisation without the consent of the patient. See also J. Markič, *Pridržanje oseb z motnjami v duševnem zdravju* [Detention of Persons with Mental Health Disorders], Pravna praksa, Nos. 16–17 (2009), pp. 6–7.
[30] In modern law, the capacity to consent (*aptitude à consentir*) is in general linked with mental capacity in decision-making, i.e. the capacity to comprehend the meaning and consequences of one’s decision. See B. Novak, D. Korošec, B. Ivanc, and J. Balažic in: J. Balažic, U. Brulc, B. Ivanc, D. Korošec, K. Kralj, B. Novak, N. Pirc Musar, and A. Robida, *Zakon o pacientovih pravicah s komentarjem* [The Patient Rights Act with Commentary], GV Založba, Ljubljana 2009, p. 42. This is also stated in A.

Polajnar-Pavčnik, *Obligacijski vidiki razmerja med bolnikom in zdravnikom, Pravo in medicina* [Aspects under the Law of Obligations concerning the Relationship Between Patient and Doctor; in: The Law and Medicine], Cankarjeva založba, Ljubljana 1998, p. 106).

[31] Z. Krušič Matè, *op. cit*, p. 55.

[32] B. Novak, D. Korošec, B. Ivanc, and J. Balažic, *op. cit*., p. 42.

[33] *Cf.* Decision of the Constitutional Court No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70). See also the Judgments of the ECtHR in *Kędzior v. Poland*, *Stanev v. Bulgaria*, and *Shtukaturov v. Russia*.

[34] In accordance with the PRA, a person has the capacity to adopt decisions regarding him- or herself if, with respect to his or her age, maturity, health condition, and other personal circumstances, the person is capable of comprehending the meaning and consequences of the invocation of rights determined by that Act, in particular of consent, refusal, or withdrawal of the refusal to accept a medical procedure or health care (point 19 of Article 2 of the PRA).

[35] *Cf.* the Judgments of the ECtHR in *Zagidulina v. Poland* and *Stanev v. Bulgaria*.

[36] Also the European Union ratified the CRPD. It has applied therein since 25 January 2011.

[37] United Nations, Convention on the Rights of Persons with Disabilities, Committee on the Rights of Persons with Disabilities, Eleventh Session, 31 March–11 April 2014, General Comment No. 1 (2014), Article 12: Equal recognition before the law, adopted on 11 April 2014. The text is accessible in several languages on the following website: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en>.

[38] The Committee also draws attention to the fact that depriving persons with disabilities (or *personnes handicapées*) of legal capacity and their detention in institutions against their will, i.e. without their consent or on the basis of the consent of their guardian, entails an arbitrary deprivation of liberty and violates Articles 12 (equal recognition before the law) and 14 (liberty and security of the person) of the CRPD.