EHRM 10 januari 2019, Čutura t. Kroatië

Hendriks, A.C.

13

Rechtbank moet waarborgen dat rechten van psychiatrische patiënt door zwak optreden advocaat niet in de knel komen

Europees Hof voor de Rechten van de Mens
10 januari 2019, 55942/15,
ECLI:CE:ECHR:2019:0110JUD005594215
(Krzysztof Wojtyczek, Ksenija Turković,
Pauliine Koskelo)
Noot Prof. dr. A.C. Hendriks

Rechtsbijstand. Passieve opstelling advocaat. Taak rechtbank.

[EVRM art. 5 lid 1]

Een Kroatische rechtbank had geoordeeld dat Dragan Čutura, geboren in 1980, zijn buren in januari 2014 verbaal had bedreigd terwijl hij psychotisch was. Dragan was daarvoor strafrechtelijk veroordeeld. Vanwege zijn psychische situatie verbleef hij in het gevangenisziekenhuis. De rechtbank bepaalde daarop dat Dragan moest worden opgenomen in een psychiatrische instelling op grond van de psychiatrische wetgeving. Deze opname werd vervolgens enkele malen verlengd, waarbij Dragan rechtsbijstand kreeg van een door de rechtbank toegewezen advocaat. De vader tekende, namens Dragan, beroep aan tegen de verlengde onvrijwillige opname. Hij stelde dat de familie geen idee had van het feit dat Dragan Čutura in het ziekenhuis kon worden vastgehouden en evenmin dat er sprake was van rechtszaken. Hij stelde voorts dat de advocaat van Dragan zich passief had opgesteld. Dragan werd uiteindelijk na anderhalf jaar, in augustus 2015, voorwaardelijk ontslagen.

Het Hof stelt vast dat Dragan wat betreft de strafrechtelijke procedure werd bijgestaan door een zelfgekozen advocaat, maar met betrekking tot de onvrijwillige psychiatrische opname een advocaat kreeg toegewezen, die al snel om onbekende redenen werd vervangen door een andere advocaat. Deze derde advocaat had zich passief opgesteld bij de procedures. Hij had Dragan en de rechter niet gesproken, had geen contact gezocht met Dragan of zijn familie en had geen standpunt ingenomen namens Dragan tijdens de procedures. Hoewel bekend met deze passiviteit had de rechtbank niet getracht te waarborgen dat Dragan op een effectieve wijze werd bijgestaan. Dit ondanks het feit dat rechtbanken daartoe een verzwaarde verplichting hebben bij mensen met een handicap. Niets wijst erop dat een rechter Dragan had geïnformeerd over zijn rechten of getracht had hem bij de gang van zaken tijdens de procedures te betrekken. De rechters hadden evenmin getracht de familie te involveren, terwijl die zich eerder hadden verzet tegen de onvrijwillige opname van Dragan. Dit leidt tot een schending van art. 5 lid 1 EVRM.

Čutura
tegen
Kroatië

Europees Hof voor de Rechten van de Mens:

Procedure

1. The case originated in an application (no. 55942/15) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Dragan Čutura ("the applicant"), on 4 November 2015.

2. The applicant, who had been granted legal aid, was represented by Ms I. Bojić a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant complained, in particular, of a lack of substantive and procedural safeguards in proceedings concerning his involuntary confinement in a psychiatric hospital, and of a lack of impartiality on the part of an appeal court judge. He relied on Articles 5 § 1 and 6 § 1 of the Convention.

4. On 21 April 2016 these complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

Facts

I The circumstances of the case

5. The applicant was born in 1980 and lives in Vrbovec.

A. Criminal proceedings against the applicant

6. On 16 July and 30 August 2013 the applicant was indicted in the Ivanić-Grad Municipal Court (*Općinski sud u Ivanić-Gradu* – hereinafter "the Municipal Court") on charges of uttering serious threats to his neighbours.

7. Following an expert report into the applicant's mental condition at the time of the commission of the alleged offences, on 2 January 2014 the relevant State Attorney's Office amended the indictments, arguing that he had committed the offences in a state of mental derangement caused by paranoid schizophrenia which he had been suffering from for a number of years. It also asked that he be placed in a psychiatric hospital in accordance with the Protection of Individuals with Mental Disorders Act.

8. In the meantime, on 26 November 2013 the Municipal Court ordered the applicant's pre-trial detention on the grounds that he might reoffend. He was detained on 30 November 2013 and on 2 December 2013 he was placed in the Zagreb Prison hospital for treatment. During the proceedings, his pre-trial detention was extended several times.

9. The applicant challenged the orders for his detention before the Velika Gorica County Court (*Županijski sud u Velikoj Gorici*), which on 12 December 2013 and 13 January 2014 dismissed his appeals as ill founded. Judge LJ.B. took part in these decisions as a member of the appeal panel of the Velika Gorica County Court.

10. On 14 January 2014 the Municipal Court found that the applicant had committed the offence of uttering serious threats against his neighbours in a state of mental derangement and that he posed a threat to others. On this basis, the court ordered his internment in a psychiatric institution, in accordance with the Protection of Individuals with Mental Disorders Act. The court also decided that he would remain detained until the judgment became final.

11. The applicant challenged the first-instance judgment by lodging an appeal with the Velika Gorica County Court. He also challenged the decision to detain him until the judgment became final.

12. On 23 January 2014 the Velika Gorica County Court dismissed the applicant's appeal against the decision to detain him until the judgment became final. Judge LJ.B. took part in this decision as a member of a three judge panel.

13. On 3 March 2014 a three-judge panel of the Velika Gorica County Court, on which Judge LJ.B. was sitting, dismissed the applicant's appeal against the first-instance judgment of the Municipal Court, which thereby became final.

14. The applicant challenged the judgment of the Velika Gorica County Court by lodging a request for extraordinary review of a final judgment with the Supreme Court (*Vrhovni sud Republike Hrvatske*) and a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*). He alleged in particular a lack of impartiality on the part of the Velika Gorica County Court, given Judge LJ.B.'s previous involvement in his case.

15. On 4 June 2014 the Supreme Court dismissed the applicant's request for extraordinary review on the grounds that there was no reason to call the impartiality of Judge LJ.B into question.

16. On 20 May 2015 the Constitutional Court upheld these findings and dismissed the applicant's constitutional complaint as unfounded.

B. The applicant's involuntary placement in a psychiatric hospital

17. After the criminal court's judgment became final, on 19 March 2014 the file was forwarded to the Zagreb County Court (hereinafter "the County Court") as the court with competence to rule on the applicant's involuntary placement in a psychiatric hospital under the Protection of Individuals with Mental Disorders Act (see paragraphs 34 and 36 below). The file also contained submissions made by F.Ž., the applicant's lawyer in the criminal proceedings. At that time, the applicant was still being held in the prison hospital (see paragraph 8 above).

18. On the same day the County Court opened the proceedings for the applicant's committal to a psychiatric hospital. In the decision opening the proceedings, it noted that the applicant was represented by a legal aid lawyer, R.T.

19. On 21 March 2014 the County Court found that the applicant had not appointed a lawyer to represent him in the proceedings and, as legal representation was mandatory, it appointed him a legal aid lawyer, T.Ž.

20. On 10 April 2014 it committed the applicant to Vrapče Psychiatric Hospital (hereinafter "the hospital") for a period of six months, starting from 3 May 2014.

21. On 28 July 2014 the hospital asked the County Court to extend the applicant's involuntary psychiatric confinement on the grounds that the treatment had started to show positive results but had been short, so further treatment was needed.
22. Upon receipt of the request, the County Court opened the proceedings for the applicant's further involuntary placement in the hospital and appointed the legal aid lawyer T.Ž. to represent him in the proceedings.
23. On 30 July 2014 the judge conducting the proceedings visited the applicant in the hospital. According to a note of the visit, it was possible to communicate with the applicant, he was engaged in therapeutic activities, his mother had been visiting him and he wanted to be given the possibility to take occasional therapeutic leave from the hospital. The note also indicated that T.Ž. had attended the meeting. There is no indication that she asked any questions or otherwise addressed the applicant or the judge during the meeting.
24. On 7 August 2014 the County Court ordered an expert report from S.H., a psychiatrist from a different psychiatric hospital to the one in which the applicant was placed, concerning the possibility of granting the applicant therapeutic leave. S.H. was of the opinion that short-term therapeutic leave from the hospital could be granted.
25. On 20 August 2014 F.Ž., the lawyer who had represented the applicant in the criminal proceedings before the Municipal Court, sent a request to the hospital for information concerning the applicant's treatment. He stressed that all his previous attempts to contact the hospital had been to no avail. He asked the hospital to consider the possibility of releasing the applicant, as his parents had been actively engaged in finding him employment. This letter appears to have only been received by the County Court on 18 December 2014.
26. Meanwhile, on 27 August 2014 the County Court held a hearing, which was attended by representatives of the hospital and the State Attorney's Office, as well as the applicant's legal aid lawyer T.Ž. Those present at the hearing agreed that the applicant should be granted short-term therapeutic leave. The representative of the hospital reiterated its request for the applicant's further psychiatric confinement (see paragraph 21 above) and the judge conducting the proceedings read out the note of her visit to the applicant (see paragraph 23 above). The representative of the State Attorney's Office agreed with the request. The legal aid lawyer T.Ž. also agreed with the request, and made no other submissions at the hearing.
27. On the same day the County Court ordered the applicant's involuntary hospitalisation for a further period of one year. It referred to the judge's meeting with the applicant (see paragraph 23 above) and noted that neither the representative of the State Attorney's Office nor the applicant's legal aid lawyer opposed the hospital's request. At the same time, the County Court granted the applicant therapeutic leave for the period between 28 and 31 August 2014.
28. The applicant's father, on behalf of the applicant, challenged the decision on his son's further involuntary hospitalisation before a three-judge panel of the County Court. He contended that the applicant's family had never been informed that his psychiatric confinement would be extended, and had only accidentally learned of his further confinement after inspecting the case file in the County Court. The applicant's father also complained of ineffective legal representation in the proceedings.
29. On 19 December 2014 a three-judge panel of Zagreb County Court dismissed the appeal as ill-founded on the grounds that a lawyer had been duly appointed to represent the applicant in the proceedings concerning his involuntary hospitalisation.
30. The applicant's father then lodged a constitutional complaint with the Constitutional Court, arguing that the legal aid lawyer appointed for his son in the proceedings before the County Court had acted as an extended arm of the institutions rather than a lawyer protecting his interests.
31. On 3 June 2015 the Constitutional Court dismissed the constitutional complaint, endorsing the reasoning of the three-judge panel of the County Court.
32. In the meantime, on 22 May 2015 the applicant, through his chosen representative F.Ž., asked to be released from the hospital.
33. On 24 August 2015, following a further examination of the applicant's situation, the County Court ordered the applicant's conditional release from the hospital.

II. Relevant domestic law

34. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Offi-

cial Gazette no. 152/2008, with further amendments) read:

Proceedings concerning mentally disturbed defendants

Article 550

"(1) If a defendant lacked mental capacity at the time of committing the unlawful act, the State Attorney shall request in the indictment that the court establish that the defendant committed the unlawful act in a state of mental incapacity and that he or she be confined [in a psychiatric hospital] under the Protection of Individuals with Mental Disorders Act."

Article 554

"(1) If the State Attorney has made a request in accordance with Article 550 paragraph 1 of this Code, and the court, upon completion of the trial, establishes that the defendant committed the unlawful act in a state of mental incapacity and that the conditions exist for ordering his or her confinement in a psychiatric hospital in accordance with the Protection of Individuals with Mental Disorders Act, it shall adopt a judgment determining that the defendant committed the unlawful act in a state of mental incapacity and shall order [his or her] involuntary confinement in a psychiatric hospital for a period of six months. ..."

Article 555

"(5) The president of the [trial] panel shall, immediately upon the decision ordering confinement [in a psychiatric hospital] becoming enforceable, forward all the necessary documents to the relevant court for the procedure under the Protection of Individuals with Mental Disorders Act."

35. The Code of Criminal Procedure also provides that the maximum period of pre-trial detention for an offence punishable up to three years, which was the case in the applicant's case, is three months (Article 133 § 1(2)). Following the adoption of the first-instance judgment, this period is extended for a further fifteen days (Article 133 § 3). When the judgment becomes final, the convicted person remains in pre-trial detention until he or she starts serving the sentence, but this cannot be longer than the actual sentence imposed (Article 133 § 6). These time-limits are accordingly applicable in proceedings concerning mentally disturbed defendants (Article 551 § 2).

36. The relevant provisions of the Protection of Individuals with Mental Disorders Act (*Zakon o zaštiti osoba s duševnim smetnjama*, Official Gazette no. 11/1997, with further amendments) provide:

Procedure for confinement [in a psychiatric hospital] of persons lacking mental capacity [when committing an unlawful act] and convicted persons

Section 44

"(1) The court shall adopt a decision on the involuntary placement [in a psychiatric hospital] of a person lacking mental capacity [at the time of committing an unlawful act] if it finds, on the basis of an opinion of a psychiatric expert, that the person in question has a serious mental disorder and ... poses a threat to others.

(2) The person [referred to above] is considered to be dangerous to others if there is a high probability that he or she may, owing to the mental disorder causing the lack of mental capacity [at the time of committing the unlawful act], again commit a criminal offence punishable by a sentence of at least three years of imprisonment."

Section 45

"(1) The first-instance court which conducted the criminal proceedings in which confinement was ordered for a person lacking mental capacity shall forward copies of the [relevant documents] to the court competent for the confinement procedure (hereinafter 'the court').

(2) The court shall appoint a lawyer to represent the person [concerned] for the protection of his or her rights if he or she has not already [appointed a lawyer].

(3) The court shall without delay forward to the Ministry of Health a copy of the [criminal court's] judgment, including expert witness reports, and any other information necessary for the selection of the institution where the individual is to be confined. Within three days of receipt of the [criminal court's judgment], the Ministry of Health shall designate the psychiatric hospital ...

(4) Upon receipt of the decision of the Ministry of Health referred to in paragraph 3 of this section, the court shall, within three days, order the committal of the person to the psychiatric hospital for the enforcement of the decision on his or her confinement."

Section 47

"(1) If the director of [the hospital's] psychiatric ward considers that the confinement of the [convicted] person lacking mental capacity should be extended he or she shall, at least fifteen days before the expiry of the period for which the confine-

ment has been ordered, submit to the court a written reasoned request for extension of the confinement.
(2) If the court finds that there are grounds for confinement under section 44(1) of this Act, it shall adopt a decision on the extension of the confinement.
(3) The confinement shall be extended for a period of one year."
Section 48
"(4) The court shall order the conditional release of a [convicted] person lacking mental capacity and ... outpatient treatment if it finds, on the basis of an opinion of the medical team of psychiatrists treating that person, that the danger to others can be averted by outpatient treatment."
Section 49
"(2) The extension of the confinement ... shall be decided following a hearing. [The court] shall give notice of the hearing to the [convicted] person lacking mental capacity, his or her guardian and legal representative, spouse or partner and if required any other close person, as well as the psychiatrist and representatives of the social welfare centre and State Attorney's Office. The hearing cannot be held in the absence of the legal representative and the psychiatrist.
(3) If the [convicted] person lacking mental capacity is unable to attend the hearing, the judge [conducting the proceedings] shall visit him or her in the psychiatric institution and, if it is possible in view of that person's mental condition, interview him or her. The court shall normally organise the hearing to take place in suitable premises at the psychiatric institution."
37. Further relevant domestic law is cited in the case of *M.S. v. Croatia (no. 2)*, no. 75450/12, § 36-39, 19 February 2015.

III. Relevant international law
38. The relevant international law is set out in the *M.S. v. Croatia (no. 2)* case (cited above, § 45-46 and 60-53).

The law
I. Alleged violation of article 5 § 1 of the convention
39. The applicant complained of a lack of substantive and procedural safeguards in the proceedings concerning his involuntary confinement in the psychiatric hospital. He relied on Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:
"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
...
(e) the lawful detention of ... persons of unsound mind ..."
40. The Government contested that argument.

A. Admissibility
41. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant
42. The applicant contended that even his initial placement in the psychiatric hospital following the decision in the criminal proceedings had been unlawful. He further pointed out that in the proceedings concerning the extension of his confinement, the County Court had not ordered an expert report related to the need for his further involuntary treatment, but had simply accepted the submission of the hospital in that respect, which his legal aid representative had not challenged. Moreover, in reality, he had not been given an effective opportunity to appoint a lawyer to represent him in the proceedings as nobody had ever informed him of his rights and at the time he had been detained with limited access to the outside world. In these circumstances, it was unclear why he had first been appointed the legal aid lawyer R.T. and then only a few days later the legal aid lawyer T.Ž. At the same time, the County Court had known that his chosen lawyer in the criminal proceedings had been F.Ž.
43. The applicant also stressed that the note of the judge's visit to him in the hospital only indicated that the legal aid lawyer T.Ž. had attended the meeting. However, nothing in the note suggested that he had been informed by the judge or T.Ž. of the fact that the proceedings for the extension of his confinement had been pending or that he had been asked to give any comment in that respect.

Moreover, there was nothing to indicate that he had even been aware that T.Ž. was his legal representative nor was there anything to show that she had advised him or otherwise discussed with him any of his rights. What was more, T.Ž. had been completely passive in the proceedings and had not sought to protect his rights by taking any action in his favour. In particular, she had never consulted him nor sought his instructions and she had not asked that an expert report be ordered in order to verify whether the hospital's request for extension of the confinement was well-founded. At the same time, she should have been aware that throughout the criminal proceedings he had opposed his involuntary placement in a psychiatric hospital and that he had later expressed a wish to be released from the hospital. In this connection, he also pointed out that the hospital had failed to take any action or to respond to the request sent to it by his chosen lawyer F.Ž.

(b) The Government

44. The Government argued that following the decision in the criminal proceedings, the County Court had committed the applicant to the hospital in accordance with the relevant law. In the proceedings before the County Court the applicant had not appointed a lawyer and thus the County Court had appointed the legal aid lawyer T.Ž. to represent him in the proceedings. The extension of the confinement had been based on an expert assessment of the applicant's situation and on a reasoned request by the hospital. The hospital and the County Court had throughout the proceedings acted in good faith concerning the applicant's case. The applicant himself had never complained about the conduct of the hospital or the County Court. Moreover, he had duly enjoyed all procedural rights in the proceedings before the County Court.

45. As to the applicant's representation in the proceedings before the County Court, the Government stressed that the applicant and his family had had every opportunity to appoint a lawyer to represent him in those proceedings and it had been their responsibility for failing to do that. The lawyer T.Ž. had duly performed her tasks. She had attended the judge's visit to the applicant in the hospital and participated in the interview which the judge had conducted. The Government could not know what kind of contact had been made between the applicant and T.Ž. on that occasion as that fell within the confidentiality of the client-lawyer relationship. The Government conceded the fact that T.Ž. had not made any objections or used remedies on behalf of the applicant. However, in the Government's view, that was not indicative of ineffective legal representation as the hospital had acted in good faith to protect the applicant's interests. There had therefore been no reason for T.Ž. to more actively engage in the applicant's legal representation.

2. The Court's assessment

(a) General principles

46. The Court refers to the general principles for the assessment of complaints of involuntary confinement in a psychiatric hospital under Article 5 § 1 (e) of the Convention, as set out in the case of *M.S. v. Croatia (no. 2)* (no. 75450/12, § 139-147, 19 February 2015).

47. The Court stresses that Article 5 § 1 (e) of the Convention affords, amongst other things, procedural safeguards related to judicial decisions authorising an applicant's involuntary hospitalisation (ibid., § 114). Thus, in order to comply with Article 5 § 1 (e) of the Convention, the proceedings leading to the involuntary placement of an individual in a psychiatric facility must necessarily provide clearly effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights (see *Rudenko v. Ukraine*, no. 50264/08, § 104, 17 April 2014).

48. In this context, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *M.S. (no. 2)*, § 152). This implies, *inter alia*, that an individual confined in a psychiatric institution because of his or her mental condition should, unless there are special circumstances, actually receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement. The importance of what is at stake for him or her, taken together with the very nature of the affliction, compel this conclusion. Moreover, this does not mean that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having

recourse to a court (ibid., § 152-153, with further references).
49. However, the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, cannot satisfy the requirements of necessary "legal assistance" for persons confined under the head of "unsound mind", under Article 5 § 1 (e) of the Convention. This is because the effectiveness of legal representation of persons with mental disorders requires an enhanced duty of supervision by the competent domestic courts (ibid., § 154).

(b) Application of these principles to the present case
50. The Court's examination of the applicant's complaints primarily relates to the decision to extend his involuntary confinement in the hospital, which was also a matter subject to examination by the Constitutional Court in its decision of 3 June 2015 (see paragraphs 30-31 above).
51. The Court notes that in the above-cited *M.S. (no. 2)* case (cited above, § 150-160), it found a violation of Article 5 § 1 of the Convention on the grounds that the competent domestic authorities had failed to meet the procedural requirements related to the applicant's involuntary hospitalisation, as required under Article 5 § 1 (e) of the Convention. This finding was based on the applicant's legal aid representative's passive attitude in the proceedings leading to her involuntary admission to a psychiatric hospital, in respect of which the domestic authorities had failed to take the necessary action. Moreover, bearing that in mind, the Court considered that there had been no valid reason justifying the applicant's exclusion from the hearing in the proceedings leading to her involuntary confinement in the hospital.
52. In the Court's view, similar considerations apply in the present case. In particular, the Court notes that the County Court, despite being aware that the applicant had been represented by a lawyer of his own choosing in the criminal proceedings before the Municipal Court, appointed him another legal aid lawyer to represent him in the proceedings for his involuntary admission to the hospital (see paragraphs 18-19 above). Moreover, for some reason, which is not clear from the material available to the Court, the County Court, only a few days later replaced that legal aid lawyer with another, T.Ž., who then continued representing the applicant in the proceedings leading to the extension of his confinement in the hospital (see paragraphs 19 and 22 above).
53. The only instance where the lawyer T.Ž. met the applicant was when she attended the meeting which the judge conducting the proceedings held with him in the hospital on 30 July 2014 (see paragraph 23 above). There is no indication in the case file that on that occasion T.Ž. asked any questions or otherwise addressed the applicant or the judge during the meeting. There is also no indication that T.Ž. or the judge explained to the applicant his particular procedural situation and rights in the proceedings, nor that they contacted and informed members of the applicant's family of the developments in his case.
54. At the same time, in order to ensure that the proceedings were really adversarial and the applicant's legitimate interests protected, the Court is of the opinion that T.Ž. should have contacted the applicant and/or his family in order to obtain their views on the request to extend the applicant's involuntary confinement (see *M.S. (no. 2)*, cited above, § 155).
55. In this connection, the Court also notes that at the hearing at which the issue of the applicant's further confinement in the hospital was discussed, the lawyer T.Ž. made no submissions on his behalf. What is more, she did not ask any questions concerning the hospital's request to extend the applicant's confinement although that request, unlike the request related to the occasional therapeutic leave, was not supported by any other expert opinion (see paragraphs 24, 26-27 above).
56. In these circumstances, the Court finds that the lawyer T.Ž. acted essentially as a passive observer of the proceedings. Although the domestic courts were well aware of her passive attitude in the proceedings, they failed to react by taking appropriate measures to secure the applicant's effective legal representation (compare *M.S. (no. 2)*, cited above, § 156). In this connection, it is worth reiterating that effective legal representation of persons with disabilities requires an enhanced duty of supervision by the competent domestic courts of the effectiveness of their legal representation (see paragraph 49 above). In the present case, the Court is not satisfied that the County Court complied with that duty.
57. Bearing in mind the ineffectiveness of the applicant's legal representation in the proceedings, and the need to have his views on the matter of psychiatric confinement heard by the relevant

court (see paragraph 48 above), the Court observes that there is nothing to suggest that the judge conducting the proceedings made appropriate allowances to ensure the applicant's participation in the proceedings.

58 Although the judge visited the applicant in the hospital, there is no evidence, as already observed above, that she informed the applicant of his rights or gave any consideration to the possibility of him participating in the hearing (see paragraph 53 above). He was thus not given an opportunity to comment on the hospital's request for the extension of his confinement nor was he and/or members of his family informed of the hearing and allowed to express their views on the matter, even though they had clearly opposed an extension of the involuntary hospitalisation (see paragraphs 11, 14, 25 and 28 above; see also paragraph 36 above, section 49 of the Protection of Individuals with Mental Disorders Act).

59. In the absence of a convincing explanation by the domestic courts, the Court is unable to accept that there was a valid reason justifying the applicant's exclusion from the hearing, particularly since it notes that during his interview with the judge in the hospital, he did not demonstrate that his condition was such as to prevent him from directly engaging in a discussion of his situation (see paragraph 23 above, and compare *M.S. (no. 2)*, cited above, § 159, with further references).

60. In the light of the findings above, the Court concludes that the competent national authorities failed to meet the procedural requirements necessary for the applicant's further involuntary hospitalisation, as required under Article 5 § 1 (e) of the Convention.

61. This is sufficient to enable the Court to conclude that there has been a violation of Article 5 § 1 of the Convention.

II. Alleged violation of article 6 § 1 of the convention

62. The applicant complained of a lack of impartiality on the part of the appeal court judge. He relied on Article 6 § 1 of the Convention.

63. The Government contested this argument.

64. Having regard to the facts of the case, the submissions of the parties and its above finding under Article 5 § 1 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the remaining complaints (see, among other authorities, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, § 156, ECHR 2014; see also Kamil Uzun v. Turkey, no. 37410/97, § 64, 10 May 2007).

III. Application of article 41 of the convention

65. 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

66. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

67. The Government considered this claim excessive and unsubstantiated.

68. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

69. The applicant also claimed costs of his legal representation at the domestic level in the amount of 15,000 Croatian kunas (HRK – approximately EUR 2,000) and costs of his legal representation before the Court in the amount of HRK 19,062.50. He asked that the costs of his legal representation before the Court be paid directly to his representative.

70. The Government considered the applicant's claim excessive and unsubstantiated.

71. Regard being had to the documents in its possession and to its case law, the Court rejects the claim for costs and expenses in the domestic proceedings as unsubstantiated. On the other hand, in view of the sum to which the applicant's lawyer is entitled on account of the granted legal aid (EUR 850), the Court considers it reasonable to award the sum of EUR 1,730 for the proceedings before the Court. This amount is to be paid directly to the applicant's representative's bank account.

C. Default interest
72. 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) *Declares* the application admissible;
(2) *Holds* that there has been a violation of Article 5 § 1 of the Convention;
(3) *Holds* that there is no need to rule separately on the complaint under Article 6 § 1 of the Convention;
(4) *Holds*
a. that the respondent State is to pay the applicant, within three months the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
ii) EUR 1,730 (one thousand seven hundred and thirty euros), in respect of costs and expenses to be paid directly to the applicant's representative's bank account;
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;
(5) *Dismisses* the remainder of the applicant's claim for just satisfaction.

NOOT

1. De bovenstaande zaak, gewezen door een comité van drie rechters van het Europees Hof van de Rechten van de Mens (EHRM of Hof), behandelt een voor de Bopz-praktijk uiterst relevant onderwerp. Patiënten die gedwongen (dreigen te) worden opgenomen, krijgen namelijk een advocaat toegewezen. Maar wat wanneer deze advocaat de belangen van zijn cliënt niet behartigt? Het comité geeft een duidelijk antwoord: de rechtbank moet dan ingrijpen.

2. De feiten zijn in de zaak *Čutura* duidelijk. Dragan Čutura was wegens het uiten van bedreigingen richting zijn buren strafrechtelijk veroordeeld. Daarop wenste de rechtbank hem te laten opnemen in een psychiatrisch ziekenhuis. Een advocaat stond Čutura bij in de strafrechtelijke procedure, maar in het kader van de procedure tot gedwongen opname in een psychiatrisch ziekenhuis beschikte Čutura niet over een advocaat. Daarop wijst de rechtbank Čutura een advocaat toe. Deze advocaat doet evenwel niet wat van een advocaat mag worden verwacht: opkomen voor de belangen van zijn cliënt. De advocaat stelt zich tijdens en rond de procedures passief op, neemt geen standpunten in namens Čutura en spreekt noch met Čutura, noch met zijn ouders. Aldus wordt het onvrijwillig verblijf van Čutura in een psychiatrisch ziekenhuis diverse malen verlengd, zonder dat de advocaat van Čutura bezwaar had gemaakt tegen de voorgenomen verlengingen.

3. De familie van Čutura krijgt uiteindelijk bij toeval te horen dat hun zoon onvrijwillig is opgenomen. Zij verneemt dan ook hoe Čutura juridische bijstand heeft gekregen. De vader van Čutura tracht het rechterlijk besluit tot verlenging van de onvrijwillige opname ongedaan te maken en klaagt daarbij ook over de rechtsbijstand die zijn zoon heeft gehad. Beide klachten worden tot in de hoogste instantie afgewezen.

4. Alvorens over de klachten te beslissen verwijst het comité naar twee eerdere uitspraken van het Hof. In 2013 had het Hof geoordeeld over de zaak *M.S. t. Kroatië* (EHRM 25 april 2013, nr. 36337/10, ECLI:CE:ECHR:2013:0425JUD003633710). Dit betrof een zaak waarin twee vrouwen wilsonbekwaam waren verklaard, op basis van schriftelijke informatie verkregen in een strafrechtelijke procedure. De zusters waren zelf niet door de overheid gezien en hun mentale gezondheid had nooit aanleiding gegeven voor een psychiatrische opname. Het Hof benadrukte in deze zaak de strikte beschermingsmaatregelen voor personen van wie de wilsbekwaamheid dreigt te worden afgenomen. Die strikte voorwaarden waren ook geschonden in de zaak *Anatoly Rudenko t. Oekraïne* (EHRM 17 april 2014, nr. 50264/08, ECLI:CE:ECHR:2014:0417JUD00502640), die het comité als tweede aanhaalt. In de Oekraïense zaak was sprake van een man die werd beschuldigd van het verstoren van de herstelwerkzaamheden aan een oliepijplijn en het beledigen van een lokale politicus. Hij had drie jaar in voorarrest gezeten, zonder dat de rechter dat had getoetst, en was vervolgens vanwege zijn politieke

opvattingen naar een psychiatrisch ziekenhuis gestuurd. Van adequate rechtshulp was geen sprake geweest.

5. Voortbouwend op deze twee uitspraken oordeelt het comité thans dat de rechtbank had nagelaten in te grijpen toen haar duidelijk was dat de advocaat van Čutura niet goed opkwam voor de belangen van zijn cliënt. Volgens het comité hadden deze gebreken voor de rechtbank meer dan duidelijk moeten zijn. Het comité wijst er daarbij op dat rechtbanken een verzwaarde verplichting hebben om te compenseren bij mensen met een handicap. Zij zijn in het bijzonder kwetsbaar. Doordat de rechtbanken hadden nagelaten in te grijpen, concludeert het comité dat sprake is geweest van een schending van artikel 5 lid 1 EVRM (recht op vrijheid en veiligheid).

6. Het is van groot belang dat het comité deze uitspraak heeft gedaan. Advocaten in Nederland behartigen de belangen van Bopz-patiënten helaas niet altijd even goed. De rechtbank heeft dan een compenserende plicht, in de zin van waarborgen dat de belangen van de patiënt alsnog goed worden behartigd. De rechtbank kan de advocaat ook op zijn functioneren aanspreken en dit zo nodig onder de aandacht brengen van de deken (zie ook M.F.J.N. van Osch, 'Mogen rechters klagen over advocaten?', *NJB* 2018, p. 803-807).

7. Dat de bovenstaande zaak is beoordeeld door een comité van drie rechters in plaats van een Kamer met zeven rechters heeft te maken met het streven naar procesefficiency in Straatsburg. Volgens artikel 28 EVRM worden zaken door een comité van drie behandeld als duidelijk is dat de klachten niet kunnen worden ontvangen, de zaak kennelijk ongegrond is, dan wel indien er reeds sprake is van een heldere jurisprudentielijn om de zaak af te handelen. De zaak *Čutura* viel in de laatste categorie, al betwijfel ik of de jurisprudentielijn nu echt zo duidelijk was. Hoe dan ook, die duidelijkheid is er nu wel en de praktijk kan hiermee zijn voordeel doen.

Prof. dr. A.C. Hendriks
Hoogleraar Gezondheidsrecht aan de Universiteit Leiden.

14

Een gedeeltelijke toewijzing van de voorlopige machtiging wordt gecombineerd met de inwilligen van een verzoek om een second opinion

Hoge Raad
1 februari 2019, 18/04083,
ECLI:NL:HR:2019:147
(mr. A.M.J. van Buchem-Spapens, mr. A.H.T. Heisterkamp, mr. T.H. Tanja-van den Broek)
(Concl. mr. F.F. Langemeijer)
Noot Redactie
[Wet Bopz art. 5, 8 lid 6]

Het verzoek voorlopige machtiging wordt door de rechtbank toegekend voor de duur van twee maanden, nu vooralsnog vaststaat dat er sprake is van een stoornis die gevaar doet veroorzaken voor betrokkene zelf en voor anderen. Voor het overige wordt de beslissing aangehouden. De rechtbank stemt verder in met het verzoek om een second opinion over de diagnose van de stoornis.

[*Betrokkene*], verblijvende te [plaats],
verzoeker tot cassatie,
advocaat: mr. G.E.M. Later,
tegen
De Officier van Justitie bij het arrondissementsparket Oost-Nederland,
verweerder in cassatie,
niet verschenen.
Partijen zullen hierna ook worden aangeduid als betrokkene en de officier van justitie.

Hoge Raad:

1. Het geding in feitelijke instantie
Voor het verloop van het geding in feitelijke instantie verwijst de Hoge Raad naar de beschikking in de zaak C/08/219173/FA RK 18-1450 van de Rechtbank Overijssel van 26 juni 2018.
De beschikking van de rechtbank is aan deze beschikking gehecht.

2. Het geding in cassatie
Tegen de beschikking van de rechtbank heeft betrokkene beroep in cassatie ingesteld. Het cassa-