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The Registrar
European Court of Human Rights
Council of Europe
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5 February 2016

WRITTEN OBSERVATIONS

In the case of *Shakulina v. Russia*

Application no. 24688/05

Dear Mr. President,

On 19 October 2015 the Government of the Russian Federation submitted their written observations and responses to the questions with regard to the above application. In response to the observations of the Government the applicant hereby submits the following comments in accordance with the order of the questions to the parties.

Question 1. Has there been a violation of the applicant's right to respect for private life contrary to Article 8 of the Convention in the light of the domestic court's decision to declare her legally incapable?

1. The Government submitted that the domestic court's decision of 5 April 2004 which declared the applicant legally incapable did not violate Article 8 of the Convention because it served the applicant's own interests. The Government explained that such measure was proportional to the aim of protecting the applicant's "health and life" because due to her mental disorder she "posed danger to herself and others and in the absence of such measures she could have harmed her health", therefore the district court had sufficient information of the applicant's "potential danger to the persons living with her, which manifested in delusional ideas and aggressive behaviour towards others" (§§ 28-29 of the Government memorandum). It follows that the only legitimate consideration

identified by the Government was protection of the applicant and other persons from her allegedly dangerous actions.

2. The applicant acknowledges that legal incapacity in this case sought to pursue a legitimate aim of protecting the applicant's rights as she was allegedly unable to exercise them through her own actions. However, the Government failed to explain how deprivation of legal capacity and subsequent placement under guardianship could serve the aim of protecting the applicant's "health and life" or protecting others from the applicant's alleged dangerousness, which the Government identified as the only legitimate purpose of placing the applicant under plenary guardianship. Moreover, no other aims were provided by the applicant's daughter who sought the incapacity judgment: as follows from the request of 23 April 2003 to the Vyborgskiy District Court of St. Petersburg the applicant's daughter referred to the applicant's mental disorder, her conflicts with neighbours and relatives, and her "danger to others" as the grounds for the incapacity request. No allegations were made that the deprivation of legal capacity sought to protect the applicant's private and family rights which were directly infringed upon by the measure, such as access to her personal health and financial information, control over the applicant's place of residence and home (and thus her social and family contacts) and her ability to conclude daily contracts e.g. for a mobile phone, personal purchases etc.

3. In the applicant's view, deprivation of legal capacity could not protect her from any actions harmful to her health and life as legal incapacitation is a formal measure, which establishes a substituted decision-making regime by removing the decision-making capacity from the person under guardianship and vesting such power in his or her guardian. Before the amendments to the Law on Psychiatric Care[1], which came in force in 2011 following the judgment of the Constitutional Court of 27 February 2009, it was the guardian, and not the patient herself, who had the legal right to consent to treatment, including inpatient treatment. Hospitalisation of a person lacking legal capacity was therefore considered voluntary as long as her guardian consented to it. However, such an approach was criticised both by this Court (*Shtukaturov*, Application no. 44009/05, judgment of 27 March 2008, at para. 108) and the Constitutional Court of Russia in its judgment of 27 February 2009. Moreover, whereas the guardian could consent to hospital placement, which meant that the hospital had an automatic right to administer treatment to such patients, the guardian's consent with regard to outpatient treatment had no practical value as no treatment could be forcibly administered outside hospital (inpatient) settings. In any event, the applicant submits that removing a person's legal capacity can in no way be considered to be a necessary measure to achieve the aim of bypassing a patient's right to consent to treatment (even if such an aim were to be considered a legitimate aim).

4. There are special legal regimes, provided by the 1992 Law on Psychiatric Care and by the Criminal Code, for imposing compulsory measures on a person who poses a

[1] In accordance with Federal Law of 6 April 2011 no. 67-FZ, amending the Law on Psychiatric Care, consent to psychiatric treatment shall be given by the guardian of a patients deprived of his legal capacity only when a patient is unable to give such consent due to his state.

danger to himself or others. Indeed, the applicant had undergone compulsory inpatient psychiatric treatment from 22 August 2002 to 16 May 2003 following a criminal case against her on account of a conflict with her neighbours. On 16 May 2003 the applicant was discharged to continue her treatment in outpatient settings as she was no longer considered dangerous. New hospitalisation followed on 24 December 2003, which lasted until 22 March 2004. Thus, compulsory psychiatric treatment was administered to the applicant regardless of her legal capacity.

5. Even if the Court accepts that deprivation of the applicant's legal capacity served the aim of protecting her health by substituting her decisions on health matters by those of her guardian, the applicant submits that such measure lacked proportionality.

6. The standards set forth by Recommendation (99)4 of the Committee of Ministers of the Council of Europe on "Principles concerning the legal protection of incapable adults", which as the Court confirmed "may define a common European standard in this area" (see *Shtukaturov*, cited above, § 95), read as follows:

> *Principle 22 – Consent*
>
> *1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.*

7. Following the amendments to the Law on Psychiatric Care in 2011 and a new Law on Health Care[2], it has been recognized that every patient, regardless of his legal capacity, has an ultimate right to decide on health matters.

8. In any case the circumstances of the instant case do not give any ground to believe that the applicant's daughter, who sought her legal incapacitation, was concerned about the applicant's medical care. Likewise, the district court did not rely on these aims to justify the need for plenary guardianship. In fact, the judgment of the district court is devoid of any assessment of potential legitimate aims for removing the applicant's legal capacity. The district court failed to identify any concrete, legitimate interests in the individual case of the applicant, which warranted any sort of protective measures affecting her legal capacity.

9. The Government relied on the findings of the experts' report issued by psychiatric hospital no. 6 of St. Petersburg on 23 January 2004 as the only piece of evidence justifying the applicant's need to be deprived of her legal capacity and to be placed under the total guardianship. In their submission, the Government cited the experts' report to demonstrate that the applicant suffered from paranoid schizophrenia since 2000 and had a history of hospitalisations. The applicant does not contest these findings. However, the experts' report is completely devoid of any assessment of the applicant's decision-making capacity in any sphere of her life, be it health care or management of her assets. While the experts established that the applicant's intellectual,

[2] Law of 21 November 2011 no. 323-FZ.

communication or mnemonic capacities had not been significantly impaired, they concluded that she lacked ability to understand the meaning of her legal actions or to govern them. Relying exclusively on this report, the district court failed to assess any information about the applicant's social performance, and proceeded from the presumption that the mere existence of a mental disorder was sufficient to justify removal of legal capacity.

10. The object of the present application is not to review the findings of the domestic court's regarding the applicant's mental state or to review its assessment of the evidence presented. Instead, the applicant argues that the findings of the domestic court were based not on a legal assessment of whether it was necessary, in light of the evidence presented, to deprive the applicant of all of her Article 8 rights to private and family life, but rather on a presumption that certain symptoms of a mental disorder represent sufficient reason to deprive that person of her legal capacity – a presumption replicated by the Government in their observations. This presumption resulted in the failure of the court to assess in any meaningful way the applicant's personal situation, or social performance or whether this measure pursued any legitimate aim in the specific circumstances of the applicant. In this regard, the incapacity decision was predetermined by the findings of the medical experts, which absolved the domestic court of its duty to assess other reasons, which must also be established in order to justify removal of the applicant's legal capacity (apart from purely medical considerations, i.e. her medical diagnosis of a psycho-social disability). The Government did not provide any explanation as to why it was necessary to deprive the applicant of her legal capacity given that no evidence demonstrated her inability to exercise any specific rights through her own actions and the authorities have not demonstrated any actual risk that her rights would be abused or how her legal decisions would infringe the rights of others. There was thus no reasonable relation between the aim pursued in this case and the means used[3] and the decision rested fundamentally on judicial and legislative 'stereotyping' of the applicant as a member of a group of people (people with psycho-social disabilities) historically subjected to prejudice, similarly to *Alajos Kiss v. Hungary*.[4] The presumption was used to justify the application of a blanket response (imposition of guardianship) without any individualised judicial evaluation of the applicant's situation or a "tailor-made' response" to achieving the legitimate aim in question.[5]

11. Therefore the applicant submits that this mechanical approach resulting in automatic deprivation of legal capacity in all cases where a medical opinion has established that the person concerned meets certain diagnostic standards is fundamentally flawed and contrary to Article 8 of the Convention, as well as to other international legal instruments, such as the UN CRPD.

[3] *James v. UK*, Application no. 9793/79, 21 February 1986, at para. 50.
[4] Application no. 38832/06, judgment of 20 May 2010, at para. 42.
[5] *Kiyutin v Russia*, Application no. 2700/10, judgment of 10 March 2011, at para. 73; *Shtukaturov v Russia*, Application no. 44009/05, judgment of 27 March 2008, at para. 95.

12. With regard to the necessity and proportionality argument, the Government further submitted that the measure applied (total legal incapacity) was proportionate to the aim of protecting the applicant's life and health because, due to her mental state, she was dangerous to herself and others and she could harm her health in future in the absence of this protective measure. However, the Government failed to specify what kind of danger the applicant could pose in the absence of protective measures given that at no point in the domestic proceedings it had been argued that the applicant was or could be dangerous. Moreover, the "dangerousness" concern has no relevance to the incapacity decision, as restriction of legal incapacity is a purely legal measure, which can protect neither the applicant nor other persons from any dangerous actions.

13. Although it is not always necessary in order to satisfy the proportionality test under the Court's jurisprudence for a State to show that it could not achieve the legitimate aim in any other way, in its submissions at paragraph 21, the Government asserts that "The need to interfere with the applicant's rights guaranteed by the Convention and the Constitution of the Russian Federation is determined by [sic] impossibility to protect the rights and legal interests of others in any other way rather than the one provided by Article 29 of the CC RF [Civil Code of the Russian Federation]", implying that such is the case under domestic law. Further, whether the aim could be achieved in another way, which has less impact on the applicant's rights, has become an increasingly important factor in the Court's own jurisprudence and several cases have suggested that such alternatives must be excluded for a measure to be proportionate.[6] The Government submitted no comments with regard to the importance of support measures – both formal and informal – which could help the applicant to act independently in some complex situations. In order for persons with disabilities who may require help in making decisions to be able to exercise their legal capacity in all areas of life, the CRPD requires States to take "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" (Article 12(3)). Therefore, rather than depriving persons with disabilities, including persons with psycho-social disabilities, of their legal capacity, States have an obligation to allow all persons to exercise their legal capacity by providing them access to supports and recognising informal supports where they exist. Such support measures or alternatives to guardianship were not excluded and, indeed, never even identified or considered by the domestic authorities (or by the Government in their Observations).

14. In sum, the applicant submits that guardianship as a consequence of legal incapacity was not a necessary and proportionate measure in the individual circumstances of the applicant as she had no legitimate interests to protect through the deprivation of her independent decision-making capacity, no actual risk of harm was identified warranting protective measures affecting her legal capacity, and in any case deprivation of her legal capacity was clearly disproportionate to any legitimate aim.

[6] *Sejdic and Finci v Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, judgment of 22 December 2009 at para. 48; *Glor v Switzerland*, Application no. 13444/04, judgment of 30 April 2009 at para 94; *Association Rhino v Switzerland*, Application no. 48848/07, judgment of 11 October 2011 at para. 65.

Question 2. Has the applicant's situation evolved, in view of the Constitutional Court's rulings of 27 February 2009 and/or 27 June 2012? Did the applicant's full incapacitation comply with the substantive and procedural requirements of the Russian law, as interpreted by the Constitutional Court?

15. As the Government pointed out, the applicant's situation improved but solely because her daughter never pursued the application for an incapacity order and not because of any actions by the authorities to rectify the original violation through re-opening the case *proprio motu* or re-examining and arriving at a fresh conclusion of capacity.

Question 3. In 2009-2015 did the Russian law or practice envisage any alternative to stripping a person of full capacity? The parties are requested to provide information on the Russian courts' cases for the years of 2009-2015 in which an issue of legal capacity/incapacity of persons suffering from mental disorders has been determined (approach, statistics, etc.).

16. As confirmed by the Government, between 2009 and 2015 Russian law did not envisage any intermediary solution between declaring a person legally capable or depriving them fully of legal capacity on the basis of a mental disability. Thus, a person declared legally incapable was deprived of his or her right to enter into any transaction, including disposing of money for everyday, petty matters.

17. The Court criticised this "all-or-nothing" approach of Russian guardianship laws in *Shtukaturov* because it did not leave the judge any other choice but to remove legal capacity entirely (§ 95). Accordingly, the Court held that Russian legislation did not provide for a "tailor-made response" contrary to the principles established in Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe which define a common European standard in this area. As a result, in the circumstances of the present case, even if there was a need to restrict the applicant's rights under Article 8, which the applicant denies, such rights were restricted more than it was strictly necessary.

18. On 27 June 2012 the Russian Constitutional Court declared Article 29 of the Civil Code unconstitutional insofar as it did not provide for any differentiation of the consequences of declaring a person legally incapable. Accordingly, on 30 December 2012 a new law was adopted (in force since 2 March 2015) which provided for the possibility of restricting a person's legal capacity if, due to a mental disorder, he can understand the meaning of his actions and govern them only with the help of others. In this case a trustee is appointed. The person with restricted legal capacity may perform legal transactions of an everyday nature. He may perform other transactions with the consent of his trustee. It is important to emphasise that not only is partial legal capacity a less restrictive

alternative to total incapacity, this new measure, unlike total incapacity, allows a wide degree of flexibility and therefore renders plenary guardianship virtually unnecessary in most cases. According to paragraphs 3 and 4 of section 30(2) of the Civil Code as amended on 30 December 2012, a trustee's consent to disposal of money by a person whose legal capacity is restricted remains valid for the term defined by the trustee and may be revoked at any time. The right to dispose of certain income without the trustee's consent may be restricted or terminated by the court, but still within the partial incapacity regime. A trustee shall assist the person whose legal capacity is restricted in exercising their rights and duties, and shall protect him from abuse by third parties.

19. However, despite this finding of unconstitutionality, no alternative legislation was put in place until 2 March 2015 when an amendment to the Civil Code finally entered into force. Between 27 June 2012 and 2 March 2015, the existing legislation continued to govern legal capacity decisions despite its lack of conformity with the Russian Constitution. Moreover, the entry into force of the new legislation in March 2015 did not include any requirement on the State to initiate re-examinations of decisions made according to the previous, unconstitutional regime, even in a context where a person under guardianship often has no access to a court (see arguments relating to Articles 5 and 6).

Case specific questions

Question 1 *(question 4 in the Government's memorandum).* ***Was the applicant's hospitalisation for involuntary treatment "lawful" and "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 (e) of the Convention? In particular, did the procedure of her confinement to a psychiatric hospital provide sufficient guarantees against arbitrariness*** (see *Winterwerp v. the Netherlands*, 6301/73, 24 October 1979, § 45, Series A no. 33)?

20. The Government submitted in their observations that the applicant's psychiatric confinement on 7 March 2008 was in conformity with the requirements of Article 5 of the Convention because the applicant had a mental disorder warranting her *de facto* forced hospitalisation (a substantive limb) and because the domestic authorities had followed the "procedure prescribed by law" (a procedural limb). The applicant accepts that her detention was "lawful" in the sense of its formal compatibility with the procedural requirements of the domestic law at the material time, subject to the arguments below in relation to the adequacy of representation provided to her by Ms. Lysyeva, which has affected the procedural 'lawfulness', particularly given the applicant was removed from the court for part of the hearing and not allowed to have the lawyer of her choice. However, although the applicant's detention had a formal basis in the national law, it was clearly in violation of its substantive requirements and of the Convention standards.

21. As the Court previously held, the notion of "lawfulness" in the context of Article 5 § 1 (e) has a stricter meaning. "[T]he detention cannot be considered as "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness" (see *Winterwerp v. the Netherlands*, Application no. 6301/73, judgment of 24 October 1979, at para. 45; *Shtukaturov v. Russia,* Application no. 44009/05, judgment of 27 March 2008, at para. 113).

22. As to the substantive limb, the domestic authorities never assessed any lawful criteria to justify the applicant's detention as her hospitalisation was considered to be voluntary on the basis that her guardian consented to it and despite the applicant's own protest (a fact which the Government did not dispute). The information in the medical reports upon which the Government relied demonstrates that the applicant had delusional ideas towards her neighbours, however, there was no assessment of whether this required the applicant's forced psychiatric detention.

23. The Government did not provide any medical reports issued on 7 March 2008 to justify the need for the applicant's hospital placement. Although the applicant accepts that she may have been "reliably shown" to be a person of "unsound mind", there was no information provided as to why her medical condition necessitated her hospital placement and subsequent detention there for one year, before the first judicial review on 10 March 2009. In sum, the applicant submits that the Government failed to demonstrate that the applicant's mental disorder was of a kind or degree warranting her *compulsory* confinement on 7 March 2008 and that her continued confinement through 9 March 2009 had been justified by the persistence of such a disorder.

24. As to the procedural limb it remains unclear from the Government's observations whether they considered the applicant's hospitalisation on 7 March 2008 voluntary or whether it fell under the deprivation of liberty. The Government claimed that the consent of the applicant's guardians, together with the medical report issued by the mental hospital, were sufficient guarantees against arbitrary detention given the applicant's legal incapacity. This Court has already established that the guardian's power to seek review of the person's confinement is not an effective remedy as it is not directly accessible to the person under guardianship[7]. Moreover, in this case the applicant's brother gave up his guardian function only a few days later following the applicant's hospital placement. Consequently, the guardian's function was assumed by the detaining authority itself.

25. It follows that the procedure of the applicant's confinement to a psychiatric hospital lacked sufficient guarantees against arbitrariness as no independent judicial body reviewed the lawfulness of such confinement in accordance with Article 5 procedural standards. The violation was even more obvious as the applicant herself was formally excluded from the confinement procedure.

[7] *Shtukaturov v Russia*, Application no. 44009/05, judgment of 27 March 2008 at para. 124.

Question 2 *(question 5 in the Government's memorandum)****. Did the national authorities authorising the applicant's involuntary placement in a psychiatric hospital demonstrate, as required by the applicable provisions of the Russian law, that***

(a) the applicant's disorder was "severe";

(b) the applicant's condition posed "an immediate danger to herself or others" and/or "significant damage to [her] health due to the deterioration or aggravation of the psychiatric condition in the absence of psychiatric assistance";

(c) there were no other less restrictive measures available?

Whether the applicant was reliably shown to be "a person of unsound mind"

26. According to the established case law of the Court, detention of a person considered to be of unsound mind must be in conformity with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion and with the aim of the restriction contained in sub-paragraph (e). In its *Winterwerp* judgment of 24 October 1979, the Court set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

27. The Court further held that the term "a person of unsound mind" does not lend itself to precise definition since research is continually evolving, treatment is increasingly flexible and society's attitudes continue to change. However, it cannot be taken to permit the detention of someone simply because his or her views or behaviour deviate from established norms (see *Winterwerp*, cited above, § 37).

28. Whether or not a deprivation of liberty on the basis of "unsound mind" is lawful or amounts to arbitrary detention must be considered in light of this continual evolution. Central to the evolution in the field of mental health is the adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD), which mirrors the guarantees of Article 5 § 1 from an equality perspective:

Article 14 – Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

29. In September 2015, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) adopted Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities in which it discusses the negotiation process for the drafting of this article of the Convention. It notes that States opposed the addition of any qualifier to the absolute prohibition of detention on the basis of disability,[8] resulting in the adoption of the above wording which has since been ratified by 41 Council of Europe Member States and the European Union.

30. The UN Special Rapporteur on Disability has echoed this position, stating "Many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a "danger to oneself and others" or in "need of treatment". The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty."[9]

31. The Office of the UN High Commissioner for Human Rights stated that even detention partly justified by likely dangerousness or the need for treatment violates the prohibition of disability-based deprivation of liberty if the person's disability is also a factor grounding the decision to detain the person concerned.[10]

32. Furthermore, the Court has stressed that the circumstances in which individuals may be lawfully deprived of their liberty as set out in Article 5 § 1 "must be given a narrow interpretation having regard to the fact that they constitute exceptions to the most basic guarantee of individual freedom" (see *Kurt v. Turkey*, Application no. 24276//94, judgment of 25 May 1998, at para. 122).

33. In the present case, when the consent of the applicant's guardian to her hospitalisation was no longer considered to justify the detention as 'voluntary' following the judgment of the Constitutional Court of 27 February 2009, the applicant was examined by a panel of psychiatrists, who confirmed the diagnosis of paranoid schizophrenia. The applicant accepts that this diagnosis was based on certain medical criteria, including the history of her previous admissions. Nevertheless, the applicant submits that, whatever her diagnosis, it could not be regarded *per se* as a sufficient reason for her continued confinement.

34. The psychiatric report of 10 March 2009 (*«Комиссионный осмотр на НГ»*) submitted together with the hospital's application was based on the assessment of the applicant's condition at the moment of her admission to the hospital on 7 March 2008, i.e.

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[8] UN Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities*, para. 7., available at http://www.ohchr.org/Documents/HRBodies/CRPD/14thsession/GuidelinesOnArticle14.doc

[9] Manfred Nowak, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/63/175, at para. 64.

[10] *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/10/48 (Jan. 26, 2009), at paras. 48-49.

more than a year before the court hearing. Although the applicant's initial mental condition may have warranted inpatient (but not necessarily involuntary) care in March 2008, this does not suggest that it has remained the same after one year in a mental hospital and no further assessment was required to judge on her subsequent detention on 10 March 2009. However, the 10 March 2009 judgment of the Primorskiy District Court is completely devoid of any of assessment of the degree or nature of the applicant's mental condition at the moment of the hearing, as the court refers to the circumstances of the applicant's hospital placement in March 2008.

35. Article 36 of the Russian Law on Psychiatric Care allows continuation of involuntary hospitalisation only for as long as the initial grounds for the patient's placement continue to exist. This essentially means that when a court decides on prolongation of psychiatric confinement it must establish that the grounds for detention – as set forth in Article 29 of the Law – are still present at the moment of the hearing, i.e. that the person's mental disorder is still "severe", the person is still immediately dangerous to self of others etc. The same approach has been adopted by the European Court which has emphasized that the validity of continued confinement depends upon the persistence of such a disorder (see *Varbanov*, cited above, at para. 45; *Winterwerp*, cited above, at para. 39.).

36. The Government did not explicitly address any of the criteria for involuntary hospitalisation of persons with mental disabilities under Article 29 of the Law on Psychiatric Care. The applicant reiterates that none of these criteria were satisfied in her case when her confinement was prolonged by the court on 10 March 2009.

Whether the applicant's mental disorder was severe

37. While there is no universal definition of a severe mental disorder, it is generally accepted that, to be severe, a mental disorder must interfere with an individual's social functioning and manifest itself in a psychosis, deep intellectual deficiencies, or gross personality changes.

38. The notion of "severity" of a mental disorder is a medical and not a legal judgment. However, it was included in the 1992 Psychiatric Assistance Act to bear certain legal value in Russian law. In this regard, the applicant argues that it was a duty of the national authorities to demonstrate that her mental disorder was severe enough to warrant her involuntary confinement under Russian law and that it satisfied Article 5 § 1(e) of the Convention as read in light of the evolving fields of psychiatry, international disability law and societal attitudes.

39. None of the medical documents explained why the applicant's mental disorder was considered as "severe" on 10 March 2009. Thus, the medical report of 10 March 2009 refers to the circumstances of the applicant's initial hospitalisation on 7 March 2008. The only description of the development in the applicant's state is confined to the statement that "persistent delusional ideas towards neighbours", "negative attitudes

towards neighbours, doctors and treatment" continued to subsist. The report emphasised that the applicant was legally incapable and had no guardian.

40. The court decision of 10 March 2009 which authorised the applicant's detention in the hospital merely reproduced the legal formula that the applicant "suffers from a severe psychiatric disorder" without substantiating this statement in any manner. Thus, the whole procedure of judicial review of the applicant's continued hospital care in 2009 essentially concerned a review of the need for her initial hospitalisation one year earlier.

41. It follows that, contrary to the requirement of the domestic law, the national authorities failed to demonstrate that the applicant's mental disorder was severe on 10 March 2009.

Whether the applicant's condition posed 'an immediate danger to herself or others'

42. No one may be detained on the basis of a disability. On the question of whether the applicant posed an immediate threat or danger to herself or others, the applicant reiterates that neither the psychiatric report of 10 March 2009 nor the court's decisions contained any reference to the risk or danger the applicant posed, let alone any assessment of such danger.

43. The report issued by the medical panel on 10 March 2009 states that "persistent delusional ideas towards neighbours" and "negative attitudes towards neighbours" continued to persist one year after the applicant's initial placement. However, this description does not suggest that delusional ideas or negative attitudes towards neighbours demonstrated any "immediate danger" from or to the applicant. Thus, the only reference to the alleged dangerousness of the applicant is a general reference to her neighbours' complaints of her "inadequate and dangerous" behaviour which the mental health facilities had received since 2004. The report did not specify when exactly those complaints were received or their scope. To the contrary, the report of 10 March 2009 states that "before this hospitalisation [on 7 March 2008] in the mental hospital [the applicant's] state has become worse, and that is why she has been hospitalised on the basis of an order of the psychiatric unit on duty". However, the report shed no light on the nature of the alleged deterioration in the applicant's condition. In any case this general allegation of the applicant's dangerousness in 2008 cannot evidence her "immediate" danger to herself or others in 2009, as required by Russian law.

44. What is more important is that these descriptions are clearly devoid of any characteristics of "immediate" danger to the applicant herself or to others.

45. It follows that the domestic authorities failed to establish that the applicant posed an immediate danger to herself or to others and therefore her continued detention was not lawful under this limb.

Whether the applicant's condition posed the risk of 'significant damage to her health due to the deterioration or aggravation of the psychiatric condition in the absence of psychiatric assistance'

46. Contrary to the requirement of Article 29(c) of the Law on Psychiatric Care, the domestic authorities did not demonstrate that the applicant's mental disorder would give rise to "significant damage to her health due to the deterioration or aggravation of the psychiatric condition in the absence of psychiatric assistance". The medical documents and the court order of 10 March 2009 are devoid of any assessment of whether there would be deterioration in the applicant's mental state if she were left without psychiatric treatment, whether such deterioration would cause harm to the applicant's health, and whether this harm would be "substantial".

47. The applicant reiterates that consideration of whether a deprivation of liberty is arbitrary contrary to the purpose of Article 5 § 1 must take into account the evolving standards of international psychiatry, societal attitudes and international human rights law, in particular the UN CRPD which prohibits detention on the basis of disability. In addition, the CRPD draws a clear distinction between deprivation of liberty and forced or involuntary treatment carried out without the consent of the person concerned. One does not and cannot justify the other. Article 25 of the CRPD provides that:

States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability… In particular, States Parties shall: … (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent….

48. The relevant Russian legislation fails to recognise this distinction and presumes that lack of consent to treatment justifies detention in a psychiatric hospital. This is evident from Article 11(4) of the Law on Psychiatric Care, which provides that treatment may be carried out without the consent of a person suffering from a mental disorder where he or she is hospitalised involuntarily under Article 29 of the Law. However, involuntary placement in a medical facility is not as such a justification for involuntary treatment according to Article 19 of "Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder". The standard set forth by this recommendation explicitly requires States to assess the person's capacity to consent to psychiatric treatment and/or placement (see Article 16(ii)).

49. The applicant addressed the issue of forced treatment in her submissions under Article 8 with regard to the guardianship functions of the hospital. She further argues that the failure of the domestic authorities to assess her capacity to consent to hospital placement of psychiatric treatment – partially deriving from the above inadequacy of the Russian law in this field – was one of the key factors contributing to the ensuing failure to assess whether the absence of medical care could lead to significant damage to the

applicant's health and whether less restrictive measures could prevent such damage (see below).

50. The Court's previous jurisprudence has emphasised that where the issue is not whether there is an imminent danger to the person's health but rather whether medical treatment would improve his condition or the absence of such treatment would lead to a deterioration in that condition, it is incumbent on the authorities to strike a fair balance between the competing interests emanating, on the one hand, from society's responsibility to secure the best possible health care for those with diminished faculties (for example, because of lack of insight into their condition) and, on the other hand, from the individual's inalienable right to self-determination (including the right to refuse hospitalisation or medical treatment, that is, his or her "right to be ill"). In other words, it is imperative to apply the principle of proportionality inherent in the structure of the provisions enshrining those Convention rights that are susceptible to restrictions (see *Plesó v. Hungary,* Application no. 41242/08, judgment of 2 October 2012, at para. 66).

51. The need to strike such balance was particularly evident in the applicant's situation where she had already spent one year in detention and had received psychiatric treatment involuntarily. This required the authorities to assess properly the benefits of continued medical treatment of the applicant and its effectiveness, against the intrusion into the applicant's autonomy.

52. The applicant urges the Court to consider that the current understanding of international human rights law no longer conflates detention and treatment, recognising that a refusal to submit to the latter cannot justify the former. Nevertheless, it also follows from the Court's own reasoning as set out above, that in the present case the applicant's detention allegedly sought to improve her condition rather than prevent her mental health from substantive and imminent deterioration. Thus, the national authorities failed to comply with the domestic law requirements and to achieve the fair balance as required by the Convention.

Consideration of less restrictive measures

53. The panel of psychiatrists who assessed the applicant on 10 March 2009 failed to examine the possibility of applying less restrictive measures. The applicant recalls in this regard that detention under Article 5 § 1 (e) can be resorted to only when other less restrictive alternatives were shown to be insufficient:

> *The detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances.* (*Varbanov v. Bulgaria,* Application no. 31365/96, judgment of 5 October 2000, at para. 46.; emphasis added. See also, more recently, *Stanev v. Bulgaria,* Application no. 36760/06, judgment of 17 January 2012, at para. 143,)

54. Similarly, Article 17 of "Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder" provides that a person may be subject to involuntary placement only if "no less restrictive means of providing appropriate care are available". Article 8 of the same recommendation states that "[p]ersons with mental disorders should have the right to be cared for in the least restrictive environment available and with the least restrictive or intrusive treatment available, taking into account their health needs and the need to protect the safety of others". This is reiterated in Article 10(ii) of Rec(2004)10, which urges States to "make alternatives to involuntary placement and to involuntary treatment as widely available as possible".

55. Russian law too incorporates the above requirement insomuch as Article 29 of the Law on Psychiatric Care permits involuntarily hospitalisation on the condition that "the person's examination or treatment is possible *in in-patient care only*" [emphasis added]. Furthermore, Article 5(2) of the said law establishes a general principle that mental health care should be provided in the least restrictive conditions. Therefore, a decision approving involuntary hospitalisation which fails to address this criterion falls short of the requirement of "lawfulness" contained in Article 5 § 1. In the present case the hospital's psychiatric report never considered other, less restrictive measures (i.e., the possibility and efficacy of the applicant's treatment in out-patient care). For example, no explanations were offered to the applicant as to why the treatment was necessary and what its expected effect was to be on her health.

56. As argued above (see § 49), the lack of consideration of less restrictive alternatives to involuntary placement was partially caused by the failure to assess the applicant's capacity to consent to continued hospitalisation and treatment as the hospital acted on presumption that, first, it was impossible to obtain the applicant's consent due to her incapacity (as evident from the mental hospital's request of 10 March 2009 for a court order), and, second, the applicant's refusal to hospital placement automatically meant her refusal to undergo any psychiatric treatment.

Question 3 *(question 6 in the Government's memorandum)****. Did the applicant have at her disposal an effective procedure by which she could challenge the lawfulness of her confinement in the hospital, as required by Article 5 § 4 of the Convention? Were the court proceedings in 2009 by which the domestic courts authorised the applicant's continued confinement fair and adversarial as required by Article 5 § 4 of the Convention? In particular, was the applicant provided with the effective legal assistance by court-appointed counsel? Did the domestic courts comply with their obligation to ensure due judicial review of the applicant's involuntary hospitalisation?***

The period from 7 March 2008 to 10 March 2009

60. The Government did not comment on the applicant's submission under Article 5 § 4 of the Convention regarding her detention from 7 March 2008 to 10 March 2009.

Even though the applicant expressly objected to her hospitalisation, during this period she was detained in the hospital without a court order on the basis of the consent of her brother who was her guardian at that time and, upon cessation of his guardian functions – based on the consent of the mental hospital acting as *ex officio* guardian. At that time Russian law did not require a court order for confining legally incapable individuals as such hospitalisation was considered voluntary as long as the patient's guardian had consented to it. The applicant herself was prevented from taking proceedings before a court with regard to the lawfulness of her detention as, according to Article 135(1)(3) of the Code of Civil Procedure, courts shall return without consideration an action brought by a legally incapable person. This rule extends to complaints related to forced hospitalisation. This issue was examined by the European Court in *Shtukaturov v. Russia* and found to be in violation of Article 5(4) of the Convention. As noted above on 27 February 2009 the Russian Constitutional Court ruled that involuntary hospitalisation of legally incapable individuals must follow the same judicial guarantees as in the cases of legally capable patients. Therefore on 10 March 2009 the hospital applied to the court to obtain a court order for further detention of the applicant and on the same day the order was issued by the Primorskiy District Court.

61. As of 27 February 2009 the Russian legal system has partially rectified the procedural flaw in its legislation concerning involuntary hospitalisation of legally incapable individuals, although the legislation implementing the judgment of the Constitutional Court was passed only on 6 April 2011. However, this cannot be regarded as sufficient redress for the violations of the applicant's rights during the period indicated (7 March 2008 – 10 March 2009) as the 10 March 2009 judgment reviewed the need for her detention as of that date, i.e. for the subsequent period, and due to her legal incapacity the applicant could not initiate proceedings to review the material lawfulness of her detention during the preceding period. Moreover, a periodic review of the need to continue a person's involuntary treatment in a mental hospital takes place every six months. Under section 36 of the Law on Psychiatric Care this renewal is initiated by the domestic authorities. A patient who is detained in a mental hospital does not have any opportunity to initiate any proceedings in which to seek examination of whether the conditions for his or her confinement for involuntary treatment are still met. The Court has found in its earlier case-law that a system of periodic review in which the initiative lay solely with the authorities was not sufficient on its own (*Rakevich v. Russia*, Application no. 58973/00, judgment of 28 October 2003, paras 43-44. and *Gorshkov v. Ukraine*, Application no. 67531/01, judgment of 8 November 2005, at para. 44.).

62. In addition to this, during her detention from 7 March 2008 to 10 March 2009 the applicant was denied her right to meet with her attorney with regard to her application to the Court, and she could not challenge this violation either. The violation of the applicant's right under Article 5(4) is particularly egregious; one week after her hospitalisation the applicant's brother ceased to be her guardian and this role was assumed by the psychiatric hospital itself. Therefore, determination of the need for the applicant's continuous detention in the hospital was entirely at the discretion of the hospital itself until the Constitutional Court changed this system on 27 February 2009. In

this regard the applicant wishes to recall that the European Court has emphasised on numerous occasions that "by virtue of Article 5 § 4, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention" (see *Winterwerp v. the Netherlands*, Application no. 6301/73, judgment of 24 October 1979, at para. 55.). In a similar case concerning detention of a legally incapable person the Court went on to say that "it is *a fortiori* true … where the applicant's confinement was authorised not by a court but by a private person, namely the applicant's guardian" (see *Shtukaturov*, cited above, at para. 121). The need for such review is greater still when the applicant's guardian is actually the hospital where the person is detained.

The period after 10 March 2009

63. The Government submitted in their observations that the proceedings before the Primorskiy District Court of St. Petersburg concerning the applicant's involuntary hospitalisation on 10 March 2009 were in conformity with the requirements of Article 5 of the Convention.

64. In the Government's view these proceedings were 'fair and adversarial' because the applicant was provided with effective legal aid by attorney M. Lysyeva and because the applicant herself took part in the proceedings in person. The Government further argued that, regardless of the attorney's presence, the applicant had an opportunity to address the court in person on any matter and to comment on any argument of the parties. This, in the Government's view, distinguishes the instant case from the situation in *Zagidulina v. Russia* (Application no. 11737/06, judgment of 2 May 2013, at para. 62.).

65. It follows from the submission of the Government that they did not address the applicant's argument concerning the decorative role of the legal aid attorney Ms. Lysyeva during the proceedings on 10 March 2009.

66. This Court previously held that, although Article 5 § 1 essentially refers to domestic law, at the same time it obliges the national authorities to comply with the Convention requirements (*Hutchison Reid v. the United Kingdom*, Application no. 50272/99, judgment of 20 February 2003, at para. 47.) as the notion of "lawfulness" has a broader meaning than it does in national legislation. For detention to be lawful, it is a prerequisite that there has been a "fair and proper procedure", including the requirement "that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary" (see *Winterwerp*, cited above, § 45).

67. The Court further emphasised that, in light of the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights, the proceedings resulting in the involuntary placement of an

individual in a psychiatric facility must necessarily provide clearly effective guarantees against arbitrariness, especially because hospitalisation in a specialised medical institution frequently results in an interference with an individual's private life and physical integrity through medical interventions against the individual's will (See *Mifobova v. Russia*, Application no. 5525/11, judgment of 5 February 2015, at paras 54-55).

68. Finally, in *Megyeri v. Germany*, Application no. 13770/88, judgment of 12 May 1992, at para. 22, the Court held that, in order to determine whether proceedings provide adequate guarantees under Article 5(4) appropriate to the kind of deprivation of liberty in question, regard must be had to the particular nature of the circumstances in which they take place.

As to the sufficiency of the applicant's personal participation in the involuntary confinement proceedings

69. The Court previously criticised the failure of the domestic authorities to secure effective legal representation for a person with a mental disorder during involuntary confinement proceedings. Consequently, the Court found a violation of Article 5 § 1 where a person – who in the opinion of the psychiatrists was delusional and lacking critical awareness of her own state of mind – was, in part, representing herself (See *Mifobova*, cited above, at para. 61).

70. In the present case, the panel of psychiatrists of Psychiatric Hospital No. 3 which assessed the applicant on 10 March 2009 noted that the applicant was legally incapable and decided not to seek her informed consent to continued hospital care. Thus, the medical panel seems to have considered that she was not capable of addressing the legal grounds for her detention and addressing complex legal issues in the context of the civil commitment proceedings. It is evident from the minutes of the hearing that the applicant's participation in the proceedings had not compensated for the lack of effective legal aid as the applicant did not know what exactly she needed to challenge or what kind of legal issues were at stake (the legal grounds for detention).

71. Moreover, the applicant was removed from the core stage of the proceedings, where the hospital presented its position to justify the confinement. The Government provided no explanation as to why this was needed. The mere fact that the applicant had the right to address the court and to file motions, as the Government suggested, or the fact that the judge "reviewed" the case file in the applicant's presence, could not rectify her absence during the core stage of the proceedings. Such right was merely theoretical in the absence of any direct access by the applicant to the information justifying her confinement.

72. Given the vulnerable status of the applicant as a person with a mental disability (see *Alajos Kiss v. Hungary*, Application no. 38832/06, judgment of 20 May 2010, at para. 43), she was entitled to reasonable and procedural accommodations to ensure her effective participation in the proceedings under Article 5(4). The UN CRPD recognises this entitlement in several provisions: Article 2 ("'Discrimination on the basis of

disability'… includes all forms of discrimination, including denial of reasonable accommodation"), Article 5 ("In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided"), and Article 13 ("States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings…").

73. Reasonable accommodation can be seen as a feature of the Court's own jurisprudence to the extent that it upholds the right of individuals to non-discrimination and other rights by treating individuals in different circumstances differently (see *Thlimmenos v. Greece*, Application no. 34369/97, judgment of 6 April 2000, at para. 44). It has applied this in practice to find in effect that failure to provide reasonable accommodations can lead to violations of certain articles of the Convention, for example, in the context of failure to take measures to ensure prisoners with disabilities were accommodated in accessible or adapted facilities (see *Price v. U.K.*, Application no. 33394/96, judgment of 10 July 2001, and more recently, *Semikhvostov v. Russia*, Application no. 2689/12, judgment of 6 February 2014, at para. 85). In the instant case, the applicant was not provided with any such accommodations to ensure her effective participation nor was she made aware that of her rights in this regard or what accommodations might have been available. On the contrary, she was actively deprived of the opportunity to participate meaningfully when she was removed from the proceedings.

As to the effectiveness of the legal aid provided to the applicant during the involuntary confinement proceedings

74. The Government did not dispute the duty of the domestic authorities (the district court) to provide the applicant with legal representation in the detention proceedings, which they had done by appointing attorney Ms. Lysyeva. However, in accordance with the general approach of this Court, the State's duty to provide legal representation cannot be limited to mere nomination of a lawyer or that lawyer's tokenistic presence at a hearing (*Artico v. Italy*, Application no. 6694/74, judgment of 13 May 1980, at para. 33).

75. Indeed, the authorities cannot be held responsible for a particular line of legal reasoning which a lawyer chooses to use in the proceedings. However, where the authorities are notified of the lawyer's failure to provide effective legal aid, they must either replace him or cause him to fulfil his obligations (see *Artico*, cited above, at para. 33). In fact, in the context of a challenge to detention in a psychiatric hospital, the Court has recently held that, since Convention rights must be practical and effective and not theoretical and illusory, it:

> *"does not consider that the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, could 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 an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts…" (M.S. v Croatia (No. 2.), Application no. 75450/12, judgment of 19 February 2015, at para. 154).

76. In that case, the lawyer had not met the applicant, made no submissions on her behalf and attended the hearing but acted "as a passive observer of the proceedings". The Court found that this passive attitude and the failure of the domestic authorities to take the necessary action deprived the applicant of effective legal assistance (ibid, § 156).

77. In the present case, the lack of any effective legal assistance to the applicant by Ms. Lysyeva was equally glaring, as the only statement she had made during the detention proceedings was limited to her consent to the applicant's confinement, despite the applicant's persistent objections.

78. The passive role of legal aid attorney, Ms. Lysyeva, and her consent to the applicant's hospitalisation despite the applicant's objections were in violation of the professional legal standards outlined by the Council of the St. Petersburg Bar of Attorneys in an information letter of 24 November 2009 following Ms. Lysyeva's unprofessional conduct in a similar case (see *appendix 1*). The Bar Council addressed a situation similar to the present case and reminded attorneys that, firstly, an attorney must not consent to hospital placement when the client objects to it, and, secondly, a legal aid attorney has the duty to ensure the adversarial nature of the confinement proceedings.

79. Not only was the ineffectiveness of the legal aid apparent, it was directly brought to the attention of the authorities at the appellate hearing, however to no avail. The appellate court dismissed this argument as the district court's judgment was "lawful on the merits".

80. The lack of meaningful legal representation resulted in the failure of the domestic authorities to ensure due judicial review of the application for the applicant's involuntary hospitalisation.

81. In sum, the applicant submits that the legal aid provided to her was clearly worthless (and even damaging), and therefore the decision regarding her detention was not made "in accordance with a procedure prescribed by law" and thus violated Article 5(1). By the same token, the relevant proceedings before the Primorskiy District Court were not fair and adversarial contrary to the requirements of Article 5(4).

Question 4** (question 7 in the Government's memorandum)**. Did the applicant have a fair hearing in the case concerning her legal capacity as required by Article 6 § 1 of the Convention? In particular, did the applicant have an effective "right to a court" given her absence from the proceedings and courts' refusals to consider her appeals?

57. The Government did not dispute the fact the Vyborgskiy District Court of St. Petersburg never notified the applicant of the incapacity hearing which took place on 5 April 2004. Although the experts' report of 23 January 2004 noted that the applicant "interpreted the aim of undergoing the expert assessment in a delusionary manner" and "[Her] daughter has cooperated with the neighbours and that is why she wrote the application", the report did not specify that the applicant had been explicitly informed of the proceedings before the Vyborgskiy District Court of St. Petersburg.

58. According to the Government the incapacity hearing before the district court in the applicant's absence on 5 April 2004 did not violate the fair trail standards under Article 6 § 1 of the Convention because it was justified by the applicant's health status. In this regard the Government relied on the experts' report of 23 January 2003, which concluded that the applicant was unable to understand the meaning of her actions and to govern them.

59. In the context of Article 6 § 1 of the Convention, the Court assumes that in cases involving a mentally ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make the relevant procedural arrangements in order to secure the proper administration of justice, protection of the health of the person concerned, and so on. However, such measures should not affect the very essence of the applicant's right to a fair trial as guaranteed by Article 6 of the Convention. In assessing whether or not a particular measure, such as exclusion of the applicant from a hearing, was necessary, the Court takes into account all relevant factors (such as the nature and complexity of the issue before the domestic courts, what was at stake for the applicant, whether his appearance in person represented any threat to others or to himself, and so on).

60. First, the applicant notes that the experts' report of 23 January 2003 never assessed her ability to participate in the court hearing. Likewise the district judge and higher courts made no assessment of the applicant's capacity to appear in the proceedings and acted on the presumption that where experts established a person's diminished mental capacity she could not take part in the proceedings. That presumption was criticised by this Court and the Russian Constitutional Court in its judgment of 27 February 2009. Indeed hearing of the incapacity case *in absentia* was the only reason for remitting the applicant's case for a fresh hearing on 24 September 2009 by the St. Petersburg City Court. It therefore follows that the domestic authorities effectively acknowledged a violation of the fair trial standards in the applicant's case.

61. Second, the Court made it clear in *Shtukaturov* that the outcome of the incapacity proceedings was important for the applicant because his personal autonomy in almost all areas of his life was in issue, including the eventual limitation of his liberty, was at stake (§ 71). Further, in *Shtukaturov* the Court emphasised that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity (§ 72). Thus, in the circumstances

of a case similar to the instant one, the Court concluded that the decision of the judge to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6 § 1 (§ 73).

62. Accordingly, the Court made it indispensable that the judge needs to at least see the person in the incapacity proceedings. The importance of this principle was recognised by the Russian authorities as, on 6 April 2011, the Law amending the Civil Code of the Russian Federation introduced the person's absolute right to be heard in the incapacity proceedings and a duty of the court to notify the individual personally of such proceedings.

63. Moreover, the applicant had no legal representative to compensate her alleged inability to appear before the judge. The district court had no duty to appoint a lawyer to the applicant despite her alleged inability to defend her rights by her own actions.

64. Both the applicant and the guardianship authority acting on her request tried to appeal the incapacity judgment relying primarily on the violation of the applicant's failure to appear before the court. However, this argument was rejected by the higher courts. The Court must always assess the proceedings as a whole, including the decision of an appellate court (see *C.G. v. the United Kingdom*, Application no. 43373/98, judgment of 19 December 2001, at para. 35). In the present case the applicant's ordinary (cassation) appeal was disallowed as introduced out of time, which happened because she had never been informed by the court of the incapacity judgment. Furthermore, supervisory appeals were disallowed without examination on the ground that the applicant had no legal capacity to act before the courts.

Question 5 *(question 8 in the Government's memorandum)****. Has there been an interference with the applicant's right to respect for her private life contrary to Article 8 § 1 of the Convention in view of her guardianship regime and confinement for involuntary treatment (a) during the period of time between 7 March 2008 and 10 March 2009 and (b) since 10 March 2009? If so, was that interference in accordance with the law and necessary in terms of Article 8 § 2? The Parties are requested to provide information and relevant documents as to (a) what kind of treatment was prescribed to the applicant and (b) what kind of treatment did she receive in the hospital. Were alternative treatments available and/or considered in respect of the applicant's health situation? Did the applicant have at her disposal an effective procedure by which she could challenge (a) her involuntary confinement in the hospital and (b) the hospital's guardian function? Did the authorities make a sufficient effort to provide the applicant with a guardian, other than the hospital? If not, did this state of affairs and the double function of the hospital (guardian and detaining authority) comply with Article 8 § 1 of the Convention?***

65. The Government accepted that the applicant's guardianship regime and her confinement for involuntary treatment in the mental hospital constituted an interference with the applicant's right to respect for private life both from 7 March 2008 to 10 March 2009, and since 10 March 2009. However, the Government argued that there has been no violation of the applicant's right to respect for her private life because such interference complied with the requirements of Russian law.

66. According to the Government after the applicant's brother had stepped down as her guardian, the mental hospital where the applicant was placed at that time became her guardian *ex officio*, by virtue of Article 35(4) of the Civil Code. Thus, the interference had a legal basis in domestic law.

67. Moreover, the mental hospital played a dual role, or even a triple role, being the applicant's guardian, the detaining authority and the mental health facility. Thus, being a mental health facility, the hospital has the right to restrict the patient's right to receive visitors, to receive correspondence and to use phone. In accordance with Article 37(4) of the Law on Psychiatric Care these rights can be restricted with regard to any patient, whether detained in the hospital or undergoing treatment voluntarily. These rights are essential for establishing contacts with the outside world.

68. Being a detaining authority, the mental hospital had an unrestricted right to administer any psychiatric treatment on the applicant because in accordance with Article 11(4) of the Law on Psychiatric Care a patient involuntarily hospitalised in the mental hospital has no right to refuse psychiatric treatment. It follows that from 7 March 2008 to 10 March 2009 (*de facto* detention) the mental hospitals power to administer treatment to the applicant was based on Article 11(3) of the Law on Psychiatric Care (before it was amended on 6 April 2011) which provided that consent to treatment of a person who has been declared legally incapable shall be given by his legal representative (the guardian). Having become the applicant's guardian the mental hospital consented to the applicant's detention in the hospital and to her treatment. From 10 March 2009 the mental hospital had acquired the same right to administer any medical treatment to the applicant on the basis of Article 11(4) of the Law on Psychiatric Care when the applicant had become *de jure* detained in the mental hospital.

69. As to the hospital's role as the applicant's guardian it is virtually impossible to distinguish its powers in that capacity from those as the detaining authority and as the mental hospital in general. Before the judgment of the Constitutional Court of 27 February 2009, according to Russian law a guardian had virtually unlimited powers to decide on every aspect of the person's private life, including hospital placement or choice of place of residence, as well as powers to decide on recourse to any judicial remedies in order to protect the legally incapable person's rights related to liberty, private or family life. This was especially important in the present case as the applicant's guardian was at the same time the detaining authority (the mental hospital) which had not only legal but actual power to restrict the applicant's private life. The applicant was thus totally dependent on her guardian's good will in exercising her substantive and procedural rights in the sphere of "development and fulfilment of her personality".

70. The applicant wanted to challenge her detention in the mental hospital but was prohibited from doing so firstly, because under Russian law a person under guardianship cannot apply to the court independently from his or her guardian, including for the purpose of challenging detention. The judgment of the Constitutional Court of 27 February 2009 has not remedied this procedural obstacle. Secondly, until the judgment of the Constitutional Court of 27 February 2009, such a person could not appoint or even consult with a lawyer without the approval of his or her guardian. As the applicant's situation demonstrates, she contacted her attorney immediately after she had been admitted to the mental hospital, indicating that she wanted to update the European Court of Human Rights of her situation in relation to her previous application filed in 2005 and to challenge her current detention. Consequently, the attorney tried to visit the applicant in the hospital but he was denied access to her and had to challenge the hospital's actions in the court. It took more than a year for the lawyer to achieve a court judgment recognising his right to see his client under the European Convention. Still, the decision of the St. Petersburg City Court of 21 April 2009 recognised the attorney's, and not the applicant's right, to meet with her and only because of the attorney's power based on the Convention, and not on Russian law. Thus, it was not a remedy directly accessible to the applicant in domestic law.

71. The applicant notes that the Government has not provided any comments with regard to the necessity and proportionality of the hospital's guardianship regime, whether the applicant had an effective remedy to challenge her confinement and the hospital's guardian function, whether the hospital's double function complied with Article 8 and whether a sufficient effort was made by the authorities to provide the applicant with a guardian.

72. The applicant further submits that she had no effective remedy to challenge her involuntary confinement in the hospital or the hospital's guardian function. This is because, firstly, the applicant lacked standing to institute any judicial proceedings due to her legal incapacity in accordance with Article 135(1)(3) of the Code of Civil Procedure. Secondly, because the mental hospital automatically assumed the guardian function by virtue of law and no court could dismiss the hospital as her guardian. The Government did not contest this argument. Likewise, the applicant could not challenge other violations of her rights under Article 8 resulting from her psychiatric confinement, including the right to reject medical treatment, the right to receive visitors, and the right to use a telephone to communicate with the outside world. In principle, Article 47 of the Russian law on psychiatric care provides for the right of users of psychiatric services to bring a complaint before a court challenging the lawfulness of the actions by hospital staff. However, it is the applicant's guardian who can lodge a complaint on the applicant's behalf, but not the applicant herself. Obviously this remedy is pointless in the applicant's case as her guardian is the detaining authority and alleged perpetrator of the violations of her rights in the sphere of private life.

Question 6 *(question 9 in the Government's memorandum)****. Did the applicant have an effective "right to a court" as required by Article 6 of the Convention in respect of her hospitalisation?***

73. The applicant is aware that the right to a court is not absolute and the State may impose restrictions on potential litigants as long as these restrictions pursue a legitimate aim, are proportionate, and do not destroy the very essence of the right (*Ashingdane v. the United Kingdom*, Application no. 8225/78, judgment of 28 May 1985, at para. 59, Series A no. 93). In the instant case, the applicant, as a legally incapacitated person, lacked standing to bring any case before court. This restriction is based on Article 31(2) of the Civil Code and Article 37(5) of the Code of Civil Procedure. The applicant acknowledges that, where based on an evaluation of an individual's specific circumstances, such a restriction may pursue a legitimate aim of protecting a person from instituting proceedings which may be contrary to his interests, as well as the protection of the interests of others and the proper administration of justice.

74. However, the Court has held that the importance of exercising procedural rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. Thus, the Court has emphasised that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see *Stanev*, cited above, at para. 241). The applicant urges the Court to acknowledge that the outcome of the proceedings concerning her hospitalisation would have equal importance for her as she was totally dependent on the hospital's discretion with regard to deprivation of liberty, treatment imposed on her and any restrictions, including to her rights to private life, during her hospital stay.

75. Arguably, a guardian acting on behalf of the applicant could initiate proceedings in her interest. However, the applicant's *ex officio* guardian was the mental hospital whose actions the applicant wanted to challenge. It follows that in the present case a blanket prohibition on the applicant's standing to apply to court made it impossible for her to effectively exercise her right to access a court. Even assuming that for some reason the applicant was unable to act in the court proceedings, Russian law did not provide for any reasonable safeguards, such as *guardian ad litem* (cf. *R.P. and others against the United Kingdom*, Application no. 38345/08, judgment of 9 October 2012, at paras 73-74).

Claim under Article 41 of the Convention

76. Deprivation of her legal capacity by judicial decision in 2004 represents an unlawful interference with the applicant's right to private life contrary to the requirements of Article 8 of the Convention. It is beyond doubt that in such circumstances she experienced and continues to experience distress and frustration which caused her to

suffer non-pecuniary damages. It is therefore justified for the applicant to request the respondent party to pay her compensation for the damages suffered in the amount of 25,000 (twenty five thousand) euros.

77. Furthermore, the applicant has had the costs of the proceedings before the Court in the amount of eighteen thousand, one hundred and thirty six euro and eighty cent EUR (18,136.80), as specified by the Payment Request attached to this submission, which were justified and reasonable in both the domestic proceedings and the proceedings before the Court and for which the applicant requests reimbursement in accordance with Article 41 of the Convention. Please note that the Mental Disability Advocacy Centre (MDAC) has advanced the entirety of the costs for the applicant's representation, as can be viewed from the agreement with Mr Bartenev. The Court has already held that, when an applicant is represented by a non-governmental organisation, the claim for costs could not be refused, since the fact that an organisation is functioning on a non-profit basis does not have to mean that they have to provide their services for free (see *Lavida and others v. Greece*, Application no. 7973/10, judgment of 30 May 2013), while it could not be refused to lawyers engaged by such organisations to request reimbursement of costs incurred (see e.g. *Klaus et Iouri Kiladze c. Géorgie*, Application no. 7975/06, judgment of 2 February 2010, at paras 91-94). Given that, in the present case, the attorney is a consultant with MDAC, a non-governmental organisation which advanced the costs of representation, it is reasonable that the costs of the proceedings should be forwarded directly to MDAC.

Yours faithfully,

Dmitri Bartenev,
attorney at law
Mental Disability Advocacy Centre

Enc: Request for payment by Mental Disability Advocacy Centre.