CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF X v. CROATIA

(Application no. 11223/04)

JUDGMENT

STRASBOURG

17 July 2008

FINAL

01/12/2008

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

In the case of X v. Croatia,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 26 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 11223/04) 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, X ("the applicant"), on 25 February 2004.

2. The applicant was represented by Mr Š. Babić, a lawyer practising in Zagreb. The applicant's representative was appointed by the Government after the indication of an interim measure under Rule 39 of the Rules of Court. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. On 18 May 2006 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the applicant's right of access to a court, her right to respect for her family life and her right to an effective remedy to the Government. It also decided to examine the merits of the remainder of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1972 and lives in Zagreb.

1. Proceedings concerning the applicant's capacity to act

5. On 15 December 1998 the S. Welfare Centre (*Centar za socijalni rad S.,* "the Centre") instituted proceedings before the Zagreb Municipal Court (*Općinski sud u Zagrebu*) with a view to divesting the applicant of her capacity to act (to perform acts with legal effect; *poslovna sposobnost*). On 9 December 1998 the Centre temporarily appointed the applicant's mother as her guardian so that she could represent her daughter in the above proceedings. The Centre based its request on the notice from the V. Psychiatric Hospital of 27 October 1998 in which it was stated that the applicant was suffering from schizophrenia. The relevant part of the notice read as follows:

> "[The applicant] has been recurrently treated at the V. Psychiatric Hospital, on the last occasion from 4 to 26 September this year, and diagnosed [as suffering from] schizophrenia (depressive disorder), after a suicide attempt.
>
> During the last few treatments [at the hospital] the patient had left the hospital of her own will. While being in a phase of exacerbation she returned [to the hospital] on several occasions, after swallowing a large quantity of pills. We are aware that the patient has had problems with her mother and also that she is occasionally inclined to take drugs. As regards the main disease (sch[izophrenia]), we have not observed productive psychotic symptoms for a long period, but her behaviour and functioning has lately been compromised with so called deficiency symptoms which impede a more structured therapeutic process to a significant degree. We consider that the above indicates the need to deprive the patient of her capacity to act..."

6. On 4 June 1999 the applicant was heard by the Municipal Court's judge for the first time. The transcript of her statement reads as follows:

> "The [applicant] says that her problems started when she went to London where she felt lost and begun to consume pot [meaning marijuana]. Since then she's been suffering from hallucinations which at that time seemed tolerable to her. After 4 years, in 1993, she returned to Zagreb where she started her treatment. She is presently receiving therapy. Her latest hospitalisation was in September last year. She is presently receiving Depot and Haldol. She sells environmentally-friendly carrier bags. She neither wishes to be placed under guardianship nor does she wish to have her mother as her guardian, for private reasons. She is presently two months pregnant and ever since she learned of this she has not taken any drugs. Most lately she has been taking pot but no heavy drugs. She is planning to terminate the pregnancy. She does not feel good on Haldol, she feels depressed and in particular it bothers her at work. She has finished elementary school but has never been employed. She went to London when she was seventeen with a group of people. She now lives in a flat owned by her mother. She lives alone since her mother lives with her new husband. However, her mother is paying the bills and the rest she earns herself. It is true that she attempted suicide by [swallowing] pills, most recently in March last year. She is aware that she has been diagnosed with paranoid schizophrenia."

In view of the opinion given by the medical expert and the fact that the applicant was undergoing psychiatric treatment, the court stayed the proceedings.

7. On 25 December 1999 the applicant gave birth to a daughter, A.

8. In his letter to the Centre of 11 April 2000, a psychiatrist of the V. Psychiatric Hospital stated as follows:

> "... we consider it necessary that the proceedings for divesting the patient of her capacity to act be resumed because her behavioural disorder has become exacerbated lately owing to her uncontrolled intake of psychoactive substances by which she has endangered her own safety and in particular the safety of her child."

9. On an unspecified date in 2000 the court resumed the proceedings and on 7 November 2000 paid a visit to the applicant's home, in the presence of the applicant and her mother as her guardian, a judge conducting the proceedings and her secretary, a representative of the Centre and a psychiatrist. The relevant parts of the report of the visit read as follows:

> "The [applicant] in the company of her mother and child is met at the premises. The representative of the Centre states that a decision to place the child in foster care was issued and that the [applicant]'s mother was appointed as carer. The [applicant] states that she agrees to that as well as to being placed under guardianship in the best interests of her child since she is aware that she is unable to care for the child or for herself. However, she asks whether she can apply to have her capacity to act restored if her condition improves. In the meantime she has twice been admitted to hospital but does not see any results and does not know what to do with herself. From time to time she says that she might go back to London to earn some money. It is true that she has been taking drugs, though rarely and only pot and also larger quantities of Plivadon together with the prescribed therapy. In fact, she is not working, she is mostly at home caring for the child. Only after being asked by her mother and the representative of the Centre does she admit that she is still receiving company at home and that she gave some kitchen cupboards to Caritas because she did not like them (the mother says that she sold them). The father of the child, living in the same building, occasionally visits her and the child, but she has no committed relationship although two weeks ago she terminated another pregnancy. Although she expresses a wish to do any job, she admits that so far she has taken no steps to that end."

10. The court also ordered a psychiatric assessment of the applicant's mental condition. The assessment was carried out by the psychiatrist present at the visit to the applicant's home. The conclusion of the report drawn up on 25 November 2000 read as follows:

> "... The patient suffers from a chronic mental illness with progressive tendency.
>
> Addiction to opiates has also been fixed and motivation for abstention is weak. Prognosis *quoad sanationem* is exceptionally unfavourable.
>
> The patient is unable to protect herself or her rights and interest and might endanger the rights and interests of others.
>
> I propose that she be entirely divested of the capacity to act."

11. On 14 May 2001 the Zagreb Municipal Court divested the applicant of the capacity to act. The operative part of this decision reads as follows:

> "X ... is entirely divested of her capacity to act."

In its reasoning the Municipal Court summarised the findings of the applicant's psychiatric assessment and concluded as follows:

> "... this court has established without doubt that the [applicant], owing to her mental illness and addiction to opiates, is not able to care for her personal needs, rights and interest, and therefore also endangers the rights and interests of others. Accordingly, she has to be entirely divested of her capacity to act under section 182 of the Family Act."

The applicant did not appeal against that decision, and it became final on 8 October 2001. An *ex lege* consequence was that the applicant was also deprived of her parental rights although the decision to divest the applicant of her capacity to act did not state it expressly. The court appointed her mother as her guardian. Following a request made by the applicant's mother, on 27 December 2001 the applicant was placed under the guardianship of N.J., an employee at the Centre.

12. On 16 February 2004 the applicant applied to the Zagreb Municipal Court in order to have her capacity to act restored. On 23 April 2004 the court asked the V. Psychiatric Hospital to make an assessment of the applicant's mental condition. The relevant parts of the report drawn up by a different psychiatrist on 8 September 2004 read as follows:

> "... Psychiatric expertise in this case commenced in June this year when the patient answered the Centre's invitation. However, during the first interview she showed transparent psychosis with delusional elements and disjointed breathless speech, and when an attempt was made to carry out a urine test for psychoactive substances the patient did not appear at the interview scheduled for the next day. ...
>
> The second interview was held on 2 September at the time of her hospitalisation in the V. Psychiatric Hospital, unrelated to these proceedings, and being the result of the evident exacerbation and bad condition of the main illness. The patient was hospitalised on 21 August 2004. During the present interview, despite the therapy administered, just the same as during the interview held in June, she manifests florid psychosis with all elements of schizophrenic psychosis. Paranoid manic ideas, relational delusions as well as delusions of persecution and bizarre manic ideas are dominant. Her interpretation of reality, of herself and others is completely distorted. [The patient] represents a typical phenomenon of derealisation and depersonalisation. Her emotions are engaged only with regard to her manic perception; otherwise she is emotionally cold and aloof. Emotional resonance is lacking during the interview. Her overall behaviour has a manic quality. There is no doubt that her everyday functioning is also determined by the above-described psychopathological perception. ...
>
> In my opinion the problems associated with the intake of addictive substances, those being cannabis, are at the time being of secondary importance. She took other psychoactive substances only experimentally and occasionally and her psychotic picture, clinically manifested for a long time, cannot be associated with it. However, it is clear that her previous intake of cannabis had a role in forming her behaviour, possibly even in inducing her psychotic behaviour and her overall clinical picture.
>
> In comparison to the previous psychiatric assessments, her psychopathology, that is to say her clinical picture of schizophrenic psychosis became more pronounced, delusions are now barely susceptible to any corrections, dislocation of the thought process is noticeable, emotional coldness and aloofness, loss of the reality test, utmost lack of critical insight towards herself. Owing to her psychopathological drives she is aggressive, hostile and paranoid towards others.

In these circumstances I consider that the conditions for restoring the capacity to act to X do not exist. On the contrary, the psychopathological reasons which led to her being divested of the capacity to act are now even more conspicuous and more numerous. Owing to her mental disturbances (schizophrenia) the patient is still not able to look after her personal needs, rights and interests and moreover she is endangering the rights and interests of others. Therefore, I propose that the court maintain [its decision] that she be entirely divested of the capacity to act and placed under guardianship.

..."

13. At the hearing on 12 October 2004, the applicant objected to the above assessment and requested a new one. The second psychiatric assessment carried out by the Psychiatric Clinic of the Zagreb Medical School supported the first one. The relevant parts of the report drawn up by a psychiatrist, M.K., on 27 January 2005 read as follows:

"...

Mental status: conscious, uncertain about time, well oriented in space, auto and allopsychic orientation preserved. Contact is easily established, she answers questions without latency. Psychomotorically tense, worried about the outcome of the proceedings. Affected behaviour. Basic disposition slightly uneasy. Emotionally distant. Thought flow regular in its form, in content [includes] description of previous manic experiences and sensory delusions, currently without florid psychopathological deviations. [She] denies delusions and none are perceived. Her intellectual and mnestic capacities are devoid of strong deviations. Her will-instinct dynamism is preserved. She is neither aggressive nor suicidal.

4. Opinion

The patient ... has been suffering for ten years from chronic mental illness, schizophrenic psychosis. In addition, as is commonly found with such an illness, she is also an addict, she has been consuming various opiates and even today her abstinence cannot be established with certainty. She has been hospitalised on more than ten occasions. The [medical] documentation and the information obtained from the patient both show that there was no single period of systematic clinical monitoring after her release from hospital or a sustained period of social functioning. Therefore, we can fully agree with the above assessment of our colleagues who gave their opinion of the patient's mental health and agree that it is good for her not to have her capacity to act restored.

There has been no improvement of her clinical picture or her social functioning in relation to the opinion expressed at the latest assessment, which is understandable given the nature of her disorder, i.e. chronic mental illness.

5. Conclusion

[The applicant] is suffering form schizophrenic psychosis of paranoid disposition and in addition is still consuming opiates, which altogether indicates that the disorder, which is in any case chronic, has also been progressing and renders X incapable of taking care of her interests, rights and responsibilities, so that there is no ground for restoring her capacity to act, of which she has been divested since 2001."

14. On 10 March 2005 the court, relying on the above psychiatric assessment, refused the applicant's request to restore her capacity to act. The applicant did not appeal against that decision.

2. Proceedings concerning the applicant's rights in respect of her daughter and her adoption

15. In a decision of 13 July 2000 the Centre placed the applicant's child in foster care, relying on section 99(1) of the 1998 Family Act, and also appointed the applicant's mother as a carer. The relevant operative parts of the decision read as follows:

> "1. A. (personal data of the child) has the right to foster care outside her own family – placement in the foster family of [maternal grandmother] ..., beginning from 13 July 2000.
>
> 2. ...
>
> 3. ...
>
> 4. Contacts between the child A. with her mother X shall be arranged in consultation with the foster carer and with her father R. every Tuesday and Thursday from 5 p.m. to 7 p.m. and every Sunday from 4. p.m. to 7. p.m.
>
> ..."

The relevant part of the reasoning reads as follows:

> "... The following has been established in these proceedings:
>
> The child A. is registered with this Centre as having parents of asocial behaviour. She was born out of wedlock. Her mother X, born on 10 March 1972 is chronically ill, under treatment for mental problems and addiction. In 1998 proceedings with a view to divesting her of the capacity to act were instituted and her mother, [the child's maternal grandmother], was appointed her temporary guardian. The proceedings are still pending.
>
> The father (his personal data) is a minor who has left school and is unemployed and a drug addict ...
>
> The quality of the parents' relationship has significantly deteriorated lately, including frequent verbal and physical conflicts requiring police intervention. The parents have neglected the child.
>
> On 13 July 2000 the expert panel of this Centre decided to allow placement of the child A. in the foster family of ..., maternal grandmother, who has helped [the parents] both by providing care for the child and financially.
>
> Contacts [between the child and her parents] are [to be] arranged according to the agreement between the parents and the foster carer."

16. In a decision of 22 November 2001 the Centre deprived the applicant of the right to live with her daughter, ordering that she be placed in SOS – Children's Village L., in the care of one of their employees, M.V. The contacts between the child and her parents were to be arranged with the

custodian and according to the House Rules of the above institution. The relevant part of the decision reads as follows:

> "The proceedings have been instituted by the Centre of its own motion.
>
> The interviews with the child's mother, X, and maternal grandmother, ..., as well as an on-the-spot inspection and the relevant documents show the following facts:
>
> The S. Welfare Centre's decision ... of 13 July 2000 ordered placement of the child A. under the foster care of her maternal grandmother ... since the child's parents had been assessed as persons who, owing to their asocial behaviour and consumption of opiates, were not capable of caring for the child. In respect of the child's mother, X, proceedings with a view to divesting her of the capacity to act were instituted owing to her mental problems and problems with addiction. She was divested of her capacity to act in a final judgment (no. ...) of 8 October 2001 on the ground that, owing to her disturbed mental state (schizophrenia) and addiction to opiates, she had been incapable of caring for her personal needs, rights and interests and was endangering the rights and interests of others ...
>
> Supervision of the child's family circumstances, however, revealed that the child, although placed in her grandmother's foster care, had continued to live in the same household with her mother, who had interfered with her upbringing and taken part in caring for the child, which the foster carer could not prevent ...
>
> The child's mother had not allowed the foster carer to care for the child. She was often under the influence of opiates which made her behave in an aggressive and unpredictable manner.
>
> The child's mother X admitted to consumption of opiates but considered that the child had not been at risk since, when feeling that she could not care for the child, she had been in the habit of taking the child to her paternal great-grandmother who then cared for the child since she, the mother, did not trust her own mother. She was aware of the overall situation and that the child's surroundings were not beneficial for her but she blamed her mother and was looking for a solution (statement given on 8 November 2001).
>
> The child's father is currently doing his military service and is therefore not in a position to care for the child.
>
> Bearing in mind the overall family circumstances, the expert panel for family protection considered that the current living conditions endangered the child and that her placement under the foster care of M.V. in Institution L. was urgent (the expert panel's conclusion of 22 November 2001).
>
> The decision on [the child's] contacts with [her] parents has been adopted in view of the mother's opposition to the taking of the child and her placement in an institution as well as the child's need for regular contacts with her parents, which contacts, having regard to the parents' state of health, shall take place under expert supervision."

According to the applicant, she continued to visit her daughter on a regular basis. According to the Government, the applicant visited her daughter once in two months.

17. On 4 July 2003 the Centre placed the applicant's child, A., under the guardianship of M.B. The relevant part of this decision reads as follows:

> "These proceedings have been instituted by the Centre of its own motion.

The following has been established in the proceedings:

- that A is a child without parental care since her father R. died on 16 April 2003 and her mother X was entirely divested of her capacity to act in the Zagreb Municipal Court's decision ... of 8 October 2001;

- that a social worker, Ms N.J., an employee of this Centre is currently a guardian of X ...;

- that the child A. has been placed in Institution L.;

- that [the Centre's employees] paid a visit to L;

-that a social worker, Ms M.B., an employee of L, was heard and agreed to be appointed as a guardian of A.;

- that the prescribed conditions for her guardianship have been fulfilled."

18. The above decision was not served on the applicant. In 2003 the Centre instituted proceedings for the adoption of A. of its own motion, without the applicant's knowledge. On 21 August 2003 M.B., as A.'s guardian, gave her consent to the adoption. The Government submitted that on 25 August 2003 the applicant's mother and the child's paternal grandmother had been informed about the ongoing adoption proceedings. They also submitted that the applicant had been informed thereof during a telephone conversation on 26 August 2003.

19. On 2 September 2003 the Centre issued a decision authorising the adoption of A. That decision became final on 11 September 2003.

20. Under the domestic legislation in force, the applicant, being a person divested of the capacity to act, was not a party to the adoption proceedings, nor was she informed that they had taken place. Only later did the applicant find out that her daughter had been given up for adoption.

II. RELEVANT DOMESTIC LAW

21. The Family Act (*Obiteljski zakon*, Official Gazette no. 162/1998 of 22 December 1998), in so far as relevant, read as follows:

Section 85

"(1) Parental rights encompass protection of a child's personal and economic interests and parental responsibility for his or her wellbeing.

(2) Parental rights may be restricted or divested only by a decision of a competent body for the reasons and in the procedure prescribed under this Act."

Section 99

"(1) Where parents do not live together a Social Welfare Centre shall designate the parent with whom the child shall live and arrange contacts between the child and the other parent except where this Act has placed such decisions within the jurisdiction of the courts.

...

(5) In the case mentioned in paragraph (1), where both parents are incapable of caring for their child or are otherwise unable to do so or are putting the child's wellbeing at risk by their acts a Social Welfare Centre shall place the child [under the care of] another person or an institution.

(6) Where a Social Welfare Centre makes a decision under paragraph (5) it shall establish the duties and rights of each parent in respect of their care for the child."

Section 102

"(1) Where parents incapable of caring for their child, owing to their absence or health or other grounds, have not placed the child under the care of a person fulfilling the conditions for a guardian, a Social Welfare Centre is empowered to place the child under the care of another person or an institution without the parents' consent.

(2) Placement or care of the child under paragraph (1) shall not exceed three months in duration."

Section 112

"(1) A Social Welfare Centre shall deprive of the right to live with his or her child a parent who seriously neglects or puts at risk the upbringing and education of the child and shall place the child under the care of another person or an institution.

...

(4) Deprivation of rights under paragraph (1) ... does not terminate other duties and rights of a parent in respect of his or her child."

Section 114

"(1) Measures under [section 112] ... shall not exceed one year in duration.

..."

Section 115

"(1) A parent who abuses or gravely neglects parental duties and rights shall be divested of these rights by a decision of a court adopted in non-contentious proceedings.

..."

Section 182

"(1) An adult who, owing to mental damage or illness, addiction to opiates, senility (dementia) or on other grounds, is incapable of taking care of his or her personal needs, rights and interests or is endangering the rights and interests of others shall be partly or entirely divested of the capacity to act.

..."

22. The Family Act (*Obiteljski zakon*, Official Gazette no. 116/2003 of 22 July 2003), in so far as relevant, reads as follows:

Section 119

"(1) Once adoption has been established parental custody [of the adopted child] shall cease.

...”

Section 125

“(1) Adoption may be established if it is in the interest of the child.

...”

Section 129

“(1) Adoption shall require the consent of both parents, except where otherwise provided.

...”

Section 130

“Adoption shall not require consent of a parent who is...

2. Divested of the capacity to act...”

Section 135

“(1) Adoption proceedings shall be carried out of its own motion by the competent welfare centre...”

Section 138

...

“(3) A parent whose consent for adoption is not required shall not be a party to the adoption proceedings.”

Section 139

“If necessary, the competent welfare centre shall hear the child’s other relatives about the circumstances relevant to the adoption decision.”

Section 144

“(1) Once adoption has taken place, all rights and obligations between the child and his blood relatives shall cease.

...”

III. RELEVANT INTERNATIONAL LAW

23. The UN Convention on the Rights of the Child of 20 November 1989, which entered into force in respect of Croatia on 8 October 1991 (Official Gazette - International Agreements 15/1990), in so far as relevant reads as follows:

Article 9

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is

necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. "

"2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known."

Article 21

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary..."

24. The European Convention on Adoption of Children of 24 April 1967, in so far as relevant, reads as follows:

Article 5

1. "...an adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:

a. the consent of the mother and, where the child is legitimate, the father; or if there is neither father nor mother to consent, the consent of any person or body who may be entitled in their place to exercise their parental rights in that respect;

b. the consent of the spouse of the adopter.

2. The competent authority shall not:

a. dispense with the consent of any person mentioned in paragraph 1 of this article, or

b. overrule the refusal to consent of any person or body mentioned in the said paragraph 1,

save on exceptional grounds determined by law.

3. If the father or mother is deprived of his or her parental rights in respect of the child, or at least of the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent. "

25. On 23 February 1999 the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The relevant provisions of these Principles read as follows:

"Principle 2 — Flexibility in legal response

1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be

sufficient, in scope or flexibility, to enable suitable legal response to be made to different degrees of incapacity and various situations. [...]

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned.

Principle 3 — Maximum reservation of capacity

1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. [...]

Principle 6 — Proportionality

1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. [...]

Principle 13 — Right to be heard in person

The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.

Principle 14 — Duration review and appeal

1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews. [...]

3. There should be adequate rights of appeal."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

26. The applicant complained that her right to respect for her family life had been infringed in that her daughter was given up for adoption without her knowledge, consent or participation in the adoption proceedings although she had never been formally divested of her parental rights.

She relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

27. The Government contested that argument.

A. Admissibility

1 Exhaustion of domestic remedies

28. The Government requested the Court to declare the application inadmissible for failure to exhaust domestic remedies. They submitted that the applicant had failed to lodge a constitutional complaint in respect of her complaint about the lack of respect for family life.

29. The applicant contested that argument.

30. The Court observes that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210 and 1211, §§ 65 and 68).

31. As to the present case, the Court firstly notes that the established practice of the Constitutional Court is to declare inadmissible constitutional complaints which do not concern the merits of a given case. Moreover, only a party to the proceedings in question is entitled to lodge a constitutional complaint (see *Debelić v. Croatia*, no. 9235/04, § 39, 12 October 2006). In this connection the Court notes that the applicant was not a party to the adoption proceedings and that she could not therefore have lodged a constitutional complaint.

32. Furthermore, the Court notes that the applicant is a person entirely divested of her capacity to act and that, therefore, under domestic law, none of her acts are capable of producing legal effects, including lodging a constitutional complaint.

33. Having regard to the above described practice of the Constitutional Court, the applicant's legal position under domestic law and the failure of the Government to produce any case-law supporting their argument

concerning the accessibility of a constitutional complaint to a person divested of the capacity to act or a person in the applicant's specific circumstances, the Court concludes that there were no domestic remedies the applicant could be required to exhaust. Accordingly, the Government's objection must be rejected.

2. Applicability of Article 8 of the Convention

34. The Government further contended that Article 8 was not applicable to the present case, arguing that the relationship between the applicant and her daughter had deteriorated to such an extent that it no longer represented a family life and that a mere blood link was not enough to maintain it. They stressed that the applicant had ceased to care for the child and that the latter had become a child without parental care, since her father had died and the mother had been divested of her capacity to act, which all had led to the child's adoption by third persons.

35. The applicant contested these arguments.

36. In its well established case-law the Court has emphasised that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care (see *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Decisions and Judgments* 1996-III, pp. 1001-02, § 52, and *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, p. 29, § 59).

37. As to the present case, the Court notes that the applicant lived with her daughter from the latter's birth in December 1999 until the child's placement in Institution L. in November 2001. Even after the child was taken from her, the applicant continued to visit her daughter (see paragraph 16 above). In the Court's view these circumstances undoubtedly show that from the moment of the child's birth until the alleged interference there existed between the applicant and her daughter a bond amounting to family life (see, *mutatis mutandis*, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 18, § 45).

3. Conclusion

38. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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' submissions

39. The applicant complained about the adoption of her daughter. In particular, she complained about the fact that she had not been a party to the adoption proceedings, that she had never given her consent to the adoption and that she had never been informed that such proceedings had been instituted. Moreover, none of the child's other relatives had been heard in the proceedings. Thus although she had not been formally divested of her parental rights, all her ties with her daughter had been completely disrupted without her consent.

40. The Government submitted that there had been no interference with the applicant's right to respect for her family life since the applicant had been informed about the adoption proceedings on 26 August 2003 and interviewed on the telephone, even though she had not been a party to these proceedings. Furthermore, the applicant's mother as well as the child's paternal grandmothers had also been informed about the ongoing adoption proceedings and interviewed by the employees of the S. Welfare Centre on 25 August 2003.

41. If the Court were to find that there had been an interference, the Government contended that such interference had been in accordance with the law and that under relevant domestic law the applicant's consent for the adoption of her daughter had not been required since the applicant had been divested of her capacity to act.

42. The competent Welfare Centre had begun the supervision of the applicant's family situation in 1998 when the V. Psychiatric Hospital had suggested that the applicant be divested of the capacity to act, owing to her mental illness. The proceedings with a view to divesting the applicant of the capacity to act had been conducted by a competent court and its decision had been based on the relevant psychiatric assessment.

43. Another crucial factor had been the placement of the applicant's child, A., with Institution L. in November 2001, which had been a consequence of the applicant's mental illness and drug addiction as well as the addiction of the child's father. Since the authorities had established that neither parent was capable of caring for the child, it had been in the child's best interest to be placed under State care, in particular in view of the fact that there had been no prospects for an improvement in the applicant's

condition and the child's paternal grandmothers had shown no interest in caring for the child.

2. The Court's assessment

a. Whether there was an interference

44. The Court notes that in the present case the measures taken by the State in respect of the applicant's relationship with her daughter originated in a decision of the S. Welfare Centre of 13 July 2000 whereby the child was placed under the foster care of the applicant's mother. Subsequently the applicant was divested of her capacity to act in a decision of the Zagreb Municipal Court of 14 May 2001, the consequences of which were the placement of the child with Institution L. through a decision taken by the Centre on 22 November 2001 and, subsequently, the applicant's complete exclusion from the adoption proceedings.

45. There is no doubt that the adoption of a child, as a very restrictive measure which results in complete disruption of the relation between a parent and a child, amounts to an interference with the applicant's right to respect for her family life as guaranteed by paragraph 1 of Article 8.

b. Legality of the interference and legitimate aim

46. The Court accepts that the decisions at issue had a basis in national law, namely the 1998 and 2003 Family Acts. In the Court's view, the relevant Croatian legislation is designed to protect children and there is nothing to suggest that it was applied in the present case for any other purpose. The Court accepts therefore that the decisions at issue were aimed at protecting the best interest of the child, which is a legitimate aim within the meaning of paragraph 2 of Article 8 (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 20, § 44; *Görgülü v. Germany*, no. 74969/01, § 37, 26 February 2004; and *Glesmann v. Germany*, no. 25706/03, § 101, 10 January 2008). It therefore remains to be determined whether the decisions could be regarded as "necessary in a democratic society".

c. Necessity in a democratic society

47. The central issue in this case is whether the procedures followed respected the applicant's family life or constituted an interference with the exercise of the right to respect for family life which could not be justified as necessary in a democratic society. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. The Court reiterates that it is an interference of a very serious order to split up a family. The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only

add to their problems. They must therefore be allowed a measure of discretion in this respect. On the other hand, predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible as in a case where a child has been taken away from his parents and freed for adoption. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences (see *B. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 72 and 73., § 63).

48. It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents. The decision-making process must therefore, in the Court's view, be such as to ensure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them. In the Court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as necessary within the meaning of Article 8 (see *B. v. the United Kingdom*, cited above, p. 73, § 64).

49. The Court considers that the procedures applicable to the determination of issues relating to family life have to be such as to show respect for family life; in particular, parents normally have a right to be heard and to be fully informed in this connection, although restrictions on these rights could, in certain circumstances, find justification under Article 8 § 2. Accordingly, the Court is entitled to have regard to such a process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (see *B. v. the United Kingdom*, cited above, pp. 73 and 74, § 65 and *Tysiąc v. Poland*, no. 5410/03, § 113, ECHR 2007-...).

50. In the present case the Court is not called upon to determine whether the adoption of the applicant's child was justified as such, but rather to determine whether the procedures followed were in compliance with the requirements of Article 8 of the Convention. The course of events concerning the applicant's child is set out in paragraphs 5 to 20 above. For the present purposes, it may be summarised as follows:

On 13 July 2000 the S. Welfare Centre placed the applicant's child in the foster care of the applicant's mother, living in the same household with the applicant, on the ground that the applicant, as a person suffering from a

serious mental illness and a drug addict, was not capable of caring for the child.

On 14 May 2001 the Zagreb Municipal Court divested the applicant of the capacity to act on the ground that she was suffering from a serious mental illness, i.e. paranoid schizophrenia, which rendered her incapable of taking care of her own rights and interests.

On 22 November 2001 the above Centre placed the child in State care on the ground that the applicant was interfering with the child's upbringing in a way which the then foster carer (the applicant's mother) was unable to prevent.

On 2 September 2003 the Centre issued a decision authorising A's adoption, which decision became final on 11 September 2003.

51. The Court notes at the outset that in none of the proceedings preceding the adoption of the applicant's child, was the applicant's relationship with her daughter assessed, despite the fact that one of the *ex lege* consequences of the decision divesting the applicant of her capacity to act was the applicant's subsequent complete exclusion from the proceedings for the adoption of her daughter, since under domestic law a parent divested of the capacity to act is not a party to the adoption proceedings and his or her consent is not required for the adoption (sections 130 and 138 of the 2003 Family Act).

52. The Court notes further that no separate decision has ever been taken about the applicant's parental rights in separate proceedings. The Court also notes that after the applicant had been entirely divested of the capacity to act, she still continued to exercise her parental rights at least to a certain extent, since her access rights were preserved until adoption.

53. Despite the fact that there had at no stage been a decision expressly divesting the applicant of her parental rights, her daughter was freed for adoption and the adoption proceedings were eventually completed without the participation of the applicant in any form, save for a telephone call as maintained by the Government. The Court has not overlooked the fact that the applicant was divested of the capacity to act. However, the Court has difficulty in accepting that every person divested of the capacity to act should be automatically excluded from adoption proceedings concerning his or her child, as the applicant was in the present case. The Court finds that it was not sufficient for the applicant to be only summarily informed by the relevant domestic authorities, while her parental rights were still intact, that adoption proceedings had been instituted in respect of her daughter. The Court considers that she should also have been given an opportunity to be heard in those proceedings and thus the possibility of expressing her views about the potential adoption of her daughter.

54. The foregoing reveals, in the opinion of the Court, an insufficient involvement of the applicant in the decision-making process. The decision of 2 September 2003, freeing the applicant's daughter for adoption, was

crucial for the future of the applicant's relationship with her daughter. It was thus clearly a decision in which the applicant should have been closely involved if she was to be afforded the requisite consideration of her views and protection of her interests.

55. By allowing the applicant's exclusion from the proceedings leading to the adoption of her daughter in the circumstances of the present case, the State failed to secure to the applicant the respect for her private and family life to which she is entitled under the Convention.

There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 13 OF THE CONVENTION

56. The applicant also complained, under Article 6 of the Convention, that she had not been a party to the adoption proceedings, that she had not given her consent to the adoption and that she had never even been informed that such proceedings had been instituted. In this connection, the applicant complained that her child's guardian N.J. had been an employee of the same Centre that had carried out the adoption proceedings, claiming that she had influenced the initiation of the adoption proceedings, instead of protecting the applicant's rights. Lastly, she complained that she had been deprived of the right to an effective remedy in that she could not have appealed against the decision on the adoption. She relied in this respect on Article 13 of the Convention.

57. The Government contested these arguments.

58. The Court notes that these complaints are linked to the one examined above and must therefore likewise be declared admissible.

59. The Court finds, however, that these complaints essentially overlap with the issues which have been examined under Article 8 of the Convention. Having found a violation of this provision, the Court holds that no separate issue arises under Article 6 § 1 or Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The Court notes that the applicant did not submit a claim for just satisfaction and that its standard practice in these circumstances has been

not to award any sum on that account. However, the circumstances of the present case might warrant a different approach. In the first place the applicant as a person entirely divested of the capacity to act was not capable under domestic law of choosing her own legal representative. Eventually, pursuant to Rule 39 of the Rules of Court on 16 May 2007 the President of the Chamber decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the respondent Government that a lawyer should be appointed to represent the applicant in the proceedings before the Court. On 12 June 2007 the S. Welfare Centre appointed Mr Š. Babić, a lawyer practicing in Zagreb, as the applicant's legal representative.

62. On 15 October 2007 the Court received a reply by the applicant's representative to the Government's observations. He also stated that he had attempted to contact the applicant by letter, but had received no reply so that he had submitted his observations without consulting the applicant. He submitted no claim for just satisfaction.

63. In the above circumstances the Court considers it justified to examine, on its own motion, whether to award to the applicant non-pecuniary damage arising from the violation found. The Court considers that compensation for damage is appropriate in this case having regard to the trauma, anxiety and feelings of injustice that the applicant must have experienced as a result of the procedure leading to the adoption of her daughter. Making an assessment on an equitable basis, the Court awards the applicant EUR 8,000 under this head together with any tax that may be chargeable to the applicant.

B. Costs and expenses

64. The applicant made no claim in this respect. The Court considers that there is no call to award her any sum on that account.

C. Default interest

65. The Court considers it appropriate that the default interest 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 remainder of the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine separately the complaints under Article 6 § 1 and Article 13 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary to be converted into Croatian kuna at the rate applicable at the date of settlement with any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 17 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President