dirittifondamentali.it

La CEDU su minore disabile affidato alle cure pubbliche
(CEDU, sez. I, sent. 23 gennaio 2020, ric. n.38067/15)

La Corte Edu si pronuncia sul caso di un bambino di otto anni con disabilità mentali, affetto da sordità e disturbi del linguaggio, affidato alla cura delle istituzioni statali sin dall'età di tre mesi, il quale, durante una visita dell'*Ombudsman* nell'istituto, nel 2013, era stato ritrovato legato al suo letto. Di qui l'avvio di una indagine con l'accusa di cure inadeguate e maltrattamenti.

I Giudici di Strasburgo hanno riscontrato l'inadeguatezza dell'istituto prescelto per ospitare il minore, per carenza di personale in generale e, soprattutto, di personale qualificato rispetto alle sue patologie, circostanza più volte, ma inutilmente, denunciata al tutore ed alle altre autorità statali dai responsabili e dipendenti dell'Istituto. Dopo lo scandalo ed il trasferimento, nell'aprile 2014, di L.R. in un altro istituto, un rapporto medico aveva attestato il suo basso livello di sviluppo, in buona parte addebitabile ad una insufficiente stimolazione ed a un trattamento non tempestivo delle sue disabilità.

La Corte oltre ad aver espresso preoccupazione per il trattamento riservato ad un soggetto estremamente vulnerabile, come il ricorrente, durante il suo soggiorno di circa un anno e nove mesi in un istituto non adeguato ad assumerne la cura, ha rilevato, inoltre, come l'indagine avviata, invece di vertere sul fallimento generale del "sistema" nel caso di L.R., si era concentrata sulla responsabilità penale individuale dei dipendenti dell'istituto, indagine alla fine archiviata perché era stata esclusa l'intenzione di nuocere al minore, avendo essi dimostrato di non aver avuto, in alcune occasioni, alcuna alternativa rispetto alla scelta di legare il bambino al letto, al fine di tutelarne la sicurezza e per evitare il rischio elevatissimo di fuga.

I Giudici di Strasburgo hanno, pertanto, dichiarato, all'unanimità, l'avvenuta violazione dell'art. 3 (divieto di trattamenti disumani o degradanti), constatando la responsabilità delle autorità statali per il collocamento di L.R. in un istituto inadeguato a soddisfare i suoi bisogni, nonché per le omesse cure necessarie e per il trattamento disumano e degradante subito; con sei voti contro uno, è stata dichiarata, inoltre, la violazione dell'art. 3 sotto l'ulteriore profilo dell'incapacità delle autorità di avviare un'indagine adeguata sul caso.

***

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

FIRST SECTION

CASE OF L.R. v. NORTH MACEDONIA

(*Application no. 38067/15*)

JUDGMENT

STRASBOURG

23 January 2020

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 L.R. v. North Macedonia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Ksenija Turković, *President*,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pere Pastor Vilanova,
Pauliine Koskelo,
Jovan Ilievski,
Raffaele Sabato, *judges*,
and Abel Campos, *Section Registrar*,
Having deliberated in private on 3 December 2019,
Delivers the following judgment, which was adopted on that date:

-

Art 34 • Standing of non-governmental organisation to lodge application on behalf of mental patient

Art 3 • Inhuman treatment • Degrading treatment • Inadequate care and treatment of a mentally disabled eight-year-old child placed over a year and nine months in an inappropriate institution • Child frequently tied to his bed to prevent him from running away • Lack of effective investigation

PROCEDURE

1. The case originated in an application (no. 38067/15) against the Republic of North Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the Helsinki Committee for Human Rights in Skopje ("the HCHR") on behalf of a Macedonian/citizen of the Republic of North Macedonia, L.R. ("the applicant"), on 27 July 2015. The President of the Section acceded to the HCHR's request not to have the name of the applicant disclosed (Rule 47 § 4 of the Rules of Court).
2. The HCHR authorised Mr S. Dukoski, a lawyer practising in Skopje, to represent the applicant on its behalf. The Government of North Macedonia ("the Government") were represented by their Agent, Mr K. Bogdanov, succeeded by their current Agent, Ms D. Djonova.
3. The applicant alleged in particular that the care and treatment which the applicant had received while in a State-run institution had violated his rights under Article 3, and that the subsequent

response by the respondent State had not been compatible with its procedural obligations under that provision.

4. On 22 August 2016 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

5. The applicant was born on 21 November 2004 to parents who suffered from a mental disability. He was abandoned at birth and at his grandmother's request he was placed in B. Orphanage at the age of three months. B. Social Welfare Centre was appointed as his guardian. Symptoms of growth delay were detected when he was one year old. According to a diagnosis given when he was two years old, his physical development had stalled and he had a speech disability. On 14 April 2008 a team of doctors from B. Hospital diagnosed that the applicant had been suffering from a moderate mental disability, the most severe (најтешко) form of physical disability (cerebral palsy), and a speech disability (alalia) since birth.

6. On 8 November 2008 the applicant's guardian placed him in B. Rehabilitation Institute, a State-run institution for people with hearing and speech disabilities. During his stay in the institute, the applicant was diagnosed as suffering from mental, physical and speech disabilities. He was discharged in June 2012 on the basis of findings made by the medical personnel in the institute which concluded that his continued stay and treatment there would not be justified.

B. The applicant's placement and treatment in the Rehabilitation Institute B.B.S.

7. On 21 June 2012 the applicant's guardian contacted the Rehabilitation Institute B.B.S. ("the RIBBS"), an open-type State-run institution for physically disabled people with no mental disabilities, asking it to accept the applicant. The competent ministry granted that request. In a reply received by the applicant's guardian on 29 June 2012, the RIBBS stated, inter alia:

"The expert panel ... decided unanimously that [the applicant] cannot be placed in our institution, for the following reasons:

On the basis of [medical material], it was established that we cannot educate and rehabilitate [the applicant] because he is unable to speak; nor can we communicate with him or understand his needs, because we have no qualified staff to understand and work with him.

Our primary activity is accommodating [and] providing care ... to people with severe physical disabilities [who are] mentally fit ..."

8. On the same date (29 June 2012), the applicant's guardian decided that he should be placed in the RIBBS. No appeal against that decision was submitted, notwithstanding the clear instruction on available legal remedies contained in the decision. Such an appeal would not have had suspensive effect, under section 181(3) of the Social Care Act. The guardian also requested that the applicant's

state of health be reclassified (рекатегоризација). However, the applicant was not transferred to B. Hospital for examination.

9. By a letter of 12 July 2012, the RIBBS notified the applicant's guardian that it had no qualified staff to care for the applicant. It further stated:

"All members of staff hold [the applicant] by the hand all the time in order to prevent him from running away. Our institution is an open-type institution, and in accordance with internal rules, we can neither lock him in a room nor apply any other restrictive measure. If we don't hold him by his hand, he runs away ... He could put himself in danger, because beyond the entrance door is a high-speed road ... We draw your attention to this in good faith, in order to find a solution for [the applicant] and avoid things for which we would all be responsible."

10. The RIBBS' records about the applicant stated that his continued stay there would worsen his condition. It was reiterated that its staff could not communicate with him because he was deaf and unable to speak. The applicant had also started injuring himself (biting himself). Whenever possible, he escaped from the institution. It was therefore recommended that he be transferred to a more appropriate institution. In this regard, meetings were held with the applicant's guardian and other competent authorities. The RIBBS also raised the inappropriateness of the applicant's placement with the competent ministry and inspectorate. In a letter of May 2013 the RIBBS told the relevant inspectorate, inter alia, "L.R. was categorised as suffering from the most severe form of physical disability, and he is in fact a schoolboy who is deaf and unable to speak".

11. On 6 November 2013 the Ombudsman visited the RIBBS, where the applicant was found tied to his bed by his leg. In a special report about the RIBBS of 16 November 2013, the Ombudsman stated:

"2. Inhuman or degrading treatment of residents in the RIBBS

A deaf child who cannot speak was found in the RIBBS, who had been tied [to a bed] for safety reasons; he cannot communicate with members of staff and the staff do not know sign language [so cannot] provide him with adequate care ...

Holding that it is inhuman to place people with special disabilities in institutions that are inappropriate for them and have no adequate safeguards [to prevent] those people and other residents [from being] put at risk, ... it has to be established whether the rights of this group of people with special needs were violated.

ESTABLISHED FACTS

... Negative events

People with special disabilities, for whom there are no adequate safeguards [at the institution], are placed in the RIBBS. The institution cannot provide these people with adequate care, nor does it have qualified staff to work with them. The Ombudsman considers that the inappropriate placement [of these people] constitutes, in itself, inhuman treatment."

12. In reply to the Ombudsman's request for information, the RIBBS stated that the applicant's placement there had been in contravention of all its internal regulations, a fact which it had brought to the attention of the competent ministries and social welfare centres.

13. Following a request by the applicant's guardian on 4 March 2014, B. Hospital examined the applicant and reached the same findings as those made in its earlier report, namely that he suffered from a moderate mental disability, the most severe form of physical disability (cerebral palsy), and a speech disability (alalia) (see paragraph 5 above).
14. On 15 April 2014 the guardian placed the applicant in the S. Rehabilitation Institute, where he is at present.
15. At a press conference on 25 June 2014 the Ombudsman presented its annual report and revealed that the applicant had been placed in the RIBBS and tied to his bed. Following that conference, on 30 June 2014 the HCHR visited the applicant at the S. Rehabilitation Institute.

C. HCHR's criminal complaint on behalf of the applicant

16. On 17 July 2014 the HCHR lodged a criminal complaint, accusing the director of the RIBBS and other (unidentified) employees of "torture and other cruel, inhuman or degrading treatment or punishment" and "ill-treatment in the performance of [their] duties", punishable under Articles 142 and 143 of the Criminal Code (see paragraphs 34 and 35 below). It was alleged that not only had the applicant been tied to the bed by his leg with a rope described as being long enough to enable him to "reach the corridor", he had also not been provided with adequate care and treatment, which had amounted to complete neglect. Furthermore, the RIBBS had had no qualified personnel to give the applicant treatment which was appropriate for his needs, which had resulted in his health deteriorating. The HCHR submitted several newspaper articles and a copy of the Ombudsman's annual report as evidence.
17. The S. public prosecutor's office obtained a great deal of documentary material from the RIBBS, the Ombudsman and other competent authorities. It also examined the director of the RIBBS (J.G.D.) and four of its employees (V.M., Z.K., N.G. and S.I.).
18. J.G.D. stated, inter alia:

"... the RIBBS is an open-type institution ... all residents are easy to communicate with ... I immediately told [the director of B. Social Welfare Centre] that our institution had no qualified staff to treat [the applicant] and that we could not accommodate him ... [it was not just that the applicant] was deaf and unable to speak and that it was impossible to establish communication with him, he was also hyperactive and took every opportunity to leave the institution ... he attempted to jump from the window of his room ... In order to ensure his safety, we removed the handles from the window. I was also informed by employees that he had run away from the institution, so we looked for him in the [nearby] village. I constantly informed the competent authorities about the problems we had with [the applicant] and the fact that our institution was inappropriate and had no qualified staff to care for children like this. All my attempts were futile ...
... [regarding the Ombudsman's visit] I informed the Ombudsman that [the applicant] created problems owing to his mental health and hyperactivity. For his safety, namely to prevent him from injuring or harming himself when employees were occupied [with other residents], employees were obliged to tie him to the bed for a while with cotton straps (*медицински завој*). When they were finished with their [other] duties, [the applicant] was untied and provided with all the requisite care, like other residents ..."

19. Relevant parts of statements by the RIBBS' employees read as follows:

"[the applicant] had no visible physical disabilities; on the contrary, he was a very active child ... Owing to his temperament, we avoided leaving him alone without any supervision ... because whenever he was alone, [he] would escape ... I do not think that he was aggressive, but he needed to be under [the RIBBS'] employees' constant supervision. For those reasons, at night we tied him lightly to his bed with cotton straps (памучен завој). We did that strictly for safety reasons, to prevent him from escaping ... I tied [the applicant] to his bed at night, but I did not do it in order to ill-treat him, [I did it] to protect him from harming himself by leaving the institution, where he would be exposed to danger ..." (Statement of V.M.)
"... [the applicant] was ... a hyperactive child ... at night we tied him to the bed on which he was sleeping for safety reasons only ... if we didn't secure him, there was a risk that he would escape and go out of the institution onto the street, where there were people, animals and traffic that could put him in danger. That was particularly necessary after 8 p.m., during the night shift, when there were only two members of staff for sixty to seventy residents ... I know that during the day, usually during the midday break, not only I, but also other members of staff would tie [the applicant] to his bed for safety reasons ... All [the RIBBS] employees knew that, the director included, but I think that that was the only way to ensure [the applicant's] safety. Our institution is an open-type institution: doors are open; windows have no bars. Given the lack of staff, ... the only way to prevent [the applicant] from harming himself or exposing himself to risk while we were occupied with other things was to tie him up during certain parts of the day ..." (Statement of Z.K.)
"... despite the fact that, according to medical reports, [the applicant] was regarded as suffering from the most severe form of physical disability, [he had] no visible physical disabilities when he was admitted to the institution. [The applicant] walked without any problems; he ran, so I can say that he was hyperactive and constantly moving ... I consider that the RIBBS is not [an] appropriate [place] to accommodate a child with such disabilities, because our institution does not have [suitably] qualified staff ..." (Statement of N.G.)

20. On 24 November 2014 the S. (first-instance) public prosecutor's office notified, under section 288 of the Criminal Proceedings Act (see paragraph 33 below), the HCHR that by a decision of the same date it had rejected the criminal complaint against those accused of crimes, namely the director of B. Social Welfare Centre, the director of the RIBBS and five carers from the RIBBS (V.M., Z.K., V.B., P.M. and K.D., all identified by their full names). The decision found that their actions had not contained any elements of the alleged crimes or any other crime subject to State prosecution. The public prosecutor established: that the RIBBS was responsible for persons with physical disabilities, but in practice also accommodated mentally disabled people; that it had sought the applicant's transfer to an appropriate institution, since its staff had not been adequately trained to provide him with the requisite care; that the applicant, notwithstanding his medical diagnosis, had not had any physical disability, but had instead been a very active child who had required constant care from the staff; that the applicant had received the daily care he required, but the results of the work with him had been limited, owing to his speech disability; that there had been incidents where the applicant had left the RIBBS; and that occasionally the applicant had been tied to his bed with a rope.

The prosecutor held that the aim of that measure had not been to ill-treat or degrade him, but to prevent him from running away from the RIBBS and putting himself in danger or harming himself. In those circumstances, the public prosecutor concluded that the act of tying the applicant to his bed could not be considered an act of unlawful use of force or threats intended to extract a confession or cause suffering. The prosecutor found that there had been a lack of intent on the part of the suspects to subject the applicant to inhuman or degrading treatment, a subjective element of the reported crimes. The applicant had been tied to his bed in order to prevent him from harming himself. Furthermore, L.R. could not be regarded as falling within any category of victims specified under Article 142 of the Criminal Code (see paragraph 34 below). A copy of the decision (containing an instruction on legal remedies) was served on B. Social Welfare Centre, the applicant's guardian. The guardian did not appeal against the decision.

21. On 30 December 2014, under the Public Prosecution Act (section 26(2)), the HCHR requested that the higher public prosecutor take over the prosecution. In that request, it reiterated that the applicant's inappropriate placement and treatment in the RIBBS had amounted to inhuman and degrading treatment in violation of domestic and international law. It further added that the applicant's guardian, although aware of his situation, had failed to take appropriate action. The findings of the first-instance prosecutor's office that the applicant had been tied to a bed for "safety reasons" were "unacceptable and absurd". According to the HCHR, that amounted to unprofessional (непрофесионално и нестручно) exercise of office by the S. public prosecutor.

22. In a letter of 27 January 2015 (received by the HCHR on 2 February 2015), the higher public prosecutor informed the HCHR that it had inspected the case file and had noted that the lower prosecutor had undertaken many investigative measures and had obtained a great deal of evidence regarding the complaint. The higher public prosecutor's office referred to the Ombudsman's report, according to which "[the applicant] had been tied up for safety reasons" (see paragraph 11 above). It endorsed the facts and reasoning provided by the first-instance public prosecutor. It also upheld the findings that the applicant had been tied to his bed for safety reasons and that there had been a lack of intent on the part of the suspects to debase the applicant.

23. For the same reasons outlined above (see paragraph 21 above), the HCHR requested that the State Public Prosecutor take over the prosecution. By a letter of 1 June 2015 (received by the HCHR on 13 July 2015), the State Public Prosecutor confirmed the findings of the lower prosecutors' offices.

D. Other relevant information

1. Medical report about the applicant's state of health following his discharge from the RIBBS

24. On 10 July 2014 a psychiatric hospital in S. drew up a medical report about the applicant, the relevant parts of which state as follows:

"... [the applicant] has a low level of functionality; [he has] communication difficulties ... [his] walking is stable, with synchronised movements; he keeps his balance properly ... Owing to [his] undeveloped communication skills, ... no two-way communication can be established ...

I consider that [the applicant] suffers from autism ... accompanied by a mental disability and a speech disability. Owing to insufficient stimulation and early treatment, the child has a very low level of development and he is practically incapable of caring for himself."

2. Proceedings before the B. public prosecutor

25. On 27 February 2015 the S. public prosecutor notified the B. public prosecutor about the HCHR's criminal complaint, stating:

"... it was established that the reported event [the applicant being tied to his bed] had been as a result of [the applicant's] inappropriate placement in the RIBBS ... notwithstanding the fact that [the applicant] had no physical disabilities, in the medical report of 14 April 2008 he was classified as a person with multiple disabilities ... [including] the most severe form of physical disability ... He was classified in a similar way ... in 2014 ... Given the fact that medical reports about [the applicant] in 2008 and 2014, [prepared] by B. Hospital, ... did not reflect his real state of health ... we bring this information to your attention, as the competent prosecutor's office, [so that you may] take measures regarding any crimes within your jurisdiction ..."

26. Soon afterwards the B. public prosecutor's office requested and obtained a copy of the medical material concerning the applicant from B. Hospital. It also obtained relevant material from the applicant's guardian and the competent inspectorate, which had found no shortcomings in B. Hospital's work. No information was submitted as to the outcome of the proceedings before the B. public prosecutor.

3. Disciplinary proceedings

27. By a decision of 22 August 2014, the director of the RIBBS found no grounds to reprimand (the measure proposed to her by the disciplinary commission of the institute) V.N., P.R.V., S.I. and E.J. – employees in the RIBBS who had allegedly failed to comply with the rules on keeping medical records (неизготвување на потребната стручна документација). There is nothing to suggest that the HCHR was informed about the institution and completion of those proceedings.

4. Other actions taken by the HCHR regarding the applicant

28. In the second half of 2014 the HCHR brought the allegedly incorrect medical diagnosis of the applicant and his subsequent neglect to the attention of the Ministry of Labour and Social Policy, the Ministry of Health, the competent inspectorate, B. Hospital and the Ombudsman. It also enquired as to whether any measures had been taken against the staff at the RIBBS and B. Hospital. The inspectorate replied that B. Hospital had not identified any shortcomings. The HCHR also reported the applicant's case in its annual reports of 2014 and 2015.

II. RELEVANT DOMESTIC LAW

A. Criminal Proceedings Act of 2010

29. Section 57 of the Criminal Proceedings Act sets out the rights of victims in criminal proceedings including, inter alia, the right to a representative (полномошник).
30. Section 59(1) entitles a statutory custodian (законски застапник) to submit private criminal charges on behalf of a minor or a person divested of his or her legal capacity.
31. Under section 66(1) of the Act, if the victim is a minor or a person divested of legal capacity, his or her statutory custodian takes the actions which are at the disposition of the victim. The private prosecutor and the victim, as well as their statutory custodians, can be assisted in the proceedings by a representative (section 67).
32. Under section 273(3), every person can report a crime subject to State prosecution.
33. The victim is served with a copy of a decision by which the public prosecutor rejects his or her criminal complaint (with an instruction on legal remedies). The person who reported a crime is only informed about the reasons for rejection (section 288).

B. Criminal Code

34. Article 142 of the Code punishes acts of torture and other cruel, inhuman or degrading treatment. It provides that a person who, in the performance of his or her official duties, uses force, threat or other means with the aim to extort a confession or other statement from the accused, witness, expert or other person, or inflicts serious bodily or causes mental suffering in order to punish him or her for a criminal offence which that or another person has committed or is accused of, is to be punished by a term of imprisonment of three to eight years.
35. Article 143 of the Criminal Code provides that a person who, in the performance of his or her official duties, mistreats, intimidates, insults or generally treats another in such a manner that his or her human dignity or personality is humiliated is to be punished by a term of imprisonment of one to five years.

III. RELEVANT INTERNATIONAL MATERIAL

A. The United Nations

1. Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (A/RES/46/119, 17 December 1991)

36. The relevant provisions of the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care read as follows:

Principle 1
Fundamental freedoms and basic rights

"...
2. All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person."

Principle 9
Treatment

"1. Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.
...
3. Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.
..."

Principle 11
Consent to treatment

"...
11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.
..."

Principle 12
Notice of rights

"1. A patient in a mental health facility shall be informed as soon as possible after admission, in a form and a language which the patient understands, of all his or her rights in accordance with the present Principles and under domestic law, and the information shall include an explanation of those rights and how to exercise them.
2. If and for so long as a patient is unable to understand such information, the rights of the patient shall be communicated to the personal representative, if any and if appropriate, and to the person or persons best able to represent the patient's interests and willing to do so.
3. A patient who has the necessary capacity has the right to nominate a person who should be informed on his or her behalf, as well as a person to represent his or her interests to the authorities of the facility."

2. Convention on the Rights of Persons with Disabilities, A/RES/61/106, 24 January 2007

37. The relevant part of the United Nations Convention on the Rights of Persons with Disabilities provides:

Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment

"1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment."

3. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, of 1 February 2013,

38. In his report on the issues of abusive practices in health-care settings, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, made the following submission:

2. Absolute ban on restraints and seclusion

"63. The mandate has previously declared that there can be no therapeutic justification for the use of solitary confinement and prolonged restraint of persons with disabilities in psychiatric institutions; both prolonged seclusion and restraint may constitute torture and ill-treatment (A/63/175, paras. 55-56). The Special Rapporteur has addressed the issue of solitary confinement and stated that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment (A/66/268, paras. 67-68, 78). Moreover, any restraint on people with mental disabilities for even a short period of time may constitute torture and ill-treatment. It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including in psychiatric and social care institutions. The environment of patient powerlessness and abusive treatment of persons with disabilities in which restraint and seclusion is used can lead to other non-consensual treatment, such as forced medication and electroshock procedures. "

3. Domestic legislation allowing forced interventions

"64. The mandate continues to receive reports of the systematic use of forced interventions worldwide. Both this mandate and United Nations treaty bodies have established that involuntary treatment and other psychiatric interventions in health-care facilities are forms of torture and ill-treatment. Forced interventions, often wrongfully justified by theories of incapacity and therapeutic

necessity inconsistent with the Convention on the Rights of Persons with Disabilities, are legitimized under national laws, and may enjoy wide public support as being in the alleged 'best interest' of the person concerned. Nevertheless, to the extent that they inflict severe pain and suffering, they violate the absolute prohibition of torture and cruel, inhuman and degrading treatment (A/63/175, paras. 38, 40, 41). Concern for the autonomy and dignity of persons with disabilities leads the Special Rapporteur to urge revision of domestic legislation allowing for forced interventions.

... "

5. Persons with disabilities

"80. Persons with disabilities are particularly affected by forced medical interventions, and continue to be exposed to non-consensual medical practices (A/63/175, para. 40). ... "

V. Conclusions and recommendations
B. Recommendations

" 85. The Special Rapporteur calls upon all States to:
..
(c) Conduct prompt, impartial and thorough investigations into all allegations of torture and ill-treatment in health-care settings; where the evidence warrants it, prosecute and take action against perpetrators; and provide victims with effective remedy and redress, including measures of reparation, satisfaction and guarantees of non-repetition as well as restitution, compensation and rehabilitation;
... "

4. Persons with psychosocial disabilities

"89. The Special Rapporteur calls upon all States to:
(a) Review the anti-torture framework in relation to persons with disabilities in line with the Convention on the Rights of Persons with Disabilities as authoritative guidance regarding their rights in the context of health-care;
(b) Impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short-term application. The obligation to end forced psychiatric interventions based solely on grounds of disability is of immediate application and scarce financial resources cannot justify postponement of its implementation;
..."

B. Council of Europe

1. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4 April 1997 (CETS 164, Oviedo Convention)

39. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, in its relevant parts provides:

Article 6 – Protection of persons not able to consent

"1. Subject to Articles 17 and 20 below, an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit.
...
3. Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law. The individual concerned shall as far as possible take part in the authorisation procedure.
4. The representative, the authority, the person or the body mentioned in paragraphs 2 and 3 above shall be given, under the same conditions, the information referred to in Article 5.
5. The authorisation referred to in paragraphs 2 and 3 above may be withdrawn at any time in the best interests of the person concerned."

Article 7 – Protection of persons who have a mental disorder

"Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health."

2. Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorders of 22 September 2004

40. The relevant parts of this Recommendation read as follows:

Chapter V – Specific situations
Article 27 – Seclusion and restraint

"1. Seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed.
2. Such measures should only be used under medical supervision, and should be appropriately documented.
3. In addition:
i. the person subject to seclusion or restraint should be regularly monitored;

ii. the reasons for, and duration of, such measures should be recorded in the person's medical records and in a register."

3. Report to the Government of "the former Yugoslav Republic of Macedonia" on the visit to "the former Yugoslav Republic of Macedonia" carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 17 October 2014, CPT/Inf (2016) 8, Strasbourg, 17 March 2016

41. The relevant parts of the above Report read as follows:

Social care establishments

"... representatives of the social work centres still did not visit regularly the persons under their care nor act effectively in their interests. Steps need to be taken to address these matters ..."

THE LAW

I. ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant complained that he had been wrongly diagnosed as early as 2008, which had led to his being placed in an inappropriate institution (the RIBBS), where he had not received adequate care and treatment, and that that had culminated in his being tied to his bed. The inadequate care and treatment had led to his neglect and the violation of his rights under Article 3 of the Convention. Furthermore, the investigation into the allegations that the applicant had been subjected to inhuman and degrading treatment had been ineffective. Lastly, with respect to his complaints under Article 3, the applicant had no effective remedy as required under Article 13. Articles 3 and 13 of the Convention read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

1. Compatibility ratione personae

(a) The parties' submissions

(i) The Government

43. The Government contended that the HCHR did not have locus standi to lodge the present application on behalf of the applicant. In that connection, they argued that it had had no contact with him before the Ombudsman had published the 2003 report, and had not engaged subsequently in improving his situation. Accordingly, it had not had sufficient direct contact with the applicant, nor did it have sufficient personal interest to file the present application. Furthermore, the applicant's parents were alive; he also had other relatives who could have acted on his behalf before the national authorities, besides his legal guardian and the Ombudsman. There was nothing to suggest that the HCHR had attempted to contact any of them and obtain authority to represent the applicant before the national authorities and the Court. Furthermore, the HCHR had not been either a party or the applicant's representative in any of the proceedings before the national authorities. That was also true as regards the proceedings before the prosecuting authorities, where no procedural rights, including the right to appeal, had been conferred on the HCHR. The case was therefore inadmissible as incompatible ratione personae with the provisions of Article 34 of the Convention.

(ii) The applicant

44. The applicant maintained that he had been abandoned at birth and that there was no evidence that his parents or any other relative had ever visited him in an institution where he had been in foster care. His guardian could not be expected to bring the case on his behalf, since the director of B. Social Welfare Centre, as the person in charge, had been charged by the HCHR and had failed to appeal against the decision of the first-instance public prosecutor. The work of social welfare centres was a systemic problem, which the CPT had confirmed in its 2016 report about the respondent State (paragraph 36 above). The Ombudsman, although entitled to do so, had failed to initiate proceedings before the public prosecutor.

45. The applicant stated that the HCHR had the requisite capacity to represent him before the Court, given the actions which it had taken on his behalf before the national authorities, which proved that it had been regarded as his de facto representative. Furthermore, it was a watchdog civil society organisation with extensive experience in providing social protection to people at risk (including those at risk as regards their health). In this context, it provided free legal aid to vulnerable groups and monitored conditions in State-run institutions, including institutions for people with disabilities, in relation to which it published reports. The fact that it had not contacted the applicant before the publication of the Ombudsman's report was irrelevant. Its subsequent (three) visits to the applicant and the steps which it had taken to inform the public about the situation of people with disabilities in State-run institutions (such a report had last been published in 2012) and the applicant's case (paragraph 28 above) were factors weighing in favour of its capacity to represent him.

(b) The Court's assessment

46. The Court notes that the HCHR lodged the application on the applicant's behalf without producing a power of attorney or written authority from the applicant himself, his legal guardian or any other competent person. In this regard, the Court reiterates that it is essential for

representatives to demonstrate that they have received specific and explicit instructions from the alleged victim, within the meaning of Article 34, on whose behalf they purport to act in the proceedings before the Court (see Post v. the Netherlands, no 21727/08 (dec.), 20 January 2009).

47. In the case of Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania ([GC], no. 47848/08, §§ 104-111, ECHR 2014), the Grand Chamber identified the following "exceptional circumstances" which can justify an association being recognised as having standing as a de facto representative of the direct victim of the alleged violations: the victim's vulnerability; the nature of the allegations brought before the Court; whether the direct victim has next of kin or a legal guardian likely to lodge an application with the Court; whether there has been contact between the direct victim and the representative; whether the representative was involved in any relevant domestic proceedings and recognised as having standing in those proceedings. The Court considers that these elements are determinative as to whether the HCHR can be recognised as having locus standi to act as the applicant's de facto representative in the present case.

48. It is undisputed that the applicant was the direct victim, within the meaning of Article 34 of the Convention, of the circumstances complained of before the Court. Given his disabilities as established by the national authorities (see paragraphs 5, 11 and 20 above) and not contested by the Government, he is to be considered a highly vulnerable person who is manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone wishes and views on whether to pursue any remedies. Furthermore, the allegations brought before the Court raise serious issues under Article 3 of the Convention.

49. It is common ground between the parties that the applicant was abandoned at birth and has been in the care of State-run institutions since he was three months old. There is nothing to suggest that the applicant's parents, who also suffer from a mental disability, or any other relative, contacted or visited him or showed any interest in his situation during the entire time he was placed in public institutions. It does not appear that any next of kin sought contact with the applicant after the Ombudsman had informed the public about his situation (see Comité Helsinki Bulgare c. Bulgarie, nos. 35653/12 and 66172/12, § 54, 28 June 2016).

50. The Court notes that, unlike in the case of Centre for Legal Resources on behalf of Valentin Câmpeanu (cited above, § 111), the applicant has a legal guardian (B. Social Welfare Centre) appointed by the State to take care of his interests. It would normally be for the guardian to provide the HCHR with the requisite authority to represent the applicant before the Court. However, the Court attaches particular importance to the fact that the applicant's guardian was accused, both before the domestic authorities and before the Court, of having failed in its responsibility to protect the applicant's interests. Accordingly, it cannot be expected that the person suspected of having been part of the applicant's alleged overall neglect in violation of his rights under Article 3 of the Convention would make a complaint on those grounds before the Court. In this regard, the Court notes that B. Social Welfare Centre did not challenge the decision of the first-instance public prosecutor rejecting the HCHR's criminal complaint notwithstanding the fact that it contained a clear instruction on legal remedies (see paragraphs 20 and 33 above). Furthermore, the Court has not been informed that the respondent State appointed another guardian for the applicant instead of B. Social Welfare Centre after the above allegations had been brought to the attention of the authorities.

51. On the other hand, the Court takes note of the fact that only shortly after the applicant's case had been revealed in public by the Ombudsman, the HCHR visited him at S. Rehabilitation Institute and contacted different competent authorities about his situation, with a view to elucidating the relevant circumstances and attributing responsibility. Similarly, it submitted the criminal complaint to the competent public prosecutor without delay and pursued the matter, taking it up to the State Public Prosecutor (see Centre for Legal Resources on behalf of Valentin Câmpeanu, cited above, § 111, and Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania, no. 2959/11, § 43, 24 March 2015; see, conversely, Comité Helsinki Bulgare, cited above, §§ 56 and 57). It is noteworthy that all those steps taken by the HCHR before the national authorities were focused on the applicant and his alleged neglect by the State authorities (see, conversely, Comité Helsinki Bulgare, cited above, where the applicant association challenged before the domestic authorities general problems related to conditions in State-run institutions for disabled children, and initiated proceedings with respect to the direct victims following a significant delay after finding out about the critical events).

52. As to the proceedings before the prosecuting authorities, the HCHR was not regarded as a party to those proceedings or the applicant's legal representative. Consequently, it did not enjoy any procedural rights, including the right to appeal against the decision of the first-instance public prosecutor (ibid., § 58, see paragraphs 30 and 31 above). However, the Court observes that the HCHR's criminal complaint set in motion the investigation carried out by the public prosecutor. Whereas the prosecutor's decision was not served on the HCHR, the HCHR obtained a detailed explanation from the public prosecutor regarding the investigative measures taken and the findings made. Subsequently, the HCHR promptly requested that higher and State public prosecutors take over the prosecution, which, in the absence of an appeal by the applicant's guardian, was the only means of pursuing the matter before the higher prosecuting authorities that was available to the HCHR. It was the HCHR's action that led the higher public prosecutor to review the lower prosecutor's findings of fact and law.

53. Against the above background, the Court considers that, in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, the HCHR should be granted standing to act as the applicant's representative.

54. Accordingly, the Court dismisses the Government's objection concerning the HCHR's lack of locus standi, in view of its standing as the applicant's de facto representative.

2. Non-exhaustion of domestic remedies

(a) The parties' submissions

55. The Government argued that the HCHR had not exhausted the domestic remedies, namely it had failed to bring criminal charges against the medical staff at B. Hospital who had allegedly incorrectly diagnosed the applicant, and the director of B. Social Welfare Centre, the applicant's guardian. In a document of 31 May 2017 containing their additional observations and comments on the applicant's just satisfaction claims, the Government, for the first time, objected on the grounds that the HCHR had not availed itself of a civil action for damages, which, given the findings of the

prosecuting authorities about the absence of any intention on the part of the people accused, would have been more appropriate.

56. The applicant stated that he had exhausted all effective remedies. The HCHR had alerted the administrative bodies about his situation and had requested that they institute disciplinary proceedings against those responsible in the RIBBS and B. Hospital. Its criminal complaint had also contained allegations about the inactivity of the applicant's guardian and the applicant having been incorrectly diagnosed by doctors at B. Hospital. As regards the latter allegation, proceedings before the B. public prosecutor were still ongoing.

(b) The Court's assessment

57. The relevant Convention principles have been summarised in the Court's judgment in the case of Vučković and Others (see Vučković and Others v. Serbia (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

58. Turning to the present case, the Court notes that shortly after it had found out about the applicant, the HCHR informed the competent administrative bodies about his situation and requested that appropriate measures be taken (see paragraph 28 above). The aim of that correspondence was to instigate actions and measures capable of elucidating the relevant circumstances and attributing responsibility. Those submissions triggered the competent inspectorate's review of the work of B. Hospital and the RIBBS (see paragraphs 27 and 28 above).

59. At the same time, the HCHR lodged a criminal complaint with the S. public prosecutor, accusing the director and several employees of the RIBBS of having subjected the applicant to inhuman and degrading treatment. As stated above, the HCHR's complaint set in motion the investigation carried out by that public prosecutor (see paragraph 47 above), which led to several persons being identified as potential suspects, including the director of B. Social Welfare Centre (the applicant's guardian, see paragraph 20 above), despite the fact that she had not been mentioned in the HCHR's criminal complaint. Similarly, although the HCHR did not make any allegations against the medical staff at B. Hospital, it must be noted that the investigation carried out on the basis of its complaint led the S. public prosecutor to notify the B. public prosecutor, who had the requisite territorial jurisdiction, to investigate whether any crime had been committed in relation to B. Hospital's alleged misdiagnosis of the applicant. The B. public prosecutor followed up on that information and took certain investigative steps, but apparently made no findings. In such circumstances, the Court is satisfied that the HCHR sufficiently brought the alleged wrongdoing in relation to the applicant to the attention of the competent authorities.

60. As to the Government's objection that the HCHR failed to exhaust the civil avenue of redress, the Court finds that, for the reasons stated in the case of Khlaifia and Others v. Italy ([GC], no. 16483/12, § 52, 15 December 2016), which likewise apply to the present case, the Government are estopped from relying on those grounds, which were not raised in their initial non-exhaustion plea. This is so, given the independent existence of two avenues of redress (civil and criminal), and the fact that the Government did not provide any explanation as to why they had not promptly relied on the existence of the civil avenue of redress.

61. In view of the foregoing, the Court considers that the HCHR did everything that could reasonably be expected of it to exhaust domestic remedies on behalf of the applicant. Consequently, the Government's non-exhaustion objection has to be rejected.

3. Compliance with the six-month rule

(a) The parties' submissions

62. The Government argued that the HCHR's requests for higher public prosecutors to take over the prosecution had not been an effective remedy which it had been required to exhaust. This was so, since the decision as to whether or not to take over the prosecution had been within the discretion of those prosecutors. Accordingly, the HCHR should not have waited for the outcome of those requests, but should have lodged the application within six months of the S. public prosecutor's office making its decision, or after the eight-day time-limit for an appeal by the applicant's guardian against that decision had expired.

63. The applicant submitted that the first-instance public prosecutor had never informed it about the decision being served on his guardian (or the exact date when service had taken place). In any event, he had submitted the application within six months of receiving the higher public prosecutor's findings regarding its request for the lower public prosecutor's work to be revised.

(b) The Court's assessment

64. The Court reiterates that in assessing whether an applicant has complied with Article 35 § 1 of the Convention, it is important to bear in mind that the requirements contained in that Article concerning the exhaustion of domestic remedies and the six-month period are closely interrelated. Thus, as a rule, the six-month period runs from the date of the final decision in the process of the exhaustion of domestic remedies. The pursuit of remedies which do not satisfy the requirements of Article 35 § 1 will not be considered by the Court for the purposes of establishing the date of the "final decision" or calculating the starting point for the running of the six-month rule. It follows that if an applicant has recourse to a remedy which is doomed to failure from the outset, the decision on that appeal cannot be taken into account for the calculation of the six-month period (see Jeronovičs v. Latvia [GC], no. 44898/10, § 75, ECHR 2016, and El-Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, § 136, ECHR 2012).

65. The Court reiterates its above findings about the specific status of the HCHR in the proceedings before the prosecuting authorities and the consequential effects on its procedural rights, notably its inability to lodge an appeal against the decision of the first-instance public prosecutor, which is an ordinary remedy to be used in such a situation. In addition, as stated by the applicant and not contested by the Government, he was not informed of that decision being served on his guardian, let alone the exact date when service took place. Furthermore, the applicant's guardian failed to lodge an appeal against that decision, notwithstanding the clear instructions in this regard given by the first-instance public prosecutor.

66. Accordingly, and as noted above (see paragraph 47 above), requesting that higher prosecutors take over the prosecution following the rejection of the criminal complaint by the first-instance

public prosecutor was the only way in which the HCHR could pursue the case. Such a request was provided for by the Public Prosecution Act; it was directly accessible to the HCHR (something which is confirmed by the fact that, on the basis of that request, the higher public prosecutor examined the case and reviewed the lower public prosecutor's findings of fact and law). Lastly, the Government did not put forward any arguments that those requests had lacked any prospect of success from the outset.

67. In the specific circumstances of the case, the Court considers that it was not unreasonable for the HCHR to apply to higher public prosecutors. Accordingly, the time which those prosecutors took to deal with those requests is to be taken into account for the calculation of the six-month time-limit. Given the date when the decision was served on the HCHR, at least the date when the notification from the higher public prosecutor was served on it (see paragraph 22 above), the Court finds that the present application was submitted within the six-month time-limit. Therefore, the Government's objection under this head must be rejected.

4. Conclusion

68. The Court notes that the Government did not raise any other objection regarding the admissibility of the application. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other grounds for declaring it inadmissible have been established. It must therefore be declared admissible.

B. Merits

1. Article 3 complaints

(a) The applicant's placement and treatment in the RIBBS

(i) The parties' submissions

69. The applicant reiterated his complaints that his inappropriate placement in the RIBBS, where he had been tied up, had violated his rights under Article 3 of the Convention. The employees in the RIBBS had tied him up for extended periods of time, notwithstanding that they had been aware of his vulnerability. The absence of any intent on their part to harm him could not relieve the respondent State from its responsibility under the Convention.

70. The Government admitted that the applicant had been tied to the bed occasionally (во периоди) during his placement in the RIBBS. However, as established by the prosecuting authorities, the persons concerned had reported that they had had no intention of harming the applicant. On the contrary, as noted by the Ombudsman, that measure had aimed to protect the applicant's life and health, given his condition. That excluded any negligence on their part. While in the RIBBS, the applicant had not been deprived of necessary medical treatment or any other treatment or therapy. Owing to his mental disability, he had been unable to learn sign language. Furthermore, measures had continually been taken to reassess his disability and place him in a more appropriate institution.

Lastly, there was nothing in the Ombudsman's material to suggest that the applicant had suffered any consequences from being tied up, let alone visible consequences.

(ii) The Court's assessment

(α) General principles

71. The Court considers that the Convention principles under Article 3 of the Convention summarised in its judgments in the cases of V.C. (V.C. v. Italy, no. 54227/14, §§ 89-95, 1 February 2018, as regards the State's positive obligation to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment), as well as Blokhin (Blokhin v. Russia [GC], no. 47152/06, §§ 135-40, 23 March 2016) and Stanev (see, Stanev v. Bulgaria [GC], no. 36760/06, §§ 201-04, ECHR 2012) apply likewise to the present case. The latter two cases are relevant notwithstanding that the applicants in those cases, unlike L.R. in the present case, were detained (pursuant to court orders) in a temporary detention center and a social care home, respectively. The Court notes that from the outset B. Social Welfare Centre, a State-run public institution, was assigned exclusive guardianship duties in respect of the applicant. The guardian ordered and arranged his placement in State-run social care institutions, namely B. Orphanage, B. Rehabilitation Institute, the RIBBS and finally S. Rehabilitation Institute, where he is at present (see paragraphs 5, 8 and 14 above). Furthermore, throughout his life, the applicant's medical diagnoses and care were provided by public health and social care services. Accordingly, the applicant was all the time in the care of the authorities.

(β) Application to the present case

72. The Court notes that from when the applicant was three months old his medical condition, as well as his mental and physical development, were monitored by health and social care services. Certain health problems were detected when he was one year old. In April 2008, at the age of three and a half, the applicant was diagnosed by B. Hospital as suffering from a moderate mental disability, the most severe form of physical disability (cerebral palsy), and a speech disability (alalia) (see paragraph 5 above). Findings regarding his mental, physical and speech disabilities were subsequently upheld (see paragraph 6 above).

73. In view of such a diagnosis, on 29 June 2012 the applicant was placed in the RIBBS, an open-type social care institution for persons with physical disabilities. No consideration was given to the RIBBS' prompt objections that it could not accommodate persons with mental disabilities (the applicant had been diagnosed with such a disability) and that its personnel were not qualified to communicate with him and provide him with adequate care and treatment (see paragraph 7 above).

74. From the time the applicant was admitted to the RIBBS, and throughout his stay there, the institution repeatedly voiced its concerns to the relevant authorities (e.g. the applicant's guardian, the competent Ministry and inspectorate), saying that it could not provide the applicant with care and treatment corresponding to his state of health. Those concerns were manifold: it was understaffed and could not ensure the applicant's constant supervision, which appeared necessary; its personnel were not qualified to communicate with him; and it did not have safety measures in

place to prevent the applicant from running away from the premises of the institution (see paragraphs 9, 10 and 18 above).

75. On 6 November 2013 the Ombudsman visited the RIBBS and found the applicant tied to his bed. It must be noted that this visit took place almost a year and a half after the applicant's admission to the RIBBS. In the internal report of 16 November 2013, the Ombudsman stated his findings about the RIBBS' inadequate treatment of the applicant, which in itself amounted to inhuman treatment. He also noted that the applicant was being tied to his bed for "safety reasons" (see paragraph 11 above).

76. On 15 April 2014, after spending a year and nine months in the RIBBS, the applicant was transferred to S. Rehabilitation Institute. Prior to that transfer, on 4 March 2014 he was examined again by B. Hospital, which confirmed its earlier findings, namely that he suffered from a moderate mental disability, the most severe form of a physical disability, and a speech disability (see paragraphs 5 and 13 above). No conclusion can be drawn as to whether B. Hospital consulted the RIBBS' personnel about the applicant's medical condition. In this connection, the Court notes that, according to those personnel, the applicant had no "visible physical disabilities", "he walked without any problems", "he ran", and he was "hyperactive" (see paragraphs 18 and 19 above). These statements appear to correspond to the medical report of 10 July 2014 by S. Psychiatric Hospital, in which there is no mention of the applicant having any physical disability. It is noteworthy that that report was drawn up only four months after B. Hospital's report had been produced (see paragraphs 13 and 24 above).

77. In the ensuing proceedings instituted by the HCHR, the prosecuting authorities confirmed that the RIBBS had had no qualified staff to provide the applicant with the requisite care, and therefore it had sought his transfer to an appropriate institution. Relying on the statements of members of staff of the RIBBS, and the Ombudsman's report, the public prosecutor also established that the applicant had occasionally been tied to his bed (see paragraphs 20 and 22 above). The public prosecutor held that "the reported event [the applicant being tied to the bed] had been as a result of [the applicant's] inappropriate placement in the RIBBS" (see paragraph 25 above). The fact that the applicant had occasionally been tied to his bed was confirmed by the Government (see paragraph 65 above).

78. Although the national authorities were not sufficiently specific about how frequently the applicant had been tied up, the Court would refer to the statements given by the members of staff who were responsible for him on a daily basis. In this connection, it notes that two employees stated that they had tied the applicant up at night, "particularly after 8 p.m." Z.K. further stated that the applicant had been tied up "usually during the midday break" and during "certain parts of the day" when employees had been occupied with other residents (see paragraph 19 above). That was confirmed by the director of the RIBBS (see paragraph 18 above). Although no inferences can be drawn as to how many times a day the applicant was tied up, it is not unreasonable, in view of the understaffing problem, to assume that that was common practice. Accordingly, it appears that throughout his placement in the RIBBS (which lasted over a year and nine months) the applicant was tied to his bed by his leg with a "rope" or "cotton straps" allegedly "long enough to enable him to reach the corridor" (see paragraphs 16 above), both at night and often during the day.

79. Having regard to the foregoing considerations, the Court accepts the findings of the prosecuting authorities that the applicant's placement in the RIBBS was inappropriate and adds that, as a result,

he did not receive the requisite care. It appears that an inaccurate diagnosis preceded that placement, given that the findings that the applicant had the most severe form of a physical disability (cerebral palsy) contradicted the first-hand and direct information from the members of staff of the RIBBS, based on their personal experience and subsequent medical evidence. The RIBBS was in no way an institution for mentally disabled persons like the applicant. Furthermore, its personnel were not qualified to communicate with the applicant, who was deaf and unable to speak. The facilities in the RIBBS were not suited to his hyperactivity, which necessitated regular supervision that staff could not ensure. Such treatment led to the applicant's overall condition worsening. In this connection, it is to be noted that after his admission to the RIBBS, the applicant started injuring himself, apparently for the first time (see paragraph 10 above). Furthermore, as noted in the medical report drawn up soon after his discharge from the RIBBS, he showed a "low level of functionality [and] communication difficulties ... [and had] undeveloped communication skills ..." The report further stated that "owing to insufficient stimulation and early treatment, [the applicant] had a very low level of development" (see paragraph 24 above). The Court finds it particularly striking that the applicant's guardian and the other competent authorities were aware from the outset that the RIBBS could not provide the applicant with the requisite care (even before his admission), but nevertheless took no measure in reply to those serious alerts and pursued that placement for a considerable period of time. The Court notes that the respondent Government provided no explanation for the failure of the authorities to react in a prompt, concrete and appropriate manner (see Nencheva and Others v. Bulgaria, no. 48609/06, § 124, 18 June 2013).

80. The inadequate treatment which the applicant received while in the RIBBS was made worse by the fact that he was tied to his bed at night and frequently during the day. The Court finds it particularly worrying that such a "measure", which in itself is incompatible with human dignity, was used for approximately a year and nine months in respect of an eight-year-old child. On numerous occasions it has stressed the particular vulnerability of minors in the context of Article 3 of the Convention, given that treatment within the meaning of this Article is liable to have a greater impact - especially in psychological terms – on a minor than on an adult (see Bouyid v. Belgium [GC], no. 23380/09, § 109, ECHR 2015). The applicant was even more vulnerable because of his disability, which meant that he could not complain at all about how he was affected by such treatment (see Keenan v. the United Kingdom, no. 27229/95, § 111, ECHR 2001-III).

81. As to the findings of the national authorities that there had been no intention to harm the applicant, the Court notes that the absence of an intention to humiliate or debase a person cannot conclusively rule out a finding of a violation of this provision (see Nicolae Virgiliu Tănase v. Romania [GC], no. 41720/13, § 117, 25 June 2019 and Bouyid, cited above, § 86). The Court further notes that, as established by the prosecuting authorities and confirmed by the Government, the applicant was tied to his bed for "safety reasons", namely to prevent him from running away and thus putting himself in danger. Although the risk of a person running away or causing injury or damage is a factor to be taken into consideration (see Julin v. Estonia, nos. 16563/08 and 3 others, § 120, 29 May 2012), the Court is not convinced that tying the applicant to his bed by his leg in order to prevent him from running away from the premises of the RIBBS and thus endangering himself was the least intrusive measure available in the context of his safety. There is no indication that any alternatives (apart from the removal of the handles of the window of the applicant's room, see

paragraph 18 above) were considered or applied before or during the application of that "measure". The Court cannot but note that the "measure" was not necessitated by any reason related to the applicant's medical condition, but, as established by the prosecuting authorities (see paragraphs 25 and 72 above), was a consequence of his inappropriate placement in the RIBBS. In this connection further reference is made to the relevant international materials (see paragraphs 36-40 above).

82. In these circumstances, the Court considers that the authorities, which were under an obligation to safeguard the applicant's dignity and well-being, are responsible under Article 3 of the Convention for his inappropriate placement in the RIBBS, lack of requisite care and the inhuman and degrading treatment that he experienced therein (see Blokhin, cited above, § 146). The circumstances complained of by the HCHR on behalf of the applicant were the result of various steps taken by public authorities and institutions through their officials.

83. The Court therefore concludes that there has been a violation of the applicant's rights under Article 3 of the Convention.

(b) Procedural obligation under Article 3 of the Convention

(i) The parties' submissions

84. The applicant submitted that the investigation carried out by the public prosecutor had not been effective within the meaning of Article 3 of the Convention. In particular, he had heard evidence from only the employees of the RIBBS, whose statements had been regarded as completely reliable and had served as the basis for his findings. The prosecutor had not examined any other witnesses or the applicant's guardian (the director of B. Social Welfare Centre), who had also been accused; no investigation had been carried out into whether any responsibility could be attributed to other State officials, or in order to elucidate the reasons why the applicant had been misdiagnosed. The fact that it had taken so long for the B. public prosecutor to gather material evidence had added to the overall ineffectiveness of the investigation.

85. The Government submitted that the investigation into the allegations made by the HCHR had met the requisite requirements of effectiveness; it had been prompt, adequate, thorough, and it had ensured adequate involvement of the public (through the HCHR). In that connection, the public prosecutor had examined several people and obtained documentary evidence from the RIBBS, B. Social Welfare Centre and the Ombudsman. Furthermore, the ultimate decision in the investigation had contained sufficient reasons for rejecting the complaint. Lastly, the S. public prosecutor had instructed the B. public prosecutor, as the competent authority, to examine the discrepancy between the applicant's real or apparent state of health (реалната или очигледната) and his state of health as noted in the medical reports of 2008 and 2014 drawn up by B. Hospital.

(ii) The Court's assessment

86. The general principles relevant for the complaint under this head were summarized in M.S. (M.S. v. Croatia (no. 2), no. 75450/12, §§ 74 and 75, 19 February 2015).

87. Turning to the present case, the Court notes that the HCHR complained to the prosecuting authorities that the applicant's placement in the RIBBS had been inappropriate and that he had been

tied to his bed with a rope. The Court considers that those allegations, as made at the time, were arguable. Article 3 thus required the authorities to conduct an effective investigation.

88. The complaint was made against the director of the RIBBS and RIBBS employees who, at the time, were unidentified. The examination of that complaint lasted less than a year and was dealt with by prosecutors of three different ranks. Accordingly, it met the requirement of promptness.

89. The prosecuting authorities rejected the complaint after examining a great deal of documentary material and hearing oral evidence from the suspects, namely the director of the RIBBS and four employees (of whom two were classified as suspects) who had been directly involved in the events in question and whose identities the prosecutor had established in the meantime. The investigation carried out by the first-instance public prosecutor was extended to include the applicant's guardian (the director of B. Social Welfare Centre), notwithstanding the fact that she had not been included in the HCHR's criminal complaint. Although the public prosecutor did not interview her, the Court does not consider that the failure to do so in the present case affected the establishment of the relevant facts. In submissions to the higher prosecutor and the State Prosecutor's Office, the HCHR did not complain that the first-instance prosecutor had relied on only the accounts of the accused, or contend that it had been necessary to examine further witnesses or carry out other procedural steps. The Court finds that such arguments (see paragraph 79 above) are of a general nature. Accordingly, the investigation, in the above context, can be said to have been thorough.

90. On the basis of the admitted evidence, the S. public prosecutor established the relevant facts, facts which, in the Court's opinion, were not significantly different from the HCHR's description of events, namely that the applicant's placement in the RIBBS had been inappropriate and the applicant had occasionally been tied to his bed (see paragraphs 20 and 25 above). Furthermore, the S. public prosecutor notified the B. public prosecutor, as the competent prosecutor, of the discrepancy between the medical diagnosis given by B. Hospital and the applicant's "real state of health", so that an investigation could be carried out into whether any crime had been committed in that regard. In the Court's opinion, the investigative measures taken by the S. public prosecutor in respect of the applicant's guardian and B. Hospital are to be viewed in the context of the State's duty under Article 3 of the Convention to carry out an official effective investigation. However, the Court cannot but note that the subsequent investigation carried out by the B. public prosecutor produced no results, despite the fact that a considerable period of time elapsed after the allegations had been brought to his attention (see paragraph 26 above).

91. Furthermore, the Court observes that the investigation by the prosecuting authorities was essentially directed against the accused by the HCHR and in respect of the "measure" of restraint used on him which, as found above, violated his Article 3 rights. They rejected the HCHR's complaint, finding that there were no grounds to hold that a criminal offence subject to State prosecution had been committed. The main reason for that finding was that they considered that there had been no intent (умисла, намера) on the part of suspects to subject the applicant to inhuman or degrading treatment, which was, as a matter of domestic law, as interpreted in the applicant's case, a compulsory element of the reported crimes under Articles 142 and 143 of the Criminal Code (see paragraphs 20, 34 and 35 above). In this connection, the Court recalls that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see

Nencheva and Others, cited above, § 134). Furthermore, the fact that those suspected of ill-treatment were not charged (and punished) is not sufficient in itself to find a violation of Article 3 of the Convention, as the procedural obligation under Article 3 is not an obligation of result, but of means (see Đekić and Others v. Serbia, no. 32277/07, § 37, 29 April 2014).

92. However, the Court reiterates that what is in issue in the present proceedings is not individual criminal-law liability, but the State's international-law responsibility. Therefore, it must concentrate on the purpose of the obligation of effective investigation, which is to secure the effective implementation of domestic laws which protect the right not to be ill-treated and, in those cases involving State agents or bodies, to ensure their accountability (see Nikolova and Velichkova v. Bulgaria, no. 7888/03, § 63, 20 December 2007, and Bureš v. the Czech Republic, no. 37679/08, § 131, 18 October 2012). Otherwise, a State's duty to carry out an effective investigation would lose much of its meaning, and the rights enshrined in Article 3 of the Convention would be ineffective in practice (see Enukidze and Girgvliani v. Georgia, no. 25091/07, § 268, 26 April 2011).

93. The Court notes that the criminal investigation identified other pertinent issues which had an impact on the applicant's situation. In particular, the prosecuting authorities established that the applicant's placement in the RIBBS had been inappropriate; that the RIBBS had notified the competent authorities of its inability to care for the applicant; and that allegedly there had been shortcomings as regards the applicant's medical diagnosis by B. Hospital. Whereas these conclusions were made in the context of the charges brought against the RIBBS employees, the Court has not been informed that they led to any effective attempt to verify whether the system's failures had resulted from acts by the authorities' representatives or any other public servant, for which they could be held accountable.

94. In the Court's view, and notwithstanding that the authorities, as they held, were not confronted with allegations of wilful ill-treatment, their overall response in investigating the allegations of serious human rights violations, as in the present case, cannot be regarded adequate. The absence of any appropriate reaction, let alone redress, with respect to the events complained of, cannot be said to be compatible with the procedural obligation of the State under Article 3 of the Convention.

95. Accordingly, and having regard to the particular circumstances of the present case, there has been a violation of Article 3 of the Convention under its procedural limb.

2. Article 13 complaint

96. The applicant submitted that his guardian had been responsible for the neglect which he had suffered in relation to his placement and treatment in the RIBBS. Furthermore, the guardian had not initiated any proceedings regarding the events that had led to such a situation. Only the HCHR had brought proceedings in order have those responsible held accountable. It further reiterated its arguments (see paragraph 79 above) that the criminal investigation in the present case had been ineffective. In addition, it submitted statistical information based on its research, according to which the prosecuting authorities had investigated only seven cases out of thirty-two complaints of torture and inhuman and degrading treatment between 2009 and 2015. Similarly, out of 138 reported crimes of harassment, investigations had been carried out only in thirty cases. During the same period, out of twenty-two cases of alleged torture, in eight cases, the accused had been sentenced to a suspended

prison term (there had been no effective prison penalty). Out of fifty-six cases of alleged harassment, suspended prison sentences had been imposed in sixteen cases, and an effective prison penalty had been imposed in one case.

97. The Government argued that the applicant had an effective remedy in respect of his complaints under Article 3 of the Convention. Alternatively, if the Court were to find a violation of the procedural obligation under that provision, it would not be necessary for it to examine the allegations under this head separately.

98. Having regard to the grounds on which it has found a violation of the procedural aspect of Article 3, the Court declares the complaint under this head admissible and finds that no separate issue arises under Article 13 of the Convention (see Andonovski v. the former Yugoslav Republic of Macedonia, no. 24312/10, § 107, 23 July 2015).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. 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

100. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage, to be paid into a bank account which the respondent State would open in the applicant's name.

101. The Government contested the applicant's claim as unfounded. They also argued against opening a bank account in the applicant's name, referring to practical reasons (without giving further details). In addition, they submitted that it had not been specified who would be authorised to have such funds at his disposal, and for what purposes. Accordingly, if the Court were to find a violation of the Convention, the Court's judgment in this regard should constitute sufficient just satisfaction in itself for any non-pecuniary damage suffered by the applicant.

102. The Court considers that the applicant must have endured suffering as a result of his inappropriate placement in the RIBBS between June 2012 and April 2014, during which time he was frequently tied to his bed by his leg. This suffering undoubtedly aroused in him feelings of helplessness and anxiety. Ruling on an equitable basis, and having regard to the gravity of the violation, coupled with the duration and its effects in view of the applicant's particular vulnerability, the Court finds it appropriate to award the applicant EUR 18,000 in respect of non-pecuniary damage, plus any tax that may be chargeable. Appropriate arrangements are to be made so that this amount may be used by an authorised guardian of the applicant in the applicant's best interests.

B. Costs and expenses

103. The applicant also claimed EUR 3,350 for the costs and expenses incurred in the proceedings before the Court. This amount included legal fees for 100 hours of legal work, expenses related to

the printing and copying of 2,000 pages, and postal expenses. Apart from an itemised list, the applicant submitted no supporting documents. Any award under this head was to be paid directly to the HCHR.

104. The Government contested that claim as unsubstantiated and excessive, and submitted that the costs had not actually been incurred.

105. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see Editions Plon v. France, no. 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,650 for the proceedings before the Court, plus any tax that may be chargeable to the applicant. This amount is to be paid into the bank account of the HCHR.

C. Default interest

106. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. Declares, unanimously, the application admissible;

2. Holds, unanimously, that there has been a violation of Article 3 of the Convention on account of the inappropriate placement of the applicant in the RIBBS, the lack of requisite care provided and the inhuman and degrading treatment which he endured there;

3. Holds, by six votes to one, that there has been a violation of Article 3 of the Convention on account of the failure of the respondent State to discharge its procedural obligation under this Article;

4. Holds, unanimously, that there is no need to examine the complaint under Article 13 of the Convention;

5. Holds, unanimously,

(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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 18,000 (eighteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,650 (one thousand six hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of the HCHR;

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

6. Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ksenija Turković
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.T.U.
A.C.

PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

1. With all due respect to my colleagues, I cannot agree with their conclusion that in the instant case the respondent State has violated the so-called procedural limb of Article 3. Moreover, the instant case raises serious issues of procedural justice.

I. Scope of the procedural obligations stemming from Article 3

2. The majority states in paragraph 86 that the general principles relevant for the complaint under this head were summarized in M.S. v Croatia (no. 2), no. 75450/12, §§ 74 and 75, 19 February 2015). This latter judgment established the following principles:

"74. In the context of allegations of ill-treatment by the use of physical restraint against an applicant who was involuntary retained in a psychiatric hospital, the Court has held that Article 3 of the Convention required States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. The domestic legal system, and in particular the criminal law applicable in the circumstances of the case, must provide practical and effective protection of the rights guaranteed by Article 3. Wilful ill-treatment of persons who are

within the control of agents of the State cannot be remedied exclusively through an award of compensation to the victim (see Bureš v. the Czech Republic, no. 37679/08, § 81, 18 October 2012).
75. Where an individual raises an arguable claim of ill-treatment under Article 3 of the Convention, the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see Selmouni v. France [GC], no. 25803/94, § 79, ECHR 1999-V). The same applies to allegations of ill-treatment in the context of psychiatric internment where physical restraint has been used against the applicant (see Filip v. Romania (dec.), no. 41124/02, 8 December 2005, and Bureš, cited above, §§ 81 and 121, emphasis added)."

3. The majority rightly concluded that the criminal investigation against the director of the RIBBS and its employees was prompt (see paragraph 88 of the judgment) and thorough (paragraph 89 in fine). It also notes (in paragraph 90) that the investigation in respect of the guardian and Hospital B. produced no results but at the same time states – rightly - (in paragraph 91) that "the fact that those suspected of ill-treatment were not charged (and punished) is not sufficient in itself to find a violation of Article 3 of the Convention, as the procedural obligation under Article 3 is not an obligation of result, but of means..." In my view, the fact the investigation in respect of the guardian and Hospital B. has not yet resulted in a decision to discontinue the proceedings or prosecute is not sufficient to find a violation of Article 3 in the instant case.
This seems also to be the view of the majority, given that they rely on two other grounds - taken cumulatively - in order to find a violation of Article 3 under its procedural limb: (i) the narrow personal scope of persons under investigation and (ii) the absence of "appropriate reaction".
4. Concerning the first of the two grounds for finding a violation of the procedural obligations enshrined in Article 3, the majority states as follows: "the prosecuting authorities established that the applicant's placement in the RIBBS had been inappropriate; that the RIBBS had notified the competent authorities of its inability to care for the applicant; and that allegedly there had been shortcomings as regards the applicant's medical diagnosis by B. Hospital. Whereas these conclusions were made in the context of the charges brought against the RIBBS employees, the Court has not been informed that they led to any effective attempt to verify whether the system's failures had resulted from acts by the authorities' representatives or any other public servant, for which they could be held accountable (emphasis added)."
This argument implies that in order to satisfy the procedural obligations under Article 3 the prosecuting authorities should have verified whether the system's failures had resulted from acts by the authorities' representatives or any other public servant, for which they could be held accountable. It is obvious that if the answer was affirmative, these persons should have been prosecuted. This part of the reasoning is based upon the underlying implicit assumption that States have an obligation to enact and enforce legislation criminalizing acts and omissions by public officials which caused the system's failures. The approach adopted by the majority is problematic for several reasons.
5. Firstly, under a criminal system based upon the presumption of innocence, it is not the decision not to investigate or prosecute which requires justification, but rather the decision to investigate or prosecute. The obligation to investigate the acts or omissions of a specific person arises only if there

is credible information suggesting with sufficient plausibility that a criminal offence might have been committed by this person. In order to suggest that the prosecuting authorities should have verified "whether the system's failures had resulted from acts by the authorities' representatives or any other public servant, for which they could be held accountable", it is necessary to explain in much more detail which specific factual elements made such verification necessary and to identify more precisely the group of persons concerned.

6. Secondly, the Court's case-law identifies three types of failure which may lead to a violation of Article 2 or 3: institutional, individual or mixed (see Armani Da Silva v. the United Kingdom [GC], no. 5878/08, § 284, 30 March 2016). Institutional failures are "failures in the overall system rather than individual error entailing criminal or disciplinary liability". In the instant case the Court identified "systemic failures", which correspond to the institutional failures referred to in earlier case-law and which so far have not entailed criminal or disciplinary liability. Yet, for the majority, the prosecuting authorities should have checked "whether the system's failures had resulted from acts by the authorities' representatives or any other public servant, for which they could be held accountable". In other words, systemic failures may result from individual failures for which those responsible should be held criminally liable. The content and scope of the implicitly recognized obligation to criminalise acts and omissions by public officials, causing the system's failures, remains undetermined.

In any event, the per curiam opinion in the instant case marks an important change to the established approach. I note in this context that, in a parliamentary regime, the ultimate responsible for systemic failures lies with the Government, with a prime minister and a minister responsible for a specific area. The reasoning may therefore be understood as suggesting that legislation be enacted to criminalise failure by members of the Government to take actions in order to prevent or correct systemic failures.

7. Thirdly, criminal law should always remain ultima ratio Rei Publicae. Broadening the scope of criminal legislation requires strong justification and does not appear to be the most effective way of preventive systemic failures in the field of human-rights protection. More generally, developing a culture of punishment does not appear to be an effective measure for improving the quality of a legal system.

8. Concerning the second ground for finding a violation of Article 3 under its procedural limb, the majority affirms the following: "In the Court's view, and notwithstanding that the authorities, as they held, were not confronted with allegations of wilful ill-treatment, their overall response in investigating the allegations of serious human rights violations, as in the present case, cannot be regarded [as] adequate. The absence of any appropriate reaction, let alone redress, with respect to the events complained of, cannot be said to be compatible with the procedural obligation of the State under Article 3 of the Convention (emphasis added)."

This passage implicitly establishes the general obligation that violations of Article 3 are to be met with an overall adequate response or that an appropriate reaction should occur. The language used ("adequate response", "appropriate reaction") clearly goes beyond the scope of criminal law. Clearly, in the absence of prosecution, the adequate response required under the Convention would encompass non-criminal measures. The judgment therefore establishes a novel obligation which

does not stem from the existing case-law. The content of the obligation is vague and allows the Court a very broad judicial discretion.

9. It not clear how the two grounds relied on by the majority to find a violation of Article 3 under its procedural limb relate to each other. Here, one must note that they may appear contradictory to a certain extent, since one requires a broader criminal reaction whereas the other suggests that non-criminal measures may nonetheless be deemed generally adequate.

In any event, the lack of precision in the Court's reasoning is always detrimental to the cause of the international rule of law. The interpretation of Article 3 adopted by the majority has not been justified under the applicable rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties. Moreover, there is a risk that the highly precise standard of "a thorough and effective investigation capable of leading to the identification and punishment of those responsible" will now be diluted in a vague "adequacy of reaction" test.

10. If the Court establishes the existence of systemic or structural failures, it may recommend or order certain individual or general measures to be taken by the domestic authorities (addressed to date as a separate issue, usually under the headings "Article 41" for individual measures or "Article 46" for general measures). In the instant case, in spite of having established the existence of systemic failures, the majority have decided not to suggest any individual or general measures. Instead, the majority prefer to limit themselves to finding a violation of the procedural limb of Article 3, invoking the absence of measures which would have constituted an appropriate reaction in the instant case. This moves the issue of appropriate measures from the domain of adequate redress to the core of the procedural limb of Article 3. I am not sure that this approach will ensure more efficient protection of Convention rights.

II. Fairness of the proceedings in the instant case

11. In this context, the instant case raises a serious issue of procedural fairness. According to the established case-law of the Court (as summarized in the judgment in the case of Alexe v. Romania, no. 66522/09, § 37, 3 May 2016), "[l]e principe du contradictoire commande que les tribunaux ne se fondent pas dans leurs décisions sur des éléments de fait ou de droit qui n'ont pas été discutés durant la procédure et qui donnent au litige une tournure que même une partie diligente n'aurait pas été en mesure d'anticiper."[1] In the instant case, the Court put, inter alia, the following question concerning the procedural limb of Article 3 at the communication stage:

"4. Having regard to the procedural aspect of Article 3 of the Convention, did the investigation in the present case by the domestic authorities comply with the requirements of this provision (see Labita v. Italy [GC], no. 26772/95, § 131, ECHR 2000-IV)? The Government are invited to provide information and relevant documents as to the outcome of the disciplinary proceedings allegedly launched against the relevant staff of the SWCB and the RIBBS."

The parties were therefore expressly instructed by the Court to plead the case upon the basis of the obligation to carry out an effective investigation, which was summarized in the case of Labita v. Italy in the following terms:

"131. The Court considers that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible (see, in relation to Article 2 of the Convention, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161; the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I, p. 324, § 86; and the Yaşa v. Turkey judgment of 2 September 1998, Reports 1998-VI, p. 2438, § 98). Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance (see paragraph 119 above), be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see the Assenov and Others judgment cited above, p. 3290, § 102)." (emphasis added)

I note that these principles coincide with the principles summarized in M.S. v. Croatia (no. 2) (no. 75450/12, §§ 74 and 75, 19 February 2015) and invoked as the principles to be applied in the instant case.
The parties could therefore legitimately expect that the Court would decide the case on the basis of these principles and prepared their submissions accordingly. Yet, as explained above, in the subsequent part of the reasoning the majority decided to apply a different standard. This different standard requires that the Court examine different issues and that the parties provide evidence and put forward arguments going far beyond the principles enunciated in the cases of Labita v. Italy or M.S. v. Croatia (no. 2). Had the parties known that this different standard would be applied, they would have probably pleaded the case differently; in particular, the Government would have been able to address the issue whether the various measures taken by the national authorities in reaction to the facts of the case were generally adequate. The standards of a fair trial which the Court imposes upon the domestic courts have not been observed by the Court itself in the instant case.

III. Representation of minors before the Europe Court of Human Rights

12. The instant case also raises another procedural issue. The applicant is a minor, and his application was lodged by a non-governmental organisation which subsequently represented the applicant throughout the proceedings before the Court. The representation of minors who do not remain under the authority of their parents is an important matter which should be regulated in the Rules of Court. The present case reveals, once again, a lacuna in this instrument (compare the judgment in the case of A and B v. Croatia, (no. 7144/15, 20 June 2019), and my separate opinion appended to it).
In a situation where the parents are unable to represent their child, it is of crucial importance to ensure that the child is properly represented in the proceedings before the European Court of Human Rights. The person representing a child should identify and defend his best interests and carefully prepare a pleading strategy accordingly.

I agree with the view that third persons may, in exceptional circumstances, be allowed to initiate proceedings before the Court on behalf of persons who are not able to bring a case themselves. Once proceedings have been initiated, however, the representation of a minor by a non-governmental organisation at subsequent stages may be problematic. Firstly, the instant case reveals the potential risks of conferring parental rights to an institution (namely B. Social Welfare Centre) instead of to a specific physical person. It seems preferable that guardianship of a minor be exercised by a physical person who is personally accountable for his actions and omissions. Secondly, non-governmental organisations have their own views, objectives and interests, which are not necessarily identical with the best interests of the minor they represent. They are involved in numerous cases and are often engaged in lobbying for the promotion of their views as well as the interests they have decided to defend. Even if, apparently, this did not occur in the instant case, there is a risk that the case of a minor may be instrumentalised for the sake of achieving the organisation's general objectives, for instance for the purposes of strategic litigation, which is by its nature directed towards general issues. For these reasons, if an application is lodged by a non-governmental organisation on behalf of minor who does not remain under the authority of his parents and the person appointed by the domestic authorities to exercise parental rights finds himself in a situation of a conflict of interests, it is preferable to appoint a physical person as curator ad litem to represent the child throughout the proceedings before the Court.
The Rules of Court should be amended to fill the lacuna and it would be preferable to provide for the appointment of a curator ad litem in situations such as that in the instant case.

IV. Conclusion

13. To sum up: the proceedings raise concerns from the viewpoint of procedural fairness; the general principles applied in practice in the instant case are different from the general principles referred to as the legal basis for the judgment; the Court has decided to innovate and has established a vague obligation, presented as part of the procedural obligations of the State under Article 3 of the Convention.
I have doubts whether the international rule of law and human rights will ultimately be better protected under the majority's approach.

---

[1]. "[T]he principle of adversarial proceedings requires that courts should not base their decision on elements of fact or law which have not been discussed during the proceedings and which make the dispute develop in a way that even a diligent party would have been unable to anticipate (see Čepek v. the Czech Republic, no. 9815/10, § 48, 5 September 2013)." (unofficial translation).