



FIFTH SECTION

CASE OF RAŽNATOVIĆ v. MONTENEGRO

(Application no. 14742/18)

JUDGMENT

Art 2 (substantive) • Life • Positive obligations • No cogent elements to depart from domestic court finding that State-run psychiatric hospital neither knew nor ought to have known of immediate risk to voluntary patient's life through suicide

STRASBOURG

2 September 2021

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 Ražnatović v. Montenegro,

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

Síofra O’Leary, *President*,
Ganna Yudkivska,
Jovan Ilievski,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 14742/18) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Montenegrin nationals, Mr Dejan Ražnatović, Mr Darko Ražnatović and Mr Radojica Ražnatović (“the applicants”), on 20 March 2018;

the decision to give notice to the Montenegrin Government (“the Government”) of the complaint under the substantive aspect of Article 2 of the Convention concerning the suicide of M.R. and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 6 July 2021,

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

INTRODUCTION

1. The applicants complained under the substantive aspect of Article 2 of the Convention that their mother and spouse, M.R., had been able to commit suicide as a result of the negligence of a State-run psychiatric hospital where she had been voluntarily hospitalised.

THE FACTS

2. The applicants were born in 1980, 1987 and 1952 respectively, and live in Podgorica. They were represented by Mr B. Lutovac, a lawyer practising in Podgorica.

3. The Government were represented by their Agent, Ms V. Pavličić.

4. The facts of the case as submitted by the parties may be summarised as follows.

5. The applicants’ mother and wife, M.R. (born in 1955), was diagnosed with depression in 1999.

6. In the period 2000-2003 she was admitted as a voluntary in-patient to the Podgorica Psychiatric Clinic, the Dobrota Psychiatric Hospital and the

Mental Health Institute in Belgrade on a number of occasions. During that period, she attempted to commit suicide once (on 31 December 2001), while she was at home.

7. In the period 2003-2006 she saw a doctor at the Podgorica Psychiatric Clinic as an out-patient, though not on a regular basis. On 6 December 2006 she was admitted as a voluntary in-patient to the same hospital because she had attempted to commit suicide.

8. On 19 December 2006 M.R. was allowed to spend a religious holiday at home with her family. During her short stay at home, she again attempted to commit suicide and immediately returned to hospital.

9. In January 2007 M.R. spent one weekend at home with her family and then returned to hospital.

10. On the occasion of the birth of her grandchild on 12 February 2007, M.R. was again authorised to spend several days at home with her family. She returned to hospital at 11 a.m. on 14 February 2007. M.R. said to V.G., her psychiatrist, that she was nervous, but denied having suicidal thoughts. She added that she had been taking regular therapy at home. V.G. decided to give her a strong sedative and, about half an hour later, M.R. fell asleep. Her husband left the hospital soon after. When V.G. checked on her at 1.30 p.m., M.R. was still sleeping. Around 3 p.m. M.R. received regular therapy and told a psychiatrist on duty that she would go out into the hospital grounds, together with another patient, for a walk. However, the two of them left the hospital grounds without permission, jumped off a nearby bridge and drowned.

11. An official investigation was initiated on 20 February 2007. Having obtained statements from the staff of the Podgorica Psychiatric Clinic, the public prosecutor eventually decided not to prosecute. The applicants were notified of that decision on 16 October 2007. They did not bring any subsidiary prosecution (see paragraph 20 below).

12. On 21 March 2007 the applicants brought a civil action for damages against the Podgorica Psychiatric Clinic before the Podgorica Court of First Instance.

13. On 12 June 2008 the court heard the then director of the Podgorica Psychiatric Clinic, Ž.G. He said that the Podgorica Psychiatric Clinic had a good ratio of doctors to beds (eleven psychiatrists for forty beds) and that it had no closed wards. He added that closed wards were not a conducive environment for patients with depression such as M.R. It would, in his opinion, be inhuman to place such a patient in a closed ward.

14. On 10 November 2010 the court heard V.G., one of the psychiatrists at the Podgorica Psychiatric Clinic (M.R. had been her patient for the last two years of her life). She said that she had seen M.R. immediately after her return to the hospital on the morning of 14 February 2007. On that occasion, M.R. had told her that she had not slept well and that she had been nervous, but had denied having suicidal thoughts. M.R. had also told her that she had

been taking regular therapy at home. V.G. had therefore decided that M.R. should be given Flormidal, the strongest sedative available, in order to allow her to sleep for a couple of hours and prepare her for regular therapy. When asked by the applicants' lawyer why M.R. had not been placed in a closed ward on 14 February 2007, she replied that the Podgorica Psychiatric Clinic did not have closed wards and that, in any event, M.R.'s state of health had not been such as to justify her placement in a closed ward. In this regard, she agreed with Ž.G. that such wards were not a conducive environment for patients such as M.R. (see paragraph 13 above). In reply to another question from the applicant's lawyer, she explained that all patients had unrestricted access to the external grounds of the hospital during visiting hours and that they usually availed themselves of that opportunity.

15. The court also admitted two expert reports in evidence. According to a team from the Kragujevac Medical Faculty, M.R. should have been placed in a closed ward on 14 February 2007, given her earlier suicide attempts. Conversely, according to a team from the Novi Sad Medical Faculty, M.R.'s state on 14 February 2007 had not been such as to justify her placement in a closed ward or the use of mechanical restraints (such as leather straps). The team added that it was impossible to prevent all risk of suicide in the case of patients such as M.R. (there had been cases of such patients committing suicide even in closed wards). In view of the contradictory reports, the court invited the applicants to submit a third expert report. They failed to do so.

16. After a retrial, the Podgorica Court of First Instance delivered judgment on 9 July 2014. It considered that M.R. had displayed no signs of suicidal thoughts on 14 February 2007. Therefore, her state of health on that date had not been such as to justify her placement in a closed ward or the use of mechanical restraints. In that connection, it considered the report of the Novi Sad Medical Faculty (see paragraph 15 above) to be more in line with domestic law (see paragraph 21 below) and the international standards which had been developed in recent years. The court also accepted V.G.'s assessment that the use of Flormidal, in order to allow M.R. to sleep for a couple of hours and prepare her for regular therapy (see paragraph 14 above), had been appropriate and proportionate in the circumstances. The applicants had therefore failed to show that M.R. had not received adequate care. The court dismissed the applicants' action and ordered them to pay the hospital's legal costs to a total of 13,275 euros.

17. On 17 March 2015 the High Court in Podgorica upheld the judgment of 9 July 2014.

18. The Supreme Court dismissed the applicants' appeal on points of law on 24 June 2015.

19. In their constitutional appeal, the applicants invoked Article 2 of the Convention, *inter alia*. On 7 February 2018 the Constitutional Court dismissed their appeal. It discerned no reason to disagree with the decisions of the lower courts.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

20. The Code of Criminal Procedure 2003¹ was in force at the relevant time. Article 59 of that code provided that where the public prosecutor decided not to prosecute a criminal offence which was subject to public prosecution, the victim was entitled to initiate a subsidiary prosecution within eight days from the notification of that decision.

21. The Mental Health Act 2005² has been in force since 4 June 2005. In accordance with section 8 of that Act, mentally ill persons have the right to be cared for in the least restrictive environment and with the least restrictive or intrusive treatment available. In accordance with section 43 of that Act, a measure of restraint may be used only as a last resort, “for a duration of between several minutes and several hours”.

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

22. The relevant international law was outlined in *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, §§ 68-77, 31 January 2019.

THE LAW

ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

23. The applicants complained under the substantive aspect of Article 2 that the hospital had known, or ought to have known, that M.R. had posed a real and immediate risk of suicide and that it had failed to take reasonable measures to prevent that risk.

24. Article 2 of the Convention, in so far as relevant to the present case, reads as follows:

“1. Everyone’s right to life shall be protected by law. ...
...”

A. Admissibility

25. The Government maintained that the applicants had failed to exhaust all domestic remedies, as required by Article 35 § 1 of the Convention. In particular, they had not filed a criminal complaint regarding the death of

¹ *Zakonik o krivičnom postupku*, Official Gazette nos. 71/03, 07/04 and 47/06.

² *Zakon o zaštiti i ostvarivanju prava mentalno obojelih lica*, Official Gazette nos. 32/05, 73/10, 40/11 and 27/13.

M.R. or commenced a subsidiary prosecution following the decision of the public prosecutor not to prosecute (see paragraphs 11 and 20 above).

26. The applicants replied that they considered the Podgorica Psychiatric Clinic, rather than any of its employees, responsible for M.R.'s death. They had therefore decided to bring civil proceedings against the hospital (see paragraph 12 above).

27. At the outset, the Court stresses that determining whether a domestic procedure constitutes an effective remedy within the meaning of Article 35 § 1, which an applicant must exhaust, depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 134, 19 December 2017).

28. For example, the Court has held that, in the area of unlawful use of force by State agents – and not mere fault, omission or negligence – civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, were not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 76, 5 July 2016).

29. By contrast, in medical negligence cases the Court has considered that the procedural obligation imposed by Article 2, which concerns the requirement to set up an effective judicial system, will be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress to be obtained (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII).

30. The Court further recalls that in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (extracts)).

31. The Court notes that the present case concerns an alleged act of medical negligence within the context of a suicide during a period of voluntary hospitalisation in a psychiatric institution. Since the Government have not contested the effectiveness of a civil action for damages in this context, the Court considers that the applicants were not required to use the criminal avenue in addition to, or instead of, the civil avenue. The objection of non-exhaustion of domestic remedies raised by the Government must therefore be dismissed.

32. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

33. The applicants submitted that the hospital staff had known or ought to have known that M.R. posed a real and immediate risk of suicide, and that they had failed to do all that could reasonably have been expected of them to prevent that risk. In particular, they claimed that a stronger sedative should have been given to M.R. and that other measures of restraint should have also been employed.

34. The Government argued that the Court should accept the findings of the domestic courts, reached after fair and adversarial domestic proceedings, that M.R.'s suicide had been unforeseeable and that the care which she had received from the Podgorica Psychiatric Clinic had been adequate.

35. The present case is very similar to *Fernandes de Oliveira*, cited above. In *Fernandes de Oliveira* (§ 124), the Court held that the authorities had a general operational duty (the so-called *Osman* duty; see *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII) with respect to a voluntary psychiatric patient to take reasonable measures to protect him or her from a real and immediate risk of suicide. It further held that the specific measures required will depend on the particular circumstances of the case, and those specific circumstances will often differ depending on whether the patient is hospitalised voluntarily or involuntarily. A stricter standard of scrutiny may be applied, in the Court's assessment, in the case of involuntary patients.

36. Accordingly, the Court must examine whether the authorities knew, or ought to have known, that M.R. posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk by putting in place the restrictive measures available (see *Keenan v. the United Kingdom*, no. 27229/95, § 93, ECHR 2001-III). The Court will bear in mind the operational choices which must be made in terms of priorities and resources in providing public healthcare and certain other public services in the same way as it bears in mind the difficulties involved in policing modern societies (see *Fernandes de Oliveira*, cited above, § 124).

37. At the same time, the Court reiterates that the very essence of the Convention is respect for human dignity and human freedom. In this regard, the authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned and in such a way as to diminish the opportunities for self-harm, without infringing personal autonomy. The Court has acknowledged that excessively restrictive measures may give rise to issues under Articles 3, 5 and 8 of the Convention

(see *Fernandes de Oliveira*, cited above, § 112, and the authorities cited therein).

38. In order to establish whether the authorities knew or ought to have known that the life of a particular individual was subject to a real and immediate risk, triggering the duty to take appropriate preventive measures, the Court takes into account a number of factors, such as a history of mental health problems, the gravity of the mental condition, previous attempts to commit suicide or self-harm, suicidal thoughts or threats and signs of physical or mental distress (see *Fernandes de Oliveira*, cited above, § 115, and the authorities cited therein).

39. In this connection, the Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among many other authorities, *Klaas v. Germany*, 22 September 1993, § 29, Series A no. 269). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 180, ECHR 2011).

40. Turning first to M.R.'s history of mental health problems, it is common ground that she had suffered from depression over a long period and that she had been hospitalised at different psychiatric institutions, on a voluntary basis, on many occasions (see paragraphs 5-7 above).

41. As to suicidal thoughts or threats, the Court notes that the parties to the national proceedings did not dispute the fact that M.R. had attempted to commit suicide on three occasions, on 31 December 2001 and on 6 and 19 December 2006, each time at home (see paragraphs 6-8 above). It was further established that, during her last stay at the Podgorica Psychiatric Clinic, M.R. had been allowed to return home to spend time with her family on two occasions because the hospital considered that the risk she might pose to herself had diminished (see paragraphs 9-10 above). Lastly, relying on the testimony of the psychiatric doctor treating M.R. (see paragraph 14 above), the domestic courts found that M.R. had not displayed signs of suicidal thoughts on the last day of her life (see paragraph 16 above).

42. As to signs of physical or mental distress, on the basis of the clinical records for 14 February 2007, the domestic courts found that no worrying signs in M.R.'s behaviour had been noted. Notably, after having slept a couple of hours, at around 3 p.m. she had received regular therapy and had gone out for a walk, together with another patient (see paragraph 10 above).

The psychiatric doctor treating her explained that all patients had unrestricted access to the external grounds of the hospital during the visiting hours and that they usually availed themselves of that opportunity (see paragraph 14 above). That assessment was accepted by the domestic courts (see paragraph 16 above).

43. Since no cogent elements have been provided which could lead the Court to depart from the findings of fact of the national courts, the Court concludes that it has not been established that the authorities knew or ought to have known that there was an immediate risk to M.R.'s life on 14 February 2007.

44. Accordingly, the Court does not need to assess the second part of the *Osman/Keenan* test, namely whether the authorities had taken the measures which could reasonably have been expected of them (see *Fernandes de Oliveira*, cited above, § 132).

45. In the light of the foregoing, there has been no violation of Article 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 2 of the Convention.

Done in English, and notified in writing on 2 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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Victor Soloveytkhik
Registrar

Síofra O'Leary
President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth
1.	Dejan RAŽNATOVIĆ	1980
2.	Darko RAŽNATOVIĆ	1987
3.	Radojica RAŽNATOVIĆ	1952