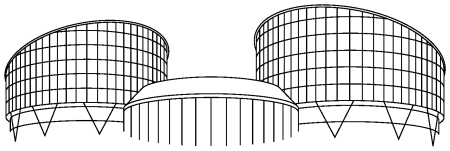

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FERNANDES DE OLIVEIRA v. PORTUGAL

(Application no. 78103/14)

JUDGMENT

STRASBOURG

28 March 2017

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 Fernandes de Oliveira v. Portugal,

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

Ganna Yudkivska, *President,*
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Motoc,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 7 March 2017,

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

PROCEDURE

1. The case originated in an application (no. 78103/14) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Ms Maria da Glória Fernandes de Oliveira ("the applicant"), on 4 December 2014.

2. The applicant was represented by Mr J. Pais do Amaral, a lawyer practising in Coimbra. The Portuguese Government ("the Government") were represented by their Agent, Ms M. F. da Graça Carvalho, Deputy Attorney General.

3. The applicant complained under Article 2 of the Convention that her son had committed suicide as a result of the psychiatric hospital's negligence in supervising him. Under Article 6 of the Convention she also complained about the length of the proceedings she had instituted against the hospital.

4. On 22 January 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1937 and lives in Ceira.

A. Background to the case

6. The applicant's son, A.J., was born in 1964. He had a history of mental disorders and of alcohol and drug addiction, and since 1984 had spent several periods in the Sobral Cid Psychiatric Hospital ("the HSC") in Coimbra: from 5 to 8 August 1984; from 15 March to 3 April 1985; from 15 to 28 November 1985; from 10 to 18 January 1993; from 1 to 3 September 1999; from 12 December 1999 to 14 January 2000; and from 2 to 27 April 2000.

7. According to A.J.'s clinical records, in September 1999 doctors told the applicant that she should seek an order for her son's compulsory confinement. During his hospitalisation in December 1999 the doctor treating A.J. instructed that he must not be permitted to leave the unit in which he was hospitalised.

8. During at least two of the periods he spent in hospital, A.J. was authorised to spend weekends at home with his family – three weekends during the period from 12 December 1999 to 14 January 2000, and two weekends during the period from 2 to 27 April 2000. During those two periods, A.J. also escaped from the HSC premises several times and sometimes went to the applicant's house.

B. Death of the applicant's son

9. On 1 April 2000 A.J. was voluntarily admitted to the HSC, upon medical advice, because he had attempted to commit suicide.

10. On 25 April 2000 A.J. went home for the weekend to spend Easter with the applicant and other members of his family, despite the reluctance of the doctor.

11. At around 10.30 p.m. the applicant took A.J. to the emergency ward of the Coimbra University Hospital because he had drunk a large amount of alcohol. According to the observation record completed by the emergency services, A.J. had behaved recklessly during the weekend because he had got drunk. They added that although A.J. had a history of mental weakness, depressive episodes and recurrent suicide attempts, those characteristics had not been observed that weekend. A.J. was subsequently sent back to the same HSC ward in which he was hospitalised.

12. On 26 April 2000 A.J. was kept under medical observation for the whole day. He was given medication and his state of health improved. He got up to dine and to welcome visiting family members.

13. On 27 April 2000 the hospital staff noted that between 8 a.m. and 4 p.m. A.J.'s behaviour had been calm and he had been walking around the unit in which he had been hospitalised. He had had lunch and an afternoon snack.

14. At around 4 p.m. the applicant called the hospital. She was told to call back later, during the afternoon snack, as her son was not inside the building at that time. She was assured that some minutes earlier he had been standing at the door and he looked fine.

15. At around 7 p.m. it was noticed that A.J. had not appeared for dinner, and a nurse informed the head nurse of his absence. The hospital staff then initiated searches in the areas of the HSC premises where patients were allowed to walk around freely, such as the cafeteria and the park.

16. At around 8 p.m. the coordinating nurse (*enfermeiro coordenador*) telephoned the applicant and told her that A.J. had not shown up for dinner.

17. At some time between 7 p.m. and 8 p.m. the hospital reported A.J.'s disappearance to the National Republican Guard (*Guarda Nacional Republicana*) and the applicant.

18. It is not known at what time A.J. left the hospital premises and followed a footpath towards the applicant's house. At around 5.37 p.m. he committed suicide by jumping in front of a train near the HSC premises.

C. Domestic proceedings against the hospital

19. On 17 March 2003 the applicant lodged a civil action with the Coimbra Administrative Court (*Tribunal Administrativo do Círculo de Coimbra*) against the HSC under the State Liability Act (*ação de responsabilidade civil extracontratual por ato de gestão pública*), seeking pecuniary and non-pecuniary damages of 100,403 euros (EUR).

20. The applicant claimed that her son had been treated at the HSC for mental disorders on several occasions; the first actual hospitalisation had been in 1993. He had been admitted to the hospital on 1 April 2000 because he had attempted to commit suicide. The fact that her son had been able to leave the hospital premises on 27 April 2000 during his hospitalisation had led the applicant to conclude that the hospital staff had acted negligently in the performance of their duties. Because of his suicide attempts and mental condition, her son should have been under medical supervision and the hospital staff should have prevented him from leaving the hospital premises. She further claimed that the HSC should have erected fencing around the boundaries of its premises in order to prevent patients from leaving. The fact that those duties had not been complied with reflected the poor organisation of the HSC services. Lastly, she argued that the HSC lacked a mechanism for checking the presence of patients and an emergency procedure capable of detecting a patient's absence, which would allow the hospital to take the measures required to ensure that patients returned safely.

21. On 29 October 2003 the court gave a preliminary decision (*despacho saneador*), specifying which facts were considered to be established and which remained to be established.

22. On 5 July 2005 the court ordered that an expert report be drawn up on A.J.'s clinical condition and the supervision measures required by that condition.

23. On 27 September 2006 a psychiatrist appointed by the Medical Association (*Ordem dos Médicos*) submitted his report, the relevant parts of which read:

> "...
>
> Although alcohol dependence was the predominant diagnosis, several other diagnoses were considered. In particular, dependent personality (*personalidade dependente*); delirious outbreaks (*surto delirante*); schizophrenia; manic-depressive psychosis (*psicose maníaco-depressiva*)...
>
> A.J.'s clinical history enables us to consider him an ill person with recurring relapses in excessive alcohol consumption ... but also another kind of symptomatology...
>
> ...
>
> There is no detailed reference in his clinical records to his psychopathological condition on 26 April 2000...
>
> ...
>
> The [plaintiff's] son suffered from disorders which caused depressive behaviour with a significant inclination to suicide.
>
> Taking into account the clinical documents, his clinical condition may have led to another attempt to commit suicide, which turned out to be fatal.
>
> In addition, the polymorphism of the patient's psychiatric condition should be emphasised. A psychopathological condition such as the patient's has a bad prognosis and suicide is frequently preceded by an attempt (or attempts) to commit suicide. ... Indeed, it must be clarified that ... it should also be considered that the hypothesis of [his] diagnosis could be of a borderline personality disorder [*perturbação de personalidade borderline*]...
>
> ...
>
> There is reference to a multiplicity of diagnoses, all of them capable of enhancing the risk of the patient's suicide (and also of suicidal behaviour).
>
> ...
>
> The clinical history and psychopathological framework [*quadro psicopatológico*], for the reasons already mentioned, would predict future suicidal behaviour; thus the occurrence of suicide is not surprising.
>
> With regard to prevention, containment and surveillance measures must without a doubt be adopted. But with a patient like this one, these measures are difficult to adopt (see for example his requests to be discharged despite the doctor's opinion, which is substantiated) and never enough because of the high potential for suicide.
>
> ...
>
> The fact that the patient had been on antidepressant treatment for more than two weeks, had wandered around the hospital without ever endangering his life ... does not

mean that the probability of that event (suicide) was negligible. However, it was hardly avoidable."

24. The first hearing took place on 8 October 2008. The applicant and the psychiatrist who had issued the medical opinion gave evidence at the hearing.

25. At five hearings the court heard evidence from different witnesses, *inter alia*, the applicant's daughter – A.J.'s sister; nurses, doctors and medical auxiliaries who had worked for or were still working for the HSC, some of whom had started their shift at 4 p.m. on 27 April 2000; a social worker employed by the HSC since 1995, who had had contact with A.J.; and the train driver. The court also analysed several documents attached to A.J.'s clinical file from the HSC.

26. On 9 March 2009 the court conducted an on-site inspection.

27. On 7 January 2010 the court held a hearing at which it adopted a decision concerning the facts.

28. On 25 April 2011 the Coimbra Administrative Court delivered a judgment in which it ruled against the applicant. If found that although her son had been suffering from a mental disorder, there was no causal link between his wholly unexpected suicide and an alleged violation of the hospital staff's duty of care. It noted, in particular, that the applicant's son had been suffering from a psychiatric disorder which had never been properly diagnosed, either because the symptoms were complex or because he had been addicted to alcohol and drugs. In this regard, it pointed out that over the years the applicant's son had been diagnosed with schizophrenia and depression. However, only after his death and as a consequence of an expert opinion requested from the Medical Association during the proceedings (see paragraph 23 above) was there an agreement that he had been suffering from a severe personality disorder. The court established that he had last been admitted to hospital after a suicide attempt. However, it considered that despite the possibility that people diagnosed with mental diseases such as that of the applicant's son might commit suicide, during the last days before his death he had not shown any behaviour or mood which could have led the hospital staff to suspect that 27 April 2000 would be different from the preceding days. The court thus concluded that the hospital staff could not have foreseen the suicide of the applicant's son and that his behaviour had been absolutely unexpected and unpredictable. With regard to the applicant's argument that the hospital should have supervised her son more effectively and erected fences or other barriers around the hospital premises, the court pointed out that the current paradigm in the treatment of mentally ill patients was to encourage social interaction. The existence of fencing would lead to the stigmatisation and isolation of mentally disabled patients. In the same way, any supervision of patients had to be carried out discreetly. The HSC had a surveillance procedure in place which consisted of verifying the patients' presence at meal and medication times; this was in

compliance with the most recent psychiatric science and respected the patients' right to privacy. With regard to the applicant's argument that the emergency procedure was non-existent, the court noted that it consisted in alerting the police and the patient's family. Therefore, the court found that there had been no omission in the duty of care on the part of the hospital.

29. On 12 May 2011 the applicant appealed to the Administrative Supreme Court, claiming that the first-instance court had wrongly assessed the evidence, that its findings of fact had been incorrect, and that it had wrongly interpreted the law.

30. On 26 September 2012 the Attorney General's Office attached to the Administrative Supreme Court, called upon to issue an opinion on the appeal, held that the first-instance judgment should be reversed. In their opinion, given that A.J.'s medical record stated that he had attempted to commit suicide on different occasions and considering that he had last been admitted to hospital because of a suicide attempt, a new attempt to commit suicide was likely and should have been foreseen. They noted that the hospital had failed to implement a supervision regime capable of preventing the applicant's son from leaving the hospital premises. They also argued that the increased monitoring of the patient was part of the hospital's duty of care and did not detract from the "open door" regime. They concluded that the monitoring measures put in place by the HSC were not adequate for an establishment categorised as a psychiatric hospital or for a patient with A.J.'s characteristics.

31. On 29 May 2014 the Administrative Supreme Court dismissed the applicant's appeal by two votes to one, upholding the legal and factual findings of the Coimbra Administrative Court. The Administrative Supreme Court held that the HSC had not breached any duty of care, as there had been no indication which could have led the hospital staff to suspect that the applicant's son would try to commit suicide, namely by leaving the hospital premises. The Supreme Court took into account that during previous periods of hospitalisation the applicant's son had also left the hospital premises, and that no link had been established between those "escapes" and a particular risk of suicide in so far as they had only been able to establish the existence of a single suicide attempt, on 1 April 2000. The Supreme Court considered that the counting of patients at meal and medication times was sufficient and had allowed the hospital staff to verify A.J.'s attendance during lunch and the afternoon snack on 27 April 2000. It concluded that there had been no anomaly in the functioning of the HSC, nor could any anomaly be attributed to either the lack of security fences or walls, or the method of counting patients.

32. In a dissenting opinion, one of the judges argued that the hospital should have secured the premises in some way in order to fulfil its duties of care and supervision. By not doing so, it had allowed patients to leave easily without being discharged, thus breaching those duties. As such, that

omission had been the cause of the "escape" and suicide of the applicant's son.

D. Background information concerning Sobral Cid Psychiatric Hospital

33. The HSC is located outside Coimbra on seventeen hectares of land, distant from any urban or industrial areas. It is part of the Coimbra Hospital and University Centre.

34. According to an on-site inspection made by the Coimbra Administrative Court on 9 March 2009 in the course of the proceedings against the hospital, the HSC has eighteen buildings dedicated to each hospital department. The grounds of the HSC do not have security fences or walls of any other kind. The buildings are surrounded by green areas with trees and other vegetation, and the different buildings are accessed by means of roadways (*arruamentos*) and paths (*passeios*), which are also surrounded by trees and other vegetation. The main entrance to the HSC has a barrier (*cancela*) and a security guard. One of the possible exits from the hospital premises leads to a shortcut towards a railway station platform (*apeadeiro ferroviário*). This shortcut is accessed by taking the road behind building no. 9. The station platform is around a fifteen to twenty minutes' walk from that part of the HSC's premises.

35. Pursuant to the guidelines prepared by the HSC, meals are taken in the hospital cafeteria and patients must remain there until the end of the meal. Patients are not allowed to leave the department without informing the relevant nurse in advance. An afternoon snack is usually provided at around 4.45 p.m.

36. According to articles which have been published in the media in recent years, several patients have managed to escape from the HSC's premises since at least 2007. Some of them were found and taken back to the hospital and others were found dead. For example, different local and national media have reported as follows:

(i) on 9 March 2008 the body of a patient who had escaped two weeks earlier was found close to the hospital premises (in *Diário de Coimbra*);

(ii) on 29 October 2008 a man escaped from the HSC and was hit by a car after jumping in front of it (in *Diário das Beiras*);

(iii) on 31 July 2008 the body of a patient who had escaped from the hospital the previous month was found in a river (in *Diário de Coimbra*);

(iv) on 14 August 2008 a patient who had been involuntarily hospitalised in the HSC escaped (in *Diário de Coimbra*);

(v) in early March 2010 three different patients escaped from the hospital; one of them was located by the police after stealing a car and another was found dead in a nearby river (in *bombeirospontopt*);

(vi) on 16 October 2011 a patient escaped from the HSC's premises and attacked two police officers with a hoe (in *Correio da Manhã*);

(vii) on 1 March 2015 two patients escaped from the HSC and stole a car by ousting the driver (in *Tvi24*).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic Law

1. The Health Act

37. The Health Act (Law no. 48/90 of 24 August 1990) provides that health care is dispensed by State services and establishments and by other public or private, profit-making or non-profit entities under State supervision. Under Basic Principle XIV of the Act, users of the health-care system have, among other rights, the right to freely choose their doctor and health-care establishment, the right to receive or refuse the treatment offered, the right to be treated in an appropriate and humane manner, promptly and with respect, the right to be informed about their condition, of possible alternative treatments and of the likely development of their condition, and the right to complain of the manner in which they have been treated and to receive compensation for any damage suffered.

38. The Health Act is regulated by Legislative Decree no. 11/93 of 15 January 1993, which approved the National Health-care System Regulations (*Estatuto do sistema nacional de saúde*). Under Article 38, the State has the task of supervising health-care establishments; the Ministry of Health is responsible for setting health-care standards, without prejudice to the functions assigned to the Medical Association and the Pharmacists' Association.

2. The Mental Health Act

39. The Mental Health Act (Law no. 36/98 of 24 July 1998 and amended by Law no. 101/99 of 26 July 1999) sets out the general principles of mental-health policy and regulates the compulsory confinement of those with psychiatric disorders. The relevant provisions read as follows:

Article 3 – general principles of mental health

"...

a) The provision of mental-health care is carried out at community level in order to avoid the removal of patients from their usual environment and to facilitate their rehabilitation and social integration;

b) Mental-health care is provided in the least restrictive environment possible.

..."

Article 7 - definitions

"...

a) Compulsory confinement: hospitalisation [ordered] by judicial decision regarding a patient with a severe mental disorder;

b) Voluntary confinement: hospitalisation at the request of the patient with a mental disorder or at the request of the legal guardian of a minor of fourteen years old."

3. Legislative Decree no. 48051 of 21 November 1967

40. Legislative Decree no. 48051, in force at the time the proceedings were instituted by the applicant, governed the State's non-contractual civil liability. It contained the following provisions of relevance to the instant case:

Article 2 § 1

"The State and other public bodies shall be liable to compensate third parties in civil proceedings for breaches of their rights or of legal provisions designed to protect the interests of such parties caused by unlawful acts committed with negligence (*culpa*) by their agencies or officials in the performance of their duties or as a consequence thereof."

Article 4

"For the purposes of this Decree, legal transactions which infringe statutory provisions and regulations or generally applicable general principles, and physical acts which infringe such provisions and principles or the technical rules and rules of general prudence that must be observed, shall be deemed unlawful."

Article 6

"For the purposes of this Decree, legal transactions which infringe statutory provisions and regulations or generally applicable general principles, and physical acts which infringe such provisions and principles or the technical rules and rules of general prudence that must be observed, shall be deemed unlawful."

41. In accordance with the case-law concerning the State's non-contractual liability, the State is required to pay compensation only if an unlawful act has been committed with negligence and there is a causal link between the act and the alleged damage.

4. Portuguese Civil Code

42. The relevant provisions of the Code read as follows:

Article 487

"1. It is for the injured party to prove liability for damage through negligence (*culpa*), unless there is a legal presumption of it.

2. In the absence of any other legal criteria, negligence is assessed with reference to the diligence of the *bonus pater familias*, given the circumstances of the case."

5. Case-law of the Supreme Court of Justice and the Administrative Supreme Court

43. In its judgment of 25 July 1985, the Supreme Court of Justice analysed the duty to supervise mentally ill patients who are hospitalised. It held that whenever a mentally ill patient was hospitalised and receiving treatment, the hospital had an obligation to comply with its medical and supervision duties. In the case at hand, the Supreme Court considered that the hospital had failed to fulfil that obligation by allowing a mentally disabled patient to leave the premises without a hospital discharge and by not making all due efforts to secure his immediate return.

44. In a judgment of 25 November 1998, the Supreme Court of Justice was called on to analyse whether by failing to object to a woman leaving the psychiatry department, the hospital was in breach of its duty of supervision. It considered that in the case under analysis, a breach had not occurred because it had been established, *inter alia*, that (i) the psychiatry department of the hospital functioned on the basis of an "open door" regime; (ii) that there had been no express order from the health service preventing the patient from leaving the department; (iii) the doctors had considered it inadvisable to restrict the patient's freedom of movement; (iv) on the day of her suicide attempt, the patient had appeared to act normally; and (v) the patient's suicide attempt could not have been predicted from her behaviour.

45. In its judgment of 29 January 2009 the Administrative Supreme Court considered that the duty to supervise a mentally ill patient who had jumped from a window in his room had not been breached. The Administrative Supreme Court noted, *inter alia*, that the duty of supervision existed only in relation to risks which could be ascertained by a prudent assessor. In the case under analysis, there had been no evidence of a suspicion that the patient might attempt to commit suicide. Thus, the level of supervision adopted had been in accordance with his condition and the foreseeable risks. The hospital had therefore not been responsible for the fact that the patient had jumped unexpectedly from the window.

B. International law

1. United Nations

46. General Assembly Resolution A/RES/46/119 of 17 December 1991 laid down several principles for the protection of persons with mental illness and for the improvement of their mental-health care. The relevant principles are the following:

Principle 8 – Standards of care

"1. Every patient shall have the right to receive such health and social care as is appropriate to his or her health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons.

2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort."

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...

4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

Principle 15 – Admission principles

...

2. Access to a mental health facility shall be administered in the same way as access to any other facility for any other illness.

3. Every patient not admitted involuntarily shall have the right to leave the mental health facility at any time unless the criteria for his or her retention as an involuntary patient...and he or she shall be informed of that right."

47. The United Nations Convention on the Rights of Persons with Disabilities (adopted by the United Nations General Assembly on 13 December 2006, Resolution A/RES/61/106) is designed to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity. The Convention updated and revised the standards which had been established by the above-mentioned General Assembly resolution. It was ratified by Portugal on 23 September 2009. The relevant parts of the convention read as follows:

Article 10 – Right to life

"State parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."

Article 14 – Liberty and security of a person

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

a. Enjoy the right to liberty and security of person;

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

2. States parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to

guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation."

48. In September 2014, the United Nations Office of the High Commissioner for Human Rights issued the following statement concerning Article 14 of the CRPD:

"Liberty and security of the person is one of the most precious rights to which everyone is entitled. In particular, all persons with disabilities, and especially persons with mental disabilities or psychosocial disabilities are entitled to liberty pursuant to article 14 of the Convention.

Ever since the CRPD committee began reviewing state party reports at its fifth session in April 2011, the Committee has systematically called to the attention of states party the need to correctly enforce this Convention right. The jurisprudence of the Committee on article 14 can be more easily comprehended by unpacking its various elements as follows:

1. The absolute prohibition of detention on the basis of disability. There are still practices in which state parties allow for the deprivation of liberty on the grounds of actual or perceived disability. In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived disability. However, legislation of several states party, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived disability, provided there are other reasons for their detention, including that they are dangerous to themselves or to others. This practice is incompatible with article 14 as interpreted by the jurisprudence of the CRPD committee.

2. Mental health laws that authorize detention of persons with disabilities based on the alleged danger of persons for themselves of for others. Through all the reviews of state party reports the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves of to others. The involuntary detention of persons with disabilities based on presumptions of risk or dangerousness tied to disability labels its contrary to the right to liberty. For example, it is wrong to detain someone just because they are diagnosed with paranoid schizophrenia.

..."

49. The United Nations Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mr Dainius Pūras, has set as "one of his priorities to look into the role of the health sector and health professionals in the implementation of ambitious goals by the CRPD". On 2 April 2015 he issued a report concerning the right to health for all people with disabilities and scrutinised the practice of deprivation of liberty in closed psychiatric institutions:

"96. The Convention is challenging traditional practices of psychiatry, both at the scientific and clinical-practice levels. In that regard, there is a serious need to discuss issues related to human rights in psychiatry and to develop mechanisms for the effective protection of the rights of persons with mental disabilities.

97. The history of psychiatry demonstrates that the good intentions of service providers can turn into violations of the human right of service users. The traditional arguments that restrict the human rights of persons diagnosed with psychosocial and intellectual disabilities, which are based on the medical necessity to provide those persons with necessary treatment and/or to protect his/her or public safety, are now seriously being questioned as they are not in conformity with the Convention. ...

99. A large number of persons with psychosocial disabilities are deprived of their liberty in closed institutions and are deprived of legal capacity on the grounds of their medical diagnosis. This is an illustration of the misuse of the science and practice of medicine, and it highlights the need to re-evaluate the role of the current biomedical model as dominating the mental-health scene. Alternative models, with a strong focus on human rihgts, experiences and relationships and which take social contexts into account, should be considered to advance current research and practice. ..."

2. Council of Europe

50. On 22 September 2004 the Committee of Ministers adopted Recommendation Rec(2004)10 concerning the protection of human rights and the dignity of persons with mental disorders. The relevant articles read as follows:

Article 7 – Protection of vulnerable persons with mental disorders

"1. Member States should ensure that there are mechanisms to protect vulnerable persons with mental disorders, in particular those who do not have the capacity to consent or who may not be able to resist infringements of their human rights.

2. The law should provide measures to protect, where appropriate, the economic interests of persons with mental disorders."

Article 8 – Principle of least restriction

"Persons with mental disorders should have the right to be cared for in the least restrictive environment available and with the least restrictive or intrusive treatment available, taking into account their health needs and the need to protect the safety of others."

Article 9 – Environment and living conditions

"1. Facilities designed for the placement of persons with mental disorders should provide each such person, taking into account his or her state of health and the need to protect the safety of others, with an environment and living conditions as close as possible to those of persons of similar age, gender and culture in the community. Vocational rehabilitation measures to promote the integration of those persons in the community should also be provided."

51. The explanatory memorandum to the recommendation states that the "principle of least restriction" is fundamental. It implies that if a person's illness improves, they should be moved to a less restrictive environment, when appropriate to his or her health needs.

52. Article 17 of the recommendation sets out the criteria governing involuntary placement and states that a person may only be subject to such a measure if he or she has a mental disorder and represents a significant risk

to himself or others because of it, and as long as the placement includes a therapeutic purpose, no less restrictive means are available, and the opinion of the person concerned has been taken into consideration.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

53. The applicant complained that the authorities had failed to protect the life of her son and were responsible for his death in violation of his rights under Article 2 of the Convention. In particular, she argued that the hospital had been negligent in the care of her son in so far as it had not supervised him sufficiently and the hospital premises had not had adequate security fencing to prevent him from leaving. Under Article 6 § 1 of the Convention she complained about the length of the proceedings she had brought against the hospital before the domestic courts.

54. The Court considers that the applicant's complaints should be examined solely from the standpoint of the substantive and procedural aspects of Article 2, bearing in mind that, since it is master of the characterisation to be given in law to the facts of the case, it is not bound by the characterisation given by an applicant or a government (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). Article 2, in so far as relevant to the present case, reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

A. Admissibility

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

B. Merits

1. The parties' submissions

56. The applicant submitted that, as a general principle, the treatment an individual required on account of his or her illness may have to be balanced against the need to adopt restrictive and monitoring measures in the light of

his or her condition. In that regard, she argued that the monitoring procedure established by the HSC had been ineffective in so far as it did not pose any obstacle to patients trying to leave the hospital premises, as the case of her son had demonstrated.

57. The applicant pointed out that her son had never been properly diagnosed. She also argued that A.J.'s history of suicide attempts, together with his mental disorders, demonstrated that he had been at particular risk, which should have led the HSC to adopt a special surveillance measure with regard to him. Given A.J.'s suicidal attempts, his suicide should have been predicted by the hospital. Moreover, with reference to the case of *Reynolds v. the United Kingdom* (no. 2694/08, 13 March 2012), the HSC should have adopted measures to prevent her son from leaving the hospital premises. The fact that A.J. had not been compulsorily confined did not relieve the HSC of the obligation to comply with its duties of care and vigilance. The applicant concluded that the Portuguese authorities had failed to ensure the protection of her son's life, in violation of the substantive limb of Article 2 of the Convention.

58. As regards the procedural aspect of Article 2, the applicant contended that the proceedings against the HSC on account of her son's death had been excessively lengthy. They had started on 17 March 2003 and the hearing of evidence had not taken place until five years later, following a series of unexplained delays. The length of the proceedings, for which the Portuguese authorities were responsible, had therefore compromised the effectiveness of the judicial system. Consequently, there had been a violation of the procedural limb of Article 2 of the Convention.

59. The Government conceded that the HSC was located in ample grounds with no security fencing or walls. They submitted, however, that it had effective mechanisms for monitoring its patients and for searching for them if they disappeared. In relation to the first procedure, it consisted in verifying the patients' presence five times a day at meal and medication times. As for the latter, it consisted in searching for the missing patient on the HSC premises. In the event that the search was unsuccessful, the hospital would inform the family and the police authorities of the patient's disappearance. Both procedures had been activated two to three hours after the afternoon snack when the HSC staff noticed A.J.'s absence. The Government further argued that the domestic courts had considered those two procedures to be effective. All three aspects were based on state-of-the-art developments in psychiatric science and were in line with international human rights recommendations from the United Nations, the Council of Europe and the European Union based on the least possible restriction of rights.

60. The Government submitted that the applicant's son had been admitted to the HSC on several occasions following crises related to the over-consumption of alcohol and on at least one occasion, the ingestion of

drugs. His hospitalisation had had a therapeutic purpose geared primarily to achieving his rehabilitation and reintegration into everyday life. It had been carried out on a voluntary basis and for short periods of time. As such, the medical team had recommended that A.J. be treated under an open regime in which he could walk around the hospital premises. The applicant's son had also been allowed to leave the premises provided that he communicated his intention to the nurse in advance, as stipulated in the HSC's guidelines.

61. The Government pointed out that, despite his suicide attempt a few weeks earlier, A.J.'s condition on 26-27 April 2000 had not given rise to any concern of a possible imminent risk. In fact, he had wandered freely and safely around the hospital. In addition, before Easter he had been authorised to spend some weekends at home. There was therefore no factor capable of suggesting that there had been a clear and immediate risk that he would commit suicide and that the adoption of closer surveillance was required.

62. The Government also pointed out that the applicant could have requested A.J.'s compulsory confinement. Under such a regime her son would have been prevented from leaving the hospital premises.

63. Lastly, with regard to the procedural limb of Article 2, the Government acknowledged that the length of the domestic proceedings had been excessive. They noted that all evidentiary steps had taken place in the course of the proceedings, namely: different doctors and nurses had been heard at the hearings; an expert report had been ordered and several clinical reports had been analysed. In addition, the adversarial principle had been complied with and the applicant had had the opportunity to present her version of the facts.

64. The Government concluded that in the instant case there had been no violation of their positive or procedural obligations under Article 2 of the Convention.

2. The Court's assessment

(a) General principles

65. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe, enjoins the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III).

66. Those principles apply in the public-health sphere too. States are required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives and to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the

public or the private sector, can be determined and those responsible made accountable (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I, and *Dodov v. Bulgaria*, no. 59548/00, § 80, 17 January 2008). In the case of mentally ill patients, consideration must be given to their particular vulnerability (see, *mutatis mutandis*, *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III; *Rivière v. France*, no. 33834/03, § 63, 11 July 2006; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 131, ECHR 2014).

67. The Court further reiterates that Article 2 may imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself (see *Renolde v. France*, no. 5608/05, § 81, ECHR 2008 (extracts), and *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011). However, in the particular circumstances of the danger of self-harm, the Court has held that for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the relevant time that the life of the person concerned was at real and immediate risk and that they had not taken measures which could reasonably have been expected of them (see *Hiller v. Austria*, no. 1967/14, §§ 52-53, 22 November 2016, and *Keenan*, cited above, § 93). Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (compare with *Tanrıbilir v. Turkey*, no. 21422/93, §§ 70-71, 16 November 2000, and *Keenan*, cited above, § 90). 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, 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 (see, *mutatis mutandis*, *Mitić v. Serbia*, no. 31963/08, § 47, 22 January 2013, and *Jagiełło v. Poland* (dec) [Committee], no.21782/15, § 23, 24 January 2017).

68. As regards the procedural obligation of Article 2, it has been interpreted by the Court as imposing an obligation on the State to set up an effective judicial system for establishing both the cause of death of an individual under the care and responsibility of health-care professionals and any responsibility on the part of the latter. This provision requires that the protective mechanisms afforded by domestic law should not just exist in theory. Above all, they must also operate effectively in practice within a time-span such that the courts can complete their examination of the merits of each individual case; this requires a prompt examination of the case without unnecessary delays (see *Šilih v. Slovenia* [GC], no. 71463/01, §§ 155 and 195, 9 April 2009).

(b) Application of those principles to the instant case

(i) The substantive aspect of Article 2

69. The Court notes at the outset that it is common ground between the parties that the applicant's son, A.J., was mentally ill and that he had last been admitted to hospital on a voluntary basis on account of a suicide attempt which had taken place on 1 April 2000. The parties' views differ, however, when it comes to the question of the foreseeability of A.J.'s suicide and the hospital's duty to prevent him from escaping and taking his own life by further monitoring him and erecting some kind of protective fencing around the hospital premises so that it would not be so easy for patients to leave the hospital.

70. The Court observes that during his hospitalisation the applicant's son managed to leave the hospital without authorisation on different occasions during the period from 12 December 1999 to 14 January 2000 and during the period from 2 to 27 April 2000 (see paragraph 8 above).The last occasion, which resulted in his suicide, took place on 27 April 2000, less than a month after he had attempted to commit suicide. According to the last clinical observation made on 25 April 2000, A.J.'s "depressive episodes and recurrent suicide attempts" were known to the health services (see paragraph 11 above). Moreover, the Court notes that when A.J. was admitted to hospital in December 1999, the doctor gave instructions for him not to leave the unit in which he had been hospitalised and in September 1999, the doctors recommended that the applicant seek a judicial order to have her son confined (see paragraph 7 above). The Court cannot speculate as to what the doctors' reasons could have been to justify such instructions and recommendation. It considers, however, that a risk of harm to him or to others must have existed. The Court also observes that according to the expert report submitted to the proceedings at the request of the Coimbra Administrative Court, "the clinical history [of the applicant's son] and the psychopathological framework [*quadro psicopatológico*] ...would predict future suicidal behaviour" and the fact that he had wandered around the hospital without endangering his life should not be understood as meaning that the risk of suicide was negligible (see paragraph 23 above). The question therefore arises as to whether A.J.'s suicide was foreseeable and whether the hospital staff did all that could reasonably be expected of them.

71. In *Renolde v. France* (cited above), the Court found a violation of Article 2 because the authorities had known from a previous suicide attempt that the applicant's brother was suffering from an acute psychotic disorder capable of resulting in self-harm and did not take the required preventive operational measures to protect his life. The case of *Reynolds v. the United Kingdom* (cited above) concerned a voluntary in-patient who had killed himself by breaking and jumping out of a sixth-floor window. The applicant's son had no history of self-harm or attempted suicide but had

heard voices ordering him to kill himself and his condition was known to the hospital staff. The Court held that the applicant had an arguable claim that an operational duty under Article 2 had arisen to take reasonable steps to protect her son from a real and immediate risk of suicide and that that duty had not been fulfilled. In the case of *Keenan*, on the other hand, the Court found no violation of Article 2 because there had been no reason for the authorities to have been alerted on the day of the inmate's death that he was in a disturbed state of mind, rendering a suicide attempt likely, even though he had voiced such thoughts. In finding that there had been no violation of Article 2 of the Convention, the Court had regard, in particular, to the fact that the authorities had "responded in a reasonable way to Mark Keenan's conduct, placing him in hospital care and under watch when he evidenced suicidal tendencies" (see *Keenan*, cited above, § 96).

72. In the instant case, having regard to A.J.'s clinical history and in particular the fact that he had attempted to commit suicide three weeks earlier, the Court considers that the hospital staff had reasons to expect that he might try to commit suicide again. Moreover, A.J. had previously escaped from the hospital premises on different occasions; another escape attempt should therefore have been foreseen by the hospital staff with the possibility of a fatal outcome in the light of his diagnosis (see, *mutatis mutandis*, *Reynolds*, cited above, § 61, and *Renolde*, cited above, § 89).

73. The Court is aware of the emerging trend concerning persons with mental disorders and the need to provide treatment in the light of the "principle of least restriction", with treatment under an "open door" regime being the most advisable option in view of state-of-the-art psychiatric science, as pointed out by the Government, and how these trends are reflected in several international documents (see paragraphs 46-52 above). It considers, however, that treatment under an "open door" regime cannot exempt the State from its obligations to protect mentally ill patients from the risks they pose to themselves, in particular when there are specific indications that such patients might commit suicide. Accordingly, a fair balance must be struck between the State's obligations under Article 2 of the Convention and the need to provide medical care in an "open door" regime, having in account the individual needs of special monitoring of suicidal patients. The Court notes in this regard that the Government contended that the applicant had never requested A.J.'s compulsory confinement. It considers, however, that in this balancing exercise, a difference should not be made as to the nature of a patient's hospitalisation: regardless of whether the hospitalisation was of a voluntary or an involuntary nature, and in so far as a voluntary in-patient is under the care and supervision of the hospital, the State's obligations should be the same. To say otherwise would be tantamount to depriving voluntary in-patients of the protection of Article 2 of the Convention.

74. In the instant case, the Court notes that the HSC checked whether patients were present during meal and medication times. In addition, they had a mechanism to be put in place when a patient's absence was noted, which consisted in searching for the missing patient on the hospital premises and informing the police and the family. In the present case, A.J. was last seen after 4 p.m., during the afternoon snack, which he seems to have attended and which, according to the hospital guidelines, took place at around 4.45 p.m. He died at 5.37 p.m. when he jumped in front of a train, fifteen to twenty minutes' walking distance from the HSC. His absence was not observed until around 7 p.m. because he had not shown up for dinner. Thus A.J. was already dead when the emergency procedure was activated. The above-mentioned procedures were thus ineffective in preventing his escape from the hospital and, ultimately, his suicide. The Court further notes that the risk was exacerbated by the open and unrestricted access from the hospital grounds to the railway platform (see paragraphs 34-36 above).

75. In the light of the State's positive obligation to take preventive measures to protect an individual whose life is at risk, and the need to take all necessary and reasonable steps in the circumstances (see *Keenan*, cited above, § 91), it might have been expected that the hospital staff, faced with a mentally ill-patient who had recently attempted to commit suicide and who was prone to escaping from the hospital premises, would adopt some safeguards to ensure that he would not leave the premises, as pointed out by the Attorney General's Office in the opinion attached to the appeal before the Administrative Supreme Court (see paragraph 30 above). Furthermore, it might also have been expected that the authorities would have monitored A.J. on a more regular basis. In this regard, the instant case is distinguishable from *Hiller*, cited above, in which there were no signs in the hospital records of any suicidal thought or attempt; for that reason the Court considered that in the mentioned case the hospital staff could not have had any reason to expect the suicide and, therefore, had not acted negligently in allowing the mentally ill-patient to take walks on his own.

76. The Court therefore concludes that there has been a violation of Article 2 of the Convention under its substantive limb.

(ii) The procedural aspect of Article 2

77. As regards the judicial response provided for the establishment of the responsibility of the HSC in relation to the applicant's son's death, the Court observes that the proceedings before the domestic courts commenced on 17 March 2003 and were finally determined by the decision of the Administrative Supreme Court on 29 May 2014 (see paragraphs 19 and 31 above). Thus, they lasted eleven years, two months and fifteen days for two levels of jurisdiction.

78. In this connection, the Court reiterates that in Article 2 cases concerning proceedings instituted to elucidate the circumstances of an

individual's death, lengthy proceedings such as these are a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify such a course of proceedings (see *Kudra v. Croatia*, no. 13904/07, § 113, 18 December 2012, and *Igor Shevchenko v. Ukraine*, no. 22737/04, § 60, 12 January 2012). In the instant case, the Court notes that the Government have acknowledged that the domestic proceedings were lengthy but have failed to provide any plausible reason justifying it (see paragraph 63 above).

79. Regarding the overall length of the proceedings, the Court cannot fail to observe that there were several long periods of unexplained inactivity. In particular, it took two years for the Coimbra Administrative Court to request an expert opinion on A.J.'s clinical condition (see paragraph 22 above); the first hearing took place on 8 October 2008, two years after the submission of the expert report to the file (see paragraphs 23 and 24 above); and it took almost three years after that for the court to deliver its judgment (see paragraph 28 above).

80. In those circumstances the Court finds that the relevant mechanisms of the domestic legal system, seen as a whole, did not secure in practice an effective and prompt response on the part of the authorities consonant with the State's procedural obligations under Article 2 of the Convention. Moreover, the very passage of time prolongs the ordeal for members of the family (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II). The Court cannot accept that domestic proceedings instituted in order to shed light on the circumstances of an individual's death should last for so long. In circumstances such as those in the present case, a prompt response by the authorities is essential in maintaining public confidence in their adherence to the rule of law, and also to allow the dissemination of information and thereby prevent the repetition of similar errors and contribute to the safety of users of health services. It is thus for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention, and in particular those arising out of Article 2.

81. In the light of all these considerations, the Court concludes that there has been a violation of the procedural limb of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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. Pecuniary damage

83. The applicant claimed 703.80 euros (EUR) in respect of pecuniary damage, representing the expenses incurred for A.J.'s funeral. She supported her claim with an invoice for the funeral service. She further claimed EUR 40,000, corresponding to the loss of income sustained in respect of the EUR 200 monthly maintenance that her son used to pay her, calculated on the basis of her life expectancy.

84. The Government considered that there was no causal link between the alleged violation of the Convention and the pecuniary damages claimed. They also argued that the applicant's claim was speculative and lacked any supporting data.

85. With regard, firstly, to the reimbursement of funeral expenses, the Court considers that this claim is not unreasonable, since the applicant had to bury her son as a result of his suicide. It also notes that the applicant properly submitted a document in support of her claim. It therefore awards in full the amount claimed under this head.

86. As to the alleged loss of financial support, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

B. Non-pecuniary damage

87. The applicant claimed EUR 40,000 in respect of non-pecuniary damage caused by the death of her son and the length of the proceedings against the hospital.

88. The Government contested this claim, which they considered excessive.

89. The Court considers that the applicant must have suffered anguish and distress as a result of the circumstances of her son's death and her inability to obtain a domestic decision in a reasonable time. In those circumstances, it finds it reasonable to award the applicant EUR 25,000 in respect of non-pecuniary damage.

C. Costs and expenses

90. The applicant also claimed EUR 409 for the costs and expenses incurred before domestic courts, representing the legal fee she had paid. She submitted the relevant invoice in support of her claim.

91. The Government pointed out that the document submitted by the applicant did not show that the expenses had been actually incurred.

92. 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 awards in full the sum claimed under this head, plus any tax that may be chargeable to the applicant.

D. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of the procedural aspect of Article 2 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 703.80 (seven hundred and three euros and eighty cents), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 25,000 (twenty five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 409 (four hundred and nine euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President