Selected Legislation and Jurisprudence

European Court of Human Rights*

ECHR 2017/1 *Case of Červenka v. The Czech Republic*, 13 October 2016, no. 62507/12 (First Section)

The Facts

In January 2005 a district court deprived the applicant, born in 1956, of legal capacity on the basis that he was suffering from alcoholic dementia and was unable to perform any legal acts of his own. He attempted to regain his legal capacity on numerous occasions, but his requests were always refused.

Between 2004 and 2010 he was repeatedly admitted to a psychiatric hospital, for a total period of over 27 months. Between February and August 2011 he was held against his will in a social care home, a private institution. He was not permitted to leave the home. In August 2011 he was transferred to a hospital, which he was discharged from in September 2011.

The applicant made numerous complaints about his placement in the social care home; to his public guardian, the police, the director of the care home and the courts. None of these were successful. In July 2011, he signed power of attorney to a lawyer. The applicant engaged in a wide array of litigation (including constitutional complaints), requesting his release from the care home, a review of the lawfulness of his detention, and claims for damages against the State on the grounds that his detention had been unlawful and the courts had followed incorrect procedures. None of these complaints were successful:

* These summaries are based on the provisional text of the judgements of the European Court of Human Rights. These judgments are still subject to editorial revision before their reproduction in Reports of Judgments and Decisions. For the full provisional text, see: <http://www.echr.coe.int>.

often on the grounds that the applicant and his appointed representatives lacked legal capacity to make such claims, and/or because the courts found that his containment had not been unlawful.

The Law

Alleged Violation of Article 5 §§ 1 and 4 of the Convention

The applicant complained that his involuntary placement in the social care home had violated his right to liberty and that he had been unable to institute any court proceedings to have the lawfulness of his detention examined and his release ordered. He relied on Article 5 §§ 1 and 4 of the Convention, which provides respectively the right to liberty and the right to take proceedings by which the lawfulness of someone's detention shall be decided speedily by a court.

Article 5 § 1 of the Convention

The Court notes that it has already had opportunities to examine the placement of mentally incapacitated individuals in social care homes, and found that it amounted to deprivation of liberty within the meaning of Article 5 § 1.

In the present case, the applicant was declared fully incapacitated at the relevant time and he could not leave the social care home on his own during the day without being accompanied or without the psychiatrist's approval. He was compulsory placed in the social care home on the basis of an agreement signed by his public guardian. While he did not show clear disagreement on the day of his admission or shortly beforehand, from his subsequent conduct it was obvious that he had not consented to his placement there. The Court further notes that although the applicant was placed in a private social care institution, his confinement was requested by his public guardian, which had been appointed by the court.

In the light of the foregoing, the Court concludes that the applicant was "deprived of his liberty", within the meaning of Article 5 § 1 of the Convention, from 7 February to 23 August 2011 with a fifteen-day interruption.

The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful". It observes that the lawfulness of the applicant's detention was not reviewed by a domestic court, as would be the normal procedure in cases of involuntary hospitalisation. The reason was that since the guardian had consented to the applicant's placement, the applicant was considered, as a matter of domestic law, to be in the social care institution voluntarily. Accordingly, the applicant's placement could be considered to be "lawful", if that term is construed narrowly, in the sense of the formal compat-

ibility of his detention with the procedural and material requirements of the domestic law.

The Court notes that various international bodies issued opinions and reports indicating a trend in international standards to require that the detention of incapacitated persons be accompanied by the requisite procedural safeguards, namely by way of judicial review. Judicial review — instituted automatically or brought about by the ward or some other suitable person — of a guardian's consent to deprivation of liberty of their ward could provide, in the view of the Court, a relevant safeguard against arbitrariness.

The Court observes that the applicant's admission to the social care home fully depended on the consent of his public guardian, who was an employee of the municipal office. It notes that while the applicant's public guardian formally talked to him prior to his transfer to the social care home, it does not appear from the record of their conversation that she clearly explained to him the real character of his placement, but led him to believe that he would receive medical treatment and undergo rehabilitation. The Court considers that a procedure which merely required the public guardian's consent to the admission of the applicant to the social care home does not provide a sufficient safeguard against arbitrariness.

The Court reiterates that one of the principal issues in examining the effectiveness of a remedy is whether it could offer adequate redress. Where the complaint is, as in the present case, about the deprivation of liberty of a fully incapacitated person, based on an agreement signed by his guardian whose competence has been put in doubt and where it is clear that the deprivation was carried out against the person's will, an adequate remedy is primarily one capable of immediately terminating the continued violation by ordering the person's release. The specific requirements of Article 5 § 4 of the Convention concerning the judicial character of a necessary procedure, including guarantees of an independent and impartial review based on the adversarial nature of the procedure and the principle of equality of arms, are inherent in such a remedy. Moreover, retrospective compensatory relief could be supplementary to that remedy.

The Court observes that the national courts did not carry out a judicial review on the lawfulness of the applicant's admission to and confinement in the social care home. Moreover, the applicant was fully legally incapacitated, and did not therefore have any independent standing before the domestic courts. Indeed, his public guardian systematically disagreed with any procedural measure initiated by him.

The Court notes that the district court appointed a new guardian chosen by the applicant on 3 June 2013. It considers, however, that any procedural steps

which the guardian could have undertaken in order to have the lawfulness of the applicant's confinement in the social care home reviewed seem to be purely theoretical and speculative given that he was appointed one and a half years after the court had approved, *ex post facto*, both the applicant's admission to the social care home and the termination of his stay there. Even after the applicant's placement became voluntary under the domestic law, it was not lawful, as it was not accompanied by sufficient guarantees against arbitrariness.

Having regard to the foregoing, the Court considers that the applicant's deprivation of liberty was not justified by sub-paragraph (e) of Article 5 § 1.

Article 5 § 4 of the Convention

Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions, which are essential for the "lawfulness" of their deprivation of liberty. In the case of detention on the grounds of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental illness, are not fully capable of acting for themselves.

The Court notes that the applicant's detention lasted more than six months, which cannot be considered too short a period to initiate judicial review. It further observes that the domestic courts were not empowered to intervene in the applicant's confinement in the social care home because the applicant was considered to be there voluntarily on account of his guardian's consent. The Court therefore concludes that there were no proceedings in which the lawfulness of the applicant's detention could have been determined and his release ordered.

Alleged Violation of Article 5 § 5 of the Convention

The applicant complained that under domestic law he did not have any enforceable right to compensation for his unlawful detention. He relied on Article 5 § 5, which provides a right to compensation in case of unlawful detention.

In the instant case the applicant was not successful with his action for damages brought under the State Liability Act. The district court did not accept the power of attorney he had given his representatives because of his full legal incapacitation and as the guardian ad litem had not joined the applicant's action for damages.

The Court further observes that the State Liability Act provide for compensation for damage resulting from an unlawful judicial decision. However, that was not the case in this instance: the Czech courts found the measure to have been lawful. The Court therefore concludes that the applicant was unable to

claim any compensation under the above-mentioned Act in the absence of acknowledgment by the national authorities that the placement was unlawful.

As to the Government's argument that the new guardian in whom the applicant had placed his trust could and should have intervened in the proceedings for damages, thus enabling the court to examine the applicant's claim for damages on the merits, the Court finds this assertion unconvincing. It notes that the new guardian was appointed on 3 June 2013, more than one month before the proceedings for damages were discontinued. However, it is not clear when the decision appointing the new guardian became final, whether it was notified to the applicant, whether the former public guardian explained to the new guardian the details of the proceedings for damages, including the fact that the guardian ad litem had been appointed for those proceedings, and whether, accordingly, the new guardian was enabled to get involved in the case with due diligence.

The Court cannot disregard the fact that the manner in which the State Liability Act was applied in the present case precluded the applicant from obtaining compensation for the detention that was imposed in breach of Article 5 § 1 of the Convention. Having rejected the applicant's compensation claim on essentially formal grounds, the Czech courts did not interpret or apply the domestic law in the spirit of Article 5 of the Convention.

Other Alleged Violation of the Convention

The applicant complained under Article 8 of the Convention that his confinement in the social care home had violated his rights to home, correspondence and private life on account of the limitation arising from his detention and involuntary medication. Furthermore, under Article 13 of the Convention he complained that he had had no effective remedy for violations of his rights under Article 5 §§ 1, 4 and 5 and Article 8. Lastly, relying on Article 14 in conjunction with Articles 5 and 8, the applicant complained that he had been discriminated against on grounds of his mental disability and that he had been denied reasonable accommodation, as he had been placed in the social care home instead of being provided with services in the community.

The Court observes that the applicant's constitutional appeals duly addressed only the issues concerning his deprivation of liberty. The fact that the Constitutional Court is bound by the content of the final plea in constitutional appeals is well known and constitutes a well-established practice of this high judicial instance, which pursues the principle of good administration of justice. As information on that practice is available to the public, the Court

considers that the applicant's legal representative should have been aware of it and acted accordingly. In the light of these circumstances, this part of the application must be rejected under Article 35 §§ 1, 3 (a) and 4 of the Convention (non-exhaustion of domestic remedies).

For these reasons, the Court, unanimously, holds that there has been a violation of Article 5 §§ 1, 4 and 5 of the Convention and declares the remainder of the application inadmissible.

ECHR 2017/2 Case of Otgon v. The Republic of Moldova, 25 October 2016, no. 22743/07 (Second Section)

The Facts

The applicant, born in 1963, was admitted to hospital in October 2005 with serious acute dysentery after drinking tap water. She was discharged two weeks later and soon after filed a lawsuit against the State-owned local utilities provider claiming the equivalent of EUR 6,700 compensation for the harm caused to her health.

In March 2006 the district court ruled in her favour since various technical and sanitary reports revealed that sewage water had infiltrated the drinking water pipe in the vicinity of the applicant's apartment. The district court awarded her the equivalent of EUR 648, basing its decision on the amount of physical and mental suffering caused. Relying on the same elements, the higher courts then confirmed the findings of the first-instance court, but reduced the award to the equivalent of EUR 310.

The Law

Alleged Violation of Article 8 of the Convention

Relying on Article 8 (right to respect for private life) the applicant complained that her health had been endangered as a result of having drunk contaminated water.

The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers, *inter alia*, the physical and psychological integrity of a person.

The Court has also found that “there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8”. Moreover, “Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar”.

In the present case, the Court notes that the parties did not dispute the domestic courts’ findings concerning the violation of the applicant’s rights by the State-owned company. An interference with the applicant’s rights protected under Article 8 of the Convention has taken place since her physical integrity has been affected by an unhealthy environment. In assessing whether the Moldovan authorities discharged their positive obligation under that provision, the Court notes that the domestic courts provided a remedy in the form of establishing the company’s responsibility and awarding compensation. Without expressly relying on the Convention but referring to the in-hospital treatment and the physical and mental suffering caused to the applicant, those courts’ judgments could be interpreted as finding in fact a breach of the applicant’s Article 8 rights.

The only issue which remains to be determined is the amount of compensation. The first-instance court awarded the applicant the equivalent of EUR 648 in respect of non-pecuniary damage, referring to such criteria as the amount of physical and mental suffering caused. While confirming the findings of the first-instance court, the higher court halved the award made and the Supreme Court of Justice upheld that reduced award. The higher courts relied on the same elements (degree of harm), but arrived at a different conclusion concerning the amount to be awarded. No specific reasons were given for this reduction, except a reference to the degree of responsibility of the defendant.

The Court takes into account the Government’s argument concerning the relatively short period of in-patient treatment and the absence of evidence of long-term effects on the applicant. Nevertheless, she was kept in hospital for two weeks, which implies that she sustained a certain degree of mental and physical suffering.

For these reasons, the Court holds, by six votes to one, that there has been a violation of the Article 8 of the Convention.

Dissenting opinion of Judge Lemmens: for Article 8 to be applicable, there should be repercussions on the affected person's private life. In the present case it has not been demonstrated that the illness has affected the applicant in the quality of her private life, except for the period spent in the hospital. Thanks to a very generous interpretation of the notion of private life, this case has been "upgraded" from an ordinary torts case to a case raising an issue under Article 8.

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