Selected Legislation and Jurisprudence

European Court of Human Rights*

ECtHR 2017/12 *Case of A.-M.V. v. Finland*, 23 March 2017, no. 53251/13 (First Section)

This summary is restricted to the issues raised under Article 8 of the Convention.

The Facts

The applicant, born in 1990, is intellectually disabled. He was taken into public care in 2001 and placed with a foster family. However, in 2007 the child welfare authorities decided to remove him from the family and to place him in a disabled children's home — with one of his brothers — in his home town in southern Finland. This was because the foster parents had made important decisions without consulting the authorities, namely they had moved to a remote village in the far north of Finland and had planned on placing him in a vocational school 300 km away.

In February 2011, a mentor who had been appointed by a court when the applicant turned 18, took a decision concerning his place of residence which, according to him, was against his own will. The applicant wished to move from his home town in the south to live in the north with his former foster parents. His mentor considered however, that it was in his best interests for him to live in his home town where other members of his family lived, and where he had

* 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>.

better educational and work opportunities; he could spend holidays with his former foster parents.

The applicant thus brought court proceedings asking to replace the mentor by another person insofar as matters concerning the choice of his place of residence and education were concerned. This request was ultimately refused in 2013 by the domestic courts. Having considered expert testimony (by a psychologist) and having heard the applicant in person as well as several witnesses, they concluded that he was clearly unable to understand the significance of the planned move to a remote part of the country. It notably took into account the level of his intellectual capacity, assessed as equal to that of a six to nine-year-old child, and the fact that he had no particular complaints about his current situation in his home town where he lived in a special unit for intellectually disabled adults, went to work, had hobbies and a support network of relatives, friends and staff from the social welfare authorities. Lastly, the courts expressed doubts as to whether his opinion was genuinely his own or that of his foster parents. There was thus no reason to replace the mentor by another person as far as matters concerning the applicant's place of residence and his education were concerned.

The Law

Alleged Violation of Article 8 of the Convention

The applicant complained under Article 8 of the Convention that following his decision to move to the North of Finland in order to live with his former foster parents, the powers of his mentor had been enlarged to encompass matters pertaining to his person. His wishes had not been respected and it had been impossible to have his mentor replaced in matters concerning his place of residence and his education, even though he had lost confidence in her. All these measures violated his right to respect for private and family life.

Firstly, the applicant's complaint, in essence, is directed at the fact that the domestic courts refused to change the mentor arrangements as a result of which the applicant was restrained from deciding for himself where and with whom to live. The Court therefore considers that there has been an interference with the applicant's right to respect for his private life under Article 8 of the Convention.

Secondly, the Court notes that the interference in question had a legal basis in the provisions of the Guardianship Services Act. Moreover, the legitimate

aim of this Act is to protect the rights and interests of persons who cannot themselves take care of their financial or non-financial affairs owing to incapacity, illness, absence or another reason. The interference was thus clearly justified by the legitimate aim of protecting the health, interpreted in the broader context of well-being, of the applicant.

Thirdly, with regard to the question whether the interference was necessary in a democratic society, the Court notes that under Finnish law, the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated. The powers of the mentor to represent the ward cover the latter's property and financial affairs to the extent set out in the appointing court's order, but these powers do not exclude the ward's capacity to act for him- or herself. If, as in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance. In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue.

The Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.

The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable

position. The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.

For the above-mentioned reasons, the Court considers that the impugned decision was based on relevant and sufficient reasons and that the refusal to make changes in the mentor arrangements concerning the applicant was not disproportionate to the legitimate aim pursued.

For these reasons, the Court, unanimously, holds that there has been no violation of Article 8 of the Convention.

ECHR 2017/13 *Case of Fernandes de Oliveira v. Portugal*, 28 March 2017, no. 78103/14 (Fourth Section)

The Facts

The applicant's son, born in 1964, had a history of mental disorders and of alcohol and drug addiction. Since 1984, he had spent several periods in a psychiatric hospital in Coimbra. In April 2000, he was admitted on a voluntary basis to the same institution, because he had attempted to commit suicide. He was authorised to spend weekends at home with his family. On 27 April 2000, he left the premises without notifying the hospital authorities, and committed suicide by jumping in front of a train. The applicant lodged a civil action for damages against the hospital, claiming that her son should have been under medical supervision and that the hospital staff should have prevented him from leaving the premises. Her claim was dismissed by the administrative court, as was her appeal to the administrative supreme court on the grounds that the suicide had not been foreseeable, and the hospital had not breached any duty of care.

The Law

Alleged Violation of Article 2 of the Convention

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.

The Substantive Aspect of Article 2

Having regard to the applicant's son'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, he 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.

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 and how these trends are reflected in several international documents. 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 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.

In the instant case, the Court notes that the hospital 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, the applicant's son 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 hospital. His absence was not observed until around 7 p.m. because he had not shown up for dinner. Thus, the applicant's son 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.

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, 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. Furthermore, it might also have been expected that the authorities would have monitored the applicant's son on a more regular basis.

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

The Procedural Aspect of Article 2

As regards the judicial response provided for the establishment of the responsibility of the hospital 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. Thus, they lasted eleven years, two months and fifteen days for two levels of jurisdiction.

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. 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.

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 administrative court to request an expert opinion on applicant's son's clinical condition; the first hearing took place on 8 October 2008, two years after the submission of the expert report to the file; and it took almost three years after that for the court to deliver its judgment.

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. 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.

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.

For these reasons, the Court, unanimously, holds that there has been a violation of the substantive and the procedural aspect of Article 2 of the Convention.

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