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HUMAN RIGHTS CENTRE

Department for the Execution of Judgments of the European Court of Human Rights
Council of Europe

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Rule 9 Submission for the Execution of the Judgment in the case of X v. Finland (Application No. 34806/04)

Introduction

This is already the second Rule 9 Submission for the case of X v. Finland by the Human Rights Centre (HRC), Finnish A-status NHRI[1] that has the monitoring of the implementation of the Court's judgments as one of its statutory tasks. The previous submission was lodged with the Department for the Execution of Judgments of the European Court of Human Rights in October 2021. **This Rule 9 submission is to be read together with the previous submission of 21.10.2021.**

On 14 September 2022 the Government submitted an updated Action Plan for this case. On 24 November 2022 an addendum to the Action Plan was submitted.

Prior to that, two similar cases concerning the lack of a legal remedy against forced medication in psychiatric hospital (*E.S. against Finland*, *application no. 23903/20* and *H.H. against Finland, no. 19035/21*) have been lodged before the Court in June 2020 and April 2021 and communicated to the Government in March 2021 and December 2021, respectively.

In the case *X v. Finland*, as well as in both abovementioned new complaints, the Court has raised, among other things, the pertinent question whether the applicants had at their disposal an effective domestic remedy against the forced administration of medication. In both cases either a regular court or two levels of administrative courts refused to examine the complaint as the law did not give an option to examine such complaints. Thus, the applicant was left with no legal avenue to pursue the matter having tried to exhaust all possible domestic remedies potentially available.

In the case of X v. Finland**,** the related events took place in 2005 and 2006. The Court found a violation in 2012 regarding Art. 5 § 1 (Right to liberty and security of person) and Art. 8 (Right to private life). No further issue arises on the implementation of the Art. 5 § violation.

[1] *The Human Rights Centre (HRC) represents the Finnish NHRI in international NHRI cooperation. The HRC forms the National Human Rights Institution (NHRI), alongside with its pluralistic 38-member Human Rights Delegation and the Parliamentary Ombudsman.*

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Regarding Art. 8, the Court found (in para. 221) that *"the absence of sufficient safeguards against forced medication by doctors deprived the applicant of the minimum degree of protection to which she was entitled under the rule of law in a democratic society."*

The 1419th meeting of the Committee of Ministers, in December 2021, examined the status of implementation and reasons for its delay, deciding to pursue the examination of the case under the enhanced procedure. The case is due to be examined again in March 2023.

Overview of the legislative process

The proposal to improve legislation on the safeguards and legal remedies in cases of involuntary medication has been in process for more than 10 years.

In the Electoral period of 2011-2014 the Government proposal (1) including the proposal on the self-determination of clients and patients lapsed as Parliament was not able to process it before the end of the electoral term.

In 2015-2019 the Government did not bring Government proposal (2) to the Parliament due to critical statements on the draft proposal received during a consultation round.

In 2020-2023, the Governmental working group met several times, a draft Government proposal (3) was written and an open consultation was held.

According to the latest Government Action Plan (September 2022, paras 67 and 68) "*However, based on the highly useful feedback received in the consultation process, it is necessary to continue the further preparation of the legislation. It will no longer be possible to submit the government proposal to Parliament during this parliamentary term, which ends in the spring 2023. In any case, the renewed government proposal will be submitted to Parliament without undue delays. The proposal is not tied to the parliamentary term and the Programme of the upcoming Government.*"

A summary of the feedback (42 statements in total) from the open consultation was prepared, and the Governmental working group is set to continue its work[2].

The HRC is concerned that the working group will not be able to reach a solution and bring a new Government proposal (4) to the parliament during the following electoral term either. What the priorities of the new Government will be, remains unknown at this point. In any case there is a risk of further delay. Furthermore, and on the substance, the consultations revealed again quite some opposition to the creation of necessary legal safeguards and different opinions on the format of such safeguards.

Possible structure and written decision

In the Government's latest draft proposal (3) in 2022, the main suggestion to secure an effective remedy for the patient was that in situations of regular administration of medication, a written administrative decision is to be made if the patient opposes medical treatment or the patient's will is unknown. Then the patient would have the possibility to appeal the written decision directly to an administrative court.

In the draft proposal an independent board-type expert body was also suggested as a possible alternative option for the future, using Denmark as an example. It is not clear

[2] https://stm.fi/-/asiakkaan-ja-potilaan-oikeuksia-vahvistetaan-kehittamalla-pitkajanteisesti-lainsaadantoa-ja-toimintatapoja?languageId=en_US

from the text whether this would be quasi-judicial, nor whether there would be a possibility to appeal. It was concluded, however, that it might be useful to assess whether this would be added to the tasks of one of the many existing expert bodies, as a creation of a new body for this purpose alone was not deemed justified.

The details given in the Addendum to the Government Action Plan reveal the various opposing views on how to proceed with the issue. When looking more closely on the feedback given in the consultation round for the Government's latest draft proposal, it is clear, that there is no uniform opinion on the way forward.

Some general views summarised in para 16 of the Addendum to the Government Action Plan are particularly worrying:

- "*The proposals and their impacts had been assessed in the draft proposal mostly from the perspective of the patient's legal protection and the judicial system and not at all from the perspective of the state, functioning and costs of the psychiatric care system."*
- *"The preparation of this legislative reform had been hurried, even though the need to reform the Mental Health Act has been known for years. Also the short duration of the consultation period and its timing in the middle of the summer holiday season were criticised".*

The HRC notes that the whole purpose of the reform is primarily to consider the patients' legal protection and from the patients' perspective and current structures and practises should not hinder the implementation of the Court's judgment. The HRC stresses that this subject matter has been discussed and mulled over for over 10 years. The process has not been particularly hurried under any estimates. Nevertheless, it is unfortunate and even inappropriate that the consultation period was so short and during the summer holidays. The HRC understands that these statements do not represent the Government's views. They show, however, views held by public and judicial actors regarding the implementation of human rights, the Court's case law and the need for legal safeguards also in these types of cases.

In the public consultation phase, a board-type expert body was widely supported. It was suggested that a body, which would enable the patients to submit a complaint about a decision on involuntary treatment for evaluation before the start of the regular administration of medication rather than afterwards, might be sufficient and functional. There were however different views in the consultation round on whether a written administrative decision is needed at all and whether there should be a possibility to appeal to a court.

A somewhat worrying feature is the fact that the Supreme Administrative Court is among those opposing the need for a written decision, with a possibility to appeal to the administrative courts, stating inter alia that the long duration of the process would nullify the treatment decision and would not grant the patient an effective remedy. The Supreme Administrative Court was open to a board-type expert body, but it did not consider a written administrative decision necessary in these cases. It also did not consider the proposed way of appeal to the administrative courts fitting for the current legal system.

The Supreme Administrative Court claims that the requirement for effective remedies regulated in Art. 13 ECHR, does not explicitly require the possibility to appeal to specifically a court, according to the Court's case law.

The HRC would like to note that, according to the Court's case law, it is true that an effective remedy does not always necessarily require a matter to be subject to a review

by a court. However, it should be noted that a non-judicial expert body should normally have the power to hand down a legally binding decision, not just a recommendation. In addition, in the view of the HRC, in cases concerning involuntary medication which is a serious interference with a person's physical integrity, there should be a possibility to appeal to a court – either directly or after the possible board-type body's decision. As opposed to the view of the Supreme Administrative Court, the HRC is of the opinion that the X. v. Finland judgment can be interpreted as indicating that an effective remedy requires that the patient has an option to appeal to a court.

Other judicial actors were concerned over the administrative courts' resources and the increase in the number of urgent cases. The actors in the social and health sector were worried about their already heavy workload, which would not become lighter if more paperwork was added to their tasks.

The HRC points out that a lack of resources or inadequate processes, possibly resulting in prolonged judicial proceedings or excessive workload for legal or health professionals, are not in itself a reason or justification to refrain from implementing the Court's judgment regarding a violation of article 8 of the ECHR. As mentioned above, current structures and practises cannot be an excuse but should be amended if necessary. If there is a will, there is a way of finding processes and structures that serve the purpose appropriately.

A main underlying problem is the rather blind trust in medical professionals' capability to always act correctly while also respecting human rights. Equally worrying is the view that the Government must protect the patients, if deemed necessary by the treating doctor, even by continuous involuntary medication against a person's will or without consent, and that no right to a written decision or appeal is deemed necessary.

Overall, it seems that contrary to international human rights law, quite many public actors in Finland do not realise the importance and urgency of legislating adequate legal safeguards in these types of cases.

Situations where a written decision is needed

In addition to the discussion on whether a written decision is needed, is the discussion on in which situations such decision would be given.

The HRC has expressed concern in inter alia its statement on the consultation round that it is not likely that the patients' legal protection or requirements of the Court are realised if a written decision is given only in cases where the patient expressly opposes the medical treatment or their views can't be established. (Proposed article: *A written decision on a regularly administered drug treatment must be given if the patient opposes medical treatment or the patient's will is unknown.*) (See the decision in case of R.D. and I.M.D. vs Romania 35402/14).

This would also not be in line with the starting point in the general Patients Act (785/1992), according to which any treatment is given in agreement with the patient.

The primary principle is to seek consensus on the means and methods of treatment. This also includes the obligation to inform the patient so that the patient understands the information and that the decision is based on this information. If the patient is not capable of deciding on the matter or expressing his/her will, the patient's wishes should be examined by, among other things, consulting the patient's relatives and friends.

The HRC considers that the lack of resistance and a mere silence, considered as approval, would not fulfil the prerequisites of the concept of mutual understanding and is therefore also contradictory in view of the Patients Act.

In terms of the patient's legal protection, a sustainable solution would be to require an explicit, documented consent from the patient to medical treatment, instead of considering a lack of resistance as consent. If consent could not be obtained, for any reason, the treatment would be involuntary, about which a written, appealable administrative decision should be made.

The realisation of a patient's legal protection cannot depend on whether the patient has the strength or ability to make decisions on the treatment. Necessary support should also be available for the decision making and, where needed, also legal assistance.

Also, it is to be noted that the purpose of providing legal protection is, among other things, specifically to prevent and correct abuses, such as unjustified, possibly harmful actions. Therefore, it cannot be directly assumed that medical treatment is always justified or medically appropriate.

In order to evaluate the justification or correctness of the medical treatment effectively in retrospect, a reasoned and appealable decision must exist. This is currently not the case in Finland.

International comparison

In June 2022 the Ministry of Social Affairs and Health prepared a memorandum comparing corresponding legislation and practices in several European countries (Norway, Sweden, Denmark, the Netherlands, the UK and Germany). These offer different ways to challenge involuntary medication before and after the decision, as well as various structures and ways to take the views of the patient into consideration. Also different options for legal remedies and legal assistance are compared in the memorandum.

Certainly, a good model could be found among these comparisons. Additionally, as such, Finland has numerous quasi-judicial bodies already, which might be used as an example, even without international comparison.

International conventions and CPT monitoring

A patient in involuntary psychiatric care may also meet the definition of a person with disabilities according to Article 1 of the UNCRPD. According to Article 25 (d) of the UNCRPD, the State parties shall require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.

Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention) deals also with consent to medical procedures. Oviedo Convention has been in force in Finland since 2010. According to Article 5 an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. Article 7 of the Convention states that a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health. This, however, is subject to protective conditions prescribed by law, including supervisory, control and appeal procedures. These do not exist in Finland.

The Council of Europe anti-torture committee (CPT) made a country visit to Finland in 2021 and visited inter alia Kellokoski Hospital. According to the CPT, patients felt that they were not asked to consent to the administration of medication and they did not consider that they had a chance to refuse it. The CPT has repeatedly, in 2014 and 2020, requested either consent or a written decision with a possibility to appeal in cases of medication. The Government has given misleading and false information on the status of the legislation (see further in the first Rule 9 Submission of the HRC on this case on 22 October 2021, page 3). Still no legislative changes have taken place.

Endnote

As it is, until the new legislation and effective safeguards exist, the ministerial guidelines which currently are used to remedy the insufficient legislation, remain in force. This is the case even though the guidelines are not law, do not include a right to appeal, are not enforceable and do not offer an effective legal remedy.

The proposal to use an independent board-type body as a legal remedy for involuntary medication was supported, but there was also resistance. Despite the efforts and proposals, the repeated failures to legislate the matter show the continuous inability and lack of will to correct the situation.

Even now, after all these years the Government is embarking on a new study on a fitting board-type body amongst the existing ones. This could and should have been done long ago. Therefore, this cannot be counted as progress in the implementation either. Various models have existed in other countries for years and both good and bad experiences would have been available. As mentioned above, there already exist other board-type bodies in Finland, especially on social affairs and health issues. The format is thus not a new one even from the Finnish perspective. A comparative study on various bodies and their tasks could be included in the new Government Proposal (4) as is the case usually for any new legislation.

The lack of progress in the implementation of this judgment was, among other things, discussed during a visit to Finland by the delegation from the Execution Department. The HRC considers further action, even possible interim measures, necessary in the future if the Government do not implement the judgment.

The implementation of this decision has taken far too long. The HRC respectfully asks the Committee to continue its enhanced supervision of the case *X. vs. Finland* and that a relatively short time frame for the next examination of the case is set.

The HRC thanks for the opportunity to provide its independent assessment on the state of the implementation of this judgment. Should the Execution Department or the Committee wish any further information on this or other related matter, do not hesitate to contact us.

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