PREVIOUS AND RECENTLY INTRODUCED STANDARDS IN THE STRASBOURG CASE-LAW RELATED TO THE HEALTH CARE OF PERSONS OF UNSOUND MIND

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Abstract

With the judgement of the Grand Chamber in the key case of Rooman v. Belgium (2019), the European Court of Human Rights has undoubted reached another milestone in its case-law. The reason for the former statement basically lies in the re-evaluation and reinterpretation of relevant principles of assessing medical treatment during the compulsory confinement of persons of unsound mind. This, in contrast to earlier practice, has resulted in emphasizing the therapeutic function of medically justified deprivation of liberty in order to reintegrate the person concerned within the shortest time possible, and also, an absolute rejection of their therapeutic abandonment. This has notably extended the standards of health care under the aegis of the ECHR, and the Court has already referred to those consistently in its subsequent cases. Therefore, this study aims to provide a comprehensive overview of the previous, and also the recently introduced, standards in the Strasbourg case-law, related to the health care of persons of unsound mind, together with the correspondingly developing positive obligations of State Parties.

Keywords: *persons of unsound mind, medically justified deprivation of liberty, therapeutic function, appropriate facility, AAAQ standards.*

„In a field as sensitive as that of a psychiatric committal, within the framework of the European Convention, (…) *unremitting vigilance is required to avoid the abuse of legislative systems and hospital structures."*[1]

1. Introduction

From a human rights perspective, the term *persons of unsound mind* as indicated in Article 5(1)(e) of the European Convention on Human Rights (ECHR) refers to a particularly vulnerable group within society. In spite of the insignificant number of cases, it turns out to be problematic to name a State Party to the ECHR that has not yet been the subject of at least one individual complaint procedure regarding the medically justified deprivation of liberty of persons of unsound mind. Furthermore, violation has been found to have occurred in the vast majority of those cases by the European Court of Human Rights (the Court), thus the matter has relevance throughout the European region.

This paper focuses on the remarkable number of cases, in which not only compulsory confinement, but also medical treatment during compulsory confinement were assessed by the Court. From one point of view, the recently reached milestone in

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[1] Judgement in the case of *Nielsen v. Denmark*, App. no. 10929/84, dated: 28 November 1988, issued by ECtHR, Separate opinion of Judge Pettiti, http://hudoc.echr.coe.int/eng?i=001-57545 (last access: 19.08.2020).

the relevant case-law can be considered a new step in implementing social and human rights models in cases where persons of unsound mind are concerned, but another important aspect cannot be disregarded. By emphasizing the therapeutic function of medically justified deprivation of liberty in order to the achieve the reintegration of the person concerned within the shortest time possible, the Court has extended the standards of health care under the ECHR in the key case of *Rooman v. Belgium.* Despite using the notion of appropriate facility, the exact elements of this can be identified with those that have already been present in universal human rights disputes, and are generally known as AAAQ. The latter expression is an abbreviation, standing for availability, accessibility, acceptability and quality, together which together make up the content of the right to health care. However, in comparison with contemporary legal literature, the right to equal access to health care may be considered the most - although not unanimously - accepted concept,[1] which has also been examined through the practice of the Court.[2]

This study therefore aims to provide an overview of the previous and recently introduced standards in the Strasbourg case-law, related to the health care of persons of unsound mind together with the correspondingly developing positive obligations of State Parties. Importantly, the investigation was limited to those cases in which the serious mental disorder of the person concerned has been - at least allegedly - a pre-existing one, and not one which has developed due to the circumstances of detention. This category includes both types of cases: those in which the dangerous nature of the individual *per se* has justified detention, and those

in which this dangerous nature exists alongside a lack of criminal liability.[3]

Part 2, after recognising the lack of a definition of persons of unsound mind in international law, places it under the umbrella term of persons with disabilities, and also draws attention to the term mental disorder. References to their theoretical backgrounds are also made in relation to both terms. Finally, I turn towards the approach of the Court. *Part 3* focuses on medically justified deprivation of liberty, and gives a short summary of its gradually expanding State obligations. In *Part 4*, the development of positive obligations to *fulfil* health care is presented, up to the most recent case-law, using the concept of health care standards. *Part 5* contains the summary and conclusions.

2. The lack of a definition of persons of unsound mind in international law

The ECHR has not provided any definition for persons of unsound mind in the last seventy years.[4] However, as Ana Elena ABELLO JIMÉNEZ pointed out in a critical

[1] Amrei Müller, "The Minimum Core Approach to the Right to Health. Progress and Remaining Challenges," in the Healthcare as a Human Rights Issue, Normative Profile, Conflicts and Implementation, eds. Sabine Klotz - Heiner Bielefeldt - Martina Schmidhuber - Andreas Frewer (Bielefeld: Transcript Verlag, 2017), p. 66.

[2] Maite San Giorgi, The Human Right to Equal Access to Health Care (Cambridge: Intersentia Publishing Ltd., 2012), pp. 143-180.

[3] For an example, see: Juhász Andrea Erika, A mentálisan beteg fogvatartottakkal mint speciális fogvatartotti kategóriával szemben megvalósuló embertelen, megalázó bánásmód: II. rész: Az Emberi Jogok Európai Bíróságának esetjoga, "Magyar Rendészet," no. XV. vol. 1/2015. p. 113-124.

[4] Ana Elena Abello Jiménez, *Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights*, "American University International Law Review," no. XXX. Vol. 2/2015. pp. 286-287.

assessment which also urged a paradigm shift, this wording can undoubtedly be traced back to the *medical model*.[5] Nevertheless, no other international legal instruments provide a decisive definition on this term.

The first of all to mention is the quasi universal *UN Convention on the Rights of Persons with Disabilities* (CRPD).[6] Elements of the *human rights model* emerge amongst the objectives expressed in Article 1, namely the protection of the dignity and human rights of persons with disabilities. This article also gives a comprehensive definition, based on the *social model.*[7] It states that "[*p*]*ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*" However, this supportable and compehensive approach gives no details or further explanation of the aforementioned types of disabilities in question.

Fortunately, Paul HUNT (UN Special Rapporteur on the right to health, 2002-2008) brings us closer to a clarification at a higher level. His definition of persons with disabilities is also as broad as possible, taking into account a number of concepts. Within this definition, three main categories of mental disability can be identified. One of them is the major mental illnesses and psychiatric disorders, another comprises more minor mental ill health and disorders otherwise called psychosocial problems, and the last but not least important are intellectual disabilities.[8]

Under the aegis of the Council of Europe, Article 7 of the *Convention on Human Rights and Biomedicine* (Oviedo Convention, 1997) provides the legal framework for the protection of persons suffering from a mental disorder of a serious nature. Similarly to the CPRD, the Oviedo Convention also provides no detailed definition of the term in question.

Progress in interpretation has been made in the *Recommendation Rec(2004)10 of the Committee of Ministers to member states on the protection of the human rights and dignity of persons with mental disorders* (Recommendation), often cited by the Court. As Article 1(1) of this non-legally binding document stipulates, the Recommendation aims to protect the human rights and dignity of persons with mental disorder in general, but with particular focus on persons undergoing involuntary placement or treatment. Article 2(1)-(2) of the same Recommendation states that the term "*mental disorder is defined in accordance with internationally accepted medical standards,*" emphasizing that a "*lack of adaptation to the moral, social, political or other values of society, of itself, should not be considered a mental disorder*."

[5] Abello Jiménez, *Criminalizing Disability…*, p. 291.

[6] *Convention on the Rights of Persons with Disabilities* (UN Doc. A/RES/61/106; adopted on 13 December 2006, New York) https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf (last access: 19.08.2020).

[7] Abello Jiménez, *Criminalizing Disability…*, p. 287.

[8] Paul Hunt - Judith Mesquita, *Mental Disabilities and the Human Right to the Highest Attainable Standard of Health*, "Human Rights Quarterly," no. XXVIII. vol. 2/2006. p. 335-336.; Paul Hunt, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (UN Doc. E/CN.4/2005/51, 11 February 2005) p. 19. https://www.refworld.org/docid/42d66e770.html (last access: 19.08.2020).

The *Draft Additional Protocol to the Oviedo Convention*[9] has recently been adopted in cooperation with UN Special Rapporteurs in 2018, taking into account relevant provisions of international documents, *inter alia* the International Covenant on Economic Social and Cultural Rights.[10] Among its separate section of definitions, Paragraph 4 indicates that the term "*'mental disorder' is interpreted in accordance with internationally accepted medical standards*," thereby manifestly referring back to the medical concept in this respect.

Along with the aforementioned, a definition of persons of unsound mind has neither been concretized by the Court. There are several reasons for this. First of all, there is the view which has been unchanged from the outset, that considers the concept of mental disorder as a constantly changing one, thus every single case needs to be observed according to the current state of medicine.[11] Hence, positioning the term 'unsound mind' within the relative concept of 'mental disorder,' allows the conclusion that the Court follows the medical model and this explains why it refrains from giving any exact legal definition.[12] Secondly, the Court considers the assessment and determination of whether someone is a person of unsound mind as being the competence of State authorities. Therefore, the Court confines itself to review the conformity of domestic public authority decisions with the ECHR.[13] Such an assessment raises the issue of medically justified deprivation of liberty as a prerequisite question, which is described in more detail below.

3. Medically justified deprivation of liberty

Medically justified deprivation of liberty is a preventive measure for persons of unsound mind.[14] In addition to the existence of voluntary health care services in most cases, a recurring and often hardly specified question from a legal point of view is: under which circumstances may State Parties intervene with compulsory medical treatment of the individual? The Court recognizes the right to self-determination in health-care, i.e. the right to be free from non-consensual medical interference. At this point, it is also worth mentioning that referring to the case-law of the German

[9] Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment as revised by the 13th DH-BIO (Strasbourg, 23 – 25 May 2018), Definitions/4. 'Mental disorder.' Personal jurisdiction does not extend to persons subjected to criminal law procedures. See: *Ibidem*. Art. 2. paras. 1-3., https://rm.coe.int/inf-2018-7-psy-draft-prot-e/16808c58a3 (last access: 19.08.2020).

[10] Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment, para. 3., https://rm.coe.int/inf-2018-8-psy-er-e/16808c58a4.
(last access: 19.08.2020).

[11] For examples, see: Judgement in the case of Winterwerp v. the Netherlands, App. no. 6301/73, dated: 24 October 1979, para. 37., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-57597 (last access : 19.08.2020); Judgement in the case of Anatoliy Rudenko v. Ukraine, App. no. 50264/08, dated: 17 April 2014, FINAL 17/07/2014, para. 102., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-142421 (last access: 19.08.2020).

[12] It should be noted that the Court also reflects the social model and the human rights model in its case-law.

[13] For an example, see: Judgement in the case of Mifobova v. Russia, App. no. 5525/11, dated: 5 February 2015, FINAL 5 May 2015, para. 52., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-150792 (last access: 19.08.2020).

[14] Comp.: Detention for the reason of criminal liability is a repressive measure. This distinction is important to mention because both types of cases are brought before the Court.

Constitutional Court, the Court adopts the approach that persons of unsound mind not only have the entitlement to receive health care in the interest of recovery, but also the right to refuse it.[15] However, as well as in cases involving anyone with a mental disorder, restrictions on the rights of persons of unsound mind can be justified,[16] but only when justified by very weighty reasons. Human rights responses in international or national legal systems basically link justification to the generally accepted criteria of dangerousness, that is, self-threatening or public-threatening behaviour of the individual concerned.

The Court has summarized the aforementioned in the case of *Plesó v. Hungary*, taking into account the results of one European Union survey carried out in fifteen European countries. The Court concluded that the existence of a mental disorder was a basic condition for compulsory placement under the domestic legal systems examined. With regard to the justification of deprivation of liberty, two concepts can be distinguished. Followers of the medical (i.e. *parens patriae*) approach states that the only factor to be examined is the dangerousness criterion, which may take the form of self- or public threatening attitudes. Somewhat differently, in States following the police-power approach, two factors may be relevant, namely the protection of public order and the protection of the rights or safety of others.

The practice of the Court is partly similar to the previous approaches. With regard to the justification of deprivation of liberty for persons of unsound mind (Article 5(1)(e) of the ECHR), a set of three conditions, collectively referred to as the Winterwerp-criteria was elaborated in 1979,[17] and applied since then. This clearly shows the use of the medical model in related cases. The interpretation of the three substantive elements was further nuanced by later practice, although this did not affect their basics. Firstly, the deprivation of liberty shall be based on the objective opinion of a medical expert, with the sole exception of a case justified on grounds of urgency. Secondly, it must be based on the type or severity of the mental disorder,- which creates a need for the deprivation of liberty in order to exclude the risk of threat to oneself- or the public, or in cases where it is not possible to cure or alleviate a severe mental condition in the absence of clinical care. Thirdly, consideration must be taken of the persistent nature of the psychotic state, which also exists when deprivation of liberty is ordered.

Outlining the relevant case-law, when deprivation of liberty by public authorities occurs, the corresponding obligations of the State Parties are threefold. The most clearly evident is, the obligation to *respect* under Article 1 of the ECHR, i.e. intervention shall be made only in medically justified cases. The obligation to *protect* first appeared in the case of *Storck v. Germany*,[18] establishing that appropriate legal guarantees are needed for persons of unsound mind during their involuntary placement and treatment - including health care – to protect them against arbitrariness. Last but not least, there

[15] Judgement in the case of *Plesó v. Hungary*, App. no. 41242/08, dated: 2 October 2012, para. 66., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-113293 (last access: 19.08.2020).

[16] For examples, see: CESCR General Comment no. 14. *'The Right to the Highest Attainable Standard of Health (Art. 12)*' (UN Doc. E/C.12/2000/4, 11 August 2000) https://www.refworld.org/pdfid/4538838d0.pdf (last access: 19.08.2020).

[17] Judgement in the case of *Winterwerp v. the Netherlands*, … para. 38.

[18] Judgement in the case of *Storck v. Germany*, App. no. 61603/00, dated: 16 June 2005, paras. 100-108., 137-150., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-69374 (last access: 19.08.2020).

is the obligation to *fulfil*, to which the recent case-law of the Court gives a new emphasis.[19]

4. Standards of the right to health care during medically justified deprivation of liberty

The approach to medical treatment during medically justified deprivation of liberty developed gradually in the practice of the Court. The examination of detention conditions and health care can be verified retrospectively to the judgement in the case of *Aerts v. Belgium*, which was significant because it laid down the foundations for examining issues related to the conditions and state of health of prisoners and other detainees.[20] Subsequently, case-law has developed in a substantially parallel and mutually reinforcing way in respect of prisoners and other detainees, as vulnerable groups in a similar position. As Ingrid NIFOSI-SUTTON has indicated earlier, a closer analysis of the practice of the Court shows that cases in reality are true right to health cases, involving serious breaches of, *inter alia*, the right to access medical care, one component of the normative content of the right to health as defined by the UN Committee on Economic, Social and Cultural Rights.[21]

Although this parallel development has been going on for a long period of time, I am of the opinion that a dichotomizing approach has recently been accepted by the Court. The turning point was the Grand Chamber key case of *Rooman v. Belgium* in 2019, in which the Court explicitly stated that greater emphasis should be placed on health care and recovery of persons of unsound mind under compulsory medical care than previously.[22] The specific significance of this statement arise for the reason that, with regard to the dual function of medically justified deprivation of liberty, this aforementioned therapeutic function was always treated as secondary to the so-called social protection function. Accordingly, the re-evaluation and reinterpretation of the relevant principles by the Court resulted in higher standards of health care in case of those persons in comparison to any other type of detainees.

With regard to the detention of persons of unsound mind, the Court stated that there is a close link between the lawfulness of detention and the provision of health care appropriate to their mental state. In my view, this emphasis was particularly important because, as has already been mentioned, the case-law on prisoners has provided additional dynamism in the examination of cases of medically justified deprivation of liberty. The common segment in both categories is the factor of dangerousness to society which justifies deprivation of liberty.

Nonetheless, as established by the separate provisions of the ECHR, the relationship between deprivation of liberty

[19] For a similar basis, but different arguments, see: Lawrence O. Gostin - Lance Gable, The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health (Washington DC: Georgetown University Law Center, 2004), p. 22.

[20] Judgement in the case of Kudła v. Poland, App. no. 30210/96, dated: 26 October 2000, para. 94., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-58920 (last access: 19.08.2020).

[21] Ingrid Nifosi-Sutton, The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective, "Harvard Human Rights Journal," no. XXIII. vol. 1/2010. p. 67.

[22] As to the factual background of the case: psychopharmacological and psychotherapeutic treatment of the applicant should have taken place in German language, however, in the facility in question, no German-speaking doctor, therapist, psychologist, welfare officer or custodial staff member was employed for years.

and health care is to be treated differently in the case of prisoners. To this latter group, deprivation of liberty is a primary consideration, even if a serious illness would justify out-of-prison care, as it would be more appropriate. Still, the State Party is obliged to provide adequate care in prison conditions.[23] This applies to every prisoner, including prisoners with several mental disorders, as well. However, this adequate care at best equals only mere access to basic health care services.

Distinctly, health care and other measures taken involving persons of unsound mind during their involuntary placement are intended to at least maintain, but preferably to improve their state of health. Through re-evaluation and reinterpretation, the Court has ruled that, as a result of the gradual development of State obligations in its practice, from now on the persons concerned are *entitled* to the appropriate medical environment and real therapeutic measures, with a view to preparing them for their release, regardless of the institution in which the detention takes place. "*Any detention of mentally ill persons must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness*."[24]

However, while noting that specific circumstances are also relevant in each case, the Court also set out the standards for appropriate health care and treatment of those affected by Article 5(1) of the ECHR in the context of compulsory confinement of persons of unsound mind. As formed in the case of *Rooman v. Belgium*, together with the subsequent case-law, it can be summarized as follows.

1. The existence of an individualized program for reintegration, taking into account the special circumstances of the person concerned.
2. The implementation of an individualized program for reintegration purposes (2a) in an appropriate facility (i.e. *availability* and *physical accessibility*); (2b) by providing adequate health care, namely (2bi) creating a suitable health environment for the implementation of the therapeutic plan (*availability and physical accessibility* of medical personnel, medicines and other tools), (2bii) and with real therapeutic measures (*quality*), including the development of an individualized therapeutic plan, medication (psychotropic substances) and therapeutic treatment (consultations) as well (*acceptability*).[25]

All of these criteria have been unanimously accepted by the Grand Chamber. Moreover, full agreement with the above principles was confirmed by all of the related dissenting opinions.[26]

[23] Juhász Zsuzsanna, "*Mentális egészség és a mentálisan sérült fogvatartottak*" in *Emberek őrzője: Tanulmányok Lőrincz József tiszteletére, 1. kötet*, eds. Hack Péter - Koósné Mohácsi Barbara (Budapest: ELTE Eötvös Kiadó, 2014), p. 113-115.

[24] Judgement in the case of *Rooman v. Belgium*, App.no. 18052/11, dated: 31 January 2019, para. 208., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-189902 (last access: 19.08.2020).

[25] Judgement in the case of *Rooman v. Belgium*, ... paras. 146-148.

[26] Judgement in the case of *Rooman v. Belgium*, … Partly concurring and partly dissenting opinion of Judge Lemmens, para. 1.; Partly dissenting opinion of JudgeNussberger, para 2.; Joint partly dissenting opinion of Judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and Chanturia, para. 3.; Partly dissenting opinion of Judge Serrghides, para. 2.

What follows is a discussion of the re-evaluated and reinterpreted principles and related standards in a more detailed manner.

a) Appropriate facility in a narrow sense

The Court vests the notion of appropriate facility with a broader and a narrower sense. As to the *broader interpretation*, an appropriate facility includes all the standards listed above. However, in the *narrower* sense, only the *availability* and *physical accessibility* of the facility itself need a closer examination. Availability in this context is equivalent to the existence of appropriate facility with sufficient capacity, while physical accessibility means that no obstruction can be identified during the admittance of the person concerned in a timely manner.

Before demonstrating examples of non-compliance with these standards, it is important to note that the appropriateness of the facilities in question has already been examined by the Court in its early case-law under the requirement of legality (Article 5(1)(e) ECHR).[27] At the beginning, only psychiatric wards of hospitals, clinics,[28] psychiatric institutions, or other similar institutions were considered appropriate to treat persons of unsound mind.[29] Based on the practice to date, the category of "other similar institutions" includes (public) social homes.[30] However, it should be added, that the assessment of legality cannot be considered automatic even for the listed facilities. Indeed, it is not certain that an institution which is adequate in the narrower sense, such as a psychiatric institution, meets all the criteria of an appropriate institution in the broader sense. Consequently, it may not be suitable for providing adequate healthcare to the person concerned.[31]

On the other hand, since the case of *Morsink v. the Netherlands*, the practice of recent years has allowed extension of the narrower interpretation of appropriate facility, by examining the lawfulness of the preventive detention of perpetrators relieved of criminal liability because of serious mental disorders, and ordering involuntary placement. Thus, an institution considered *a priori* inadequate, such as a custodial clinic[32] or the psychiatric wing of a prison,[33] can also

[27] For an example, see: Judgement in the case of *Ashingdane v. the United Kingdom*, App. no. 8225/78, dated: 28 May 1985, para. 44., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-57425 (last access: 19.08.2020).

[28] Judgement in the case of *S. v. Estonia*, App. no. 17779/08, dated: 4 October 2011, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-106584 (last access: 19.08.2020).

[29] Oliver Lewis, *Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights*, "European Journal of Health Law," no. IX. vol. 4/2002. p. 297.

[30] From recent case-law: Judgement in the case of *Červenka v. the Czech Republic*, App. no. 62507/12, dated: 13 October 2016, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-167125 (last access: 19.08.2020); Judgement in the case of *Hadžimeljić and others v. Bosnia and Hercegovina*, App. nos. 3427/13, 74569/13 and 7157/14, dated: 3 November 2015, issued by the ECtHR, http://hudoc.echr.coe.int/eng?i=001-158470 (last access: 19.08.2020); Judgement in the case of *Kędzior v. Poland*, App. no. 45026/07, dated: 16 October 2012, FINAL 16 January 2013, issued by the European Court of Human Rights, http://hudoc.echr.coe.int/eng?i=001-113722 (last access : 19.08.2020); Judgement in the case of *D.D. v. Lithuania*, App. no. 13469/06, dated: 14 February 2012, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-109091(last access: 19.08.2020); Judgement in the case of *Stanev v. Bulgaria*, App. no. 36760/06, dated: 17 January 2012, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-108690 (last access: 19.08.2020).

[31] For an example, see: Judgement in the case of *Rooman v. Belgium*, ... para. 242.

[32] Judgement in the case of *Morsink v. the Netherlands*, App. no. 48865/99, dated: 11 May 2004, para. 65., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-61754 (last access: 19.08.2020).

[33] For an example to the opposite situation, see: Judgement in the case of *Proshkin v. Russia*, App. no. 28869/03, dated: 7 February 2012, FINAL 09 July 2012, para. 78., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-108961 (last access: 19.08.2020).

be assessed as satisfactory by the Court, but only if it also meets the requirements of appropriate facility in the broader sense.

In the case of *Rooman v. Belgium*, the Court did not examine the adequacy of the psychiatric institution in question, as in principle it complied with all the relevant standards. According to this, a more incisive example is the case of *Strazimiri v. Albania*, in which the Court did not find the prison environment suitable as an appropriate institution in the narrow sense and also noted the *total hiatus of the availability of any appropriate facilities*. The applicant, having been released from criminal liability because of his serious mental disorder, and been subjected to involuntary placement by the domestic court at the same time, spent his long-term imprisonment in a prison hospital. According to the decision of the Court, the prison hospital could not be considered appropriate, as the domestic mental health legislation would have required the applicant to be placed in a specialized health facility, forming part of the integrated health care system. Moreover, both national and international human rights control mechanisms confirmed that there was no special facility for the treatment of persons of unsound mind in the State Party concerned. Consequently, the Court found an infringement related to the fact that the public authorities had not done enough to remedy this structural deficiency in the long period of approximately eight years between the adoption of the relevant domestic law in 2012 and the Court decision in 2020.[34]

However, if any appropriate facility is available, but lack adequate capacity, it cannot be ruled out that the public authority ordering the deprivation of liberty initially designates an inappropriate facility or placement in such a facility for a shorter period of time. If, according to a medical expert's opinion, a person concerned cannot be provided with adequate care in one facility, but suitable facilities are available, public authorities are obliged not only to seek and consider alternatives, but also to transfer the individual to an appropriate institution. The Court acknowledged that taking action by public authorities needs time, considering the differences between *available institutional capacities* and *capacity needs*.[35]

At this point, the question arises: what amount of time does the Court consider to be excessive to maintain this kind of involuntary placement in an inadequate facility? In the case of *Aerts v. Belgium*, despite ordering the transfer by domestic authorities, the lack of capacity in the designated and appropriate psychiatric institution resulted in a seven-month delay in transfer. Until then, the applicant was detained in a prison psychiatric wing, which *in abstracto* - and also *in concreto* - proved to be inappropriate.[36] Although the Court found the *lack of capacity in an adequate number* unacceptable, it neither specified the aspects of its assessment, nor gave any reasoning in this respect.

This shortcoming was overcome in the case of *Morsink v. the Netherlands*. The applicant was sentenced to fifteen months imprisonment at a custodial clinic. However, he was placed in a pre-trial detention centre due to the capacity constraints of the appointed custodial clinic. That decision was extended several times by domestic authorities. The applicant was eventually admitted to the designated institution after a

[34] Judgement in the case of *Strazimiri v. Albania,* App. no. 34602/16, dated: 21 January 2020, para. 121., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-200452 (last access: 19.08.2020).
[35] Judgement in the case of *Rooman v. Belgium*, ... para. 198.
[36] Judgement in the case of *Aerts v. Belgium,* App. no. 61/1997/845/1051, dated: 30 July 1998, paras. 47-49., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-58209 (last access: 19.08.2020).

total delay of fifteen months. The State Party affirmed this was not an isolated case during the period under review: however, the Government had taken the necessary policy measures and increased capacity by twenty percent between 1998 and 2002. The State Party also expressed its opinion that the existing gap between the capacities available in custodial clinics and the capacities required should be considered acceptable, in order to manage and balance public expenditures.[37]

The Court seemed to accept this argument under the notion of reasonable balance of competing interests to a certain extent, as "*it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It accepts that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable.*"[38] However, in the present case, the structural problem of lack of capacity was already noticed by the public authorities in 1986 and there were no exceptional and unforeseeable circumstances which would have allowed the delay in transfer. Thus, in the majority view of the Court, declaring the admission to the custodial clinic with a delay of fifteen months as acceptable would have undermined the essence of the right protected by Article 5 of the ECHR.

It should be added that judge LOUCAIDES in his concurring opinion explained that reasonable time - as introduced in Article 6 of the ECHR - should be applied in similar cases, instead of the reasonable balance of interests, as it would be better reasoning against State Party arguments based on difficulties of implementation and eliminate the risk of arbitrariness.

However, the Court upheld the majority decision in its subsequent case-law. This is clearly shown for example in the case of *Brand v. the Netherlands*, where the Court presented essentially the same reasoning in its judgement as before.[39]

As indicated in other cases, *when capacities in adequate number would be available otherwise*, the domestic authorities should also be aware of further *obstacles of physical accessibility*, which may result in an unacceptable delay in transfer. For one example, the applicant in the case of *Mocarska v. Poland* spent almost a year and two months in a detention centre, about eight months of which occured after a domestic court decision to release him from criminal liability in a psychiatric institution. More than a month later, the same court asked the Psychiatric Commission, the latter being the competent domestic expert body, to designate an appropriate facility for the applicant. Another month passed before the response of the Psychiatric Commission, in which it requested expert reports on the applicant. An institution was proposed one and a half months later and three more weeks elapsed before the domestic court ordered the transfer of the applicant to that institution. The designated facility then indicated that it could not receive the applicant immediately due to a lack of

[37] Judgement in the case of *Morsink v. the Netherlands*, … para 55.
[38] Judgement in the case of *Morsink v. the Netherlands*, … para. 67.
[39] Judgement in the case of *Brand v. the Netherlands*, App. no. 49902/99, dated: 11 May 2004, FINAL 10 November 2004, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-61755 (last access: 19.08.2020).

capacity, thus the transfer had to be delayed a further two months and twenty-six days.[40]

The Court concluded, with particular reference to the inclusion of a national expert body in the domestic process and its responsibility, that an eight-month interval was not in conformity with the standards,[41] indicating that the national bodies should have take measures with far shorter deadlines in order to avoid generating obstacles of physical accessibility.

Not for a reason attributable to the capacity of the health care system, but because of a delay created exclusively by public authorities, infringement was also found in the case of *Proshkin v. Russia*. In that case, the domestic court ordered medically justified deprivation of liberty at the same time as the release from the criminal liability of the person concerned. Subsequently, it took more than five months for the authorities to obtain the necessary Latvian travel visa for his transfer to the designated psychiatric hospital located in the Russian exclave, Kaliningrad. Moreover, the lack of the necessary identification documents only came to light later, which resulted in a total delay of six months for the transfer to the designated facility. During this time, the standard of *physical accessibility* of the appropriate facility had not been fulfilled, since the deprivation of liberty was carried out in a detention facility, contrary to the decision of the domestic court.[42]

First of all, the Court reiterated its reasoning of reasonable balance as indicated in the case of *Morsink v. the Netherlands*. It then stated that the domestic authorities were required to take into account the need to obtain visa and identity documents and there was no exceptional or unforeseeable circumstance which would have allowed a six-month delay. In addition, the Court emphasized that the domestic authorities have the competence to designate the appropriate facility and did not intend to interfere in their decision. Nonetheless, it noted that the State Party had failed to present any argument that the transfer would be justified by the fact that there was no hospital in the Russian area that could admit the person concerned.[43] This allows the conclusion that, in principle, there could have been spare capacity in other facilities, which could be considered adequate in the narrower sense, thus the admission of the applicant could have been achieved in a significantly shorter period of time. However, this opportunity was not taken into account at all during the domestic procedures, thus raising the question of the responsibility of the relevant national court.

As a final question of importance, it should be noted that it is beyond question that the delays in the transfer to the appropriate institution in a narrow sense were evidently excessive in all of the above referred cases. Nevertheless, the least excessive period of time assessed so far by the Court relates to the case of *Pankiewicz v. Poland*, demonstrating a strict approach of the forum, with an analysis more closely linked to the individual. In that case, the domestic court ordered that the applicant be released from criminal liability and placed in a psychiatric hospital. However, there was no spare capacity in the hospital in question. After one month and twenty-six days, the domestic court decided to extend the pre-

[40] Judgement in the case of *Mocarska v. Poland*, App. no. 26917/05, dated: 6 November 2007, FINAL 06/02/2008, paras. 10-24., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-83076 (last access: 19.08.2020).
[41] Judgement in the case of *Mocarska v. Poland*, … paras. 45-49.
[42] Judgement in the case of *Proshkin v. Russia*, … para. 30., 34-36.
[43] Judgement in the case of *Prohskin v. Russia*, … paras. 80-81.

trial detention ordered earlier, during the investigation phase. A further twenty-four days later, the same court decided to designate another hospital with free capacity as the location of the involuntary placement. It took another four days to transfer the applicant to the newly designated facility.[44] This meant a total delay of two months and twenty-five days, while the applicant spent his deprivation of liberty in a general detention centre.

Although the State Party considered this time of delay to be acceptable and in line with the standards developed by the Court, the latter argued that the State Party did not provide a detailed justification for the delay and did not clarify that the applicant was receiving adequate medical care in the general detention centre. In this respect, a delay that is not particularly excessive at first glance cannot be considered acceptable, either.[45] Besides, with regard to the expert opinion proposing psychiatric treatment, the delay in admission to a psychiatric hospital and the initiation of health care was found to be clearly detrimental to the applicant.

These support the conclusion that the *access to a prima facie appropriate institution in a timely manner* in order to initiate the health care of the person concerned is a basic standard in cases of compulsory confinement of persons of unsound mind.

b) Appropriate facility in a broader sense – including suitable medical environment and real therapeutic measures

As the cited contemporary case-law indicated, neither *availability* nor mere *physical accessibility* in themselves - and not even both occurring together - are sufficient to satisfy the notion of appropriate facility in the broader sense. In addition to the aforementioned standards, a suitable medical environment and real therapeutic measures are also essential. The focus has been noticeably extended with consideration of the individual health care needs of the person concerned, examining the *quality and acceptability* of health care during compulsory confinement.

First of all, the Court emphasizes that its role is not to analyse the content of the treatment that is offered and administered. The choice of the form and content of a specific therapeutic treatment and medical programme remains essentially a matter for the public authorities.[46]

Besides, compared to other detainees, the scope of treatment of persons of unsound mind during involuntary placement must reach beyond the level of basic health care. More specifically, the Court found it essential from now on "*to verify whether an individualised programme has been put in place, taking account of the specific details of the mental health of the individual concerned with a view to preparing for possible future reintegration into society*."[47]

An example of the lack of personalized therapeutic treatment occurs not only in the case of *Rooman v. Belgium*, where, due to language barriers, therapeutic consultation had failed for several years, but also in the case of *Strazimiri v. Albania*, in which the Court specified the nature of the violation according to healthcare as follows: "[*t*]*he Court cannot accept* […] *the state of therapeutic abandonment.*"[48]

[44] Judgement in the case of *Pankiewicz v. Poland*, App. no. 34151/04, dated: 12 February 2008, FINAL 12/05/2008, paras. 16-19., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-85004 (last access: 19.08.2020).
[45] Judgement in the case of *Pankiewicz v. Poland*, … para. 45.
[46] Judgement in the case of *Rooman v. Belgium*, ... para. 209.
[47] Judgement in the case of *Rooman v. Belgium*, ... para. 209.
[48] Judgement in the case of *Strazmiri v. Albania*, … para. 109.

In their joint opinion, Judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and CHANTURIA mentioned as a shortcoming of the Grand Chamber decision in the case of *Rooman v. Belgium* that the majority opinion did not transfer the principle of a comprehensive therapeutic plan from the established practice under Article 3 of the ECHR to the list of principles under Article 5(1)(e).[49] The Court clearly included this in the scope of the investigation in the case of *Strazimiri v. Albania*.

Finally, the Court ruled that an aggravation of the condition of a psychotic patient deprived of his or her liberty does not necessarily lead to a violation of Article 5(1)(e). However, this is conditional on the public authorities taking all necessary measures to overcome the obstacles to care.

5. Summary and conclusions

Although recognizable progress has been made, the lack of a term for persons of unsound mind in international law still exists. This circumstance and the medical approach of the term unsound mind leads the Court to maintain that domestic authorities have the competence to assess and decide whether someone is a person of unsound mind or not.

However, over the past few decades, the Court has developed and gradually expanded the related State obligations to respect, protect and fulfil. Due to the important reassessment and reinterpretation of principles in the case of *Rooman v. Belgium* new standards within the obligation to fulfil were highlighted. They are interpreted under the notion of *adequate facility*, for which the Court has developed a broader and also a narrower interpretation.

According to recent case-law, adequate facility in the narrower sense may include not only *a priori* adequate facilities, which are part of the public health system in general, but also *a priori* inadequate facilities, with particular attention to prison health care. Nonetheless, as the decisions of the Court show, a prejudicary manner can be misleading, thus the special conditions of the individual concerned needs close examination in any type of facility on a case-by-case basis.

Nevertheless, the notion of appropriate facility in the narrow sense rests on the standards of *availability* and *physical accessibility*, demanding that public authorities overcome structural deficiencies and any lack of capacity (Government) and order the transfer from an inappropriate to an appropriate facility (courts and other competent domestic authorities).

Immediate transfer is not expected, but the Court delineates a rather strict deadline for every measure required to be taken, to achieve compatibility with the ECHR. Nor can an argument based on structural deficiencies and lack of capacity be accepted as a reference to an exceptional and unforeseeable circumstance (*availability*). Nor does a government policy measure involving an expansion of capacity in itself, but which is protracted for a longer period of time, seem to make delayed transfers, if any occur, acceptable.

This motivates the authorities - either national courts or expert bodies involved in the decision in individual cases - to take into account the issue of capacity and to designate an appropriate institution that also has free capacity at the time of the decision. Under the relevant case-law, the Court basically did not impose any other criteria for decision-making. Mentioning the specific example of the case of *Strazimiri v. Albania*, in which there was a structural deficiency in the public health system, the

[49] Judgement in the case of *Rooman v. Belgium*, ... Joint partly dissenting opinion of Judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and Chanturia.

Court mentioned that a transfer from the prison hospital to a civilian psychiatric institution (i.e. non-public health sector) should have been considered (*availability*). And if other state authorities responsible for the enforcement of the court decision are also involved, they are obliged to take all other necessary measures to ensure the admission as soon as possible (*physical accessibility*).

Regarding the proportionality of deprivation of liberty, another important element is the consideration of the possibility of deinstitutionalisation, also based on expert opinion, which also serves the purpose of social reintegration.

The notion of *adequate facility* in a broader interpretation also includes not only mere access to basic health care services, but also entitlement to an appropriate health environment and real therapeutic measures (*quality and acceptability*). With this important development, the Court has clearly taken a position recognizing the right to health care with a view to future reintegration for persons of unsound mind who are deprived of their liberty, raising the level of guarantees against circumstances which jeopardize their particular vulnerability. Another promising aspect is that the Court has already referred to the aforementioned principles consistently in its subsequent cases.

The outcome of this research invites us to focus attention on the progressive, step by step realization of the right to health care in the legal sphere, as well as presenting key examples of its enforceability in the European region.

Hopefully, these developments in the interpretation of the Court will add new dynamism to further clarification of the right to health care standards in the field of international human rights, either for other vulnerable groups or in general.

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