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Legal protection in psychiatry. The jurisprudence of the organs of the European Convention of Human Rights

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Summary - The European Convention of Human Rights recognises a certain number of rights and freedoms for persons within States' jurisdiction. For those confined in psychiatric hospitals, this legal protection concerns first of all the lawfulness of deprivation of liberty, which must conform to the conditions laid down by the Convention as interpreted by the case-law of the Convention organs (the Commission and Court of Human Rights). The Convention also guarantees to person deprived of their liberty further rights: the right to information, the right to appear before a court, the right to compensation and also the right to the respect of privacy and correspondence. © 1998 Elsevier, Paris

Convention of Human Rights / legal protection / lawfulness of detention / rights during detention

INTRODUCTION

Drawn up under the aegis of the Council of Europe and signed in 1950 by its member states, the European Convention for the Protection of Human Rights and Fundamental Freedoms (known more commonly as the European Convention on Human Rights) recognises a certain number of rights and freedoms which it protects and which States must comply with in respect of any person placed under their jurisdiction.

The Convention also created an original institutional mechanism, made up of the European Commission of Human Rights, which receives all the applications, examines them, decides as to their admissibility and adopts an opinion as to the facts, and the European Court of Human Rights, which passes judgements which are binding on the States. The Committee of Ministers of the Council of Europe also plays a role in this system in so far as, for all cases not deferred to the Court, it takes decisions, equally binding for the States, in which it establishes whether there has been a violation of the Convention[1].

This paper aims at examining the question of legal protection in psychiatry through the jurisprudence of the Commission and the Court of Human Rights (known hereafter as the organs of the Convention) in respect of deprivation of liberty.

PROTECTION CONCERNING THE CONDITIONS OF DEPRIVATION OF LIBERTY

The first series of guarantees laid down by the Convention are those to do with the lawfulness of detention as stipulated in Article 5 para 1 of the Convention.

Article 5 para 1 of the Convention states the following: "Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) e. the lawful detention (...) of persons of unsound mind (...)"

The definition of unsoundness of mind

The first question the organs of the Convention had to resolve was the definition of unsoundness of mind. This question was examined for the first time in the case of Winterwerp v The Netherlands[2]. In its report the Commission noted that the Convention does not include a definition of this term and that its usual meaning is far from being precise. It would be pointless and bold, the Commission concluded, to provide a general or definitive definition because this concept evolves with time according to progress in psychiatry and the way in which mental illness is viewed by society.

However, the Commission pointed out that "Article 5 para 1 e) could not be taken to cover the deprivation

of liberty of anyone whose behaviour in public or in private diverges from standards, dominant ideas, or even fashions, leaving to the States the power to classify under the term of unsound of mind any citizen considered 'asocial' or 'marginal'".

In its judgement, the Court confirmed this approach: "The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation (...) it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.

In any event, sub-paragraph (e) of Article 5 para 1 obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society"[3].

Lawfulness of detention

The second problem to be examined was that of lawfulness of detention. In its report on the Winterwerp case[4] the Commission emphasised the requirement that detention should not be arbitrary, namely that the patient cannot be admitted and especially not held in a psychiatric establishment without it having been established medically that this was justified by his mental state. The Court subscribed to this thesis, holding that the lawfulness of detention firstly presupposed compliance with domestic legislation (as to the procedure and the facts) but also with the restrictions authorised by Article 5 para 1 e)[5]. The Court then listed three minimum conditions for there to be lawful detention of a person of unsound mind: "For the detention of a person of unsound mind to be lawful, except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder"[6].

Recently the Commission adopted a report in the case of G and ML v France[7] where the applicant, having been declared responsible for his acts and sentenced to a prison sentence for the rape of his sons, had been the subject of an ex officio placement on the day he should have been released. The medical certificate providing the basis for the confinement decision mentioned in particular that his release "gave rise to fears of new perverted sexual attacks". He was released 11 months later, after two psychiatric expert opinions.

The judge held that "obviously, once a mental illness is no longer diagnosed, psychiatric confinement could not be used to continue to protect society against the potential action of an offender, after the latter has served the sentence which sanctioned his deeds, in order to thus prevent any reoffending."

In this case the Commission concluded that there had been a violation of Article 5 para 1 of the Convention in that the psychiatric confinement of the applicant did not correspond to the purpose of such confinement. The Commission concluded, quoting a passage from the Winterwerp judgement of the Court[8], "in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as 'lawful'."

In a case brought against the United Kingdom, recently deferred to the Court[9], the Commission examined in depth the last condition, namely the persistence of the disorder: in this case the applicant had been confined in 1984 after having been sentenced for assault and battery. In 1989 the competent court (Mental Health Review Tribunal) held that he no longer suffered from mental disorders and ordered his release subject to a place being found for him in a home. However, such housing being impossible to find, the tribunal postponed his effective release from one year to the next, until he was finally released in 1993. The Commission reached the conclusion that his confinement from 1989 to 1993 was in breach of Article 5 para 1 e) of the Convention, due to the long delay which had occurred and the absence of strict procedural guarantees enabling him to be released earlier[10].

Respect of the "procedure prescribed by law"

Article 5 para 1 also provides that, over and beyond the requirement of lawfulness, deprivation of liberty can only occur "in accordance with a procedure prescribed by law".

According to the Court, these words refer essentially to national legislation and embody the requirement to follow the procedure laid down therein. Nonetheless, the Court added, domestic law must itself comply with the Convention, including the general principles stated or implied in the Convention.

In the present case, these principles are as follows: "The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and

be executed by an appropriate authority and should not be arbitrary"[11].

An example of the non-respect of a procedure prescribed by law would be the absence of a clerk in the hearing of the Wassink v the Netherlands case[12] or, in the Van der Leer case, the fact that there was no audition of the applicant by the cantonal judge who ordered her confinement[13].

Control by the organs of the Convention

Since Article 5 para 1 refers to domestic legislation it might be thought that the organs of the Convention do not control the application by domestic authorities.

Nonetheless the Court has stated the following principle: "In deciding whether an individual should be detained as a 'person of unsound mind', the national authorities are to be recognised as having a certain discretion since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities[14]. Whilst it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise in relation to matters, where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review"[15].

PROTECTION DURING DEPRIVATION OF FREEDOM

The Convention does not only guarantee lawful detention; it also guarantees persons deprived of their liberty a certain number of rights which are mostly to be found in the other paragraphs of Article 5 of the Convention. Article 8 of the Convention may also be mentioned.

The right to information

Article 5 para 2 of the Convention establishes the right, for any person arrested, to be informed of the reasons for his arrest and of any charge against him.

The first question raised is to do with the applicability of Article 5 para 2 of the Convention to types of civil detention and in particular to cases of psychiatric confinement.

This question was examined for the first time in the case of X v the United Kingdom[16] in which the applicant complained of not having been informed adequately or promptly of the reasons for his renewed confinement. The British government held that Article 5 para 2 applied only to an arrest prior to charges being brought, emphasising the difficulties involved in dealing with the mentally unsound and the fact that it is unreasonable to expect that policemen arresting a patient explain to him the reasons for his confinement.

The Commission replied that, in its opinion, Article 5 para 2 applied to all cases of justified confinement as listed in Article 5 para 1, with the purpose of informing adequately any person detained of the reasons for his arrest, so that he may assess whether the detention is lawful and take any measures he might feel useful. Moreover, it held that the mentally ill were not excluded, as exceptions, from the protection of Article 5 para 2, because of the particular difficulties they presented[17].

In its judgement concerning this case the Court did not give an opinion on this point but, subsequently, in its judgement in the Van der Leer case, it approved of this approach: "Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of this right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (...)

Paragraph 4 does not make any distinction as between persons deprived of their liberty on the basis of whether they have been arrested or detained. There are therefore no grounds for excluding the latter from the scope of paragraph 2"[18].

Once it has been established that Article 5 para 2 is applicable to cases of civil detention, it is then necessary to look at the content of the information.

Firstly the ability of the person being informed to receive and understand the information must be taken into consideration. The Commission examined this point in the case of X v the United Kingdom:

"The range of details and the kind of information to be made available to the detainee to comply with the obligations of Article 5 para 2 will depend on the circumstances of each case. For example, with certain persons of unsound mind, there may be a justification for concealing information from the patient if he is clearly not in a position to receive or understand such information or if there are serious grounds for thinking that he might react in a dangerous way or that the information might have the opposite effect of the purpose pursued through the confinement by frightening the patient to such an extent that it might jeopardise his future treatment. Nonetheless, if the patient is not himself in a position to receive the intended information the Commission considers that the necessary details must be given to the

persons who represent his interests, for example to his lawyer or his curator"[19].

In this case the Commission noted that, whatever the mental state of the applicant may have been, in any event no information had been given to his solicitors and concluded, because of this, that there had been a breach of Article 5 para 2 of the Convention.

Moreover, Article 5 para 2 states that the information should be provided "promptly". In the majority of penal cases where there is deprivation of liberty the information is given at the time of arrest by the persons carrying out the arrest. However, the Commission had to interpret this requirement in the specific case of psychiatric confinement and held that: "Bearing in mind the particular difficulties posed by certain mental patients, the Commission grants that it may not be the role of the policemen, responsible for the sometimes delicate task of arresting a patient, to inform him of the detailed reasons for his arrest or his confinement because they are not qualified to appreciate the mental state of the patient nor his ability to understand the situation. It is however up to the doctors to inform the patient or his representatives. They should carry out this obligation promptly, in other words, once the patient has arrived at the hospital at the very latest"[21].

Finally the obligation to inform does not cease at the moment of confinement but remains in the event of renewed confinement or if there is a change in the legal basis of the confinement[22].

The right to appeal before a court

Article 5 para 4 of the Convention states: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be determined speedily by a court and his release ordered if the detention is not lawful."

The body concerned must be a court with all that this implies in terms of independence from the executive and the parties[23] but, in addition, the function it fulfils in those cases coming within its competence must be judicial in nature and not administrative, for example [24].

Moreover the appeal must be a proper one, within the meaning of Article 5 para 4. It is in the field of non-penal deprivation of liberty and, more particularly, that of psychiatric confinement, that the interpretation of Article 5 para 4 has given rise to difficulties.

In the first stage of its jurisprudence the Court considered that if a decision of deprivation of liberty is taken by an administrative authority, States should organise an appeal before a court but that, if the decision is taken by a judicial authority, the control intended in Article 5 para 4 was, so to speak, incorporated in the initial decision. Therefore, if the confinement had been ordered by a court, there seemed to be no appeal open to the person concerned.

The Commission expressed the opinion that this approach could not be applied as such to cases where a person had been deprived of his liberty indefinitely as is often the case with psychiatric confinement and where it was therefore indispensable to verify, with the passage of time, if the conditions laid down by the law were still met[25].

The Court finally reached the same conclusion in the Winterwerp case. It accepted that the reasons justifying the original confinement may have ceased to exist and that, by its very nature, the deprivation of liberty involved implies the possibility of exercising a subsequent control of lawfulness at reasonable intervals whatever the nature of the authority which took the initial decision on confinement[26, 27].

The guarantees of appeal provided for in Article 5 para 4 of the Convention must be those offered by any judicial procedure but it is necessary to take into account the special nature of the circumstances in which the proceedings are taking place[28].

In the case of the detention of the mentally unsound it may effectively be necessary, in the interests of the person concerned, to have recourse to non-public proceedings and not to inform him in person of all the elements used as a basis for the competent authority to take its decision.

The organs of the Convention did however lay down a limit by specifying an "irreducible nucleus" of such proceedings: the person concerned must have the right to give his opinion as well as to contradict the "medical and social observations" invoked in order to justify his confinement[29].

It is then up to the national legislator or to the judge dealing with the case to organise these rights (in particular the hearing of the applicant himself or his representatives) in the way they deem the most appropriate [30]. The proceedings may be entirely in writing as long as the applicant is represented by a lawyer and is in a position to fully contest the lawfulness of his detention before the competent courts.

With respect to the scope of the control exercised by the court, not only must there be a verification of the lawfulness of the detention as to the form, but also as to the facts, in other words of the necessity to uphold confinement in the light of the mental state of the person concerned[31].

In this context the Commission and the Court reached

the conclusion, in several cases involving the United Kingdom, that the British procedure of "habeas corpus", which was limited to certain aspects only of the lawfulness of detention (and, in particular, did not assess the mental state of the person concerned) did not comply with the requirements of Article 5 para 4 of the Convention[32].

As a result of these cases, the British system has been reformed, enabling the person concerned to refer his case to a tribunal (Mental Health Review Tribunal) after six months and then once a year[33].

Article 5 para 4 also provides that the court to which the case is referred should take its decision "speedily". "Speedily" cannot be assessed in abstracto but must be appreciated in the light of the circumstances of the case. It is necessary to take into account the general conduct of proceedings and the extent to which the delays may be due to the behaviour of the applicant or his counsels. In principle, however, it is the responsibility of the State to ensure that the proceedings are conducted in the minimum period of time because the liberty of the individual is at stake.

Right to compensation

It is worth mentioning briefly that, under Article 5 para 5 of the Convention, " Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

This right to compensation presupposes a prior establishment that there has been a violation of one of the paragraphs from 1 to 4 of Article 5 and includes both non-pecuniary and pecuniary damage.

Right to the respect of privacy

This right is laid down in Article 8 of the Convention which guarantees the right to respect for private and family life and correspondence. The second paragraph of this article allows "interference" by the State with the exercise of these rights as long as such interference is in accordance with the law, with a specific purpose in mind and is done in a way which is in proportion to the goal.

The case of Herczegfalvy v Austria[34] provided the organs of the Convention with the opportunity to examine the compatibility with this Article, as well as with Article 3 of the Convention (which prohibits torture and inhuman or degrading treatment) of the following facts, complained of by the applicant: forced feeding and administration of neuroleptics, isolation, use of handcuffs and a security bed to which the applicant was attached for several weeks. In addition he contested the fact that the hospital authorities had passed on all his letters to his curator.

If, unlike the Commission, the Court held that the fact of attaching the applicant and force feeding him, as well as administering neuroleptics by force, did not constitute a violation of Article 3, it nonetheless laid down the following principle: "the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3 whose requirements permit of no derogation.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist."

In this case the Court held that the period during which the handcuffs and the security bed were used seemed to give rise to concern, but accepted the argument of the Austrian government according to which, in conformity with the psychiatric principles commonly accepted at the time, such treatment was justified for therapeutic reasons. This being the case, for the Court there had been neither "inhuman or degrading treatment" within the meaning of Article 3 of the Convention nor any violation of respect for his private life, which also includes protection of physical integrity.

On the other hand the Court was of the opinion that the selection of the correspondence to be transmitted to the applicant's curator was an unjustified interference in his right to the respect of his correspondence.

CONCLUSION

At the end of this paper which, of necessity, is incomplete, it can be seen that the Commission and Court–in a dynamic and developing case-law–have taken care strictly to limit restrictions on the fundamental right to liberty which, to quote the judgement in the Engel case, is "the foundation of any democratic society".

But it should be remembered that in the system established by the Convention, it is first and foremost up to the States themselves, and their authorities, to protect the rights recognised in the Convention.

NOTES

1 It should be pointed out that this system will undergo far-reaching changes with the entry into force on 1st November 1998 of Protocol N° 11 to the Convention which establishes a single Court of Human Rights sitting permanently in Strasbourg. The current Commission and Court will disappear and the Committee of Ministers will no longer have quasi-judicial powers.
2 N° 6301/73 Comm report 15.12.77, series B n° 31, p 36 and Eur Court of HR, judgement of 24 October 1979, series A n° 33, pp 16–17, para 37 and following.
3 Judgement quoted above, p 16, para 37.
4 Report quoted above, p 36, para 76.
5 Winterwerp judgement, quoted above, p 17–18, para 39; cf, also Eur Court HR, Ashingdane v United Kingdom, judgement of 28 May 1985, series A n° 93, p 22, para 48.
6 Cf, also judgement X v United Kingdom of 5 November 1981, series A n° 46, p 18, para 40.
7 G and ML v France, Comm report 6.9.95.
8 Judgement quoted above, p 18, para 39.
9 Johnson v United Kingdom, Comm report 25.6.96, para 59 and following.
10 *Ibidem*, para 67–72.
11 Winterwerp judgement, quoted above, p 19–20, para 45.
12 Comm report 12.7.89, Eur Court HR series A n° 185–A, p 23, para 39–41 and judgement of 27 September 1990, p 12, para 27.
13 Comm report 14.7.88, Eur Court HR series A n° 170, p 19, para 97–98 and judgement of 21 February 1990, p 12, para 23.
14 Winterwerp judgement, para 40.
15 *Ibidem*, para 46.
16 Comm report 16.7.80, series B n° 41, pp. 33–34, para 101 and following and judgement of 5 November 1981, series A n° 46.
17 Report quoted above, pp 33–34, para 104–6.
18 Van der Leer judgement, quoted above, note 21, p. 13, para 27–8.
19 Report quoted above, p 34, para 106.
20 Report quoted above, p 35, para 111 and following.
21 Cf, N° 18526/91, JCC v France, dec 11.3.94; N° 17734/91, G and ML v France, dec 29.6.94; N° 19869/92, GG v France, dec 26.2.96, unpublished: in these different cases, given the circumstances of each case, the Commission held that the authorities had respected the requirements of Article 5 para 2 of the Convention.
22 Cf, especially report X v United Kingdom, quoted above, note 45, para 105.
23 The Dutch Ministry of Justice, which is part of the executive, is not such an organ (Koendjbiharie v Netherlands, Comm report 12.10.89, Eur Court HR series A n° 185–B, p 51, para 72 and Keus v Netherlands, Comm report 4.10.89, Eur Court HR series A n° 185-C, p 78, para 67).
24 Above–mentioned report, p 92, para 175.
25 Cf, N° 6859/74 X v Belgium, dec, 2.10.1975. DR 3 pp 139, 141. See also above–mentioned Commission report in Winterwerp case p 40, para 95.
26 Above–mentioned judgement, p, 23, para 55 and above–mentioned judgement X, v United Kingdom, pp, 22–23, para 52–53.
27 The same applies a fortiori if the person concerned is subject to a renewal of confinement after a period of liberty: cf, X v United Kingdom, Comm report pp 36–37 and above–mentioned judgement pp 22–23, para 52–54; E v Norway, Comm report 16.3.89. Eur Court HR series A n° 181–A, p 32, para 126.
28 E v Norway, Comm. report 16.3.89, Eur Court HR series A n° 181–A, p. 32, para 127; Wassink v Netherlands, Comm report 12.7.89, Eur Court HR series A n° 185–A, p 25, para 48.
29 Winterwerp case, above–mentioned Comm report, p 42, para 102 and above–mentioned judgement, p 24, para 60.
30 Winterwerp case, above–mentioned Comm. report, *ibidem*.
31 Above–mentioned report, p 40, para 90.
32 Above–mentioned report of X v United Kingdom; p 39, para 136 and above–mentioned judgement, p 25, para 58; N° 6870/75, B. v United Kingdom, Comm report 7.10.81, DR 32 p 85, para 231 and following.
33 Cf, for a description of the system introduced in 1983, the case of Johnson v United Kingdom, Comm report 25.6.96, para 37–47.
34 Eur Court HR, judgement of 24 September 1992, series A n° 244, and Comm. report 1.3.91, series A pp 30 and following.