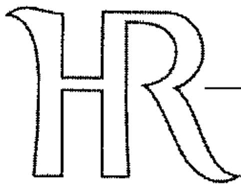

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COMMUNICATION

FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

KĘDZIOR V. POLAND

APPLICATION NO. 45026/07

1. Introduction

The Helsinki Foundation for Human Rights with its seat in Warsaw, Poland ("the HFHR"), submits its communication to the Committee of Ministers of the Council of Europe in respect to implementation of the European Court of Human Rights judgment of 16 October 2012 issued in *Kędzior v. Poland* (application no. 45026/07).

The HFHR is a non-governmental organization established for the protection and promotion of human rights. One of the most important aspects of its activity in Poland is preparation of legal submissions to national and international courts and tribunals, as well as interventions regarding implementation of human rights standards.

Since the Polish authorities have not undertaken effective actions to implement the judgment in *Kedzior v. Poland* the HFHR finds it necessary to submit this communication. The following communication is submitted under Rule 9 paragraph 2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, which authorizes non-governmental organizations to submit their opinions with regard to the execution of judgments under Article 46, paragraph 2, of the

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Convention. Consequently, the present communication will focus on implementation of the judgment on the general level.

2. Background of the case

The case of *Kędzior v. Poland* centered on a violation of the Applicant's right to protection of personal liberty and effective remedies.

In December 2001 Mr. Stanisław Kędzior ("the Applicant") was completely incapacitated by the Krosno Regional Court. The court's decision was motivated by the fact that the Applicant suffered from schizophrenia and had a tendency to abuse alcohol.

Subsequently, in February 2002, the Applicant was placed in a social care home against his will. Since he was completely deprived of his legal capacity, the procedure was initiated by his legal guardian – his brother, Zbigniew Kędzior. Placement in the social care home took place on the basis of administrative decisions, with no involvement of courts – the motion of the Applicant's guardian was interpreted as expressing the Applicant's own will.

The Applicant spent 10 years in the social care home in Ruda Różaniecka, and in 2012 he was moved to the social care home in Sośnica. He tried to initiate proceedings before the courts in order to be released from the institution; however, this was unsuccessful due to the fact that domestic law did not provide totally incapacitated persons any effective remedies in this regard. The Applicant also attempted several times to institute proceedings to have his incapacitation quashed. Unfortunately, since 2009, Polish courts have rejected all his motions as inadmissible, and, in 2009, after reviewing his case as to the merits, the court dismissed his request arguing that his mental state did not improve to the extent that would allow him to function independently.

The European Court of Human Rights ("the ECtHR") held unanimously that there was a violation of Articles 5 §§ 1, 4 and 6 § 1 of the European Convention on Human Rights ("the Convention"). The ECtHR held that involuntary placement of the Applicant in the social care home constituted deprivation of liberty and, because of that, it had to satisfy the requirements set in the Article 5 of the Convention. Referring to the judgment in *Winterwerp v. the Netherlands*, the ECtHR reiterated that, in the context of persons with mental and psychosocial disabilities, Article 5 § 1 sets three conditions of admissibility of deprivation of liberty: "except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, the existence of a true mental disorder must be established by 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." Applying these criteria to *Kędzior* case, the ECtHR ruled that the authorities did not prove that the state of mental health of the Applicant justified his detention and, moreover, that they failed to assess whether the disorders warranting the applicant's confinement still persisted. That situation was caused by deficiencies in the Polish law, which did not oblige domestic authorities to review periodically the legality and purposefulness of detention of persons with mental disabilities. As to Article 5 § 4 the ECtHR took into account that the Applicant had not had at his disposal any effective procedure whereby he could challenge the necessity for his continued stay in the social care home and obtain his release, which is in clear contradiction of the Convention. Article 6, on the other hand, was violated by the fact that between 2007 and 2009 the

Applicant had been prevented from directly applying to a court for restoration of his legal capacity, despite the judgment of the Constitutional Tribunal which found that lack of access for incapacitated persons to court in this area violated the Constitution.

The ECtHR awarded the Applicant EUR 10,000 in respect to non-pecuniary damage.

3. General measures

3.1 Current legal framework

The permissible grounds for total incapacitation are regulated in Article 13 of the Civil Code, according to which: "A person who has reached the age of thirteen years may be completely incapacitated if, due to mental illness, mental deficiency or any other mental disorder, notably drunkenness or drug addiction, he/she is not able to control his/her conduct". Article 14 of the Civil Code specifies that legal acts performed by the persons deprived of legal capacity shall be void, with exception to contracts concluded commonly in the ordinary circumstances of daily life. Lack of legal capacity influences a person's life in many areas: he/she cannot get married, participate personally in the proceedings before courts and public administration and, more generally, cannot decide for himself/herself. The institution of guardianship is based on the substantive decision-making model, which means that the guardian is authorized to take decisions on behalf of the person under guardianship – his/her will substitutes the will of this person. The guardian is, however, subject to supervision of the guardianship court.

Issues related to admission of persons to social care homes are regulated, *inter alia,* in the Psychiatric Protection Act ("PPA"). According to Article 38 PPA "any person who, on account of mental disorder or mental disability, is unable to take care of himself or herself and cannot be taken care of by somebody else, and does not need hospital treatment, may be placed in a social care home with his or her consent or the consent of his or her guardian".

When placement in the social care home is voluntary, the guardianship court is not involved in the procedure. The court is involved only in the proceedings for involuntary placement (art. 39 of the PPA), which take place when:

- a person or her/his guardian does not express consent, but the local social assistance organ files a motion to the court for compulsory placement,
- a director of the psychiatric hospital files motion to move a person from the hospital to the social care home because he/she believes that there is no need for staying in a hospital but the person still needs some assistance to take care of himself/herself,
- when the person, because of his/her mental state, is unable to express consent to being placed in the social care home and, at the same time, the person is not under guardianship (otherwise, the consent may be expressed by the guardian).

In case of totally incapacitated persons (such as the Applicant), the will of the guardian is generally treated as the expression of the will of the person under guardianship. However, according to Article 156, in conjunction with the Article 175 of the Family and Guardianship Code, the guardian should obtain the court's authorization in all major issues regarding the person or property of the person under guardianship. Placement in the social care home is generally considered a major issue regarding the person under guardianship and, as such, requires the approval of the guardianship court.

The procedure regarding placement of a totally incapacitated person in a social care home is regulated in the Act on Social Assistance and Regulations issued by the Minister of Social Policy and in summary looks as follows:

- first: the guardian should obtain the guardianship court's permission for placing person in the social care home;
- second: the guardian has to file a motion for admission of a person under guardianship to social care home. Regulation of the Ministry of Labour and Social Policies of 2012 enumerates documents which should be attached to such motion – the court's authorization issued upon the art. 156 of the Family and Guardianship Code is not listed among them;
- third: the authority of the relevant commune issues decision regarding admission of person in social care home. Subsequently, the second decision, regarding placement of the person to the specific social care home, is issued by authority of the relevant commune which runs this home. These two decisions have to meet formal requirements specified in the Code of Administrative Proceedings.

Matters regarding supervision of the legality of the placement and continued stay of persons in psychiatric hospitals and social care homes for mentally disabled persons are regulated in the Regulation of the Minister of Justice of 2012. This regulation provides that such inspection should include:

1) examination of the correctness of keeping documentation which served as a basis for admission to the facility and staying of mentally disabled persons;
2) examination of the correctness of medical record-keeping on the use of coercive measures and the use of health services posing an increased risk for people with the mental disorders;
3) examination of cooperation of the facility with the families and guardians of mentally disabled;
4) examination of the accuracy and punctuality in dealing with complaints and requests of mentally disabled;
5) direct contact with mentally disabled persons in the facility;
6) the issuance of recommendations and supervision of implementation of them;
7) other activities designed to address the deficiencies and to prevent further infringements.

Inspections are carried out at least once every two years ("permanent controls") or should be carried out *ad hoc* in case of a justified suspicion of infringements of law in the functioning of institutions ("*ad hoc* controls"). The inspection is exercised by the judge with a special knowledge of mental health issues, appointed by the president of the district court in which district the facility is located.

In addition, on the basis of Social Assistance Act, also the "voivodship governor" (*wojewoda*) has some supervisory powers regarding units of social assistance (including social care homes). The statute regulates the scope of these supervisory powers, as well as procedural matters of the inspection.

To sum up, currently the law does not impose on the courts an obligation to conduct a periodic review of legality and purposefulness of placement and continued stay of persons in social care homes. Neither does it provide such persons with effective remedies to request a review from the court. The provisions regarding controls focus mostly on inspections regarding proper functioning of given institutions as a whole and not on examining situations of individual persons.

3.2 Information provided in the Government's Action Plan

The Government explained that in order to ensure full compatibility of the Polish law with the standards of the Convention, it planned to reform the PPA. The primary aim of the reform would be resignation from the assumption that each incapacitated person is unable to express

his/her will regarding placement in the social care home. The new law would provide that the consent of incapacitated person would be generally required. However, if a person is unable to express his/her consent or would refuse it, the placement in the social care home could be done on the basis of the guardianship court's decision.

Moreover, the Government declared that the new provisions would grant incapacitated persons placed in social care homes the right to appeal to the guardianship court for changing its decision regarding admission to a social care home. The law would also provide easier access for incapacitated person to free legal representation.

3.3 Current state of reform

The reform referred to in the Government's Action Plan has not yet been implemented and, moreover, the legislative plans are still in their initial phase. The Government published only Draft Assumptions to the Act on Amendment of Psychiatric Protection Act and Act on Upbringing in Sobriety and Counteracting Alcoholism. In the Polish legislative process, draft assumptions are the first document published by the Government during legislative works, and their aim is to present and discuss the primary objectives and concepts of planned law. Therefore, draft assumptions are not even an official draft – they are not formulated as provisions (articles, sections etc.) but as textual presentation of the most important aspects of new law.

The Minister of Health published Draft Assumptions on 18 June 2014. Subsequently, the draft was sent to certain institutions (various Ministers, National Council of Judiciary, General Inspector of Personal Data Protection etc.) for consultations. Those authorities responded until autumn of 2014 and in October 2014 their comments were made available to the public. Since then the legislative works over the draft seemed to stop, as there is no information regarding further developments.

The Draft Assumptions present similar objectives to those described in the Government's Action Plan. Therefore, there will be a requirement of consent from an incapacitated person in order to place him/her in the social care home and, in case of refusal or impossibility to express the will, the decision regarding placement would belong to the guardianship court. Moreover, the reform would give the incapacitated person placed in a social care home against his/her will the right to request examination of his/her mental state in order to establish whether the grounds for placement still exist. Such a motion could be filed every 6 months. If the mental health of a person got better, the guardianship court, acting upon the request of this person of *ex officio*, would be authorized to change its decision regarding placement.

In addition, the Government is currently working on a law which would fundamentally reform the institution of incapacitation in Poland. The current law would be replaced with a more flexible system in which the guardianship courts would be equipped with several types of supportive mechanisms with various degrees of intrusiveness in the autonomy of the supported person. The full deprivation of legal capacity would be permissible only in exceptional cases, when the person would be completely unable to understand the meaning and consequences of legal actions. The Government adopted assumptions to the new law on 10 March 2015. The draft law has not yet been published.

3.4 The HFHR assessment of execution of the general measures

First of all, the HFHR would like to underline that the Polish law is still incompatible with the Convention standards. This situation leads to continuous violation of human rights of many incapacitated persons, which was confirmed, *inter alia*, in subsequent cases before the ECtHR

(*K.C. v. Poland*, 25 November 2014, app. no 31199/12; *T.T. v. Poland*, 10 March 2015, app. no. 3090/13).

In our opinion, the Government has not taken sufficiently effective actions aimed at implementation of the *Kędzior v. Poland* judgment on the general level. Despite passage of a relatively long time since the delivery of the judgment (more than 2,5 years), the Government has developed only draft assumptions to the reform, constituting merely a first step of the legislative process.

On 25 May 2015 the Ombudsman sent a letter to the Minister of Health with the question regarding the current state of legislative works over the draft and the expected date of its final adoption.[1] On 1 July 2015 the Minister replied that the draft is being consulted with the Prime Minister and Minister of Foreign Affairs.[2] Recently, the media have informed that it is highly probable that the law would not be enacted in this term of office of the Parliament.[3]

This delay in implementation of the Convention standards cannot be justified by the scale of necessary amendments or their complexity. In fact, the reform proposed by the Government is rather simple – it requires amendments of just a few provisions of the PPA aimed at guaranteeing an incapacitated person kept in a social care home against his/her will access to courts. It does not require any far-reaching reorganization of the system of justice, nor does it require significant financial resources for its implementation.

Turning to the merits of the Government's proposals, the HFHR believes that such a reform could be acceptable. However, it still needs some improvements. For instance, the incapacitated person should have a right to appeal against the guardianship court's decision on compulsory placement in the social care home. Moreover, procedural guarantees should be applicable also in case of transferring a person between various social care homes. The law should also explicitly declare that involuntary placement in the social care home should be treated as *ultima ratio*.

Nevertheless, the HFHR would like to strongly emphasize that all these solutions should be perceived only as a first step towards more fundamental restructuring of the system of assistance for persons with mental and psychosocial disabilities. Mere introduction of procedural guarantees for deprivation of liberty of persons with disabilities would not be enough to secure protection of their fundamental rights. The true objective of the Polish Government should be major reorganization of the system of assistance for persons with mental disabilities in order to ensure protection of their rights to live in community and protect their autonomy.

In this context we would like to refer to the statement on Article 14 of the Convention on the Rights of Persons with Disabilities issued in September 2014 by the Committee on the Rights of Persons with Disabilities[4]. The Committee underlined "that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived disability" and that "it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on presumptions of risk or

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[1] https://www.rpo.gov.pl/sites/default/files/Do_MZ_ws._osob_z_niepelnosprawnosciami_przebywajacych_w_domach_pomocy_spolecznej_wbrew%20wlasnej_woli.pdf.

[2] http://www.gazetalekarska.pl/?p=15908.

[3] B. Lisowska, *Psychiatria w stanie zapaści, ale zmiany przepisów na razie nie będzie*, „Dziennik Gazeta Prawna", 7 July 2015, http://serwisy.gazetaprawna.pl/zdrowie/artykuly/881628,psychiatria-znow-odstawiona-na-boczny-tor.html.

[4] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E.

dangerousness tied to disability labels is contrary to the right to liberty". Therefore, in light of the CRPD, the state parties are obliged to reorganize their systems of assistance for persons with mental disabilities in accordance with the principle of deinstitutionalization, that is preference for mechanisms which respect the autonomy of person and his/her right to live in the local community (Article 19 of the CRPD).

The HFHR understands that standards of the Convention are not exactly identical to those set in the CRPD. Unlike the CRPD, Article 5 § 1(e) of the Convention provides an explicit basis for deprivation of liberty of persons with mental disabilities. Nevertheless, we believe that interpretation of the Convention should not depart from other important human rights standards developed in international law. Thus, Article 5 of the Convention should be interpreted in accordance with the CPRD and should be understood as prohibition of arbitrary, discriminatory deprivation of liberty of persons with mental disabilities. Consequently, states should have positive obligations to establish such a system of assistance for persons with mental disabilities, which would respect their right to function in society and protect them against exclusion and isolation.

In addition to deinstitutionalization, the Polish Government should also continue legislative works over the abolition of the institution of incapacitation. The draft assumptions briefly described above should be assessed positively, however possibility of complete deprivation of legal capacity, even in the most exceptional circumstances, seems to be incompatible with the CRPD. The Committee interprets the Article 12 of the CRPD as complete prohibition of any forms of substituted decision-making mechanisms. For that purpose it explicitly condemned German legislation[5] which strongly influenced the Polish draft.

4. Conclusions

In the HFHR's opinion current Polish legislation is clearly incompatible with the standards of the Convention and CRPD. Instead of protecting and respecting personal liberty, legal capacity and right to autonomous functioning in the society for persons with mental disabilities, it allows complete deprivation of their legal capacity and involuntary placement in the social care homes if only their guardians wish to do so. Such a situation has to be changed as soon as possible. Unfortunately, so far the Polish Government has not taken sufficiently effective steps to bring the Polish law into accordance with the international human rights standards. The HFHR notes that so far the Polish legislature has not amended even a single provision to implement the *Kędzior v. Poland* judgment. The only legal document developed during the two and a half years since the delivery of the ECtHR decision is a draft assumptions of rather modest, procedural reform, which does not solve the essence of the problem, i.e. institutionalization of the system of assistance for persons with mental disabilities.

5. Executive summary

- So far, the judgment in *Kędzior v. Poland* has not been satisfactorily implemented on the general level.
- Current Polish legislation is clearly incompatible with the standards of the Convention and the CRPD. It allows for complete deprivation of legal capacity of persons with mental disabilities and their involuntary placement in isolative institutions without ensuring proper procedural safeguards. Since the delivery of the judgment, the Polish

[5] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1.

Government has not taken any effective steps aimed at reforming the law. The only document it published consisted of Draft Assumptions of laws which would introduce some procedural guarantees for persons with mental disabilities placed in social care homes against their will. However, the document does not even have the form of an official draft of law and it is very difficult to predict the time of its final enactment.

- The HFHR believes that in order to bring the Polish law in full accordance with international human rights standards, the Government should undertake far-reaching reform of the system of assistance for persons with mental disabilities. The new law should be based on principles of deinstitutionalization and respect for legal capacity of such persons.

This communication has been prepared by Marcin Szwed, LL.M., lawyer of the HFHR, under the supervision of Dr. Adam Bodnar, Vice President of the Management Board and head of the legal division of the HFHR.

On behalf of the Helsinki Foundation for Human Rights,

Dr Adam Bodnar

Vice-president of the Board

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