HELSINKI FOUNDATION for HUMAN RIGHTS

August, 2018

Alternative Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities in Poland

About Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 based in Warsaw, Poland. HFHR is one of the most experienced, professional and influential non-governmental organizations operating in the field of human rights in Poland and Eastern and Central Europe. Since 2007, HFHR has a consultative status within the United Nations Economic and Social Council (ECOSOC).

HFHR's objective is the promotion and protection of human rights. Its main activity areas include:

- domestic education in the field of human rights;
- international activities: programs promoting democracy, constitutionalism, rule of law and human rights in the countries of the Commonwealth of Independent States;
- public interest activities aimed at increasing the standards of human rights protection in Poland, implemented through monitoring, intervention and strategic litigation before domestic and regional courts. The HFHR is also a member of FRA networks within the European Union Agency for Fundamental Rights and the National Focal Point within the FRA's research network FRANET.

This submission has been prepared by HFHR lawyers: Jarosław Jagura (j.jagura@hfhr.org.pl) Małgorzata Szuleka (m.szuleka@hfhr.org.pl) and Marcin Szwed (m.szwed@hfhr.org.pl).

Institutional and legal framework

Institutions

Poland ratified the UN Convention on the Rights of Persons with Disabilities (hereinafter: the Convention) in 2012. Ratifying the Convention, Poland, in line with Article 33.1 of the Convention, established a mechanism for the coordination of works on the implementation of the Convention. This task was delegated to the Ministry of Labour, Family and Social Policy whose work in this field is supported by the Governmental Plenipotentiary for Persons with Disabilities and Ministry's Team on implementation of the CRPD. This system has, however, several deficiencies which weaken the process of implementing the provisions of the Convention. First of all, such a mechanism lacks necessary holistic approach – by the fact that the Ministry of Labour, Family and Social Policy has been appointed for the position of the coordinator of the works on the implementation of the Convention, the main focus is put on issues related to the problems of social benefits, employment of persons with disabilities and social rehabilitation, without a proper focus on other aspects of life and rights of persons with disabilities such as political or economic rights. Secondly, the Team on implementation of the CRPD, which is composed of representatives of 16 ministries, serves as a forum of exchanging information on actions related to implementation of the Convention rather than a body initiating and designing the policies related to the implementation.[1]

The Ombudsman Office is an independent institution responsible for protecting, promoting and monitoring the process of implementation of the Convention. Yet, since the moment of the ratification by Poland of the Convention, these tasks have not been reflected in the Act on the Ombudsman. Furthermore, Ombudsman's budget does not provide sufficient funds for fulfilling all the obligations and duties related to a broad mandate of the Ombudsman. Since 2012, Ombudsman's budget has been slightly increased by the Parliament, however this increase has never fully met the requirements presented by the Ombudsman in draft budgets. The most visible cut in financing occurred in 2016, when the Ombudsman presented a draft version of the annual budget for almost 45 million PLN (approx. 11 million EUR), however the Parliament granted only 35 million PLN (approx. 8 million EUR) in the final budget. Such a decrease does not allow the Ombudsman to fully implement all obligation and duties.[2]

Law

As the member of the European Union, Poland was obliged to implement the European Union law provisions protecting from discrimination. Adopted in 2010, the Act on implementation of Certain European Union Provisions on Equal Treatment (so-called Equality Act) failed to introduce a comprehensive mechanism of prohibiting discrimination. From the perspective of the rights of persons with disabilities this law does not introduce sufficient safeguards on protecting from discrimination. In the light of the provisions of the Act, persons with disabilities are not protected from the discrimination in education, access to services or social insurance. The law also fails to provide the definition of multiple and intersecting forms of discrimination.

[1] Office of the Governmental Plenipotentiary for Persons with Disabilities, Materiały z posiedzeń, available at: http://www.niepelnosprawni.gov.pl/p,111,materialy-z-posiedzen
[2] Ombudsman's office, Annual budget, available at: http://www.bip.brpo.gov.pl/pl/category/budzet

Policies

There is no comprehensive national program or action plan addressing the problems related to protection and implementation of rights of persons with disabilities. The last edition of the National Programme for Equal Treatment covered the period of 2013-2016. Despite the information from the Governmental Plenipotentiary for Equal Treatment that the Programme would be continued in the next term[3], since 2016 the government has not adopted any plans for the next edition.[4] Furthermore, the government is working on the National Strategy for Persons with Disabilities. At the beginning of 2018, the draft version of the strategy was sent to national consultations, yet the final document has not been adopted yet.

Possible recommendations

In this context, it is HFHR's belief that the institutional and legal framework could be improved by implementing the following recommendations:

- Reforming the mechanism of implementing the provisions of the Convention by introducing the central institution responsible for designing and implementing the policies and action plans concerning the rights of persons with disabilities,
- Amending the Equality Act in a way that would embrace the protection of persons with disabilities from discrimination in access to services and health care,
- Developing and implementing the National Strategy for Persons with Disabilities.

Article 5 – Problem: discrimination of persons with disabilities in access to services

Examples of discrimination cases

Persons with disabilities still face discrimination in access to goods and services. HFHR has been involved in cases concerning discrimination of blind persons.

In March 2016, the Regional Court of Warszawa-Praga ruled that the bus driver, who denied access to their services to a blind person traveling with a guide dog, violated the woman's personal interests. In 2014, our client was traveling from Lublin to Warsaw and wanted to use a long-distance shuttle service operated by a private carrier. A driver refused to let her embark, claiming that the company policy forbade animals on board. The court found the carrier's conduct discriminative and noted that the rights of our client had certainly been violated because she should be able to live her public life to the fullest, regardless of her disability.

HFHR participated also in cases concerning the discrimination in access to medical services. In March 2018, the Regional Court in Krakow ruled that an ophthalmologist's cancellation of an appointment of our client, a blind person traveling with a guide dog, constituted not only a violation of patients' rights, but also violation of personal interests of this person. In 2015, our client made a telephone appointment and later emailed the doctor's office that she would arrive with her assistance dog. As soon this became apparent, the doctor cancelled the appointment

[3]Ombudsman's Office, Letter from the Governmental Plenipotentiary for Equal Treatment, available at: https://www.rpo.gov.pl/sites/default/files/odpowiedz_SORT.pdf

[4] Rzeczpospolita, Program równego traktowania poczeka, 8 June 2017, available at: http://www.rp.pl/Rzad-PiS/170609224-Program-rownego-traktowania-poczeka.html

and gave the patient addresses of other ophthalmology clinics. He informed the patient that the appointment was cancelled because of the need to determine whether he can provide medical services to persons accompanied by assistance dogs. The court held that the ophthalmologist had unreasonably refused to perform a medical service for HFHR's client, which resulted in a violation of patients' rights. In the Court's assessment, the cancellation of the appointment because of the presence of an assistance dog was unreasonable and unlawful, and constituted a manifestation of discrimination based on disability. The court considered that this behaviour of the physician had violated such personal interests of the patient as freedom and dignity.

Legal framework

Pursuant to Article 20a of the Act on Occupational and Social Rehabilitation and Employment of People with Disabilities, a person accompanied by a guide dog has the right of access to all public utility facilities, including restaurants and means of transport. This provision was introduced in 2008 in the wake of the another HFHR's case of a woman with a guide dog who was denied access to a hypermarket. However, cases mentioned above show that despite the clear wording of the respective provision, there are still problems with the exercise of that legal right of persons with disabilities.

Also it should be underlined that in cases concerning discrimination of persons with disability in access to goods and services there is no possibility to use the Act on implementation of Certain European Union Provisions on Equal Treatment (so-called Equality Act). As a consequence during the trials in mentioned cases i.a. special rules of burden of proof, which are stipulated by the Equality Act, cannot be applied. As a consequence, persons with disability have to lodge lawsuits based on violation of personal interest, what is connected with more complex trials.

Possible recommendations

In this context, the HFHR would suggest the following recommendations:

- Amending the Equality Act in order to ensure the protection of persons with disabilities from discrimination in access to services and health care;
- Introducing additional legal framework ensuring effectiveness of rights of persons with disability accompanied by a guide dog;
- Undertaking actions in order to raise knowledge in society abut rights of persons with disability in access to goods and services.

Article 12 – Problem: incapacitation of persons with disabilities

General overview

According to the Polish Civil Code persons with intellectual or mental disability may be deprived of legal capacity based on court decision about full incapacitation or their capacity may be limited on the basis of partial incapacitation. Incapacitated persons have no possibility to participate in political life and have severely limited participation in social life. Polish model of incapacitation represents the substitute decision-making regime and is contrary to the standard of UN Convention on Rights of People with Disabilities. What is more, in Poland does

not exist any effective system of supported decision-making mechanisms, which would allow tailor-made response to needs of persons with intellectual or mental disability.

Statistics

The number of incapacitated persons in Poland has been increasing dramatically for last thirty years. In 1985, there were almost 24,000 incapacitated persons, but in 2012 this number increased up to 74.000 persons[5]. Each year courts receive higher number of motions upon incapacitation. For example, in 2005 courts conducted 9.425 incapacitation proceedings, but in 2017 number of these cases was 14.161. In 2017 courts issued 9.515 decisions about incapacitation and 90% of these cases ended with full incapacitation.[6] Such proportion between rulings about full incapacitation and partial incapacitation was also present in previous years. What is more, this is extremely rare that in cases of incapacitation parties make an appeal to the second instance courts. Between 2006-2017 the number of appeals varied from 85 to 160 per annum.

Discontinued works on the reform of legal framework

In 2013, the Codification Commission of the Civil Law at the Ministry of Justice prepared the draft of grounds to the bill concerning the change of legal incapacitation.[7] The draft of the grounds provided four types of care, which would replace legal incapacitation. The solution proposed by the Codification Commission did not fully correspond with the standards set by the Convention in the area of legal capacity but achievements of the Codification Commission determined the direction of changes in the law. In 2015, the Codification Commission was dissolved. Since that time Polish government has not undertaken any legislative actions in order to change the incapacitation system. In November 2016, HFHR received official statement from the Ministry of Justice in which the Ministry informed that legislative process on the reform of incapacitation has been temporarily suspended.

Possible recommendations

In this context, the HFHR would suggest the following recommendations:

- Replace the present model of incapacitation with the regulation concerning supported decision-making regime with respect to the right of persons with disability to dignity and autonomy.

Article 13 – Problem: access to justice for persons with disabilities

Although in recent years there have been several legal developments improving the access to justice system for persons with disabilities (such as e.g. special mode of hearing of witness of certain crimes), still the Polish judiciary system has many deficiencies which make it very difficult for persons with disabilities, and especially persons with mental disabilities, to seek justice.

[5] L. Kociucki, *Zdolność do czynności prawnych osób dorosłych i jej ograniczenia,* p. 18 – 19; M. Domański, *Ubezwłasnowolnienie w prawie polskim a wybrane standardy międzynarodowej ochrony praw człowieka* [in:] *Prawo w działaniu*, ed. E. Holewińska – Łapińska, t. 17, Warsaw 2014, p. 45.

[6] Ministry of Justice, *Ewidencja spraw o ubezwłasnowolnienie w latach 2004 – 2017*, available at: isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,54.html.

[7] Draft no. ZD79 available at: https://legislacja.rcl.gov.pl/docs//1/208000/208041/208042/dokument152071.pdf.

Organisation of the judiciary system

Research carried out by the Ombudsman's office in 2017 shows that the justice system is still not fully prepared to address the needs of persons with disabilities. One of the biggest problems in this field is the lack of full adjustment of courts' and prosecutors' offices buildings to the needs of persons with movement disabilities. Also, another ongoing problem is the lack of proper adjustments in the proceedings such as availability of the sing language interpreter or preparation of the documents in Braille's language.[8] For example in 2012, HFHR represented a person with vision impairment who submitted a lawsuit in a Braille language to the court. According to the court, such a lawsuit did not meet the procedural requirements, hence the court ordered the person to present a lawsuit in writing.[9]

Furthermore, during the professional training judges and prosecutors do not have any dedicated courses about dealing with persons with disability as parties or witnesses. In consequence, the judges and prosecutors may not have sufficient knowledge about needs of persons with disabilities or reasonable accommodations used by them. For example, judges and prosecutors participating in project carried out by the HFHR in 2014-2016 underlined the great challenges in communication with persons with different types of disabilities. Also, experiences of persons with disabilities collected during the above-mentioned project showed that sometimes the disability was used to question the credibility of statements or testimonies delivered to the court. For example, in a case concerning breaches of the peace at night the judge contested possibility of preparing a computer printout (with dates of incidents at nights) by a blind person because of that person's disability. The judge argued that the blind person cannot draw such type of a document. Moreover, participants of HFHR's research underlined the situations where blind people were denied the right to be a witness because in opinion of a person conducting a hearing, someone who does not see the incident cannot be a credible witness.[10]

It should be underlined that there is no general procedural framework or general practice which would allow judges or prosecutors to prepare for visit of persons with disability in a courtroom. In vast majority of cases judges and prosecutors find about the disability of a witness or a party at the beginning of a hearing (if the information about disability is not contained in documents of a case). In such situations there is no possibility to introduce adequate accommodations for a person with disability.

Criminal procedure

One of the biggest deficiencies is the lack of mandatory representation by a lawyer of a defendant with mental disabilities in the criminal proceeding. The Polish Code of Criminal Proceedings provides a mandatory representation only in cases when a defendant is "deaf or blind or when there are reasonable doubts if their psychological conditions allow them to

[8] Ombudsman's Office, Dostępność wymiaru sprawiedliwości dla osób z niepełnosprawnościami, available at: https://www.rpo.gov.pl/pl/content/dost%C4%99pno%C5%9B%C4%87-wymiaru-sprawiedliwo%C5%9Bci-dla-os%C3%B3b-z-niepe%C5%82nosprawno%C5%9Bciami

[9] Helsinki Foundation for Human Rights, Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów [Equal treatment of participant of proceedings. Guide for judges and prosecutors], eds. D. Pudzianowska, J.Jagura, Warsaw 2016, http://www.hfhr.pl/wpcontent/uploads/2016/02/HFHR_rowne_traktowanie_uczestnikow_postepowan.pdf

[10] Helsinki Foundation for Human Rights, Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów [Equal treatment of participant of proceedings. Guide for judges and prosecutors], eds. D. Pudzianowska, J.Jagura, Warsaw 2016, http://www.hfhr.pl/wpcontent/uploads/2016/02/HFHR_rowne_traktowanie_uczestnikow_postepowan.pdf

participate in the proceeding or defending themselves on their own" (Article 79 of the Code of Criminal Proceeding). The Code of Criminal Proceeding does not provide explicitly mandatory legal representation of persons with mental disabilities. Furthermore, there is no standard practice for the law enforcement officers to recognise mental disabilities or psychological conditions at the early stages of the proceedings.[11] The interrogation of persons with mental disabilities is recorded only in the interrogation records and is not supported by e.g. additional video recording. This may lead to severe violations of the right to fair trial like e.g. in the case of P.M. who is a person with mental disability and who confessed to the police to committing a crime. The hearing records from his interrogation, however, are full of sentences and expressions he could not use in his stage of mental disability. Despite that and despite limited evidence, P.M. was sentenced for the crime.[12]

Civil and administrative procedures

Both Code of Civil Procedure and Code of Administrative Procedure lack any procedural guarantees for persons with mental disabilities. Similarly to the criminal proceedings, there is no mandatory legal representation for persons with mental disabilities in civil or administrative proceedings (except cases concerning involuntary placement in psychiatric hospitals and social care homes – see below). Although the civil and administrative procedures allow the possibility to question a person with disability outside the courtroom and in e.g. their houses, still these procedures lack any specific guarantees concerning among others participation of a psychologist in the questioning. Furthermore, the persons with mental disabilities do not have to fulfil all the procedural requirements only in a certain type of cases, while when it comes to the majority of cases decided by the civil and administrative courts persons with disabilities have to meet all the procedural requirements just as other participants of the proceedings.

Possible recommendations

In case of better protection of right to a fair trial for persons with disabilities the following recommendations should be implemented:

- Improve the access to justice for persons with disabilities by widening the access to sign language interpreters and communication in Braille language,
- Mandatory legal representation (either by a chosen lawyer or court-appointed lawyer) of persons with mental disabilities in all kinds of proceedings,
- Introducing special regimes of hearings of persons with mental disabilities in court proceedings,
- Introducing trainings for judges and prosecutors about special needs and reasonable accommodation used by persons with disability.

[11] Ombudsman's Office, Osby z niepełnosprawnością intelektualną lub psychiczną osadzone w jednostkach penitencjarnych, E. Dawidziuk, M. Mazur (ed.), avaialble at: https://www.rpo.gov.pl/sites/default/files/Osoby%20z%20niepe%C5%82nosprawno%C5%9Bci%C4%85%20intelektualn%C4%85%20%20lub%20psychiczn%C4%85%20osadzone%20w%20jednostkach%20penitencjarnych%202017_0.pdf

[12] Helsinki Foundation for Human Rights, Wmówione morderstwo. Skarga do ETPC w sprawie osoby z niepełnosprawnością intelektualną, available at: http://www.hfhr.pl/wmowione-morderstwo-skarga-do-etpc-w-sprawie-osoby-z-niepelnosprawnoscia-intelektualna/

Article 14 – Problem: conditions of detention of persons with disabilities in prisons and arrests

General overview

Following a great number of cases sent by the inmates, we have noticed that complaints about the condition of medical care in confinement form the bulk of issues that the inmates raise to the Foundation's attention. The HFHR is of the view that the level of medical care in correctional facilities, including in particular specialist medical care, does not guarantee that the inmates get access to the medical services as required. What is more, there is a problem in obtaining a consent to treatment outside the correctional facility when there is no access to the relevant medical services. Such cases are mostly due to the fact that inmates do not have access to specialists or to expensive treatment. This situation may lead to serious violations of rights of persons with disabilities.

Conditions of medical care - examples of cases

The HFHR sent letters to the governors of correctional facilities and penitentiary courts concerning cases relating to the level of medical services for inmates, including but not limited to the cases of A.K. and A.F. in 2015. The first inmate suffered total vision loss in one eye, and partial vision loss in the other one. A.F. suffered from hemiparesis of the right side, coronary artery disease, chronic heart failure and carotid artery atherosclerosis at an advanced stage. In their letters to the HFHR, they both indicated that they had not been granted temporary release from prison despite medical documentation proving that they had needed to be treated outside the correctional facility. It needs to be pointed out that while the right to be released from prison or the right to be granted a temporary release from prison is not guaranteed under the ECHR standards, nevertheless the Court states it explicitly that in certain cases it is indispensable that inmates receive treatment outside the correctional facility.

In 2017, the HFHR took action in many similar cases relating to the absence of appropriate medical services for inmates with disabilities. The case of D.B., an inmate suffering from paranoid schizophrenia, may serve as an example. D.B. claimed that his condition was improperly managed in a correctional facility. According to the inmate, he received medication different from those he was on during admission to psychiatric wards. The HFHR requested information concerning the conditions of medical treatment in the correctional facility. The head of the correctional facility responded to the HFHR's inquiry in the case, stating that D.B. was not a paranoid schizophrenic but only faked the condition. In the case of D.B., the HFHR prepared an application to the ECtHR.

Lack of adjustments and reasonable accommodations- examples of cases

Failure to grant temporary release from prison is not the only problem related to medical care in correctional facilities. The inmates who sent their complaints to the HFHR also mentioned difficulties with access to medical services which should have been provided within the correctional facility. The cases of R.K. and C.Z. can be used as an illustration of such issues; they both are deaf and they received one hearing aid from the penitentiary facility which they were to share. When the device broke, the inmates lost contact with the outside world. Calling on the principle of humanity, the HFHR requested the governor of the penitentiary facility to provide R.K. and C.Z. with access to hearing aids.

The HFHR also received complaints from individuals with physical disabilities who served their prison sentence. They mentioned problems with moving around the correctional facility, non-adjustment of the cells to the needs of persons moving in wheelchairs as well as the lack of assistance in daily life activities from the correctional facilities' administration. On 12 February 2013, the European Court of Human Rights gave its judgment in the case of D.G. v. Poland (application no. 45705/07). The applicant who is confined to a wheelchair complained that the medical and nursing care, which he had been provided with by the Polish authorities during his detention, had been inadequate. In the judgment, the Court held that the Convention had not been violated; however, D.G. was awarded compensation in the amount of EUR 8000.

The HFHR sent letters in the cases of inmates with disabilities to the authorities overseeing penitentiary facilities. One of the cases concerned a paraplegic who needed to use a wheelchair. He also suffered from a number of other diseases, including but not limited to post-traumatic epilepsy and diabetes. As a person with disabilities, he needed assistance in all activities, i.e. washing up, dressing, or going to the restroom. The only action taken by the correctional facility to help the inmate was to train a cellmate so that he could help a disabled person. However, even that help was not provided because the cellmate was in the hospital, hence man with disability was left without any help or care for many hours; he required help, among other things, to ensure proper hygiene as he was suffering from the paralysis of sphincter muscles. HFHR indicated that the conditions in the prison may be considered degrading and the prison authorities may be accused of inhuman treatment which may be considered a violation of Article 3 of the European Convention on Human Rights. Second case concerned a person with a disability who had his leg removed. On 24 September 2015, the prison officer told him that he should get ready to collect a package with a TV set from the storeroom. Since he used forearm crutches to move, he asked the officer for a wheelchair. The officer declined without giving any reason for such a decision. The cellmates helped the man to get the package. HFHR requested the governor of the detention centre to state his position on that matter and to take actions so that inmates with disabilities are able to use equipment that enables them to move around and take activities of daily life. The governor of the detention centre complied with the request. In response, he noted that the artificial limb that A.K. usually uses worked properly and there had been no medical indications for using forearm crutches or wheelchair. He also cited the Regulation of the Minister of Justice of 13 November 2003, whereby prison officers are not authorised to hand orthopaedic devices to the inmates. The manager was of the view that the conduct of the prison officer was lawful. In the opinion of the HFHR, such conduct of the detention centre administration was not compliant with the effective legal system.

Possible recommendations

- Ensure that persons with disabilities deprived of their liberty in penitentiary facilities have access to adequate health care and are provided with reasonable accommodations,
- Ensure that persons with mental and psychosocial disabilities, who require psychiatric treatment, do not stay in regular penitentiary facilities but specialized health care units.

Articles 14 and 19 – Problem: situation of persons with disabilities in the social care institutions

General framework

Pursuant to the Act on Social Assistance (hereinafter: "ASA"), a social care home is a place which provides services of general interest, care, support and education at the effective standard level, within the scope and in the forms arising from the individual needs of the individuals who stay there. There are several types of social care homes under the ASA, including but not limited to social care homes for the elderly, individuals with chronic mental disorders, adults with intellectual disabilities, children and young people with intellectual disabilities. The residents of the social care homes are under the supervision of the social care home administration, and their personal freedom is subject to considerable restrictions (e.g. they are not free to leave the social care home whenever they wish to). As at the end of 2014, there were around 78,000 individuals in social care homes, according to the specification presented by the Ministry of Labour and Social Policy[13]. The primary reason for this relatively large number is the lack of progress in implementation of deinstitutionalisation strategy.

Procedural aspects

Generally, an individual may be placed in a social care home of their free will or by compulsion on the basis of the Mental Health Protection Act (hereinafter: "MHPA").

A person may be involuntarily placed in a social care home if they are incapable of satisfying their basic life needs due to a mental illness or an intellectual disability and if that person is unable to use the care of other people which poses a threat to his/her life. A decision in this regard is taken by the court.

However, for a long time the law did not qualify as "involuntary" a placement of totally incapacitated person under guardianship in social care home upon the consent of their guardian. As a result, the decision in this area was taken without fair supervision of the court – even if a guardian applied to a court for a permission to place an incapacitated person in a social care home, the court was not obliged to hear such person or psychiatric experts. Incapacitated person also could not appeal against the court's ruling. Moreover, after a placement, incapacitated person did not have any legal remedies to request a court to review the legality and purposefulness of the continued stay in a social care home and such a review was not conducted automatically in reasonable periods of time. This legal framework was found to be incompatible with ECHR by the ECtHR (see e.g. *Kędzior v. Poland*, 16 October 2012, app. no. 45026/07) and with the Constitution by the Constitutional Tribunal (see judgment of 28 June 2016, ref. no. K 31/15). The flawed provisions were amended by the law which entered into force on 1 January 2018. Currently, MHPA provides, *inter alia*, that placement of an incapacitated person in social care home against his/her will but with the approval of his/her guardian requires the decision of the court. Moreover, the person placed in the social care home is entitled to request the court to conduct a review of legality and purposefulness of continuous stay. The proceedings before the court must be fair and respect the right of a person to be heard. Similarly, as in the

[13] Ministry of Labour and Social Policy, Department of Social Assistance and Integration, Wybrane informacje o ponadgminnych oraz gminnych domach pomocy społecznej, środowiskowych domach samopomocy, mieszkaniach chronionych i placówkach całodobowej opieki prowadzonych w ramach działalności gospodarczej i statutowej, available at: https://www.mpips.gov.pl/download/gfx/mpips/pl/defaultopisy/9477/2/1/2015%2009%2030%20MPiPS-05%20za%20rok%202014.pdf (last accessed on 4 August 2018).

context of involuntary civil commitment, a person has a right to legal aid lawyer. Moreover, the law provides that at least every six months the incapacitated person placed in social care home against their will, but with the approval of their guardian, has to be examined by doctors with the aim to establish whether his/her stay in social care home is justified.

Despite these positive developments, there are still some problems with respect to involuntary placement of persons in social care homes. In one of cases in which HFHR was engaged, totally incapacitated woman was placed in a social care home temporarily, for the duration of proceedings regarding permission for the guardian to place her for indefinite time. The problem is that the law does not explicitly permits such placement. Because of that, persons may be deprived of important guarantees, such as right to periodic review of continued deprivation of liberty.

Internal regulations of social care homes

According to the reports of National Preventive Mechanism many social care homes adopt their own internal regulations which restrict rights of patients. In particular, these rules regulate disciplinary sanctions against persons who violate the rules of conduct.[14] The law does not authorize social care homes to restrict rights of their patients in that way and according to the Polish Constitution, every restriction of right or freedom must have basis in a statute.

Private care institutions

HFHR believes that the supervision of Polish public authorities over private psychiatric care institutions is not sufficiently effective. Under ASA, business activity involving full-time care for persons with disabilities, persons with chronic conditions or elderly persons may only be run pursuant to a licence granted by the province governor. The conditions and the procedure for granting such licences are set out in the Act and in the secondary regulation thereto. The Province Governor is entitled to control and impose certain sanctions on such facilities in case of any violation. However, the financial penalties are not sufficiently deterring.

A line of complaints sent to HFHR and media reports confirm that the oversight of the business operations of that type is not effective enough. For example, one of the cases in which HFHR intervened concerned a care facility run without the required licence; there was a non-incapacitated person who was placed in that institution under suspicious circumstances (most probably on the basis of an agreement entered into by the legal representative of that person who exceeded the scope of her authorisation). In April 2016, the media reported numerous cases in which patients with Alzheimer's disease who stayed in the care facility were abused by the staff. Reports about excessive use of direct coercive measures towards patients who are immobilised by safety belts and who are not provided with adequate hygiene routines are a particular concern. In October 2016 the media informed about similar situation in two other private care home. All these abuses could be qualified at least as a degrading treatment.

Moreover, right now the law does not regulate in details the procedure for placement of incapacitated persons in private care institutions. However, currently the Government works on

[14] *Prawa mieszkańców domów pomocy społecznej. Jak wspólnie zadbać o godne życie osób starszych, chorych i z niepełnosprawnościami? Naruszenia – Dobre praktyki – Problemy systemowe. Raport Krajowego Mechanizmu Prewencji Tortur, Lipiec 2017*, pp. 86-88, available at: https://www.rpo.gov.pl/sites/default/files/KMPT%20raport%20o%20domach%20pomocy%20spolecznej.pdf (last accessed on 4 August 2018).

necessary amendments to ASA and MHPA which would make the abovementioned provisions regarding placement in social care homes applicable in these situations.

Possible recommendations

- Develop and implement an effective deinstitutionalization plan, with a clear time frame and benchmarks, involving persons with disabilities, in order to ensure that persons with mental disabilities have access to wide range of supportive measures provided in their local communities, so that voluntary or involuntary isolation in a social care home (or a similar institutions) will not be the only available form of help;
- Ensure that every case of involuntary placement in a social care home (and similar institutions, including private ones), temporarily or for definite time, is ordered only as a measure of last resort, on the basis of precise provisions and in a fair procedure;
- Effectively supervise private care institutions for persons with mental disabilities and impose deterrent and proportionate sanctions whenever violations of human rights are identified.

Articles 14, 19 and 25 – Problem: situation of persons with disabilities in the health care institutions

General overview

Poland still has not conducted the process of deinstitutionalisation either of health or social care systems. Access to non-isolative forms of care and assistance for persons with mental disabilities in many cases is only illusory. Because of that, there is still a wide use of involuntary measures against persons with mental disabilities. Such situation is inconsistent with the recommendations of the Committee on the Rights of Persons with Disabilities, according to which "The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty".

Civil commitment

Question of so-called "civil commitment" is regulated in the MHPA. This Act provides several procedures which regulate involuntary placement of persons with mental disabilities in psychiatric hospitals.

As a rule, psychiatric treatment may be conducted only upon free and informed consent of a patient. There are however some exceptions to this principle. A person who was diagnosed with "mental illness", defined as psychotic disorders, may be placed in a psychiatric hospital without their consent if their behaviour indicates that they may threaten their own life or life or health of others. A decision in this regard is taken by a doctor after a personal examination of a patient. The doctor is then obliged to notify, within 48 hours since the admission, the director of the hospital, who confirms the admission and informs the court within 72 hours since the admission. The court has to organize a hearing in this case within 14 days since delivery of the notification. A decision with regards to lawfulness of the admission has to be taken immediately after the hearing. A person with "mental illness" may also be involuntarily placed in a psychiatric hospital upon the motion of, among others, their close relatives or a person who

exercises care over them. This is possible if behaviour of the person indicates that the lack of the admission to the hospital would lead to significant deterioration of their state of mental health or if the person is unable to independently satisfy basic life needs, and it is reasonable to anticipate that treatment in a psychiatric hospital would improve their health. In that case, the admission takes place only after delivery of the final judgment of the court. MHPA provides different procedures for involuntary commitment of the persons who are unable to express free and informed consent for treatment, the persons who are under guardianship and the minors. There is also separate procedure for an admission for a psychiatric assessment (in that case, duration of the psychiatric detention cannot exceed 10 days). Generally, every case of a placement of a person in a psychiatric hospital without their consent has to be authorized by the court (before or, in case of emergency situations, after the admission).The only exception in this area is a placement of a minor younger than 16 years of age upon the consent of their parents (with regards to minors between 16 and 18 years of age, consent of both a patient and a parent is required, in case of contradictory statements a decision is taken by the court).

Even if one agrees that involuntary commitment may be acceptable before thorough deinstitutionalisation strategy is implemented, current law does not provide all necessary guarantees protecting persons against arbitrary deprivation of liberty. Certain lacunae in this area were noticed by, among others, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

First of all, there is no automatic periodic judicial review of legality and purposefulness of continued involuntary stay of a patient in a psychiatric hospital. It is true that a patient, their legal representatives and relatives may apply for the release to the court, however this mechanism cannot replace the automatic review. In some situations, a patient or their family may not be able to apply for the release personally and so the detention could be unjustifiably prolonged. It is worth to note that in the recent "Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017", CPT called the Polish authorities to amend MHPA in this area.

Secondly, CPT also noted that in practice there are problems with legal status of patients who have initially been admitted voluntarily but subsequently wished to leave the hospital, while doctors thought that they should remain to continue inpatient treatment. According to MHPA such patients should be treated as involuntary and consequently a possibility of their continued detention depends on substantive and formal requirements provided for the involuntary placement. However, it seems that in practice it is not always the case.

Thirdly, HFHR notices that in some situations a period between an actual involuntary admission to a psychiatric hospital and a day of delivery of the decision of the court regarding legality of the hospitalization may be relatively long. In 2016, HFHR analysed data regarding this issue provided by six randomly selected hospitals. Substantial amount of the analyzed proceedings lasted longer than 14 days. In some courts, more than 30% of proceedings lasted longer than one month. It cannot be excluded, however, that recent amendment to MHPA, which entered into force on 1 January 2018, could positively change this situation, as it obliged the court to deliver a judgment immediately after the hearing.

On the other hand, it is worth to note that in every case concerning an involuntary placement or its continuation, a patient has a right to a legal aid lawyer.

Criminal (forensic) commitment

Criminal involuntary commitment concerns persons who have committed a prohibited act in the state of complete insanity (defined as inability, due to mental disability, mental illness or other mental disorder, to control one's own behaviour or understand its meaning) and there is a high probability that they might commit another particularly dangerous act again in connection with their disorder. In that situation, the court should discontinue criminal proceedings and order involuntary hospitalisation of a person. Moreover, the court may also decide to place in a psychiatric hospital a person who committed unlawful act in the state of partial insanity and was sentenced to imprisonment, if there is a high probability that they might commit another particularly dangerous act again in connection with their disorder. In that case, a person is placed in a psychiatric hospital after completion of a sentence. Similar rules apply to persons who were convicted for crimes committed in connection to their sexual preferences disorders. The Penal Code provides also a possibility to place a person in a psychiatric hospital for the purpose of a psychiatric assessment (which aim is to establish whether a person may be held criminally responsible for their actions). It may be ordered only by the court, upon the motion of psychiatric experts, when there is high probability that a person committed a serious crime. Its duration cannot exceed 8 weeks.

Also in this case, the law (and its practical application by the courts) does not fully protect persons with mental disabilities against arbitrary deprivation of liberty.

First of all, the law provides that the legality of a continued stay of a patient in a psychiatric hospital has to be reviewed by the court every 6 months. However, it does not guarantee the patient the right to take part in the hearing and be heard by the court. Because of that, in the judgment of 22 March 2017 (ref. no. SK 13/14) the Constitutional Tribunal ruled that the relevant provisions of the Executive Penal Code violated the Constitution. However, this judgment still has not been implemented by the Parliament.

Secondly, it seems that sometimes the courts do not sufficiently analyse whether there are other, less restrictive measures which can be applied instead of involuntary placement in a psychiatric hospital. HFHR represents before the European Court of Human Rights a man, who was placed in a psychiatric hospital despite positive effects of his voluntary treatment. In 2014 the applicant, in the state of psychosis, attacked his parents with a knife, however luckily the attack had not resulted in any serious injuries. Subsequently, the criminal proceedings were initiated and the man was subject to a psychiatric examination. The expert witnesses concluded that the applicant had been legally insane at the time the act was committed, and his mental condition justified his placement in a psychiatric hospital. Based on that opinion, the prosecutor filed a petition with the court to discontinue the proceedings and place the man in a psychiatric hospital. Throughout the criminal proceedings, both the applicant's parents and his attorney argued that the man's condition improved significantly since the psychiatric examination. The applicant started his treatment at a centre that applies modern therapeutic methods, and his illness had been in remission for a long time. Unfortunately, both the trial and the appeal courts disregarded those arguments and resolved to place the applicant in the psychiatric hospital. The man had not been subject to another psychiatric examination during the proceedings. Hence, a legal and binding court order was issued on the basis of a psychiatric opinion that had been prepared a year earlier during pre-trial proceedings, and could not take into account developments in the applicant's mental health condition after he started a voluntary therapy.

Yet another case litigated by the HFHR before the ECtHR concerned unjustifiably prolonged involuntary criminal commitment. The applicant was placed in a psychiatric hospital in 2008. Already in 2014, the psychiatric experts indicated that the hospitalisation is no longer necessary. However, for the next 14 months the court refused to release the applicant on the grounds that his family could not guarantee he would continue his treatment if at liberty. He was eventually released at the end of 2015. The proceedings before the ECtHR ended with unilateral declaration of the Government, which acknowledged that there was a violation of Article 5 § 1 of the European Convention on Human Rights[15].

In this context, it is also worth to mention that in 2015 the Supreme Court, after submission of cassation complaints by the Ombudsman, ruled that the involuntary placement of two persons, in 2004 and 2006, in psychiatric hospitals was unlawful. These violations of the law have not been identified by the courts for a very long time, despite the fact that continued use of forensic commitment has to be reviewed every 6 months. It may show that in practice the guarantees against arbitrary deprivation of liberty are not particularly strong.

Involuntary treatment

According to the Article 33(1) of MHPA, a person who was placed in a psychiatric hospital involuntarily may be treated against their will in order to eliminate the symptoms which justified hospitalisation. Only certain, the most invasive forms of treatment, such as electro-convulsive therapy, cannot be performed without the consent of a patient or their legal representative. It follows, that the court's decision regarding involuntary placement authorizes the hospital to subject the patient to any necessary forms of treatment (with exceptions mentioned above) and there are no separate judicial proceedings in this area. Moreover, the patient does not have access to legal remedies which could initiate judicial review of involuntary treatment. This situation was criticized by the CPT, according to whom "The admission of a person to a psychiatric establishment on an involuntary basis should not be construed as authorising treatment without his consent. Every competent patient, whether voluntary or involuntary, should be given the opportunity to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances."

Moreover, as already mentioned, the law provides that certain invasive forms of treatment, including ECT, may be performed without the consent of the patient but upon consent of his/her legal representative. In HFHR opinion, such solution may violate dignity and personal integrity of the patient.

Means of restraint

Permitted forms, grounds and methods of the application of means of restraint against patients of psychiatric hospitals are regulated in the MHPA. The law provides four types of restraint: manual restraint (holding), coerced administration of medication (chemical restraint), mechanical restraint (immobilisation with the use of belts, handles, sheets or straitjacket) or seclusion. Means of restraint may be used when a patient commits an assault against: life or health of his/her own or an another person or the general safety, violently destroys or damages objects in their surroundings, or seriously interferes with or prevents the functioning of a medical facility. In addition, involuntary patients may be also subject to means of restraint when

[15] *Jędruch v. Poland* (dec.), 16 January 2018, app. no. 42249/15.

this is necessary to apply involuntary treatment (see above). The decision to use means of restraint belongs to a doctor, who defines the type of restraint measure and personally supervises its execution. When it is impossible to obtain an immediate decision of a doctor, the use of means of restraint is decided upon by a nurse, who must notify a doctor without delay. The doctor confirms the application of the measure or orders it to be stopped. The law regulates methods of application of various forms of restraint, duties regarding registration of their use etc.

HFHR would like to point out that the law does not provide any separate rules with regard to application of means of restraint against minors. Lack of regulation in this area may threaten health of the young patients.

Possible recommendations

- Develop and implement an effective deinstitutionalization plan, with a clear time frame and benchmarks, involving persons with disabilities;
- Increase the availability of community-based mental health services;
- Ensure that involuntary placement in a psychiatric hospital, both in civil and criminal proceedings, is always used only as a measure of last resort, when the life or health of a patient or others cannot be protected via use of less restrictive measures, in particular outpatient therapy;
- Amend MHPA so as to provide automatic periodic judicial review of the continued involuntary stay of a patient in a psychiatric hospital;
- Ensure that every case of an involuntary admission ordered by a hospital is reviewed, as soon as possible, by an independent and impartial court in a fair hearing, which respects the patient's right to be heard;
- Implement the judgment of the Constitutional Tribunal of 22 March 2017 (ref. no. SK 13/14) by adopting provisions which guarantee that every person involuntarily hospitalised by a criminal court has a right to be present on the hearing and be heard by the court in proceedings regarding legality of a continued stay in a psychiatric hospital;
- Amend MHPA so as to respect the right of involuntary psychiatric patients to refuse treatment, define grounds on which involuntary treatment could be applied and provide judicial supervision of the decisions with regards to involuntary treatment;
- Ensure that particularly invasive forms of treatment, such as ECT, are not applied against involuntary patients under guardianship without their free and informed consent, solely on the basis of the consent of their guardians;
- Provide separate, more strict rules for the use of means of restraint against children, taking into account hazards to their physical and mental development.

Article 23 – Problem: right to marry for persons with disabilities

The Polish law significantly restricts persons with disabilities' right to marry.

First of all, Article 11 of the Family and Guardianship Code (hereinafter: "FGC") provides that totally incapacitated persons cannot get marry. There are no exceptions to this rule, in particular the law does not authorize the guardianship court to permit a person to conclude marriage if his/her state of health allows him/her to take autonomous decisions in this area. However, if marriage is nevertheless concluded (e.g. because a person or his/her guardian did not inform

the head of a civil registry office, responsible for registration of marriages, about his/her incapacitation), it may be invalidated by the court upon the request of each spouse. Marriage cannot be invalidated if total incapacitation was revoked after conclusion of marriage.

Secondly, Article 12 of FGC restricts right to marry with regards to persons with mental disabilities who were not totally incapacitated. According to this provision, a person "who suffers from mental illness or intellectual disability" may not enter into marriage. However, the court may grant consent for his/her marriage if his/her state of mental or physical health would not threat the marriage or health of future children. Similarly, as in the context of Article 11, marriage concluded with violation of this provision may be invalided by the court upon request of each spouse, unless the person no longer suffers from mental disorder. The constitutionality of Article 12 of FGC was upheld by the Constitutional Tribunal in the judgment of 22 November 2016 (ref. no. K 13/15).

HFHR believes that the both Article 11 and 12 disproportionately restrict rights of persons with disabilities and should be abolished. The protection of persons with mental disabilities could be achieved with the use of less invasive and non-discriminate measures (for example, general provisions which allow invalidation of marriage concluded by persons in a state which disallowed them consciously express the will of getting married – see Article 15^1 § 1 point 1 of FGC).

Possible recommendations:

- Abolish Article 11 and 12 of FGC or reformulate them in a non-discriminate manner.

Article 29 – Problem: right to vote for persons with disabilities

General framework

According to Article 62 of the Polish Constitution, Polish citizens who have been declared incapacitated by a final judgment of a court have no right to vote and participate in elections. This provision does not distinguish between full and partial incapacitation for determining voting rights. It means that incapacitated persons are automatically deprived of electoral rights.

It should be highlighted that in 2010 European Court for Human Rights ruled the Hungarian regulation, which was similar to the Polish one, was a violation of the European Convention of Human Rights. The European Court for Human Rights ruled that "an indiscriminate removal of voting rights, without individualized judicial evaluation and solely based on a mental disability necessitating guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote"[16].

Alternative voting procedures

The Electoral Code provides two alternative voting procedures for people with disability: voting by correspondence and by a plenipotentiary. In 2018, the procedure of voting by correspondence was limited. At present this solution is available only to people who have been

[16] Judgement of 20 May 2010, case of Alajos Kiss v. Hungary, application no. 38832/06.

officially declared to have a significant or moderate degree of disability. Previously this procedure could be used by every voter. Also, procedure of voting by a plenipotentiary is dedicated only to voters with declared degree (moderate or significant) of disability.

Accessibility of polling stations

It should also be underlined that the right to vote of persons with disabilities may be restricted in practice due to insufficient level of accommodations of polling stations. Inspections carried e.g. by the Ombudsman showed plenty of irregularities in this area. For instance, in 2014 84% of polling stations monitored by the Ombudsman, which were officially declared as adapted to the needs of persons with disability, did not fully meet adequate standards[17].

Possible recommendations

It is HFHR's belief that the right to vote of persons with disability could be ensured by implementing the following recommendations:

- Amending the Polish Constitution and the Electoral Code to ensure that incapacitated persons are not deprived of electoral rights automatically;
- Ensuring accessibility of voting procedures and facilities for all persons with disabilities.

[17] Ombudsman's Office, Report on inspections of polling stations, Warsaw 2015, https://www.rpo.gov.pl/sites/default/files/Raport%20RPO%20Lokale%20wyborcze.pdf.