EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 16103/15
Andrzej ŻELAWSKI
against Poland

The European Court of Human Rights (First Section), sitting on 11 July 2017 as a Committee composed of:

Aleš Pejchal, *President,*
Krzysztof Wojtyczek,
Armen Harutyunyan, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 27 April 2015,

Having regard to the declaration submitted by the respondent Government on 17 January 2017 requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr Andrzej Żelawski, is a Polish national who was born in 1955 and lives in Nowy Sącz. He was represented before the Court by Mr P. Kładoczny from the Helsinki Foundation for Human Rights.

2. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska from the Ministry of Foreign Affairs.

3. The applicant complained under Article 5 §§ 1 and 4 of the Convention about his placement in a social care home and the procedure for challenging the lawfulness of his detention.

4. On 8 July 2016 the application was communicated to the Government.

A. The circumstances of the case

5. The applicant has been undergoing psychiatric treatment since 1979. He suffers from schizophrenia.

1. Incapacitation proceedings

6. On 31 May 2000 the Nowy Sącz Regional Court declared the applicant totally legally incapacitated. This decision was upheld by the Cracow Court of Appeal on 10 November 2000.

7. On 3 March 2009 the Nowy Sącz Regional Court amended its previous decision and declared the applicant only partially legally incapacitated. Following an appeal by the applicant this decision was upheld by the Cracow Court of Appeal on 26 May 2009.

8. On 20 January 2010 the Nowy Sącz Regional Court appointed the applicant's brother, J.Z., as his guardian (*kurator*).

9. On 23 November 2010 the applicant lodged a request with the Nowy Sącz Regional Court for his full legal capacity to be restored. The applicant's guardian lodged a request with the same court for the applicant's request to be refused and for him to be declared totally incapacitated.

10. On 5 June 2013 the Nowy Sącz Regional Court refused the applicant's and his brother's requests. This decision was upheld by the Cracow Court of Appeal on 14 November 2013.

11. On 15 October 2014 the Supreme Court dismissed a cassation appeal by the applicant. The decision was served on the applicant on 10 December 2014.

2. Placement in a social care home

12. On 3 September 1998 the Nowy Sącz Regional Court placed the applicant in a social care home (*Dom Pomocy Społecznej*).

13. On 7 December 2001 the applicant was transferred to a social care home in the village of Zaskale.

14. On 13 February 2013 the Director of the Nowy Targ Regional Family Aid Centre (*Dyrektor Powiatowego Centrum Pomocy Rodzinie*) decided to transfer the applicant to a social care home in Nowy Sącz for persons with chronic mental illness.

15. The applicant appealed against this decision.

16. On 28 March 2013 the Nowy Sącz Self-Government Board of Appeal (*Samorządowe Kolegium Odwoławcze*) dismissed the applicant's appeal.

17. On 19 July 2013 the Cracow Administrative Court rejected a further appeal by the applicant on procedural grounds. The court considered that in view of his partial legal incapacity the applicant lacked legal standing to appeal against the decision of the Nowy Sącz Self-Government Board of

Appeal. The court further noted that the appeal had not been supported by the applicant's guardian.

18. On 7 November 2013 the applicant's legal-aid lawyer informed the applicant that there were no grounds for his lodging a cassation appeal on his behalf.

19. On 15 November 2013 the applicant lodged a request for leave to lodge a cassation appeal out of time.

20. On 19 December 2013 the Cracow Administrative Court refused the applicant's request.

B. Relevant domestic law and practice

21. The relevant domestic law and practice concerning the placement of persons in a social care home – in particular the relevant provisions of the Psychiatric Protection Act of 1994 (*ustawa o ochronie zdrowia psychicznego*) ("the 1994 Act") – are set out in the Court's judgment in the case of *Kędzior v. Poland* (no. 45026/07, §§ 38-45, 16 October 2012).

22. On 23 June 2016 the Constitutional Court, (in decision no. K 31/15) ruling on an application submitted by the Ombudsman, declared unconstitutional section 38 of the 1994 Act in so far as it did not provide that a fully incapacitated person could participate in cases initiated by his/her guardian concerning that person's placement in a social care home. The court also declared unconstitutional section 41(1) in so far as it deprived a fully incapacitated person placed in a social care home of the right to lodge a request to have the decision on his or her placement reviewed.

23. Under section 26(2) of the 2002 Act on Proceedings before Administrative Courts ("the 2002 Act") a partially legally incapacitated person may act only in proceedings resulting from actions which that person is entitled to undertake himself/herself.

COMPLAINTS

24. The applicant complained under Article 5 § 1 of the Convention that his placement in the social care home had constituted an unlawful deprivation of liberty.

25. He further alleged under Article 5 § 4 that he had not had an effective procedure by which he could have challenged the necessity of his stay in the social care home.

THE LAW

A. Complaints under Article 5 § 1 and 5 § 4

26. The applicant complained that his placement in the social care home had constituted an unlawful deprivation of liberty. He further alleged that it had not been possible for him to challenge this decision. These complaints were communicated to the Government under Article 5 §§ 1 and 4 of the Convention.

27. After the failure of attempts to reach a friendly settlement, by a letter of 17 January 2017 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application, in accordance with Article 37 of the Convention.

28. The declaration provided as follows:

> "The Government hereby wish to express – by way of a unilateral declaration – their acknowledgement that the applicant was deprived of his liberty in breach of Article 5 § 1 (e) of the Convention and that the applicant, during the period of his full incapacitation, had no effective remedy by which he could challenge the lawfulness of his admission to the social care home, in breach of Article 5 § 4 of the Convention.
>
> Simultaneously, they declare that they are ready to pay the applicant the sum of PLN 20,000 (twenty thousand Polish zlotys), which they consider to be reasonable in the light of the Court's case-law in respect of similar cases ..., as well as the individual circumstances of the present case.
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> ...
>
> The sum referred to above – which is to cover any pecuniary and non-pecuniary damage, as well as costs and expenses – will be free of any taxes that may be applicable. It will be payable within three months of the date of the notification of the decision taken by the Court, pursuant to Article 37 § 1 of the European Convention on Human Rights. In the event of failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it, from the expiry of that period until settlement, at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points ...
>
> The Government respectfully suggest that the above declaration might be accepted by the Court as [an example of] 'any other reason' to justify striking the case out of the Court's list of cases, as referred to in Article 37 § 1 (c) of the Convention ..."

29. By a letter of 15 February 2017, the applicant indicated that he was not satisfied with the terms of the unilateral declaration on the grounds that the sum proposed by the Government was disproportionate to the damage suffered and that a judgment by the Court in respect of his case would help him to challenge his legal incapacitation and obtain his release from the social care home.

30. The Court reiterates that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions

specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if, "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

31. It also reiterates that in certain circumstances it may strike out an application or (a part thereof) under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government, even if the applicant wishes the examination of the case to be continued.

32. To this end, the Court has examined the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (see *Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI; *WAZA Sp. z o.o. v. Poland* (dec.), no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.), no. 28953/03, 18 September 2007).

33. The Court has established in a number of cases, including some brought against Poland, its practice concerning complaints about violations of Article 5 §§ 1 and 4 of the Convention within the context of a person placed in a social care home (see *Kędzior v. Poland*, no. 45026/07, 16 October 2012, and *K.C. v. Poland*, no. 31199/12, 25 November 2014).

34. Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed (which is consistent with the amounts awarded in similar cases), the Court considers that it is no longer justified to continue the examination of this part of the application (Article 37 § 1 (c)).

35. Moreover, in the light of the above-mentioned considerations, and in particular given its clear and extensive case-law on the topic, the Court is satisfied that respect for human rights, as defined in the Convention and the Protocols thereto, does not require it to continue the examination of this part of the application (Article 37 § 1 *in fine*).

36. Finally, the Court emphasises that, should the Government fail to comply with the terms of their unilateral declaration, the application could be restored to the list, in accordance with Article 37 § 2 of the Convention (see *Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008).

37. In view of the above, it is appropriate to strike the case out of the list in so far as it relates to complaints under Article 5 §§ 1 and 4 of the Convention.

B. Remaining complaints

38. The applicant further complained under Article 5 § 4 that also during the period of his partial incapacitation he could not have challenged the necessity of his stay in a social care home. Article 5 § 4 of the Convention, reads as follows:

> " 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 decided speedily by a court and his release ordered if the detention is not lawful."

39. The Government argued that under section 41 of the 1994 Act the applicant could, at any time, have requested a court to change the decision to keep him in the social care home. From 26 May 2009 the applicant had been only partially incapacitated and thus had been entitled to act on his own before the domestic courts. He could have lodged a request under section 41 of the 1994 Act, following which judicial proceedings would have been opened and the legality of his stay in a social care home would have been examined.

40. The Court notes firstly that the applicant's placement in the social care home was ordered by a court (see paragraph 12 above).

41. The Court further observes that under domestic law there is no obligation to carry out an automatic judicial review of the lawfulness of admitting a person to, and keeping him in, an institution such as a social care home. At the same time, however, persons deprived of their liberty in social care homes may, at any time, request a review of the lawfulness of their detention and the need for them to remain in the closed facility (see *K.C.,* cited above, § 81). This possibility was open to the applicant. He was not prevented from instituting judicial proceedings on account of his partial incapacitation.

42. The Court notes that it would appear that the applicant did not make use of the available procedure. The applicant's appeal against the decision of 13 February 2013 did not concern the legality of his stay in a social care home but rather his transfer to a different home. That decision was issued in the course of administrative proceedings, where – pursuant to the relevant provisions of the 2002 Act – a partially legally incapacitated person is indeed required to act through his guardian (see paragraphs 14-15 and 23 above).

43. The Court has already concluded that the procedure provided by the 1994 Act satisfies the criteria required under Article 5 § 4 (see *K.C.*, cited above, §§ 79-83). The applicant could and still can lodge a relevant request under section 41 of the 1994 Act.

44. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Takes note of the terms of the respondent Government's declaration under Article 5 §§ 1 and 4 of the Convention and of the arrangements for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases, in accordance with Article 37 § 1 (c) of the Convention, in so far as it concerns the complaints under Article 5 §§ 1 and 4 of the Convention;

Declares the remainder of the application inadmissible.

Done in English and notified in writing on 7 September 2017.

Renata Degener	Aleš Pejchal
Deputy Registrar	President