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Legal challenges of the mandatory confinement of a mentally-ill person against his will

In light of the leading case Plesó v. Hungary of the European Court of Human Rights

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It is part of a series of cases concerning the anomaly of compulsory confinement of persons with psychosocial disabilities (mental patients) and the related interference with their right to self-determination and personal freedom and the resulting prejudice. This case is a good example of how a judgment, which contains a number of common-sense considerations, can be sensationalised in the (public) consciousness of civil rights defenders, leading some to unexpected legal conclusions.

The Plesó case

This leading case is one of the two currently relevant cases of the European Court of Human Rights („ECtHR"), which contain findings of principle that are likely to have a significant impact on European and national case law as well as national legislative frameworks of the confinement of mentally ill persons. (The other case, Bures v. Czech Republic, also concerns the imposition of compulsory medical treatment and the resulting claim for damages. This will be briefly discussed later.)

The basic principles are the following: 1) the prohibition of coercive measures in the treatment of mental patients (e.g. restraints); 2) the declaration of a "right to illness"; 3) the abolition of the quasi-judicial character of the psychiatric expert's opinion, while at the same time calling for full and thorough evidence in lawsuits in which the person concerned suffers from mental illness.

The facts of the case Tamás Plesó (the applicant) is 37 years old and lives as a dependent in the household of his mother and grandmother. He leads a withdrawn, unconventional lifestyle, although he does not engage in any specific threatening or directly dangerous behaviour. His son's behaviour has caused his mother to become fearful; she complains about this to her psychiatrist, whom she sees regularly, and that Plesó's bizarre habits make it impossible for them to have a proper lifestyle (utility bills skyrocket because of his 'ritual cleaning') and the mother moves out of the house out of fear. The mother's psychiatrist (in the text of the judgment: "...the applicant has been ordered...") to seek psychological assessment and treatment. Plesó cooperates for a while, then breaks off contact with his doctor. His diagnoses are: 'schizoid alienation, sensitivities, paranoid behaviour, megalomania'. As a consequence of this, and directly in connection with a conflict, the mother asks the psychiatrist for help. Consequently, the doctor refers the case to the Dunakeszi Municipal Court and requests Plesó to be placed under mandatory confinement of a psychiatric hospital.

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The legal case

In conclusion, there were both medical and professional shortcomings and procedural irregularities in the case, which led Tamás Plesó to take the case to the European Court of Human Rights in Strasbourg and ultimately to win the case, together with a substantial amount of damages.

The most significant of the medical and professional errors were: the forensic psychiatric reports were manifestly superficial and did not contain an explicit finding that Plesó had engaged in dangerous behaviour that would justify an order for his compulsory treatment. It was a procedural and professional error: the psychiatric expert gave his opinion in 40 minutes during the break in the hearing. The applicant ended up spending about 1 month in hospital: 2 weeks in a closed ward, then 2 weeks in an open ward. A review ("judicial review") was then carried out, in which it was established that there was no immediate danger, that the patient was psychotic and that he was willing to receive treatment voluntarily, and he was discharged to his home. The MDAC (Mental Disability Advocacy Centre - Centre for the Rights of People with Disabilities; an NGO based in Budapest) also intervened and provided Plesó with legal advice.

It was certainly the above-mentioned medical-technical and procedural errors that played a key role in the Strasbourg Court's decision in favour of the applicant.

Arguments and counter-arguments
On the part of the applicant

Plesó won the case in Strasbourg, and I see his success in pointing out a serious deficiency that exists: the court, by simply accepting an inadequately qualified forensic psychiatric expert opinion, has failed to act, to the detriment of a vulnerable group of people such as those with mental illness. Last but not least, the outcome of the case must have been influenced by the fact that there is a strong worldwide drive, so that people with mental illness can make decisions about their own lives independently and are not 'assisted' by another person unless they explicitly request it.

Of the arguments put forward by the applicant, I will only highlight those which might be relevant for the future and are expected to improve the case law.

> *1) [As to whether a dangerous condition existed] "The concept of 'dangerousness' as defined in domestic law could not have been replaced by considerations relating to the applicant's unconventional lifestyle, partial recognition of his condition or unwillingness to be institutionalised (...)".*[2]

The quoted passage goes on to say that the argument also stands up in particular because less restrictive measures, such as outpatient care or "further observation"[3] could have been available. This raises the question: how can outpatient care be provided to a patient who refuses it or does not present himself, and what other form of "further observation" is possible if the person concerned refuses medical treatment or consultation?

2 Judgment, paragraph 44.
3 Ibidem.

2) "As regards the requirement of "thorough examination", the applicant argued that psychiatric patients constitute a particularly sensitive group, which requires that any interference with their rights be subject to strict and thorough examination and that any interference can only be justified by "very serious reasons" (see Kiss Alajos v. Hungary, no. 38832/06, p, 28 Judgment).[4]

3) "(...) not all refusals of treatment justify deprivation of liberty; if they did not, the argument would become circular: the person refusing treatment could be committed to an institution merely on the ground of refusal, irrespective of his actual condition. For refusal of treatment to be a factor at all in the assessment of the case, the person must be seriously ill, the refusal of treatment must be potentially seriously dangerous to his health and must be based on wholly unreasonable grounds, such as lack of capacity to make a decision about treatment, which was not the case in the present case. " [5]

This argument is acceptable and does not go against Hungarian case law. Its significance lies in the fact that in the present case there was no thorough examination of the evidence, which fully covered the living conditions and circumstances of the person concerned.

On the part of the Government

The Government stated that the applicant's mandatory confinement had been ordered in accordance with Hungarian law and in accordance with Article 5(1)(e) of the European Convention of Human Rights. [6]

This is followed by a reasoning which is probably not in line with the provisions of the Convention. „*The Government argues that the need for treatment is sufficient justification in itself, without any danger to oneself or others, for compulsory psychiatric treatment of mentally disordered persons. A medically established risk of self-harm to the health of a psychiatric patient, as manifested by the patient's refusal to accept voluntary treatment, is considered to be a disorder of a type or degree that warrants compulsory institutionalisation."*

This point can be effectively answered by the arguments of the requesting side - i.e. the circularity of the argument on dangerousness and lack of consent (see above), because in this form the government's position is rather narrow. *Self-danger or public danger is, in my view, a necessary condition for such a radical intervention as compulsory institutionalisation.* I cannot therefore agree with the first sentence quoted, but the second sentence seems to be correct, stressing that this general statement should in any case be supported by the specific facts of the case.

4 Judgement. par. 46.
5 Judgement par. 47.
6 Judgement par. 49.
7 The European Court of Human Rights in Strasbourg issued two rulings bolstering the rights of persons with psycho-social disabilities. In October 2012, the European Court of Human Rights in Strasbourg published two judgments that promote the rights of persons with psycho-social disabilities. 'The ECHR's decision (...) in the (...) case [of] Plesó v. Hungary(...), creates new ground for challenging forced interventions and detentions under the guise of paternalistic concerns.

On the margins of the human rights victory[7] in Strasbourg: observations in the wake of Civil Procedure Decision 1130/2004

Although at first glance this may seem to be a play on words, the relevant part of the Civil Principal Decision No.1130/2004 was able to express the logic of the procedure followed and to be followed by the Hungarian case law in a more effective and balanced way: '(...) the dangerous behaviour of the patient (...) existed, since he did not visit the institution (...) due to his lack of knowledge of the disease. The deterioration of the condition was, however, medically foreseeable because of the lack of treatment. (…).'"[8]

> *"The patient's conduct endangers his or her own health, and the right to self-determination of a person who is otherwise capable of acting cannot be infringed by the fact that the proceedings are before a court, and the decision is taken by the court in accordance with the provisions of the law containing legal guarantees."*

The essential difference between the two formulations is that while the government's argument in Strasbourg denies the necessity of self-danger or public danger for the ordering of institutional treatment, the civil principal does not; it is precisely the absence of a presumption of illness that indicates self-danger. However, it seems necessary to stress here too that it is not the refusal of treatment per se that constitutes self-danger, but the lack of knowledge. It is essential, however, that the latter should be subjected to a thorough investigation. This is also the view expressed in the Civil Principal Decision. This comment, in my view, avoids the error of 'circular reasoning'.

In this context, it is worth underlining that in the Plesó case there was no thorough medical examination of the applicant, which not only implies that the court and the psychiatric expert failed to make a finding of omission, but also that the applicant himself could not make a valid argument for the absence of his illness. Since the applicant himself claims that "it has not been conclusively established that he is mentally ill",[9] and the "seriousness" of his condition has not been clearly established either.[10]

When Plesó complains of his "psychiatric detention "(i.e. his compulsory institutionalisation) on the basis of Article 5(1)(e)[11] of the European Convention on Human Rights, he bases this - and the whole case - on his claim (i.e. that his "mental illness" has not been conclusively proven). However, the existence or absence of a disease is not proved by whether or not the doctor assigns a BNO code to the person concerned, or whether or not he

8 Civil principal decision No 1130/2004. The cited text is another (ref. no. E. 20.838/2003/10 of the Supreme Court of Justice ordering a review procedure in the case), The passage quoted in full is as follows: 'The dangerous behaviour required for the decision to be taken was, in the opinion of the expert and the specialist at the institution, present in the case of the patient, who had not visited the institution for about six months because of a lack of awareness of the illness. However, the deterioration of the condition was medically foreseeable due to the lack of treatment, which did not even raise the possibility of reversing the permanent condition."

9 Judgement par. 41.

10 Judgement par. 42.

11 Article 5: Right to liberty and security:

1. personal security. No one shall be deprived of his or her liberty except in the following cases and for the following reasons (...) (e) detention for the purpose of preventing the spread of communicable diseases, and the deprivation of liberty of mentally ill persons, alcoholics, drug addicts or persons who are in the (...) 5. in violation of the provisions of this Article shall have the right to compensation." Note: after the very existence or absence of "insanity" has not been proved beyond reasonable doubt, it is open question whether the applicant could have had any reasonable grounds to rely on this plea.

has assigned the right one, whether or not he has diagnosed him correctly, whether or not he has acted with due care, whether or not there has been any omission, but by examining all the circumstances of the person concerned.

The right to refuse treatment and the exercise of the right to self-determination (both of which are also linked to the right to personal liberty and the violation of that right in the Plesó case) are also worth mentioning.

Ad 1: Patients have the right to refuse treatment[12] and the right to self-determination (§ 15), i.e. they are free to decide whether they wish to receive health care and what interventions they are willing to undergo. This was also the case in the Plesó case.[13]

Ad 2: However, these rights cannot be exercised in a way that harms others. This is referred to in Art 5 of the ECHR. The role of the individual states, inter alia, that everyone is responsible for his or her own health to the extent that he or she is aware of it, has a duty to refrain from any conduct or activity which is known to endanger the health of others beyond a socially acceptable level of risk, and has a duty to render assistance to the extent that he or she is aware of it and to notify the health care provider responsible for the situation if he or she becomes aware of or is informed of an urgent need or a condition which is likely to endanger his or her health [ECHR. § 5 (3)].

The exercise of rights presupposes a sense of responsibility (or even "discernment") on the part of the right holders; the normative formulation of this is the "proper exercise of rights", the violation of which - as a fundamental principle pervading the entire legal system - is subject to adverse legal consequences in different ways in different branches and areas of law. To sum up: health is both a right and a duty.

Ad 3: Special provisions apply to psychiatric patients. These are designed to ensure a high level of care for a group of people who are particularly vulnerable due to their illness, which may be perceived as a form of increased "control" due to their temporary or permanent mental condition (e.g. lack of or limited insight), where their physical integrity and health can be protected in the context of health care without their consent. It would be important to see that in these cases, it is often not only the patient's health and integrity that needs to be protected, but also that of his/her family members and environment, even if he/she does not engage in directly threatening behaviour. So these 'curative-preventive' procedures are not only about psychiatric patients and the restriction of their personal freedom, but also about the situation of those in their immediate environment: their concern about the patient's condition, and even, where appropriate, their fears, their helplessness and their lack of knowledge or ability to apply the appropriate treatment (therapy).

Although the ECtHR judgment in the Plesó case is essentially intended to promote good causes - namely: to draw the attention to the indispensability of the courts during hearing cases of people with mental illness to order a thorough investigation covering all the circumstances of the case and to put an end to the "autocracy" of medical expert opinions in the evidence - in its observations and criticisms of Hungary.

12 Act CLIV of 1997 on Health Care [Act on Health Care], § 20

13 These rights may be limited in the cases defined in the ECHR, although within a narrow scope: life-sustaining, life-saving interventions may not be refused, and the care of an expectant mother if she is foreseeably capable of carrying the foetus to term [Art. 20(6) of the ECHR].

I think that the statement of the Civil Principal decision, according to which: "*The patient's right of self-determination and personal freedom were not violated, because it was necessary to provide for treatment appropriate to his condition - to be carried out in the institution - with the provision that the treatment he had previously voluntarily sought could not be provided because of the patient and that emergency treatment could not be provided because of the lack of conditions.*"[14]

Unexpected conclusion

There would be good reason to think that the Plesó case, as well as the Bures v. Czech Republic case, as mentioned above, results in the fact that the monopoly of psychiatric expert opinions as evidence is now over. Courts should be more careful to ensure that the evidentiary process in trials of people with psychosocial illnesses (mental patients) should cover all the circumstances of the case (including, for example, the lifestyle, the hearing of the persons concerned: interested/interested parties). In the Bures v. Czech Republic,[15] in which the ECtHR ruled that the use of straps to restrain a patient constitutes deliberately inhuman and degrading treatment, in breach of Article 3 of the European Convention on Human Rights. The Court also found that the failure to thoroughly investigate the victim's complaint was also contrary to the Convention. It awarded the victim damages of €20 000.[16]

I hope that this judgment will reform the use of coercive instruments in Central Europe and, more broadly, open the way for lawyers and judges to break away from judging such cases purely on the basis of medical opinion. This judicial decision is also important because it establishes new principles requiring the assessment of "mishandling" of people with disabilities. It also sets out a new type of review procedure that allows victims to claim reparation.

In the Plesó judgment, that the judgment establishes a new basis for combating coercive measures and punishments and new guidelines of the ECtHR confirms that people with disabilities, like anyone else, should be able to make their own decisions about their medical treatment.

The twist comes in the further interpretation of the Court's judgment. In the judgment, the Court states that a balance must be struck between the various competing interests: on the one hand, the need to uphold society's responsibility to provide the best possible medical treatment to persons with "diminished capacity" (for example, the inability to judge their own health), and on the other, the need to respect the individual's inalienable right to self-assertion (which includes the right to refuse hospital and other medical treatment), i.e. the "right to be sick". This is the first time that this definition has been used by the ECtHR. It may not seem an important right to many people, but its significance is that it gives disabled people the opportunity to do something they really need to do but are usually denied: *taking risks.*[17]

14 Civil Principal decision No 1130/2004.

15 'In one of the cases, Bures v. Czech Republic (...), the plaintiff, who had been hospitalized after he inadvertently overdosed on medication prescribed by his psychiatrist, was strapped to a bed for several hours, resulting in long-term injuries to his arms and ending his career as a cello player. He brought criminal charges, but they were dismissed.

16 In its decision in Bures, the European Court of Human Rights found that "the application of restraining belts on the applicant was a wilful act constituting inhuman and degrading treatment "violating Article 3 of the European Convention on Human Rights. The Court also held that the failure to sufficiently investigate the client's complaint was a violation of the convention. The plaintiff was awarded 20,000 euros.

Conclusion

Personal liberty is indeed one of man's greatest treasures, and efforts to defend it and to dismantle restrictions which are indeed unjustified are to be commended, but it must not be separated from man himself, from his natural goods. Only that should be recognised as a human right which genuinely helps man to achieve the goods which are in accordance with his nature. In my opinion, the 'right to be sick' cannot in any way be called a human right to be recognised. Furthermore, the discovery of a flaw in a legal institution or a legal mechanism does not in itself necessarily justify the complete abolition of that institution or mechanism. The defects discovered must be remedied, where possible, in order to enable the institution to fulfil its role in society. If it is not possible to remedy the situation, it may be appropriate to aim for its abolition. However, I do not yet see any effective alternative to compulsory (psychiatric) institutional treatment, which is subject to strict conditions laid down by law and should be applied carefully and only in the most necessary cases.