The Ability of the European Court of Human Rights to Ensure Effective Access to its Proceedings for People with Disabilities

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Rezumat:

Curtea Europeană a Drepturilor Omului, renumită ca fiind cel mai ardent apărător al drepturilor omului, înfruntă noi provocări procedurale prin prisma primului caz adus în fața Curții Europene cu privire la accesul la protecția instituită de aceasta, împotriva încălcării abuzive a drepturilor persoanelor instituționalizate cu dizabilități, care nu sunt capabile să facă o plângere sau să solicite repararea prejudiciilor cauzate în fața unor instanțe naționale. Scopul acestui articol este de a analiza angajamentul Curții de a asigura accesul la justiție pentru persoanele cu disabilități, în pofida cerințelor sale extrem de restrictive în ceea ce privește calitatea procesuală. În cazurile în care persoanele decedează în circumstanțe suspecte, întrebarea privind accesul la Curtea Europeană se poate constitui într-o lacună considerabilă cu referire la protecția oferită de Convenție, care ar deveni astfel iluzorie și impractică. Având în vedere că în prezent Curtea recunoaște calitatea procesuală doar rudelor victimei pentru a înainta o plângere privind încălcarea art. 2 CEDO privind dreptul la viață, plângerea introdusă de un ONG în numele unei persoane cu dizabilități ar fi acceptată de Curte sau ar fi respinsă ca inadmisibilă? În lumina unui asemenea caz, decizia Curții ar putea avea un efect nebănuit și revoluționar asupra sistemului de drept național. Ca și consecință, acestă lucrare țintește spre a evalua posibilul răspuns al Curții, iar în cazul unui răspuns pozitiv, ce ar stabili un precedent, care ar fi urmările acestuia.

Abstract:

The European Court of Human Rights, renowned as the most ardent defender of human rights, faces new procedural challenges in dealing with the first case brought before the Court which concerns the access to ECtHR's protection against extreme

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human rights abuses inflicted upon institutionalised people with disabilities who are unable to complain or seek remedies for their plight before a national court. This paper aims at analysing the Court's commitment to ensure access to justice for people with disabilities in contradiction with its extremely restrictive construction of standing requirements. In cases of people who subsequently die in suspicious circumstances, the question of access to the Court could raise a considerable gap in the protection provided by the Convention, which would thus become illusory and impractical. Given the fact that, in present, the Court only recognises standing to bring cases under Article 2 of the European Convention on Human Rights concerning the right to life for the victim's next-of-kin, would the application lodged by an NGO on behalf of a person with disabilities meet the acceptance of the Court, or would it be dismissed as inadmissible? In the light of a case like this, the decision of the Court may have an unthinkable and revolutionary effect on domestic law systems. Accordingly, this work targets the evaluation of the possible answer of the Court, whether a positive response would set a precedent and what would its outcomes be.

Keywords: The European Court of Human Rights, effective access, proceedings for people with disabilities, personal capacity

Introduction

A survey supported by various inter-governmental bodies for human rights[675] and conducted in several European countries concluded that the access of people with intellectual disabilities to rights and justice has not been ensured properly by states[676]. These kinds of reports are irrefragable evidence that the mortality rate in mental disability institutions is still increasing.[677] For example, as a result of a visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT) at Poiana Mare Psychiatric Hospital in Romania in 1995, CPT noted 61 deaths over a seven-month period.[678] Meanwhile, the situation has not improved. The hospital has a bad reputation for its record of recurring human rights abuses perpetrated against its residents.

Our paper is built upon the momentous case of *The Centre for Legal Resource on behalf of Valentin Câmpeanu v. Romania,* which is currently pending before the Grand Chamber of the European Court of Human Rights.[679] According to Application no. 47848/08, the applicant, Valentin Câmpeanu, now deceased, was a Romanian national of Roma ethnicity born in 1985. He had been abandoned at birth, never met his parents and lived his whole life in care institutions. He was diagnosed with "*profound mental retardation"* and in time, he also developed associated symptoms such as pulmonary tuberculosis, pneumonia and chronic hepatitis. Mr. Câmpeanu was discharged in September 2003, after

[675] i.e. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Centre for Legal Resources.

[676] (Centre for Legal Resources, 2009), (Fundamental Rights Agency, 2011), pp.37-5.

[677] (MDAC, 2011), p. 9.

[678] (CPT, Rapport au Gouvernement de la Roumanie relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants en Roumanie, 1995).

[679] CLR on behalf of Valentin Câmpeanu v. România, Application no. 47848/08, lodged with the European Court on 2 October 2008; on 4 September 2013, the European Court held a Grand Chamber Hearing and, at the moment, the Court had yet to rule on admissibility.

reaching the age of majority (18 years in Romania), from the orphanage where he lived. All efforts by local authorities to identify an institution for adults willing to accept him were in vain, mostly due to Câmpeanu's HIV infection, despite the fact that his medical diagnosis was engineered to make the admission process easier by removing any reference to his intellectual disability. Eventually, Câmpeanu was admitted to a social home, where he was brought without proper clothing or any antiretroviral treatment which he had been taking for years. He stayed there for five days, before being transferred to the Poiana Mare Psychiatric Hospital, where he was abandoned in an isolation room, lacking proper care, treatment, and in extremely degrading living conditions. Câmpeanu died there on 20 February 2004.

The highest Romanian court recognised[680] that the Centre for Legal Resources (hereinafter: CLR), an NGO, has legal standing to initiate and continue domestic proceedings on applicant's behalf.[681] The official investigation of Câmpeanu's death, marred by procedural irregularities, did not result in any charges against officials involved in his successive transfers, or against staff from the institutions he was admitted to during the last months of his life. The death certificate also noted that HIV infection was the "initial morbid state" and designated "mental retardation" as "another important morbid state". Furthermore, an autopsy of the body was not carried out.

In these circumstances, CLR lodged an application before the European Court on behalf of Valentin Câmpeanu, claiming violation of art. 2, 3, 5, 8, 13 and 18 of the Convention. This application is testing the Court's commitment to ensure remedies against extreme human rights abuses inflicted upon people with disabilities, as, in accordance with its procedural rules, only direct victims or their next-of-kin could lodge an application. NGOs, international instruments for human rights and the intervention of Nils Muiznieks, the European Commissioner for Human Rights, have put pressure on the Court to adapt its admissibility criteria so as to allow NGOs to bring cases on behalf of the deceased Valentin Câmpeanu, having regard in particular that he was an orphan and he had no appointed legal guardian. At present, the Court is about to rule on the admissibility of the application. In analysing the possible answers of the Court, we have examined the importance of ensuring the respect of rights of institutionalised people with mental disabilities, the history of access to justice for those people both in ECHR jurisdiction and other international courts and the consequences of eventual positive or negative responses of the Court.

The obligation to ensure the respect of rights for people with mental disabilities

Article 21(1) of the Romanian Constitution regarding the free access to justice states that: „*every person may access justice to defend his rights, freedoms and legitimate interests*" and, if this article is read in conjunction with article 16(1),[682] it is a matter of course to assume that people with disabilities have

[680] Decision no. 4948/1/2006, High Court of Cassation and Justice, 15 June 2006.

[681] Government Ordinance no.137/2000 (reissued), art.28(1) (NGOs, which aim to protect human rights or have legitimate interest in combating discrimination, have *locus standi* where discrimination is manifested in their field and affects a community or group of people.).

[682] "*The citizens are equal before the law and the public authorities, without privileges and discrimination",* the Romanian Constitution, adopted in 1991 and revised in 2003.

likewise access to justice. Despite this, in the light of the rules of Romanian legal procedure, on most occasions, this exists only in theory. This situation is even more peculiar, given the fact that we are referring to a vulnerable social category that needs those extra protective measures to ensure their fundamental rights.[683] Ignoring the broad legal provisions,[684] the protection of basic rights of people with mental disorder or with intellectual disability, particularly in case of persons placed in psychiatric establishments, was repeatedly challenged.[685]

Such a situation has been noted by CPT, which visited the Poiana Mare Hospital three times, in 1995, 1999 and 2004.[686] The Romanian government had been informed repeatedly about the CPT's findings and each time it filled a reply.[687] By doing so, the State not only has acknowledged the facts, but also became liable to assume its guilt, consequently being no longer in ignorance of the situation.

Under international human rights law, the national authorities are obliged to conduct effective investigation when an individual's right to life has been violated by a governmental body or a private individual.[688] Moreover, the state is under an exceptional duty to protect individuals who find themselves in a vulnerable position as a result of their placement in state custody, including medical care.[689]

In the case of Valentin Câmpeanu, the circumstances of his death were brought before the Romanian courts by CLR[690] on his behalf. The NGO was recognized as having legal standing during the criminal investigation. The domestic proceedings were concluded in a malevolent manner for the current case, as the Prosecution Office considered that "no causal relationship between the death and the activities of the two defendants had been established" and that in relation to the defendants, "the two fulfilled their duties adequately".

As a consequence, no prosecution was initiated, despite the fact that Mr Câmpeanu died in at least suspicious circumstances. The official investigation was „limited in scope, superficial, overly deferential towards medical opinion, and extremely lengthy"[691]. But, was there indeed „no causal relationship", in the context of a common practice of misdiagnosis, incorrect administration of medicines, medical records which were not duly kept[692] and no autopsies being performed?[693]

Can we talk about an impartial investigation, if the evidence administered to conclude this criminal investigation was superficial and insufficient? The reliance on evidence presented by only one party, i.e. personnel of the hospital, is insufficient for the purpose of effective investigation.

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[683] The Constitution includes a provision regarding the protection of persons with disabilities in general in art. 50.

[684]Romanian Civil Code (art.143); Law no. 487/2002; Directive 2000/43/EC.

[685] At the ECtHR, there is another application pending, filed by CLR, on behalf of five patients who died at the Poiana Mare Psychiatric Hospital in the period of January to February 2004: *Malacu and others v. Romania*, application no. 55093/09.

[686](CPT, Rapport au Gouvernement de la Roumanie relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants en Roumanie, 1995-2004).

[687] *Ibidem*.

[688] (Powell c. United Kingdom, 2000).

[689] (Amnesty International, 2005).

[690] Romanian NGO with expertise in the promotion of the human rights of persons with disabilities.

[691] (Centre for Legal Resources, 2009).

[692] (Amnesty International, 2005).

[693] (Order no. 1134, art. 34(3)(d)), lack of autopsy is not possible in the case of people who were previously hospitalized in state custody (prisoners, the mentally ill, hospitalised persons); Law no. 104/2003, *per a contrario* art. 26(d).

In case of states that do not recognize the legal standing of a NGO on behalf of a victim, a positive decision in *Valentin Câmpeanu v. Romania* would certainly be a cornerstone for a progressive, salutary and imperative change in their procedural rules.

Failure to obtain evidence from all key witnesses, including NGO monitors that may hold relevant information[694] indicates, once again, that the authorities have not handled this case with the diligence required. The European Court has established that there is a need for effective, independent system for establishing the cause of death of an individual under the care and responsibility of health professionals.[695]

The practice of the ECHR reveals that the public authorities have the duty to adopt rules which are to be imposed to the hospitals, both public and private, to take measures through which the life of patients is to be protected. Furthermore, this implies the obligation to establish an efficient and independent judicial system, able to determine the *mortis causa* of a person found under the protection of an authority of a specialized medical body, public or private, and able to make possible the engaging their responsibility for their actions, if necessary.[696]

A short overview on the right to access to justice under ECHR

Access to justice is not just a right in itself, but also an enabling and empowering right in so far as it allows individuals to enforce their rights and to obtain redress. Undoubtedly, the respect of fundamental rights for persons with disabilities should be first and foremost an issue at the national level,[697] but when states fail to ensure a proper protection, international monitoring bodies may operate as subsidiary means of obtaining redress.

The ECtHR represents, in terms of both case load and influence, the main mechanism for accessing justice above national level in Europe. The Convention ensures the right of access to justice, provided in art. 6 of the Convention, but, at the same time, its unduly restrictive concepts of legal standing and victim status could, paradoxically, in some circumstances, exclude persons with disabilities, held in mental health institutions, from the protection of ECHR by denying them the access to the Court's proceedings.[698]

Consistent with art.34 of the Convention, only direct victims of a violation of the rights provided by the Convention, acting in their personal capacity, have *locus standi* to file an application before the Court.[699] Notwithstanding, the Court used a more flexible admissibility criterion in cases of violation of the right to life under art. 2 when interpreting the notion of "victim" in a wider understanding, so that claims might be brought before the Court on behalf of those who died by their next-of-kin.[700] The *Fairfield v. United Kingdom* case is only one situation in which the Court fashioned an exception to the principle of "direct victim", invoking "the interest of human rights", a concept

[694] (Amnesty International, 2005).
[695] (Powell c. United Kingdom, 2000).
[696] (Bîrsan, 2010), p. 88.
[697] (Fundamental Rights Agency, 2011).
[698] (Cojocaru, 2011).
[699] (Amuur v. France, 1996, §36).
[700] (Gakiyeva v. Russia, 2009, §165), (Marie-Louise Loyen and Other v. France, 2005, § 29).

included in art.37 (1) *in fine* of the Convention.[701]

In its case-law, the Court stated that persons with intellectual disabilities, who are deprived of their legal capacity, may initiate judicial proceedings only through their guardians.[702] Yet, this interpretation of *locus standi* rules still does not ensure the protection provided by the Convention for individuals who died in circumstances arising under art. 2 and had no next-of-kin to represent them.[703].

Cases initiated by third parties where there was no one who could assert the rights of victims have previously been examined by the ECtHR. The early European Commission of Human Rights rendered a negative precedent in the *Skjoldager v. Sweden case.* The complaint made by a state-employed psychologist, on behalf of three residents who suffered from mental disability and were detained unlawfully in a nursing home, was rejected as inadmissible on the basis that the applicant lacked *locus standi.*[704] In contrast, in *Becker v. Denmark*, the Court recognised the validity of the application lodged by a person who had neither the custody nor the guardianship of approximately 200 Vietnamese orphans who had been threatened with expulsion. The decision was made in the view of the vulnerability of the children.[705]

Notwithstanding, the admissibility criteria for legal standing remain a barrier for persons or entities, such as NGOs, to file a claim on behalf of a dead person who had suffered egregious human rights violations and had no next-of-kin to validity lodge an application in front of the Court.

Access to justice for persons with disabilities in international human rights law

Other international adjudication bodies have proved to be more permissive than the ECtHR in regard to legal standing rules. For example, the Inter-American Commission of Human Rights (IACHR) and the African Commission of Human and Peoples' Rights[706] expressly permit applications submitted by human rights bodies on behalf of persons with mental disabilities, even in the absence of specific written authorization.[707]

The recognition of *locus standi* for NGO's on behalf of persons with disabilities is well-established by the jurisprudence of various international bodies. For example, in *Purohit and Moore v The Gambia,* the African Commission found the complaint lodged by two British mental health workers holidaying in Gambia, who witnessed the poor conditions prevailing at a hospital in Banjul, admissible. This was despite the fact that they lacked any authority to act on behalf of victims.[708] The IACHR was confronted with a similar situation to that of *Valentin Câmpeanu*, when two international NGOs had filed a request for precautionary measures on abuses perpetrated against residents of a psychiatric hospital.[709]

[701] (Fairfield v. United Kingdom, 2005), (Cardot v. France , 1991), (Katic and Katic v. Serbia , 2004).

[702] (Stanev v. Bulgaria, 2010), (Lashchevskiy v. Russia).

[703] The same applies to victims with disabilities who have died and have no relatives who could file an application on behalf of them (Cojocaru, 2011).

[704] (Skjoldager v. Sweden , 1995).

[705] (Becker v. Denmark, 1975).

[706] Art. 12 and 13 of the UN Convention on the Rights of Persons with Disabilities, art.44 of IACHR.ACHPR Information Sheet No.2: Guidelines on the Submission of Communications [*http://www.achpr.org/english/_info/guidelines_communications_en.html* [retrieved on 16 November 2013].

[707] (MDAC, 2011).

[708] (Purohit and Moore v. The Gambia, 2003).

[709] (Hillman, 2005), pp. 25-28.

We can conclude that in contrast to the ECHR's legal standing rules, the person or entity filing a claim need not to be a direct victim of the violation alleged to assert an application on behalf of any specific victim.[710]

Third party attitudes and reactions in support of admissibility of the *Valentin Câmpeanu v. Romania* application

Notwithstanding that this case may be a typical and classical violation of the Convention, its success is surrounded by hazard because of the Court's rules of procedure. Nevertheless, civil society and official entities have acknowledged its importance and clearly expressed their supportive point of view towards the procedural issues in front of the European Court.

At the hearings from 4 September, the Commissioner for Human Rights of the Council of Europe, Nils Mui•nieks, intervened as a third party. He stated that, in exceptional circumstances, NGOs should be allowed to apply to the Court on behalf of victims.[711] He motivated his assertions stating that "effective equality for persons with disabilities requires removing the barriers that prevent them from accessing courts to claim their human rights".[712]

A study by the non-governmental organization *Inclusion Europe* concluded that access to justice for people with intellectual disabilities is by no means guaranteed in many European countries, stressing that „partial or complete legal incapacitation combined with limited access to justice are the ingredients for a degree of social exclusion by only few other groups of people".[713] However, in the current domestic law of European states, there is a tendency to accept that a third party may take legal action in the name of victims of alleged human rights violations in domestic courts, especially in cases concerning vulnerable groups of people.[714]

Other European Union member states grant support to the landmark case of *Valentin Câmpeanu v. Romania*. For example, the Bulgarian Helsinki Committee (hereinafter: BHC), after receiving an invitation from applicants, has been given the Court's permission to intervene with observations on the application. According to the BHC's statement,[715] if the Court examines the claim, this will set a precedent which the Bulgarian NGO could use before the ECtHR in cases of children with disabilities which died in long-term stay institutions. In September 2011, following a joint operation of the BHC and the Chief Prosecutor's Office, a grisly picture of neglect in Bulgarian state homes for mentally disabled children was revealed: 238 children have died since 2000. The Bulgarian NGO submits that if the ECtHR shall rule negatively on admissibility, people with disabilities who die in long-term stay institutions without relatives to represent them would be subject to equal injustice twice, once by the ECtHR, and once by the national-level bodies.[716]

A positive answer from the European Court would improve access to justice for people with disabilities. A survey supported by the European Commission and Inclusion Europe,[717] based on reports

[710] (Pasqualucci, 2003), p. 100.
[711] (Juridice.ro, 2013).
[712] (Commissioner for Human Rights, 2011).
[713] (Fundamental Rights Agency, 2011).
[714] (Commissioner for Human Rights, 2011).
[715] (BHC, 2011).
[716] http://www.novinite.com/view_news.php?id=132691 [retrieved on 21 November 2013].
[717] Justice, Rights and Inclusion for People with Intellectual Disability, a report of the European Commission and Inclusion Europe, available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=gladnetcollect [viewed on 21 October 2013].

from 9 European Union member states,[718] provided an overview on a very heterogeneous situation among European countries. The situation of service provision for people with intellectual disability in the EU is in all countries far from adequate as legal structures and proceedings are generally not accessible for them. It results that states bear legal responsibility for the situation of those persons. Moreover, only a few countries'[719] NGOs have legal standing to defend the interests of people with intellectual disability in domestic proceedings, while the vast majority of states recognise standing only for persons appointed as guardians.[720]

It follows that the only remedy to this pervasive disenfranchisement is to allow NGOs to pursue justice for institutionalised persons with mental disabilities in their own right, even where a victim is deceased, or lacks formal capacity under domestic law to validly authorise representation.

Conclusion

In the light of the above presented, it is our belief that the Court should not only declare admissible the *Valentin Câmpeanu v. Romania* case, but it should also give a pilot-judgment.[721] In doing so, the Court would once again consolidate its role, as „the decisions of such a court are mandatory and are not susceptible to be contested in the domestic legal system, on the grounds of free access to justice".[722]

The long awaited response of the Grand Chamber upon the admissibility of the case lodged by CLR on behalf of *Valentin Câmpeanu v. Romania* could have two outcomes. On the one hand, if the response is a negative one, there will be undoubtedly strong reactions among NGOs and other international instruments for protecting persons with disabilities. A negative response will prove the European Court's rigorous loyalty towards the rigidity and the steadiness of its well-established rules. In our opinion, this should not prevail over the primary purpose of the Convention, the protection of human rights.

On the other hand, if the court declares the application admissible, the outcomes will have a great impact on several levels. Firstly, by a presumptively affirmative response, the Court will have to revise its rules on *locus standi.* Then, the NGOs ability to file an application on behalf of a victim whose fundamental rights were violated, must be restricted only to the special circumstances expressly provided by the Convention, which, in our opinion, are: the victim must be deprived either totally or partially of legal capacity due to severe intellectual disabilities or deceased; there exists no next-of-kin who could file a claim on behalf of it; and the fundamental rights infringed must be among those provided by the Convention. Secondly, the entity that files an application on behalf of the victim must prove legitimate interest, which can be easily demonstrated by the statute, general rules or declared purpose of such an entity. Thirdly, a favourable response would have repercussions on the domestic level as well. A judgment of the

[718] Sweden, Germany, Spain, France, Ireland, Belgium, the Netherlands, Poland and Slovenia.

[719] France (only if NGOs receive authorisation from the victim, the family or guardian), Germany, Poland, Spain.

[720] Including the Netherlands, Slovenia, Sweden..

[721] Rule 61(1) of The Rules of Court (the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting States concerned the existence of a structural or systematic problem or other similar dysfunction which has given rise or may give rise to similar applications).

[722] (Drăganu, 2003), p. 53.

Court in this matter would consolidate the admissibility of complains submitted by NGOs on behalf of a victim, leaving no excuses for a state to continue a flagrant and systematic violation of human rights. In case of states that do not recognize the legal standing of a NGO on behalf of a victim, a positive decision in *Valentin Câmpeanu v. Romania* would certainly be a cornerstone for a progressive, salutary and imperative change in their procedural rules. Nevertheless, all these criteria should not turn into another rigid rule of proceedings. They should be approached in a flexible manner and in accordance with case-to-case facts.

One issue that we thought that might occur is that of the remedies sought. In our point of view, even if in countries such as Malta, the interveners are entitled to claim in their own right the same remedies as victims can, entities that act on behalf of victims should not have standing to claim any remedies in their own right. The one and the only aim of such an application must be the engagement of the state's responsibility towards the failure to ensure the respect of fundamental rights of its citizens.

Albeit the almost absolute wording of art.21 of the Romanian Constitution, and of art. 6(1) of the ECHR, the jurisprudence and doctrine have generally recognised that the right to access to justice has a non-absolute character. Tudor Drăganu asserted that this non-absolute nature of this right is given by the factual reality in which an individual who suffered an infringement of his rights is not always provided with access to justice by the authorities, except for some well-established situations.[723] This reality is neither shocking nor unheard of. It is simply a fact of a society and a system that, despite their imperfections, are in continuous progress, aiming to provide protections for all humans.

[723] (Drăganu, 2003), p.92.