

DOI 10.20544/HORIZONS.A.29.2.21. P14

UDC341.645.2(4):342.7(497.7)

MACEDONIAN CASE L.R. IN FRONT OF EUROPEAN COURT OF HUMAN RIGHTS - WHAT WENT WRONG?¹

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ABSTRACT

The Case L.R. v. Macedonia stands out from the rest of the Macedonian cases in front of the European Court of Human Rights (ECHR), since a non-governmental organisation lodged an application on behalf of a mental patient. Moreover, ECHR noted that there has been a violation of the Article 3 of the Convention on account of the inappropriate placement of the applicant in the Rehabilitation Institute, where he endured a lack of requisite care provided and he was subject to the inhuman and degrading treatment. In addition, ECHR found one more violation of the Article 3, i.e. the respondent State failed to discharge its procedural obligation regarding the effective investigation.

Having in mind the above, the Paper shall focus on the applicant - a mentally disabled eight-year-old child, as well as on the noted violations of the Convention's Article 3. Consequently, the Paper shall provide a theoretical and critical overview of this case, as well as to other relevant judgements and documents that address the issue of prohibition of torture.

KEY WORDS: Prohibition of torture; European Court; Macedonian Case L.R.

INTRODUCTION

“Any restraint on people with mental disabilities for even a short period of time may constitute torture and ill treatment. It is essential that an absolute

¹ review scientific paper

ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including in psychiatric and social care institutions” was stated by Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in his Report on the issues of abusive practices in health-care settings (United Nations - General Assembly - Human Rights Council, 2013: para. 63). Similar observations can be seen in many international documents that address the question of the human rights, especially the rights of persons with mental illness and their protection. For example, within the Council of Europe (CoE) an emphasis should be given to the so-called “Oviedo Convention”, or the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (CoE, 1997), that among other things points to the protection of persons who have a mental disorder, as well as to the role of the person’s representative or an authority or a person or body provided for by law in giving a consent to an intervention. In the same line is the Recommendation Rec(2004)10 of the Committee of Ministers of CoE to the member States concerning the protection of the human rights and dignity of persons with mental disorders (CoE - Committee of Ministers, 2004), stipulating that seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed, with a note that such measures should only be used under medical supervision, and should be appropriately documented. Finally, an emphasis should be given to one of the most relevant documents, i.e. CoE’s Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) (CoE, 1950) and its Article 3 that prohibits torture by specifying that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Despite the fact that the Convention was signed and afterwards ratified by the Macedonian Assembly in 1997 (Law on Ratification of the Convention, 1997), as of September 20, 2021, 15 cases that establish violation of the Article 3 can be found through HUDOC database that provides access to the case-law of the European Court of Human Rights (ECHR). Among these cases, the Case *L.R. v. Macedonia* (ECHR, 2020-a) stands out because a non-governmental organisation lodged an application on behalf of a mental patient, as well as because of the inappropriate placement of the applicant in the Rehabilitation Institute, where he endured a lack of requisite care provided and was subject to the inhuman and degrading treatment.

THE CIRCUMSTANCES OF THE L.R. CASE

The Helsinki Committee for Human Rights in Skopje (HCHR) on 27 July 2015 lodged an Application (No. 38067/15) against Republic of Macedonia. The Application was lodged on behalf of L.R. (the applicant), stating that the care and treatment which he had received while in a State-run institution had violated his rights under the Article 3, and that the subsequent response by the respondent State had not been compatible with its procedural obligations under that provision. Based on the actions taken over by the HCHR, ECHR ruled that it should be granted standing to act as the applicant's representative, despite the fact that the application was without producing a power of attorney or written authority from the applicant himself, his legal guardian or any other competent person.

Namely, L.R. was born on 21 November 2004, and at the age of three months he was placed in B. Orphanage, since his parents abandoned him at birth (they suffered from a mental disability) and his grandmother requested it. In addition, B. Social Welfare Centre was appointed as his guardian. In the years that followed, he was given several diagnosis, like - stalled physical development and speech disability (at the age of two), and moderate mental disability, most severe form of physical disability - cerebral palsy and speech disability (at the age of four).

Starting from November 2008 till June 2012, L.R. was placed in B. Rehabilitation Institute (a State-run institution for people with hearing and speech disabilities), where he was diagnosed that he has mental, physical and speech disabilities. On the assessment given by the Institute's medical personnel that his continued stay and treatment there would not be justified, he was discharged in June 2012. Consequently, his guardian asked Rehabilitation Institute B.B.S. ("the RIBBS" - an open-type State-run institution for physically disabled people with no mental disabilities) to accept him, and the competent ministry granted that request. However, on 29 June 2012 the RIBBS replied that L.R. cannot be placed in there because they cannot educate and rehabilitate him since he was unable to speak, nor they cannot communicate with him or understand his needs, because they have no qualified staff to understand and work with him. Regardless of such reply, the applicant's guardian decided that he should be placed in the RIBBS and requested his state of health to be reclassified. However, he was not transferred to B. Hospital for examination. Once again, the RIBBS notified the applicant's guardian that it had no qualified staff to care for the applicant (as stated "...all members of staff hold him by the hand all the time in order to prevent him from running away... if we don't hold him by his

hand, he runs away...”). Also, RIBBS recommended L.R. to be transferred to a more appropriate institution because, as its records showed, his continued stay there would worsen his condition (the staff could not communicate with him because he was deaf and unable to speak; L.R. had started biting himself; L.R. was escaping from the institution whenever it was possible). Moreover, RIBBS had meetings with the applicant’s guardian and other competent authorities and informed the competent ministry and inspectorate about the inappropriateness of his placement.

During the Ombudsman’s visit to RIBBS (November 2013), L.R. was found tied to his bed by his leg. In its report, the Ombudsman noted that “a deaf child who cannot speak was found in the RIBBS, who had been tied to a bed for safety reasons; he cannot communicate with members of staff and the staff do not know sign language (so cannot) provide him with adequate care ...”. Furthermore, the Ombudsman raised the question whether the rights of this group of people with special needs have been violated since it was inhuman to be placed in institutions that are inappropriate for them and have no adequate safeguards (to prevent) those people and other residents (from being) put at risk. The RIBBS replied to the Ombudsman that L.R.’s placement was contrary to all its internal regulations, which was brought to attention to the competent ministries and social welfare centres.

Five months later (March 2014), applicant’s guardian request for his examination, which was done by B. Hospital, establishing the same findings as those made in its earlier report (moderate mental disability; most severe form of physical disability - cerebral palsy; speech disability - *alalia*). Subsequently, L.R.’s guardian on 15 April 2014 placed him in the S. Rehabilitation Institute.

It is important to note that following L.R.’s discharge from the RIBBS, a medical report was drew up on 10 July 2014 by S. Psychiatric hospital, stating that “L.R. has a low level of functionality; he has communication difficulties; his walking is stable, with synchronised movements; he keeps his balance properly; no two-way communication can be established because of his undeveloped communication skills.”. Also, it was considered that L.R. has suffered from autism, accompanied by a mental disability and a speech disability, and because of the insufficient stimulation and early treatment, “he has a very low level of development and he is practically incapable of caring for himself.”

Having in mind the above circumstances, HCHR on behalf of L.R. on 17 July 2014 lodged a criminal complaint, accusing the RIBBS’s director and other (unidentified) employees for committing criminal acts under Article 142 (Torture and other cruel, inhuman or degrading treatment or punishment) and Article 143 (Ill treatment in the performance of their duties)

of the Criminal Code. However, based on the obtained material (documentation from RIBBS, Ombudsman and other competent authorities) and examination of the RIBBS's director and four of its employees, the S. First-Instance Public Prosecutor's Office on 24 November 2014 rejected the criminal complaint establishing that the actions of the suspects had not contained any elements of the alleged crimes or any other crime subject to State prosecution (there had been a lack of intent on the part of the suspects to subject L.R. to inhuman or degrading treatment; L.R. had been tied to his bed in order to prevent him from harming himself, etc.).

HCHR continued with its actions and on 30 December 2014 requested the Higher Public Prosecutor to take over the prosecution and, among other things, pointed that the findings of the First Instance Prosecutor's Office that L.R. had been tied to a bed for "safety reasons" were "unacceptable and absurd", which represented unprofessional exercise of office by the prosecutor. Once again, the same decision was made, i.e. Higher Public Prosecutor's Office endorsed the facts and reasoning provided by the First-Instance Public Prosecutor, and upheld the findings that L.R. had been tied to his bed for safety reasons (the same was noted in the Ombudsman's report) and that there had been a lack of intent on the part of the suspects to debase the applicant. Finally, HCHR addressed the issue to the State Public Prosecutor, but once more - with a letter of 1 June 2015 the findings of the lower prosecutors' offices were confirmed.

ECHR'S RULING IN THE L.R. CASE

As mentioned in the Case *V.C. v. Italy* (ECHR, 2018: para. 89-95), ECHR observed that the State must take measures designed to ensure that individuals within their jurisdiction are not subjected to ill treatment, including ill treatment administered by private individuals. These measures must provide effective protection, in particular of children, who are particularly vulnerable to various forms of violence, and include reasonable steps to prevent ill treatment of which the authorities had or ought to have had knowledge, as well as effective deterrence protecting minors against such serious breaches of personal integrity. In addition, ECHR in the Case *Stanev v. Bulgaria* (ECHR, 2012-b: para. 201-204) raised the question whether such treatment was intended to humiliate or debase the victim is a factor to be taken into account, although the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3.

Correspondingly, in the Case *Blokhin v. Russia* (ECHR, 2016: para. 135-140), ECHR pointed out that the lack of appropriate medical care may

amount to treatment contrary to Article 3, i.e. this article further imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical care. As noted in the Case *Keenan v. the United Kingdom* (ECHR, 2001: para. 111), the lack of appropriate medical care may amount to treatment contrary to Article 3. In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. Therefore, ECHR in the Case *Bouyid v. Belgium* (ECHR, 2015-a: para. 109) concluded that ill treatment is liable to have a greater impact - especially in psychological terms - on a minor.... The need to take account of the vulnerability of minors has also been clearly affirmed at the international level.

In order to determine whether the threshold of severity has been reached, as mentioned in the Case *Nicolae Virgiliu Tănase v. Romania* (ECHR, 2019: para. 117), ECHR may also take other factors into consideration, in particular: the purpose for which the ill treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3; the context in which the ill treatment was inflicted, such as an atmosphere of heightened tension and emotions; and whether the victim was in a vulnerable situation. Concerning the use of handcuffs or other instruments of restraint, ECHR in the Case *Julin v. Estonia* (ECHR, 2012-a: para. 120), stated that their use does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary. In this regard, it is important to consider, for instance, the danger of the person's absconding or causing injury or damage.

Continuously to the above mentioned cases, ECHR noted that L.R. was all the time in the care of the authorities (his medical condition and his mental and physical development were monitored by health and social care services starting from the age of three months), which were under an obligation to safeguard his dignity and well-being. Therefore, ECHR found them responsible for his inappropriate placement in the RIBBS, lack of requisite care and the inhuman and degrading treatment that he experienced therein. Having in mind these findings, ECHR unanimously ruled that there has been a violation of the Convention's Article 3. ECHR also pointed out to the inaccurate diagnosis that preceded L.R.'s placement in RIBBS (the diagnosis

that he had most severe form of a physical disability - cerebral palsy, contradicted the first-hand and direct information from the RIBBS's staff, as well as the medical report of S. Psychiatric Hospital, in which there was no mention that he had any physical disability). ECHR observed that RIBBS was in no way an institution for mentally disabled persons like L.R., which led to his overall condition worsening. In addition, ECHR was stunned because L.R.'s guardian and the other competent authorities were aware from the outset that the RIBBS could not provide L.R. with the requisite care (even before his admission), but nevertheless took no measure in reply to those serious alerts and pursued that placement for a considerable period of time.

In addition, ECHR observed that during his placement in the RIBBS, L.R. was tied to his bed by his leg with a "rope" or "cotton straps" allegedly "long enough to enable him to reach the corridor", both at night and often during the day. ECHR stressed that it cannot establish how many times a day L.R. was tied up, but assumed that it was common practice. Furthermore, the given arguments by the Government that the personal had no intention to humiliate or debase L.R., were assessed by ECHR that cannot conclusively rule out a finding of a violation of this provision.

When it comes to the procedural aspect of the Article 3, an emphasis should be given to the Case *M.S. v. Croatia* (no. 2) (ECHR, 2015: para. 74-75), where in the context of allegations of ill treatment by the use of physical restraint against an applicant who was involuntary retained in a psychiatric hospital, the ECHR has held that Article 3 of the Convention required States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. As a continuation to the above case, ECHR in the Case *Nikolova and Velichkova v. Bulgaria* (ECHR, 2008: para. 63) noted that it is not its task to verify whether their judgments correctly applied domestic criminal law; what is in issue in the present proceedings is not the individual criminal law liability of the officers, but the international law responsibility of the State. In essence, as reiterated in Case *Bureš v. the Czech Republic* (ECHR, 2013: para. 131), is not ECHR's task to interpret the domestic law, including the Criminal Code. Therefore, it will not express a view on whether the applicant's ill treatment should have been investigated as the crime of torture and other inhuman or cruel treatment. It must concentrate on the purpose of the obligation of effective investigation, which is to secure an effective implementation of the domestic laws which protect the right not to be tortured and, in those cases involving State agents or bodies, to ensure their accountability. Finally, in the Case *Enukidze and Girgvliani v. Georgia*

(ECHR, 2011: para. 268), ECHR recalled that, while it largely defers to the national courts' choice of sanctions for ill treatment and homicide, it nevertheless must, as the ultimate watchdog of the protection of Articles 2 and 3 of the Convention, the two most fundamental provisions, exercise a power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Otherwise, the States' duty to carry out an effective investigation would lose much of its meaning, and the rights enshrined in the above-mentioned provisions would be ineffective in practice.

Having in mind the facts of the case, as well as the previously mentioned judgments on the account of the procedural limb of the Convention's Article 3, ECHR ruled (by six votes to one), that in the case of L.R. there has been a violation of Article 3 on account of the failure of the respondent State to discharge its procedural obligation under this Article. Namely, ECHR established that the authorities did not take an appropriate reaction, as well as their overall response in investigating the allegations of serious human rights violations cannot be regarded adequate. Furthermore, there was no effective attempt to verify whether the system's failures had resulted from acts by the authorities' representatives or any other public servant, for which they could be held accountable. ECHR observed that in this case the persons that were suspected of ill treatment were not charged (and punished), and this fact was not sufficient in itself to find a violation of Article 3, because the procedural obligation under Article 3 is not an obligation of result, but of means.

CONCLUSION

At fifteen words, Article 3 of the Convention is one of the shortest provisions in the Convention. However, the brevity of the article should not belie its depth. National authorities cannot afford to be complacent when understanding what it means to respect and enforce this provision (Reidy, 2002: 8). The ECHR has repeatedly stated that the rights found in Article 3 of the Convention are 'absolute' and 'subject to no exception whatever', a mantra that has also been endorsed in the academic literature (Brems & Gerards, 2014: 12). No derogation from Article 3, as well as the historical background of the Convention, has led to the argument that Article 3 should not be trivialized, i.e. understood as not forbidding other, but only the most serious forms of ill treatment.... In practice, the "threshold" is lowered to cover certain forms of indirect forms of ill treatment, without visible trivialization (Haris, O'Bojl, Bejts & Bakli, 2009: 69).

Based on the specifics of the case, as well as on the previous judgements, ECHR has correctly decided when it found violations of the Convention's Article 3 in the Macedonian Case L.R. In addition, the whole situation gets even more complicated because of the fact that L.R. as a child with a specific medical diagnosis was all the time under the care of the State-run institutions. Therefore, only one conclusion can be made - Macedonian authorities have failed on both grounds, i.e. substantive and procedural aspect of the Article 3.

ECHR found it particularly worrying that someone as vulnerable as the applicant, an eight-year-old mentally disabled child who was deaf and could not speak, had frequently been tied to his bed during his stay of approximately a year and nine months in an institute which had clearly been inappropriate as it was for the physically disabled, despite the staff there voicing their concerns to the authorities from the outset that it was understaffed and not qualified to cope with him. Moreover, the investigation, instead of looking into the general failure of the system in L.R.'s case, had focussed on the institute's employees' individual criminal liability, which had led to the prosecutors finding that there had been no intention to harm the child and dismissing his case (ECHR, 2020-b).

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