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COMPULSORY PSYCHIATRIC CARE UNDER THE LAWS OF UKRAINE IN THE HIGHLIGHT OF EUROPEAN COURT OF HUMAN RIGHTS' PRACTICE

Research article is devoted to the problems of the protection of human freedoms and interests of persons against whom the case is to provide mental health care to enforce on the basis of the European Court of Human Rights. The analysis of the practice led to conclusions about a mismatch between the existing legislation of Ukraine and European standards of human rights that allow to draw the conclusions about the possible ways to overcome inconsistencies.

Right to mental health is a natural right of every individual. Mental health refers to the primary person wealth, without which in one way or another the most of the other values plays out. In addition, the protection of the rights of persons with mental health disabilities is an integral part of protection of rights and freedoms of citizens of Ukraine.

Mental diseases in the past two decades become significant spread and the number of psychiatric patients is growing. According to the Ministry of Health of Ukraine, compared with 1990, the number of patients with disabilities arising from mental disorder increased: in 1990 in 100 thousand persons 17,6 had a disability due to mental illness, by the end of 2012 – 25,2. At the beginning of 2013 in Ukraine 282,748 patients with mental and behavioral disorders had a group of disability, including 8.1% of children fewer than 17 years and including 17 years old. Over the past five years, according to official statistics, the prevalence of mental disorders increased over 0.3%¹. The growing number of psychiatric patients reflects the lack of effectiveness of social and rehabilitation measures in the system of psychiatric care. However, it must be emphasized that persons with mental illness enjoy the same rights and fundamental freedoms as all other citizens. They should not be subject to discrimination on the grounds of mental illness, their rights and freedoms must be protected and secured.

According to independent experts, the system of psychiatric care in Ukraine is a zone of serious human rights violations. Relevant institutions of Council of Europe (Committee of Ministers of the Council of Europe,

¹ Довідка прес-служби МОЗ України від 20 грудня 2013 року. *Офіційний сайт Міністерства охорони здоров'я України*. <http://www.moz.gov.ua/ua/portal/pre_20131220_n.html> (2014, май, 30).

Council of Europe Commissioner for Human Rights, the Commission on Human Rights) receive a large number of complaints of citizens of Ukraine on human rights violations in the provision of mental health care, including – of torture. However, the rights and freedoms of man and citizen has become an integral part of the European integration of Ukraine and, consequently, the formation of our country as developed, legal, democratic state.

The aim of the study is to analyze the current legislation of Ukraine to protect the rights of incapacitated individuals in providing them a compulsory mental health care, and individual practice of the European Court of Human Rights on the mentioned issue.

In the study of problem of protecting the rights of persons with mental disorders in civil procedure engaged such leading Ukrainian scientists as V. V. Komarov, R. M. Minchenko, O. S. Pogrebnyak, Yu. D. Prytyka, G. O. Svetlichnaya, S. A. Chvankin, M. M. Yasynok and others. However, their work deals mainly procedural issue of providing the person with compulsory psychiatric care, without making a detailed analysis of this issue in the light of European standards for the protection of Human Rights and the European Court of Human Rights' practice.

In Ukraine, the regulation of providing of psychiatric care effected at the level of national and supranational law. The basic regulations in the sphere of mental health are the Constitution of Ukraine, Fundamentals of the legislation on health protection on November, 19. 1992, Law of Ukraine "On Psychiatric Care" on February 22, 2000, Civil Procedural Code of Ukraine, Criminal Procedural Code of Ukraine and some other laws and bylaws.

The most important international document on human rights is the Universal Declaration of Human Rights, adopted in 1948 by the UN. Since its acceptance were adopted a number of declarations and principles covering issues of human health. UN General Assembly resolution № 46/91 of 16 December 1991 highlights the importance of access to "decent medical care" to maintain or restore optimal level of physical, mental and emotional well-being. Thus, the United Nations General Assembly deals with the legal provision of mental health care¹.

On the 4th of November 1950, the Council of Europe had adopted the Convention on the Protection of Human Rights and Fundamental Freedoms. This convention corresponds to the Universal Declaration of Human Rights and is aimed to ensure the human rights and freedoms by

¹ Riedel, E. (2013). *Health, Rightto, International Protection*. Heidelbergand Oxford University Press.

Member States of the Council of Europe in its territory. Ukraine ratified the Convention on the 17th of July 1997¹, thereby taking on the obligations contained in this international act. In particular, Ukraine has pledged to recognize and implement the decisions of the main supervisory authority for the Protection of Human Rights of the Council of Europe – European Court of Human Rights (hereinafter – the Court)².

The Constitution of Ukraine by article 29 provides that no one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in the manner prescribed by law³. This article corresponds to p. 1 art. 5 of the Convention on Human Rights and Fundamental Freedoms, which states that everyone has the personal right to liberty and security. No one shall be deprived of his liberty except for certain cases and in accordance with a procedure prescribed by law. One of these cases is the lawful detention of persons for the prevention of infectious diseases, the lawful detention of mentally ill, alcohol and drug addicted and antisocial individuals⁴.

From the specified is understandable that Article 5 applies to all deprivations of liberty, not only, for example, preventive detention. Thus, in the case of “M. v. Ukraine” (application № 2452/04), judgment of 19 April 2012, the applicant pointed to the violation of her right to liberty and security during several hospitalizations to a psychiatric institution, namely under paragraph 1 of Article 5 of the Convention:

– during the second and third hospitalization – the failure to notify the applicant about the trial of court to decide about involuntary hospitalization, the adoption of such a decision in the absence of the applicant; no indication in the judgment what actions of the applicant are the grounds for involuntary placement, regarding the type and the regime of hospitalization and the time limit of its use; on the national level the unforeseen possibility to engage the independent experts in deciding

¹ See: Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року, Першого протоколу та протоколів № 2, 4, 7 та 11 до Конвенції (1997) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon4.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80>> (2014, май, 30).

² See: Про виконання рішень та застосування практики Європейського суду з прав людини (2006) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon4.rada.gov.ua/laws/show/3477-15>> (2014, июнь, 10).

³ Конституція України, ст. 29 (1996) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon1.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>> (2014, май, 30).

⁴ See: *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14* (adopted 4 November 1950, entered into force 3 September 1953) (Council of Europe) <<http://conventions.coe.int/treaty/en/treaties/html/005.htm>> (2014, май, 30).

on involuntary hospitalization to a psychiatric establishment and the possibility to appeal the court decision about involuntary hospitalization;

- during the fourth hospitalization – lack of sign of a psychiatrist on the consent of the applicant on the admission in breach of national law, applicant's inability to leave a psychiatric establishment at will, the lack of documentary evidence for periodic review of the applicant to determine the grounds for continuing hospitalization, the absence of the applicant's opportunity to get legal advice to protect her interests at the time of admission.

The European Court found a violation of Article 5 § 1 of the Convention. The Court found a violation of Article 5 § 1 of the Convention on the second, third and fourth applicant's admission to a psychiatric institution¹.

The hospitalization of citizen M. held under the Art. 13 of the Law of Ukraine "On Psychiatric Care". This article states that a person under the age of 14 years (minor) is hospitalized to a psychiatric establishment at the request or with the consent of parents or another legal representative and that person recognized in accordance with the law as incapacitated, hospitalized to a psychiatric institution on request or with the consent of her guardian. In case of disagreement of one parent or the absence of parents or legal representative of a minor hospitalization to a psychiatric establishment held by a decision (agreement) of a guardianship authority, which may be appealed to the courts. The consent for hospitalization is fixed in the medical documentation signed by the person or his legal representative and psychiatrist.

A person may be hospitalized to a psychiatric establishment in the forced order on the grounds specified in Article 14 of the Law of Ukraine "On Psychiatric Care" (without the presence of informed consent, by court order). The procedure for proceedings of such a hospitalization is regulated by Chapter 10 of the Civil Procedure Code of Ukraine. The hospitalization of person is conducted by a psychiatrist's decision within 24 hours from the time of hospitalization a person should be examined by the committee of psychiatrists to make a decision about advisability of such hospitalization².

If the hospitalization recognized as reasonable, the representative of the medical institution, in which the person is, within 24 hours send to the court at the location of the institution a statement of hospitalization of a person to a psychiatric institution compulsorily indicating the period

¹ *M. v. Ukraine* (just satisfaction), no. 2452/04, ECHR

² See: Мінченко, Р. М. (2010). *Окреме провадження в цивільному процесі України: навчальний посібник*. Одеса: Фенікс, 182 – 184.

of such assistance. The court considered specified statement within 24 hours after receiving it by the court.

In the case of “*Stork v. Germany*” the Court notes that the term of imprisonment includes an objective element (limitation in space for a considerable period of time) and subjective element (lack of consent of the person for such restriction)¹. However detention of a person may violate Article 5, even when the person herself agreed to it². Consent of the person for admission to a psychiatric establishment for hospital treatment can be considered as valid for the purposes of the Convention only if there are sufficient and credible evidence that the mental ability of the person to give consent and understand its implications were objectively established during the fair and proper procedures and that all necessary information regarding of hospitalization and planned treatment is provided in an adequate way³.

Based on the abovementioned, the placement of an incapacitated person without his consent and in failing health reasons for it to consent to hospital treatment at the institution from which it cannot at any time to go out on his own, is equivalent to deprivation of liberty. The condition of the legality of detention “in order prescribed by law” requires a national law “fair and due process” and adequate legal protection against arbitrary imprisonment. In its judgment in the case “*Shtukaturova v. Russia*” the Court pointed out that in the context of the provisions of paragraph 1 of Article 5 of the Convention “at the base of the concept” a procedure prescribed by law “lies a fair and proper procedure, namely that the decision to take any action that deprives the person of his liberty is taken and implemented an authorized entity and not be arbitrary”. In other words, the detention cannot be considered “lawful” within the meaning subparagraph of paragraph 1 of Article 5, if the national process does not provide sufficient guarantees against the arbitrariness⁴.

From the content of art. 29 the Constitution of Ukraine implies that imprisonment is possible only upon a justified court decision and only on grounds prescribed by law. The hospitalization of incapacitated person to the psychiatric institution specified in Art. 13 of the Law Ukraine “On Psychiatric Care”, held at his request or by the guardian of the person for the resolution of a psychiatrist. In terms of Clause 1, Article. 5 of the Convention on Human Rights and Fundamental Freedoms, hospitalization of an incapacitated person to a psychiatric establishment

¹ *Stork v. Germany* (just satisfaction), no. 61603/00 ECHR.

² *Osyenko v. Ukraine* (just satisfaction), no. 4634/04 ECHR.

³ *M. v. Ukraine* (just satisfaction), no. 2452/04, ECHR.

⁴ *Stukaturov v. Russia* (just satisfaction), no. 44009/05 ECHR.

is deprivation of its liberty, because she kept in a confined space for a long time without her consent.

A similar provision is contained in the Federal Law “On Psychiatric Care and Guarantees of the rights of citizens under such care” of 2 July 1994. Decision of the Constitutional Court on the appeal of J. K. Gudkov, P. V. Shtukaturova, M. A. Yashina from the February 27, 2009 № 4-P of the abovementioned provision, indicating the possibility of hospitalization of an incapacitated person without his consent and substantiated court decision was declared unconstitutional¹.

The conducted research leads to the conclusion that the practice of the European Court of Human Rights aimed at ensuring the rights, freedoms and interests of individuals, regardless of their mental state. Ukrainian legislation at a decent level reflects the requirements and principles of the Convention for the Protection of Human Rights and Fundamental Freedoms, but some questions are still as not corresponding to the practice of the European Court of Human Rights. Therefore, to ensure the rights, freedoms and interests of an incapacitated person which is given compulsory psychiatric care, it must be established a judicial procedure for reviewing cases on admission of that person without his or her written consent.

Bibliography:

1. Довідка прес-служби МОЗ України від 20 грудня 2013 року. *Офіційний сайт Міністерства охорони здоров'я України*. <http://www.moz.gov.ua/ua/portal/pre_20131220_n.html> (2014, май, 30).
2. Riedel, E. (2013). *Health, Rightto, International Protection*. Heidelbergand Oxford University Press.
3. Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року, Першого протоколу та протоколів № 2, 4, 7 та 11 до Конвенції (1997) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon4.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80>> (2014, май, 30).
4. Про виконання рішень та застосування практики Європейського суду з прав людини. (2006) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon4.rada.gov.ua/laws/show/3477-15>> (2014, май, 30).

¹ Дело о проверке конституционности ряда положений статей 37, 52, 135, 222, 284, 286 и 379.1 Гражданского процессуального кодекса Российской Федерации и части четвертой статьи 128 Закона Российской Федерации «О психиатрической помощи и гарантиях прав граждан при ее оказании» в связи с жалобами граждан Ю.К. Гудковой, П.В. Штукатурова и М.А. Яшиной (постановление) № 4-П, КС РФ 2009. <<http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=85643>>

5. Конституція України, ст. 29 (1996) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon1.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>> (2014, май, 30).
6. *Convention for the Protection of Human Rights and Fundamental Freedoms. as amended by Protocols No. 11 and No. 14* (adopted 4 November 1950, entered into force 3 September 1953) (Council of Europe) <<http://conventions.coe.int/treaty/en/treaties/html/005.htm>> (2014, май, 30).
7. Мінченко, Р. М. (2010). *Окреме провадження в цивільному процесі України: навчальний посібник*. Одеса: Фенікс.
8. *Stork v. Germany* (just satisfaction), no. 61603/00, ECHR.
9. *Osyenko v. Ukraine* (just satisfaction), no. 4634/04, ECHR.
10. *M. v. Ukraine* (just satisfaction), no. 2452/04, ECHR.
11. *Stukaturov v. Russia* (just satisfaction), no. 44009/05, ECHR.
12. Дело о проверке конституционности ряда положений статей 37, 52, 135, 222, 284, 286 и 379.1 Гражданского процессуального кодекса Российской Федерации и части четвертой статьи 128 Закона Российской Федерации «О психиатрической помощи и гарантиях прав граждан при ее оказании» в связи с жалобами граждан Ю. К. Гудковой, П. В. Штукатурова и М. А. Яшиной (постановление) № 4-П, КС РФ 2009. <<http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=85643>>.