

U. no:202/2007-0-0

Date:01/30/2008

Preface

The Constitutional Court of the Republic of Macedonia, by virtue of Article 110 of the Constitution of the Republic of Macedonia, and Article 71 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992), on its session held on January 30, 2008, adopted the following

RESOLUTION

Text

1.A PROCEDURE IS NOT INSTIGATED for appraisal of the constitutionality of Article 39, point 8 of the Law on Mental Health ("Official Gazette of the Republic of Macedonia" no. 71/2006).

2. The Citizens' Association "Polio Plus" from Skopje submitted an initiative to the Constitutional Court of the Republic of Macedonia for instigating a procedure for appraisal of the constitutionality of Article 39, paragraph 2 of the Law marked in point 1 of this Resolution.

According to the submitter of the initiative, the contested provision was unconstitutional because it jeopardized the fundamental rights and freedoms guaranteed by the Constitution of the Republic of Macedonia, in this case exclusively to persons with disabilities. Further the initiative quoted Article 30 paragraph 1 of the Constitution, which guarantees the proprietorship to all citizens, and the same was also derived from Article 14, point 7 of the Law on Mental Health. Namely, this provision stipulated which persons with mental illness had the right to possess items for personal use, for clothing, for performing personal hygiene, as well as for other personal and indispensable needs, in accordance with the state of their mental health.

But, according to the formulation of the contested provision and according to its discretionary right, the State Sanitary and Health Inspectorate had the right and the duty to order that a person with mental illness be provided with items for personal use, for clothing, for performing personal hygiene, as well as for other personal and indispensable needs, in accordance with the state of his/her mental health. If the Inspectorate reckoned that it is not in accordance with the mental illness, it would not issue such an order, and thus that person would be denied his/her constitutionally guaranteed right to proprietorship. Since these and other limitations did not exist for other citizens in the Republic of Macedonia, the contested provision could also be considered as discriminatory given that the person with mental illness was given different treatment, which also meant a violation-infringement of equality in the enjoyment of rights.

According to the above stated, the contested provision violated Article 8, paragraph 1, lines 1, 3 and 6, Article 9, Article 30, Article 51 and Article 54 of the Constitution of the Republic of Macedonia.

3.At its session, the Court determined that, by virtue of the contents of Article 39 point 8 of the Law on Mental Health, in performing supervision stipulated in Article 38 paragraph 2 of this Law, the State Sanitary and Health Inspectorate has the right and the duty to order that a person with mental illness be provided with items for personal use, for clothing, for performing personal hygiene, as well as for other personal and indispensable needs, in accordance with the state of his/her mental health.

4. According to Article 8, paragraph 1 lines 1, 3 and 6 of the Constitution, the fundamental freedoms and rights of the human being and citizen recognized by international law and determined by the Constitution, the rule of law and the legal protection of proprietorship are one of the fundamental values of the constitutional order of the Republic of Macedonia.

According to Article 9 of the Constitution, citizens of the Republic of Macedonia are equal in their rights and freedoms irrespective of gender, race, skin colour, national and social origin, political and religious beliefs, property and social status. Citizens are equal before the Constitution and the laws.

According to Article 30 of the Constitution the right to proprietorship and the right to inheritance are guaranteed (paragraph 1). The proprietorship imposes rights and duties and should serve the wellbeing of both the individual and the community (paragraph 2). No person may be deprived of his/her proprietorship or of the rights deriving from it, except in cases concerning the public interest determined by law (paragraph 3).

Further, towards the analysis of the contested provision, with respect to the allegations of the initiative, the Court also inspected the full text of the Law on Mental Health, as well as the full text of the Law on Sanitary and Health Inspection ("Official Gazette of the Republic of Macedonia" no. 71/2006) and determined the following:

The existence of a person's mental illness can be diagnosed only by medical doctor - specialist in psychiatry, by virtue of the diagnostic criteria of evidence-based medicine.

During their stay in a health care facility, the persons with mental illness, in addition to general rights and duties, are also allowed to exercise special rights, such as the rights from Article 14 point 7 of the Law on Mental Health, the provision which is indicated by the submitter of the initiative (the right to own items for personal use, for clothing, for performing personal hygiene, as well as for other personal and indispensable needs, in accordance with the state of his/her mental health). In other words, it is a provision that allows the exercise of a certain right.

In accordance with the state of the mental health of the patient, the specialist doctor determines whether the named right (Article 14 point 7) will be limited in order to protect the health of the patient or the health of other persons in his/her surrounding.

The contested Article 39 point 8 of the Law is also set as a provision which provides exercise of the given right from Article 14 point 7, but in this case it is the State Sanitary and Health Inspectorate which, while inspecting the implementation of the Law, has the right and the duty to allow exercise of the previously limited right to a person with mental illness, without the existence of medical basis for it. Hence, the contested Article 39 point 8 of the Law is set as a provision which enables the exercise of a previously limited right, which means that it cannot be a provision which violates proprietorship, but, on the contrary, it enables proprietorship, as well as the usage of items for personal use and hygiene.

Both Article 14 point 7 and the contested Article 39 point 8 of the Law use the state of health of the patient as a starting point, based on which it depends whether the person with mental illness will exercise the provided rights or he/she will be allowed to exercise limited rights. This is stipulated in such a manner so to protect the health of the person itself as well as the health of third parties from possible physical harm which could arise from the nature of the illness.

The issue whether the State Sanitary and Health Inspectorate will not issue an order in the particular situation, although there are circumstances for enabling the exercise of the given right, does not fall into the domain of constitutional-judicial issues, but it is a factual issue or rather, an issue of particular implementation of the Law.

As a result of the above stated reasons, as well as in line with the fact that limitation of certain rights to persons with mental illness is always with function of protection of their health, there is no space for appraisal of the contested provision, neither in respect of equality in the exercise of rights nor in its accordance with Article 9 of the Constitution.

On the basis of the above stated, the Court appraised that the contested Article 39 point 8 of the Law on Mental Health is in accordance with Articles 9 and 30 of the Constitution.

In respect of the possible violation of Article 8 paragraph 1 line 1, 3 and 6, Article 51 and Article 54 of the Constitution, the initiative does not contain any particular allegations.

5. By virtue of the above stated, the Court decided as in point 1 of this Resolution.

6. This Resolution was delivered by majority of votes in the following composition: President of the Court Trendafil Ivanovski PhD and the judges: Liljana Ingilizova-Ristova, Vera Markova, Branko Naumoski, Igor Spirovski and Zoran Sulejmanov PhD.

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January 30, 2008
Skopje
m.p.

PRESIDENT
of the Constitutional Court of the Republic of Macedonia
Trendafil Ivanovski PhD