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HR-2011-2325-A (A v Vestre Viken Health Agency)

Court: Norwegian Supreme Court

Length: 3,961 words (11 pages)

Summary:

The case concerned whether the Vestre Viken Health Agency (VVF) broke procedural rules under the Mental Health Care Act and European Convention on Human Rights in admitting a person to compulsory psychiatric observation. The Court held that the State could not be held liable for the breach of A's legal interest protected under Norwegian and European law. Further, the Court held that that the wording of Mental Health Act and European Convention on Human Rights indicated that the Buskerud hospital did not have a duty to investigate whether initial psychiatric assessments of A were conducted in accordance with the law or under coercion.

Judges: Noer, Endresen, Matheson, Kallerud, Matningsdal.

Full text of judgement:

(1) Judge Noer: The case concerns whether the Vestre Viken Health Agency (VVF) broke procedural rules of law under the Mental Health Care Act admitting A to compulsory psychiatric observation. Furthermore, the case involves an assessment of whether the decision to admit A to compulsory psychiatric observation constituted a breach of Article 5, paragraph 1 of the European Convention on Human Rights (ECHR). Moreover, the case involves an assessment of whether the Department of Health can be held liable for potentially unlawful actions by the psychiatric treatment centre and A's general practitioner.

(2) On 20 September 2007, A was admitted for compulsory psychiatric observation at the Buskerud Hospital under § 3-2 Mental Health Care Act. The hospital forms part of Vestre Viken Health Agency (herafter known as VVF).

(3) A's admission process was initiated by her husband and children following a request for admission to A's general practitioner who had treated A earlier for mental illness issues. On the basis of information from her family, A's doctor wrote to the Buskerud hospital on 28 August 2007 and requested that A be "hospitalized as soon as possible pursuant to § 3-2 Mental Health Care Act."

(4) The responsible physician at Buskerud hospital contacted A's doctor on 5 September and said that the hospital would take A into compulsory observation. The responsible physician at Buskerud hospital informed A's doctor that A had to be examined by a doctor within the last 10 days before compulsory admission could occur as outlined in the Regulations to the Mental Health Care Act.

(5) A's general practitioner tried, with help from A's family, to make A to attend a medical examination voluntarily. When A refused, the doctor contacted then the police, who on 20 September brought her forcefully to the doctor's office. To avoid having to take the A through the waiting room due to her distressed and due to the fact that she accompanied by the police, A's doctor went out into the parking lot and talked to her there. A's doctor concluded that A met the criteria for hospitalization and wrote in the admission documents that A was "clearly in need of help as she is unable to care for herself either on physical or mental level. She behaves irrationally, speaks incoherently and generally represents a danger to herself and others." A was then transported by the police to Buskerud hospital.

(6) All parties agreed that A was to be admitted to compulsory psychiatric observation as described under § 3-1 Mental Health Care Act.

(7) In Buskerud hospital, A was examined by a doctor and psychologist. A's medical records detail a conversation between A and the psychologist in which A "has a copy of the Mental Health Care Act and repeatedly asked if I am the second doctor who is required to perform an independent medical examination as a requirement for compulsory psychiatric observation." This led the psychologist to ring call A's general practitioner and obtain a statement regarding the medical examination which occurred prior to admission to Buskerud hospital.

(8) The psychologist, who was also responsible for admissions decisions at the hospital, decided on 21 September to place A under compulsory psychiatric observation pursuant to § 3-2 Mental Health Care Act. A appealed the decision to the Mental Health Commission. In a meeting with the Commission on 25 September, the hospital decided to transfer her to the voluntary admissions section of the hospital and A withdrew her appeal. A's spouse appealed the decision and a stay of proceedings was granted which meant A was still formally registered as being under compulsory psychiatric observation. On 28 September, the hospital made the decision to formally transfer A from compulsory observation to voluntary observation under § 3-3 Mental Health Care Act. A was discharged from hospital on 1 November 2007.

(9) A commenced legal proceedings against VVF –the body responsible for Buskerud hospital – in Drammen District Court on 2 July 2009. Drammen District Court handed down its judgement on 22 January 2010 (TDRAM-2009-106892). VFF was acquitted, and A was required to pay costs. A appealed to the Court of Appeal which handed down the following judgement (LB-2010-60016) on 13 April 2011:

"1. A's appeal of the District Court's judgement paragraph 1 is rejected.

2. Costs for Court and Court of Appeal are not awarded. "

(10) A appealed to the Supreme Court and Appeals Committee has allowed the appeal to be heard by the full bench of the Supreme Court.

(11) During the proceedings in the Court of Appeal, the Court – upon on its own initiative – investigated the question of whether the VVF was the appropriate defendant. Neither VVF nor Buskerud hospital have disputed the distinction and the appellate court came to no definitive position on the issue, see § 9-6 third paragraph Civil Procedure Act. In granting leave to appeal to the Supreme Court, however, the justices affirmed that the parties would be required to address this matter at trial.

(12) The appellant, A, has argued in brief:

(13) VVF, as the body responsible for Buskerud hospital, is the appropriate defendant for all potential breaches arising from her admission. It follows from § 6 Health Regulatory Authorities Act that VVF can be held legally responsible for actions of subordinate bodies. Prior to adoption of this Act, there was political disagreement on the issue, and the amendment to the Act attempted to address this confusion. Further, neither VVF nor Buskerud Hospital have argued that VVF cannot be held liable for any potential breaches.

(14) A also argued that VVF has breached its duty to investigate the admission of A and has thus acted in violation of ECHR Article 5 paragraph 1. Buskerud hospital was obliged to ensure that the conditions for admission are met, including that the patient, prior to admission, was examined by an independent physician. A's examination by her general practitioner was not voluntary. Without a voluntary examination by an independent practitioner, A's examination was not lawful. A's general practitioner did not gained the municipal doctor's consent, and therefore had no authority to have the police detain A and conduct a medical examination against her will.

(15) The condition that a patient's general practitioner must gain the consent of the municipal doctor is an important mechanism to ensure patients' rights are respected. If the municipal doctor had been consulted, it would have meant that A received notice of the opportunity to present her case and appeal the decision. These are important prerequisites for admission and the hospital was under a legal duty to ensure that these rules were adhered to. The Mental Health Care Act must be interpreted in light of the ECHR and the hospital has an independent duty to investigate all steps prior to admission. The hospital makes a decision on the compulsory hospitalization of patients and the very legal weight of this decision imparts therefore an overall responsibility on the hospital.

(16) When national rules have been violated in connection with compulsory admission, it follows that a breach of Article 5 paragraph 1 ECHR is also proven. The European Court of Human Rights has held in a number of similar cases that the breach of national procedural rules in relation to compulsory admission also represented a breach of Article 5 paragraph 1 ECHR.

(17) Furthermore, the ECHR's requirements that outcomes under the Medical Health Care Act are clear, predictable and available were not met in this case.

(18) The appellant, A, has submitted the following plea:

"1 The procedure for admission to compulsory psychiatric evaluation from 20/09/2007 to 09/25/2007 was in violation of Article 5 No. 1 ECHR and § 3-2 Mental Health Care Act

2. VVF should be ordered to pay the costs of the District Court of Appeal and the Supreme Court."

(19) The respondent, VVF, has argued in brief:

(20) Both the VVF and the hospital agree that VVF may be sued in determination of the lawsuit alleging breaches under the Mental Health Care Act and the ECHR. The State has the overall responsibility for specialist health services of which VVF is a part. The hospital is the State's physical representation and point of contact with patients and thus exercises public authority through admission decisions.

(21) VVF disputes the assertion that the hospital had a duty to further investigate the admission process of A. Specialist health agencies cannot be responsible for events beyond their remit. Neither the Mental Health Care Act nor the explanatory materials to the legislation support a broader interpretation of VVF of the hospital's responsibility in relation to earlier procedural steps in the admission process.

(22) A procedural error in regular doctor's examination of the patient does not mean that the admission decision is invalid or unlawful. The Mental Health Care Act legislation requires that the local doctor must decide whether the patient does not consent to a psychiatric examination. Therefore, it is the general practitioner's responsibility to arrange the transportation of patients who will not voluntarily attend an examination. However, this provision does not in impinge on the municipal doctor's competences to admit a patient to compulsory psychiatric observation.

(23) VVF entered the following statement:

"1. The appeal should be dismissed.

2. VVF should be awarded legal costs for the proceedings held at the court of first instance, the Court of Appeal and the Supreme Court."

(24) As permitted under Civil Procedure Act § 15-8, paragraph b, the State has provided submissions in relation to the public interest issues raised in this case:

(25) The basis of the provisions of the ECHR is that the states must comply with the obligations under the Convention and they can be held liable for any breaches. The State cannot assign or "contract away" its responsibilities and obligations under the ECHR by creating separate legal entities who exercise public authority, see inter alia judgement of the ECHR of 28 October 1999 in Case Zielinski, Pradal, Gonzalez et al v. France, paragraph 60 (EMD-1994-24846). The state can always be made to the counterparty in the case of breach of the Convention. However, this does not preclude other legal entities also being held legally responsible.

(26) Health agencies such as the VVF are independent legal entities with full autonomy and the right to act as a party before the courts. The agencies are owned by

the state and are authorised to exercise power on behalf of the state. This suggests that the VVF can be considered as the appropriate defendant in the case. In support of this argument are previous Supreme Court decisions in matters where municipalities have been found liable for breaches of the ECHR and were made the object of determining cause of action for breach of the Convention, see Rt-2003-301 and Rt-2008-290 .

(27) The case also raises questions about the so-called "horizontal application" of the ECHR, in that a "private" entity is subject to legal obligations and duties under the ECHR. In this case, we are talking about government activities exercised through the VVF, a separate legal entity, and the case does not raise the question of direct application of the Convention between private sector actors.

(28) A finding of breach by the VVF under the ECHR places neither national nor international law obligations upon Norway, as a nation state, to remedy the legal wrong – rather it remains the domain of the VVF. The lawsuit does not raise questions whether the legal provisions are incompatible with the ECHR. There are no legal barriers preventing the VVF being named as the defendant in this case, although it would be desirable to have a clear rule for future cases rather than rely on an assessment of the individual case.

(29) My view on the matter:

(30) Firstly, I would like to address the question of who is the appropriate defendant in matters requiring judgement for potential breaches of the ECHR.

(31) The starting point must be taken in § 1-3 Civil Procedure Act which regulates an objectionable action, party affiliation and litigation. For a claim to be validly brought before a court:

"(1) It must be matter based on a specific legal dispute.

(2) The case must demonstrate a real legal need to have the matter settled in relation to the defendant. This will be determined on an overall assessment of the claim, the time of the claim and all parties related to the claim."

(32) There are certain cases where a plaintiff may bring a lawsuit against the State directly claiming a breach of his/her human rights as protected under the ECHR, see Rt-2003-301 Section 39. However, in such cases, the plaintiff must demonstrate that (s)he has a legal interest in obtaining a judgement for the claim against the State directly rather than obtaining a judgement against a delegate of state authority, c.f. Schei et al Disputes Act (2007) page 52.

(33) There is further support for the argument that the State may be defendant in such litigation regarding the interpretation of the ECHR, see Rt 2008-1601 Section 63, Rt-2009-1350 section 24 and Skoghøy, Dispute Resolution (2010) page 412. Although the Supreme Court in case RT-2003-301 rejected a claim relating to a potential breach of human rights provisions under the ECHR, the Court held that the state could be included as a party to the proceedings. In that particular matter, the Court did not even consider the question of the appropriate defendant as challenged, and I therefore find no reason to attach such decisive importance to this matter.

(34) The Health Authorities Act of 15 June 2006 No. 93 § 6 provides that the health authority, in this case VVF, is a party in litigation matters that are under the health agency's responsibility. The question is whether this legislation has the effect of making the health agency the defendant in lawsuits alleging breaches of the ECHR or whether such cases must be brought against the State.

(35) An argument against making the State the defendant is that the health authority exercises public authority and is an integral part of the State health care system. It may further be noted that a rule that the State must be made to the defendant would create confusion and be impractical where the plaintiff has multiple claims against a particular health authority. In addition, it must be observed that it is for the plaintiff to decide whether (s)he will proceed with a claim against which parties (s)he deems responsible.

(36) Many have argued that the State should be the defendant in determining matters relating to the ECHR as “only the states are obliged persons under the ECHR”, cf Rt-2009-1350 section 24 and Rt-2010-291 Section 38. Although a health authority is not a party subject to the ECHR, it has been established above the institutions or bodies which execute state authority will be held liable to the provisions of the ECHR. There is no persuasive argument to make exceptions in this case. Further, a broader analysis shows that health authorities such as the VVF do not represent a unique type of legal actors compared to other defendants in cases regarding the ECHR.

(37) Moreover, I emphasise that any potential finding of breach against the health authority under the ECHR would not be immediately enforceable against the State as a legal actor. The VVF is, as mentioned, a separate legal entity under § 6 Health Agency Act. A judgement against the health authority will not be binding on another health agency in another case even though the same legal relationship is present.

(38) Finally, I would like to emphasise that any finding of breach under the ECHR may cause reflection about whether changes to the law or associated regulations may be necessary. Such a rule would be necessary even if the State in some cases - when the case is before the Supreme Court – shall be notified and asked for comment on public interest matters, see § 30-13 Civil Procedure Act.

(39) My conclusion is that the State may not be the defendant in this case.

(40) I now turn to the question of whether the VVF breached provisions under the Mental Health Care Act in admitting A for compulsory psychiatric observation. A argued that the hospital should have checked whether there were procedural errors in the first psychiatric examination conducted by her general practitioner. Moreover, A argued that the hospital - if it was such a duty to investigate - acted as the admission of A was in breach of ECHR Article 5 paragraph 1

(41) The relevant parts of Article 5, paragraph 1 ECHR read as follows:

"Everyone has the right to liberty and security. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

the lawful detention of persons to prevent the spread of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;"

(42) The provision requires that detention must be in accordance with national law. Breaches of national regulations, concerning both the conditions for detention and the procedures to be followed, could potentially represent breaches of rights under the ECHR. In analysing the breach of procedural rules, an assessment must be made of whether there is a serious and obvious error – a "gross and obvious irregularity" c.f. decision by European Court of Human Rights from 9 July 2009, Mooren against Germany, paragraph 84 (EMD-2003-11364). A does not dispute that the substantive requirements for her admission were fulfilled: it is the procedure under which the admission occurred which she believes is incompatible with the provisions of the ECHR.

(43) I now turn to the question of whether the hospital followed the correct statutory approach in the admission of A.

(44) As previously mentioned, A did not wish to meet her general practitioner for an assessment and she was therefore taken by the police for investigation. The Mental Health Care Act § 3-1 second paragraph requires that compulsory admission can only

occur once that the municipal doctor approved the decision. This did not occur in this case. A's general practitioner did not follow the statutory procedures during his examination of A. However, the hospital was not aware of this failure when it proceeded with A's admission.

(45) The hospital's duty of inspection upon admission to compulsory observation arises under Mental Health Care Act § 3-2. Decisions on admission made by the professionals at the institution must be consistent with the conditions for compulsory admission under § 3-2 first paragraph. The relevant parts of § 3-2 reads as follows: "Based on information from the medical examination pursuant to § 3-1, the municipal doctor shall make an assessment of whether the following conditions for compulsory psychiatric observation are met:

...

2. The patient shall be examined by two doctors, one of whom shall be independent of the responsible institution, see § 3-1.

...

The two independent doctors shall make decisions on the basis of available information and their own personal examination of the patient."

(46) It is not disputed that the hospital checked if a medical examination was conducted prior to admission. A argues, however, that the hospital had a duty to check whether the doctor's examination was conducted voluntarily or under coercion as required by law.

(47) The wording of the Mental Health Care Act suggests that the hospital's duty of inspection is limited to checking that the patient prior to admission was examined by an independent doctor. In support of this interpretation, the Regulations to the Mental Health Care Act stipulate that the decision on compulsory psychiatric observation shall be made on the basis of "available information". The Act's explanatory materials provide no further information about the matter.

(48) A decision on compulsory psychiatric observation must be made within 24 hours, and during this time, the patient should be examined by a doctor at the institution as well as by those who make decisions about admission. A central element of the admission decision is the criteria of "immediacy", see § 3-2 second paragraph Mental Health Care Act and Regulations to the Mental Health Care Act regarding

admission for compulsory psychiatric observation from 15 December 2006 No. 1424 § 5. The hospital, therefore, has limited time after the patient arrives to check the other circumstances of the case, and the primary task must be to investigate whether the patient's condition is such that the basic conditions for compulsory psychiatric observation are met. This suggests that under § 3-2 Mental Health Care Act, the duty of the hospital does not extend to investigate the processes involved prior to a potential admission.

(50) The obligation to obtain consent to compulsory medical examination rests with the primary physician. I agree with the VVF in that the starting point must be that specialist care is not obliged to check whether primary care has acted properly within its statutory responsibility. A's reaction and protests to her admission are understandable. However, she could have taken her concerns up with primary care – i.e. her general practitioner – or asserted them in connection with the Mental Health Commission's review of admission.

(51) There may be certain situations where it emerges from the documents, or otherwise, that the primary physician's examination of the patient was deficient. In such situations, it would be the responsibility of the hospital to determine what impact the error may have on the professional judgement of the individual case. The assessment will depend on the patient's situation and needs, and what kind of error is present, see Rt-2004-583 paragraphs 27 and 29 on a similar assessment in which the error was due to the long processing time. In our case, however, the hospital had no reason to suspect that there were errors in the basis for admission to compulsory psychiatric observation.

(52) My conclusion is that the hospital did not violate the Mental Health Care Act in the admission of A.

(53) I mention in conclusion that I cannot see that there is a basis for the argument that § 3-2 Mental Health Care Act does not satisfy the requirement of sufficient clarity and accessibility for ECHR, as the Appellant has argued.

(54) In dismissing the appeal, I rule that VVF shall pay its own legal costs for the proceedings, see § 20-2 Civil Procedure Act. The reason for this finding is that none of the parties objected to the original admission decision. Because of this, and taking account of the balance of power between the parties, I have concluded that

compelling circumstances make it reasonable to not award legal costs for any party, see § 20-2 Civil Procedure Act

(55) I rule the following:

1. The District Court and Appeal Cout decisions are upheld.
2. No cost orders are awarded.

(56) Judge Endresen: In relation to the reasoning and outcomes presented in the aforementioned judgement, I concur.

(57) Judge Matheson: I concur.

(58) Judge Kallerud: I concur.

(59) Judge Matningsdal: I concur.

(60) The Supreme Court this judgement:

1. The District Court and Appeal Cout decisions are upheld.
2. No cost orders are awarded.