

Sundhedsministeriet

Notat

Enhed: FOPS
Sagsbeh.: DEPNFF
Koordineret med:
Sagsnr.: 1903808
Dok. nr.: 2199667
Dato: 29-03-2022

Consolidated action plan: Aggerholm v. Denmark, Application no. 45439/18

Description of the case

The present case concerns a psychiatric patient who was strapped to a restraint bed (*tvangsfikseret*) in a psychiatric hospital for 22 hours and 50 minutes between 8 and 9 February 2013.

In September 2020 the European Court of Human Rights (hereinafter “the Court”) held that there had been a violation of Article 3 on prohibition of inhumane or degrading treatment in the European Convention of Human Rights (hereinafter “the Convention”).

The Government of Denmark (hereinafter “the Government”) accepted the judgment in December 2020 and submitted an action plan regarding the implementation of the judgement in June 2021.

Individual measures

As stated in the Government’s action plan from June 2021, the applicant was awarded EUR 10,000 for non-pecuniary damage and EUR 4,000 in respect of costs and expenses plus any tax that may be chargeable to the applicant on the amounts.

The said amounts were transferred to the applicant on 22 December 2020.

For the record, the Government would like to emphasize that the applicant is no longer in psychiatric hospital. Therefore, no other individual measures are possible or required.

General measures

1. The first issue in the judgment was that the doctor decided to maintain the restraint on 8 February 2013 at 10.46 p.m. because the doctor found the patient “potentially” dangerous to other people.

It follows from Article 14 (2) of the Danish Mental Health Act (*lov om anvendelse af tvang i psykiatrien m.v.*) that compulsory restraint must only be used to the extent that it is necessary to prevent a patient from exposing himself or others to an imminent risk of harm to body or health.

The Court noted that a “potential” danger does not suffice to establish that a danger is immediate or imminent, and that a latent danger that may manifest itself under certain conditions or circumstances that may occur later will not suffice.

The Health Authority (*Sundhedsstyrelsen*) has issued a number of guidelines (binding instructions) for the healthcare sector, including a guideline regarding the use of compulsion in psychiatric hospitals (*vejledning om anvendelse af tvang m.v. i psykiatrien*). In this guideline, the Health Authority has described Article 14 of the Mental Health Act and the conditions regarding the use of forced physical restraint. Accordingly, it appears from the guideline that one of the conditions in Article 14 is that there has to be an immediate or imminent danger to the patient or others.

As stated in paragraph 1 in the action plan, the regions, who are responsible for the healthcare sector, including psychiatric hospitals, have given the Health Authority a number of suggestions on how to clarify the guidelines, including giving practical examples with a view to clearly describe when there is an immediate or imminent danger.

The Health Authority has begun adjusting the guidelines and will incorporate an elaboration of the condition regarding the imminent risk of harm to body or health as mentioned in Article 14 (2) in the Mental Health Act. This includes which elements the chief doctor must include in the assessment of imminent risk of harm to body or health.

The Health Authority expects to publish the adjusted guidelines in September 2022.

The Government emphasizes that the present guidelines contain, among other things, details regarding the fundamental principle of the use of compulsion as a last resort. It follows from the guidelines that the medical staff must do what is possible to achieve the patient's voluntary participation. The chief doctor must make a concrete and medical assessment of the patient and take into consideration the patient's preferences to treatment etc. It is also emphasized that the more intrusive the compulsion, the more important it is to consider if the purpose of the treatment can be achieved through other and less intrusive methods.

Finally, the Government refers to paragraph 4 in the action plan where the Government notes that it on an ongoing basis receives information from the regions regarding training of the medical staff. The regions put a lot of effort into securing competent and well-educated staff in all positions in order to prevent the use of compulsion. Both new staff as well as staff with more seniority receive training and/or participate in seminars to improve and maintain the necessary knowledge and skills. In relation to the Execution Department's question regarding any planned capacity building measures within the judiciary, the Government notes that the City Court of Roskilde (*Byretten i Roskilde*), The High Court (*Østre Landsret*) and the Supreme Court have been notified of the Court's judgment in the present case. Accordingly, the judiciary is thus made aware of the Court's judgment.

2. The second issue in the judgment was that the applicant was not attended to by a doctor for almost twelve hours between 8 February 2013 at 10.46 p.m. and the following day, 9 February 2013 at 10.30 a.m.

According to Article 21 (4) of the Mental Health Act in force at the time of the judgement, the use of forced physical restraints should be reviewed as often as the concrete situation requires, and at least 3 times every

24 hours, which should be evenly spread out, after the decision on the use of the compulsory restraint has been made.

Based on the judgment in the present case, the Danish Parliament has changed Article 21 (4) of the Mental Health Act and introduced specific intervals between the 3 reviews by the doctor.

With the change, the first review by the doctor must occur 4 hours at the latest after the decision on the use of the compulsory restraint has been made. The following reviews must occur with 10 hours interval at the latest which must be evenly spread out.

The Government emphasizes that the 3 reviews every 24 hours are minimum requirements. Thus, patients in compulsory restraint shall be reviewed as often as the specific situation requires it. There is always a permanent guard present when patients are submitted to compulsory restraints, and the patient will be released as soon as there is no longer a need to maintain the compulsory restraint.

An exemption to the new intervals is restricted to special cases, where the patient is asleep and where based on a medical assessment waking up the patient would be harmful to the patient, e.g. if a patient has been awake a longer period of time before it is decided to use compulsory restraints, and it therefore would be counterproductive or detrimental to the patient to wake up the patient. In such cases, the guard will summon the doctor, as soon as the patient wakes up, so the review can take place.

The Government notes that the Health Authority has been made aware of the change in Article 21 (4) and will adjust the guidelines accordingly. This means that the intervals between the reviews will be described in the guidelines along with the exemption. The Health Authority expects to publish the adjusted guidelines in September 2022.

Finally, the Government notes that Parliament has changed Article 16 of the Mental Health Act and has established a *duty* for the permanent guard for patients who are submitted to compulsory restraints to make on-going written descriptions of the state of the patients at least every 15 minutes. This description will serve as a supplement to the already mandatory patient chart and be a tool for the doctor who assesses the continued use of compulsory restraints, as well as for patients who wish to complain about the decision of compulsory restraints.

Both of the changes in the Mental Health Act entered into force 1 January 2022.

In March 2022 the Ministry of Health published a new guideline (*Vejledning om notatpligt for den faste vagt for patienter, der er tvangsfikseret med bælte*) describing when and how the guard must make the written descriptions. As a part of the guideline, the Ministry of Health has made an example of a schedule the psychiatric hospitals can use if they wish.

The change regarding the permanent guard's written descriptions was introduced in connection to among other things the friendly settlement in the case *Dam v Denmark* (Application No. 1349/21), which the Court was informed of in a letter of 15 October 2021.

3. In the action plan's paragraph 4 and 5, the Government acknowledged the challenges with reducing the frequency and duration of instances of compulsory restraint in psychiatric hospitals and stated that the use of compulsory restraints should only be used as a last resort. The Government referred to the fact that the Government has been working towards reducing compulsion in psychiatric hospitals for a number of years.

In addition, the Government referred to a number of legal rights in the Mental Health Act, hereunder that every use of compulsion has to be registered in a protocol with a description of the measure and why it was deemed necessary to use it, and that the medical staff is obliged to offer the patient a conversation about compulsion and why the medical staff thought it necessary to use compulsive measures.

The Government also noted that the Government was working on a comprehensive 10-year plan to permanently improve psychiatric care. At the time of the Government submitting the action plan, the Health Authority and the National Board of Social Services were compiling an overview of the main challenges regarding mental health care and social care for people with mental illness.

The Health Authority and the National Board of Social Services presented in January 2022 a report with 37 recommendations to improve the quality of life for people with mental illness as a basis for the preparation of the 10-year plan.

In connection with the preparations of the 10-year plan, recommendations for a new target to reduce compulsion will be discussed. As mentioned in the action plan, the Government will closely continue to monitor the extent of compulsion in psychiatric hospitals until new ambitious goals to reduce compulsion have been implemented.

4. On 17 March 2022 the Ministry of Health received from the Department for the Execution of Judgments of the ECHR a letter including a joint communication submitted by DIGNITY, Better Psychiatry and The Danish Institute for Human Rights.

The organizations have initially expressed concern as to whether the 10 year-plan will be able to reach the set goals to effectively reduce the use of means of restraint to an absolute minimum. The organizations have also stated that they believe that the present case is not an isolated case.

The Government refers to paragraph 3 in the action plan, where it is laid out that the Government has acknowledged the challenges with reducing the frequency and duration of instances of compulsory restraint in psychiatric hospitals and that the use of compulsory restraints should only be used as a last resort. The Government has referred to the fact that the Government has been working towards reducing compulsion in psychiatric hospitals for a number of years.

As mentioned in paragraph 3, the Government's 10-year plan is prepared following the report from the Health Authority and the National Board of Social Services, and recommendations for a new target to reduce compulsion will be discussed in this regard.

The Government also notes that it is not the Government's view that the present case is an expression of a general practice in Denmark, and that the Government has taken a number of measures to prevent similar cases from occurring. As mentioned above, the Government has thus among other things changed the Mental Health Act and relevant guidelines on the basis of the judgement, and the Government is working on further adjustment of the relevant guidelines. Moreover, the regions put a significant effort into ensuring competent and well-educated staff in all positions in order to prevent the use of compulsion. When the Government received notice of the case *Dam v Denmark* (Application No. 1349/21), the Government decided to enter into a friendly settlement in the case. The Ministry of Health had a long and positive dialogue with the applicant and the Minister of Health had a meeting with the applicant to among other things listen and take into consideration the applicant's experience and thoughts.

In addition, as mentioned in paragraph 8 in the action plan, a number of independent institutions follow the use of compulsion in psychiatric hospitals and the mental health area in general. Also, as mentioned in paragraph 7 in the action plan, the national courts are generally aware of the judgment from the Court. There is also a sharp focus from the Government on the use of compulsion. In addition to the forthcoming 10-year plan, Parliament has earmarked an additional (DKK) 600 million (EUR 80.578.558) a year from 2020 and onwards to the psychiatric hospital services. Among other things, this will lead to an increase in the general capacity at psychiatric hospitals. As part of the implementation agreement between the Government and the regions, it has been agreed that the regions' prioritization of the funds will be followed up annually by following the development within four indicators, including the development in the use of coercion in psychiatry.

In regards to the organizations' four specific points of attention, the Government would like to note the following:

First, the organizations have commented on the duration of intervals between medical assessments and noted that the duration of the use of mechanical restraint should be as short as possible, and should always be terminated when the underlying reason for their use have ceased. In the view of the organizations, intervals of respectively 4 hours and 10 hours between assessments are insufficient to ensure that the continuation and duration for the restraint does not exceed what is strictly necessary and respects the patient's dignity. Hence, the organizations recommend that the use of belt restraints should be assessed as often as required and at least every two hours.

The Government notes that as stated in paragraph 2, the 3 reviews every 24 hours are *minimum* requirements. Hence, patients in compulsory restraint shall be reviewed as often as the specific situation requires it and not less than 3 times within 24 hours. There is always a permanent guard present when patients are submitted to compulsory restraints, and the patient will be released as soon as there is no longer a need to maintain the compulsory restraint.

Second, the organizations have commented on the permanent guard's need for special guidelines and on the permanent guards' obligation to document the patient's condition. The organizations' notes that the documentation should be prepared as often as deemed relevant, presumably every 30-60 minutes. The organizations recommend permanent guards to have educational backgrounds within health care and to be provided with special guidelines and training in how to adequately and correctly document the patient's condition.

The Government in that connection refers to paragraph 2 of the action plan, which describes the publication by the Ministry of Health of a new guideline (*Vejledning om notatpligt for den faste vagt for patienter, der er tvangsfikseret med bælte*) describing when and how the guard must prepare the written descriptions.

The Government also notes that, as mentioned in paragraph 2, the permanent guard is obligated to make on-going written descriptions of the state of the patients at least every 15 minutes and thus not as referred to by the organizations every 30-60 minutes. This part of the amendment of the Mental Health Act was introduced relatively late in the legal process and thus does not appear in the original legislative proposal to the amendment of the Mental Health Act, but in a proposed amendment contained in a supplementary report accessible along with the rest of the preparatory works (supplementary report no. 84 A of 16 December 2021), and the 15 minute interval described therein has subsequently been incorporated into the new guideline (*Vejledning nr. 9285 af 4. april 2022 om notatpligt for den faste vagt for patienter, der er tvangsfikseret med bælte*).

Third, the organizations have stressed that in Denmark solid knowledge exists on how to reduce and prevent the use of means of restraint in psychiatric wards. The organizations refer to the 2021 report from the Danish Health Authority on monitoring the use of means of restraints where a number of initiatives is highlighted, such as the Six Core Strategies for Reducing Seclusion and Restraint Use.

The Government refers to paragraph 1 in the action report which describes that The Health Authority arranges meetings with a national task force (*Task Force for Psykiatriområdet*) twice a year where developments in the psychiatric field, especially the use of compulsion in psychiatric hospitals, are discussed. Members of the task force are representatives from the regions and relevant Danish authorities, including the Danish Patient Safety Authority, the Danish Health Data Authority and the National Board of Social Services.

In regards to the organizations' recommendation that the permanent guard must have a health background, the Government refers to the fact that most permanent guards are medical staff, that all the permanent guards are trained in observing the patient and that their observation of the patient is a part of the doctor's assessment of the patient.

Fourth and finally, the organizations have stated in regards to effective legal guarantees, that the provisions in Section 2 of the Mental Health Act is not supported by any legal guarantees and that in practice, the

Psychiatric Patients' Complaints Board and the Danish courts do not look at the circumstances and treatment provided prior to the decision to use means of restraint.

The organizations refer specifically to Article 2 (2) of the Mental Health Act which stipulates that means of restraint must never replace care, treatment and nursing, and Article 2 (5) from which it follows that in order to prevent the use of restraint the health care authorities must provide hospitalization, treatment, care and nursing that meets the standards for good mental health care in psychiatric wards.

The Government notes that Article 2 in the Mental Health Act is equivalent to a preamble and does not grant patient rights. Instead, Article 2 has to be taken into consideration when interpreting the rules in the Mental Health Act.

The Government also refers to Article 4 in the Mental Health Act which stipulates that compulsion should not be used unless all other available options have been pursued to achieve the voluntary participation by the patient. Moreover, the use of compulsion shall be proportionate with its aim and the compulsion shall be used as carefully as possible and with consideration to the patient, so that no unnecessary compulsion or inconvenience occurs.

Article 4 is a part of the juridical review made by the Psychiatric Patients' Complaint Board and the courts.

Moreover, as referred to in paragraph 8 of the action plan, a number of independent institutions follow the use of compulsion in psychiatric hospitals and the mental health area in general. In addition, as mentioned in paragraph 1, a public oversight committee established by the Danish Parliament (*§71-tilsynet*), supervises the conditions for patients who are involuntary admitted to psychiatric hospitals. The Danish Parliamentary Ombudsman also supervises how psychiatric hospitals treat patients who are involuntary admitted. Thus, these independent institutions supervise both the use of coercion and the general treatment of the patients and the Government is always responsive if the institutions inform the Government of challenges or issues in the psychiatric hospitals.

5. Conclusions of the government

It is the position of the Government that the necessary general measures have been taken or are (in respect to the pending adjustments of the relevant guidelines) in the process of being taken.

The Government notes emphasizes that the Health Authority has begun adjusting the relevant guidelines regarding the use of compulsion in psychiatric hospitals (*vejledning om anvendelse af tvang m.v. i psykiatrien*) and expects to publish the adjusted guidelines in September 2022.

In addition, Parliament has changed the Mental Health Act and introduced specific intervals between the 3 reviews of patients who are submitted to compulsory restraints by the doctor and established a duty for the

permanent guard to make on-going written descriptions of the state of patients submitted to compulsory restraints at least every 15 minutes.

The amendments to the Mental Health Act entered into force 1 January 2022. In March 2022, the Ministry of Health published a new guideline describing when and how the guard must make the written descriptions. Furthermore, in January 2022 the Health Authority and the National Board of Social Services presented a report with a number of recommendations to improve the quality of life for people with mental illness as a basis for the preparation of the Government's 10-year plan. Finally, the Government will continue to follow the extent of compulsion in psychiatric hospitals closely until new ambitious goals to reduce compulsion have been implemented.