EHRM 28 maart 2017, Fernandes de Oliveira t. Portugal, nr. 78103/14

Hendriks, A.C.

EHRC 2017/121

Recht op leven, Zelfmoord van 'risicopatiënt', Preventieve positieve verplichtingen, Beschermende maatregelen tegen zelfmoord, Procedurele positieve verplichting, Duur van de procedure

GEGEVENS

Instantie	Europees Hof voor de Rechten van de Mens
Datum uitspraak	28-03-2017
Publicatie	EHRC 2017/121 (Sdu European Human Rights Cases), aflevering 7, 2017
ECLI	ECLI:CE:ECHR:2017:0328JUD007810314
Zaaknummer	78103/14
Rechtsgebied	
Rubriek	Uitspraken EHRM
Rechters	Yudkivska (President) Tsotsoria Pinto de Albuquerque Wojtyczek Kūris Motoc Bosnjak
Partijen	Fernandes de Oliveira tegen Portugal
Regelgeving	EVRM - 2

SAMENVATTING

Klaagsters zoon was al lange tijd alcohol- en drugsverslaafd en is opgenomen in een halfgesloten kliniek met het oog op behandeling. In 1999 was aan klaagster aangeraden om te verzoeken om opname in een gesloten kliniek, maar dat is niet gebeurd. In 2002 deed klaagsters zoon een zelfmoordpoging. De zoon keerde daarop korte tijd terug naar huis voor een bezoek, maar hij werd daarna weer opgenomen in de kliniek. Drie weken na de eerste poging bleek hij zoek te zijn bij het avondeten. Later werd ontdekt dat klager was ontsnapt en dat hij in de buurt van het terrein van de kliniek voor de trein was gesprongen. Het Hof constateert dat hier alle preventieve positieve verplichtingen gelden die het eerder voor dit soort gevallen heeft toegepast, waarbij

vooral de ‘reasonable knowledge test’ moet worden toegepast om te kunnen beoordelen of de autoriteiten redelijkerwijze hadden kunnen weten van de risico’s. In dit geval was er bij de autoriteiten wel kennis aanwezig van de risico’s, ook gelet op de eerdere zelfmoordpoging, en was ook bekend dat klager al eerder was ontsnapt. De regering heeft betoogd dat het vastzetten van klager in strijd zou zijn met inmiddels geaccepteerde inzichten over de wenselijkheid van een meer open benadering van psychiatrische patiënten. Het Hof neemt niettemin aan dat ook dan een evenwicht moet worden gevonden tussen de waarden van zo’n behandeling en de noodzaak van bescherming tegen zelfmoord. In dit geval is die afweging niet goed uitgepakt. Ook zijn de algemene preventieve maatregelen tekortgeschoten, wat onder meer blijkt uit het feit dat pas anderhalf uur nadat klager al was overleden, is opgevallen dat hij vermist was. Schending preventieve positieve verplichtingen onder art. 2 EVRM. Daarnaast heeft de procedure voor twee instanties ruim elf jaar geduurd, terwijl daarvoor geen rechtvaardiging bestond. Daardoor is ook de procedurele positieve verplichting onder art. 2 EVRM geschonden.

UITSPRAAK

I. Alleged violation of Article 2 of the Convention

53. The applicant complained that the authorities had failed to protect the life of her son and were responsible for his death in violation of his rights under Article 2 of the Convention. In particular, she argued that the hospital had been negligent in the care of her son in so far as it had not supervised him sufficiently and the hospital premises had not had adequate security fencing to prevent him from leaving. Under Article 6 § 1 of the Convention she complained about the length of the proceedings she had brought against the hospital before the domestic courts.

54. The Court considers that the applicant’s complaints should be examined solely from the standpoint of the substantive and procedural aspects of Article 2, bearing in mind that, since it is master of the characterisation to be given in law to the facts of the case, it is not bound by the characterisation given by an applicant or a government (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). Article 2, in so far as relevant to the present case, reads as follows:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

A. Admissibility

55. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

56. The applicant submitted that, as a general principle, the treatment an individual required on account of his or her illness may have to be balanced against the need to adopt restrictive and monitoring measures in the light of his or her condition. In that

regard, she argued that the monitoring procedure established by the HSC had been ineffective in so far as it did not pose any obstacle to patients trying to leave the hospital premises, as the case of her son had demonstrated.

57. The applicant pointed out that her son had never been properly diagnosed. She also argued that A.J.'s history of suicide attempts, together with his mental disorders, demonstrated that he had been at particular risk, which should have led the HSC to adopt a special surveillance measure with regard to him. Given A.J.'s suicidal attempts, his suicide should have been predicted by the hospital. Moreover, with reference to the case of *Reynolds v. the United Kingdom* (no. 2694/08, 13 March 2012), the HSC should have adopted measures to prevent her son from leaving the hospital premises. The fact that A.J. had not been compulsorily confined did not relieve the HSC of the obligation to comply with its duties of care and vigilance. The applicant concluded that the Portuguese authorities had failed to ensure the protection of her son's life, in violation of the substantive limb of Article 2 of the Convention.

58. As regards the procedural aspect of Article 2, the applicant contended that the proceedings against the HSC on account of her son's death had been excessively lengthy. They had started on 17 March 2003 and the hearing of evidence had not taken place until five years later, following a series of unexplained delays. The length of the proceedings, for which the Portuguese authorities were responsible, had therefore compromised the effectiveness of the judicial system. Consequently, there had been a violation of the procedural limb of Article 2 of the Convention.

59. The Government conceded that the HSC was located in ample grounds with no security fencing or walls. They submitted, however, that it had effective mechanisms for monitoring its patients and for searching for them if they disappeared. In relation to the first procedure, it consisted in verifying the patients' presence five times a day at meal and medication times. As for the latter, it consisted in searching for the missing patient on the HSC premises. In the event that the search was unsuccessful, the hospital would inform the family and the police authorities of the patient's disappearance. Both procedures had been activated two to three hours after the afternoon snack when the HSC staff noticed A.J.'s absence. The Government further argued that the domestic courts had considered those two procedures to be effective. All three aspects were based on state-of-the-art developments in psychiatric science and were in line with international human rights recommendations from the United Nations, the Council of Europe and the European Union based on the least possible restriction of rights.

60. The Government submitted that the applicant's son had been admitted to the HSC on several occasions following crises related to the over-consumption of alcohol and on at least one occasion, the ingestion of drugs. His hospitalisation had had a therapeutic purpose geared primarily to achieving his rehabilitation and reintegration into everyday life. It had been carried out on a voluntary basis and for short periods of time. As such, the medical team had recommended that A.J. be treated under an open regime in which he could walk around the hospital premises. The applicant's son had also been allowed to leave the premises provided that he communicated his intention to the nurse in advance, as stipulated in the HSC's guidelines.

61. The Government pointed out that, despite his suicide attempt a few weeks earlier, A.J.'s condition on 26-27 April 2000 had not given rise to any concern of a possible imminent risk. In fact, he had wandered freely and safely around the hospital. In addition, before Easter he had been authorised to spend some weekends at home. There was therefore no factor capable of suggesting that there had been a clear and immediate risk that he would commit suicide and that the adoption of closer surveillance was required.

62. The Government also pointed out that the applicant could have requested A.J.'s compulsory confinement. Under such a regime her son would have been prevented from leaving the hospital premises.

63. Lastly, with regard to the procedural limb of Article 2, the Government acknowledged that the length of the domestic proceedings had been excessive. They noted that all evidentiary steps had taken place in the course of the proceedings, namely: different doctors and nurses had been heard at the hearings; an expert report had been ordered and several clinical reports had been analysed. In addition, the adversarial principle had been complied with and the applicant had had the opportunity to present her version of the facts.

64. The Government concluded that in the instant case there had been no violation of their positive or procedural obligations under Article 2 of the Convention.

2. The Court's assessment

(a) General principles

65. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe, enjoins the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III).

66. Those principles apply in the public-health sphere too. States are required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives and to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I, and *Dodov v. Bulgaria*, no. 59548/00, § 80, 17 January 2008). In the case of mentally ill patients, consideration must be given to their particular vulnerability (see, *mutatis mutandis, Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III; *Rivière v. France*, no. 33834/03, § 63, 11 July 2006; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 131, ECHR 2014).

67. The Court further reiterates that Article 2 may imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself (see *Renolde v. France*, no. 5608/05, § 81, ECHR 2008 (extracts), and *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011). However, in the particular circumstances of the danger of self-harm, the Court has held that for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the relevant time that the life of the person concerned was at real and immediate risk and that they had not taken measures which could reasonably have been expected of them (see *Hiller v. Austria*, no. 1967/14, §§ 52-53, 22 November 2016, and *Keenan*, cited above, § 93). Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (compare with *Tanribilir v. Turkey*, no. 21422/93, §§ 70-71, 16 November 2000, and *Keenan*, cited above, § 90). At the same time, the Court reiterates that the very essence of the Convention is respect for human dignity and human freedom. In this regard, authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned and in

such a way as to diminish the opportunities for self-harm, without infringing personal autonomy (see, *mutatis mutandis, Mitic v. Serbia*, no. 31963/08, § 47, 22 January 2013, and *Jagiello v. Poland* (dec) [Committee], no.21782/15, § 23, 24 January 2017).

68. As regards the procedural obligation of Article 2, it has been interpreted by the Court as imposing an obligation on the State to set up an effective judicial system for establishing both the cause of death of an individual under the care and responsibility of health-care professionals and any responsibility on the part of the latter. This provision requires that the protective mechanisms afforded by domestic law should not just exist in theory. Above all, they must also operate effectively in practice within a time-span such that the courts can complete their examination of the merits of each individual case; this requires a prompt examination of the case without unnecessary delays (see *Šilih v. Slovenia* [GC], no. 71463/01, §§ 155 and 195, 9 April 2009).

(b) Application of those principles to the instant case

(i) The substantive aspect of Article 2

69. The Court notes at the outset that it is common ground between the parties that the applicant's son, A.J., was mentally ill and that he had last been admitted to hospital on a voluntary basis on account of a suicide attempt which had taken place on 1 April 2000. The parties' views differ, however, when it comes to the question of the foreseeability of A.J.'s suicide and the hospital's duty to prevent him from escaping and taking his own life by further monitoring him and erecting some kind of protective fencing around the hospital premises so that it would not be so easy for patients to leave the hospital.

70. The Court observes that during his hospitalisation the applicant's son managed to leave the hospital without authorisation on different occasions during the period from 12 December 1999 to 14 January 2000 and during the period from 2 to 27 April 2000 (see paragraph 8 above).The last occasion, which resulted in his suicide, took place on 27 April 2000, less than a month after he had attempted to commit suicide. According to the last clinical observation made on 25 April 2000, A.J.'s "depressive episodes and recurrent suicide attempts" were known to the health services (see paragraph 11 above). Moreover, the Court notes that when A.J. was admitted to hospital in December 1999, the doctor gave instructions for him not to leave the unit in which he had been hospitalised and in September 1999, the doctors recommended that the applicant seek a judicial order to have her son confined (see paragraph 7 above). The Court cannot speculate as to what the doctors' reasons could have been to justify such instructions and recommendation. It considers, however, that a risk of harm to him or to others must have existed. The Court also observes that according to the expert report submitted to the proceedings at the request of the Coimbra Administrative Court, "the clinical history [of the applicant's son] and the psychopathological framework [*quadro psicopatológico*] ...would predict future suicidal behaviour" and the fact that he had wandered around the hospital without endangering his life should not be understood as meaning that the risk of suicide was negligible (see paragraph 23 above). The question therefore arises as to whether A.J.'s suicide was foreseeable and whether the hospital staff did all that could reasonably be expected of them.

71. In *Renolde v. France* (cited above), the Court found a violation of Article 2 because the authorities had known from a previous suicide attempt that the applicant's brother was suffering from an acute psychotic disorder capable of resulting in self-harm and did not take the required preventive operational measures to protect his life. The case of *Reynolds v. the United Kingdom* (cited above) concerned a voluntary in-patient who had killed himself by breaking and jumping out of a sixth-floor window. The applicant's son had no history of self-harm or attempted suicide but had heard voices ordering him to kill himself and his condition was known to the hospital staff. The Court held that the applicant had an arguable claim that an operational duty under

Article 2 had arisen to take reasonable steps to protect her son from a real and immediate risk of suicide and that that duty had not been fulfilled. In the case of *Keenan*, on the other hand, the Court found no violation of Article 2 because there had been no reason for the authorities to have been alerted on the day of the inmate's death that he was in a disturbed state of mind, rendering a suicide attempt likely, even though he had voiced such thoughts. In finding that there had been no violation of Article 2 of the Convention, the Court had regard, in particular, to the fact that the authorities had "responded in a reasonable way to Mark Keenan's conduct, placing him in hospital care and under watch when he evidenced suicidal tendencies" (see *Keenan*, cited above, § 96).

72. In the instant case, having regard to A.J.'s clinical history and in particular the fact that he had attempted to commit suicide three weeks earlier, the Court considers that the hospital staff had reasons to expect that he might try to commit suicide again. Moreover, A.J. had previously escaped from the hospital premises on different occasions; another escape attempt should therefore have been foreseen by the hospital staff with the possibility of a fatal outcome in the light of his diagnosis (see, *mutatis mutandis, Reynolds*, cited above, § 61, and *Renolde*, cited above, § 89).

73. The Court is aware of the emerging trend concerning persons with mental disorders and the need to provide treatment in the light of the "principle of least restriction", with treatment under an "open door" regime being the most advisable option in view of state-of-the-art psychiatric science, as pointed out by the Government, and how these trends are reflected in several international documents (see paragraphs 46-52 above). It considers, however, that treatment under an "open door" regime cannot exempt the State from its obligations to protect mentally ill patients from the risks they pose to themselves, in particular when there are specific indications that such patients might commit suicide. Accordingly, a fair balance must be struck between the State's obligations under Article 2 of the Convention and the need to provide medical care in an "open door" regime, having in account the individual needs of special monitoring of suicidal patients. The Court notes in this regard that the Government contended that the applicant had never requested A.J.'s compulsory confinement. It considers, however, that in this balancing exercise, a difference should not be made as to the nature of a patient's hospitalisation: regardless of whether the hospitalisation was of a voluntary or an involuntary nature, and in so far as a voluntary in-patient is under the care and supervision of the hospital, the State's obligations should be the same. To say otherwise would be tantamount to depriving voluntary in-patients of the protection of Article 2 of the Convention.

74. In the instant case, the Court notes that the HSC checked whether patients were present during meal and medication times. In addition, they had a mechanism to be put in place when a patient's absence was noted, which consisted in searching for the missing patient on the hospital premises and informing the police and the family. In the present case, A.J. was last seen after 4 p.m., during the afternoon snack, which he seems to have attended and which, according to the hospital guidelines, took place at around 4.45 p.m. He died at 5.37 p.m. when he jumped in front of a train, fifteen to twenty minutes' walking distance from the HSC. His absence was not observed until around 7 p.m. because he had not shown up for dinner. Thus A.J. was already dead when the emergency procedure was activated. The above-mentioned procedures were thus ineffective in preventing his escape from the hospital and, ultimately, his suicide. The Court further notes that the risk was exacerbated by the open and unrestricted access from the hospital grounds to the railway platform (see paragraphs 34-36 above).

75. In the light of the State's positive obligation to take preventive measures to protect an individual whose life is at risk, and the need to take all necessary and reasonable steps in the circumstances (see *Keenan*, cited above, § 91), it might have been expected

that the hospital staff, faced with a mentally ill-patient who had recently attempted to commit suicide and who was prone to escaping from the hospital premises, would adopt some safeguards to ensure that he would not leave the premises, as pointed out by the Attorney General's Office in the opinion attached to the appeal before the Administrative Supreme Court (see paragraph 30 above). Furthermore, it might also have been expected that the authorities would have monitored A.J. on a more regular basis. In this regard, the instant case is distinguishable from *Hiller*, cited above, in which there were no signs in the hospital records of any suicidal thought or attempt; for that reason the Court considered that in the mentioned case the hospital staff could not have had any reason to expect the suicide and, therefore, had not acted negligently in allowing the mentally ill-patient to take walks on his own.

76. The Court therefore concludes that there has been a violation of Article 2 of the Convention under its substantive limb.

(ii) The procedural aspect of Article 2

77. As regards the judicial response provided for the establishment of the responsibility of the HSC in relation to the applicant's son's death, the Court observes that the proceedings before the domestic courts commenced on 17 March 2003 and were finally determined by the decision of the Administrative Supreme Court on 29 May 2014 (see paragraphs 19 and 31 above). Thus, they lasted eleven years, two months and fifteen days for two levels of jurisdiction.

78. In this connection, the Court reiterates that in Article 2 cases concerning proceedings instituted to elucidate the circumstances of an individual's death, lengthy proceedings such as these are a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify such a course of proceedings (see *Kudra v. Croatia*, no. 13904/07, § 113, 18 December 2012, and *Igor Shevchenko v. Ukraine*, no. 22737/04, § 60, 12 January 2012). In the instant case, the Court notes that the Government have acknowledged that the domestic proceedings were lengthy but have failed to provide any plausible reason justifying it (see paragraph 63 above).

79. Regarding the overall length of the proceedings, the Court cannot fail to observe that there were several long periods of unexplained inactivity. In particular, it took two years for the Coimbra Administrative Court to request an expert opinion on A.J.'s clinical condition (see paragraph 22 above); the first hearing took place on 8 October 2008, two years after the submission of the expert report to the file (see paragraphs 23 and 24 above); and it took almost three years after that for the court to deliver its judgment (see paragraph 28 above).

80. In those circumstances the Court finds that the relevant mechanisms of the domestic legal system, seen as a whole, did not secure in practice an effective and prompt response on the part of the authorities consonant with the State's procedural obligations under Article 2 of the Convention. Moreover, the very passage of time prolongs the ordeal for members of the family (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002 II). The Court cannot accept that domestic proceedings instituted in order to shed light on the circumstances of an individual's death should last for so long. In circumstances such as those in the present case, a prompt response by the authorities is essential in maintaining public confidence in their adherence to the rule of law, and also to allow the dissemination of information and thereby prevent the repetition of similar errors and contribute to the safety of users of health services. It is thus for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention, and in particular those arising out of Article 2.

81. In the light of all these considerations, the Court concludes that there has been a violation of the procedural limb of Article 2 of the Convention.

II. Application of Article 41 of the Convention

82. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

83. The applicant claimed 703.80 euros (EUR) in respect of pecuniary damage, representing the expenses incurred for A.J.'s funeral. She supported her claim with an invoice for the funeral service. She further claimed EUR 40,000, corresponding to the loss of income sustained in respect of the EUR 200 monthly maintenance that her son used to pay her, calculated on the basis of her life expectancy.

84. The Government considered that there was no causal link between the alleged violation of the Convention and the pecuniary damages claimed. They also argued that the applicant's claim was speculative and lacked any supporting data.

85. With regard, firstly, to the reimbursement of funeral expenses, the Court considers that this claim is not unreasonable, since the applicant had to bury her son as a result of his suicide. It also notes that the applicant properly submitted a document in support of her claim. It therefore awards in full the amount claimed under this head.

86. As to the alleged loss of financial support, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

B. Non-pecuniary damage

87. The applicant claimed EUR 40,000 in respect of non-pecuniary damage caused by the death of her son and the length of the proceedings against the hospital.

88. The Government contested this claim, which they considered excessive.

89. The Court considers that the applicant must have suffered anguish and distress as a result of the circumstances of her son's death and her inability to obtain a domestic decision in a reasonable time. In those circumstances, it finds it reasonable to award the applicant EUR 25,000 in respect of non-pecuniary damage.

C. Costs and expenses

90. The applicant also claimed EUR 409 for the costs and expenses incurred before domestic courts, representing the legal fee she had paid. She submitted the relevant invoice in support of her claim.

91. The Government pointed out that the document submitted by the applicant did not show that the expenses had been actually incurred.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the documents in its possession and the above criteria, the Court awards in full the sum claimed under this head, plus any tax that may be chargeable to the applicant.

D. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court, unanimously,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of the substantive aspect of Article 2 of the Convention;

3. *Holds* that there has been a violation of the procedural aspect of Article 2 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 703.80 (seven hundred and three euros and eighty cents), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 25,000 (twenty five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 409 (four hundred and nine euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.