CASE NOTE: N V ROMANIA (APPLICATION NO. 59152/08, DECISION OF 28 NOVEMBER 2017)

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I. INTRODUCTION

Is deprivation of liberty ever justified for reasons arising out of a person's disability? Whilst there was a long-standing consensus in both international and regional human rights law that it could be, the adoption of the UN Convention on the Rights of Persons with Disabilities ('CRPD') in 2006 may radically have changed the picture, Article 14(1)(b) CRPD providing that "*the existence of a disability shall in no case justify a deprivation of liberty*."

In *N v Romania*, the European Court of Human Rights ('ECtHR') addressed how it considered Article 5 ECHR is to be interpreted in light of Article 14 CRPD; the case also saw Strasbourg grappling with the question of what is to be done where a person no longer meets the criteria for detention but cannot be discharged because of a lack of adequate provision in the community. This note discusses both that case and, in the concluding section, the subsequent decision of the Grand Chamber of the ECtHR in *Rooman v Belgium.*[1]

II. BACKGROUND

On 29 January 2001, following the publication of an article in the national press and a programme broadcast on a national television channel, the Romanian police initiated a criminal prosecution against the applicant, N. He was charged with incest and sexual corruption of his two under-age daughters, aged 15 and 16. He was alleged to have had sexual intercourse with his elder daughter and forced both his daughters to be present while he was having sexual intercourse with his wife. On April 2001, he was admitted to a psychiatric hospital, a forensic medical report prepared in November 2001 finding that he suffered from chronic paranoid schizophrenia and lack of discernment, and recommending putting in place a programme of compulsory medical treatment. All but one of the criminal charges (that relating to sexual corruption) were not, ultimately, proceeded with by the prosecution, but in April 2002 Bucharest District Court No 6 upheld the medical detention order against him. He remained detained in different psychiatric hospitals for the next 16 years.

N's position underwent a formal (if not a substantive) change in 2016, when, on the basis of forensic medical reports which determined that he did not pose a risk of danger to society, but that it was inconceivable that he could be released to be subject to treatment in the community absent social support, a court ordered that he continue to be detained in psychiatric hospital, pending transfer to a specialised institution capable of providing proper living conditions and treatment. A further forensic report

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[1] Application no. 18052/11, decision of 31 January 2019.

in 2017 recommended replacing the detention measure with a compulsory medical treatment order [in the community] in view of the applicant's "*low level of dangerousness (while on treatment), compliance with the rules, absence of incidents,* [and] *the lengthy period of supervision*" (paragraph 70). This led to a further order for the replacement detention measure with a compulsory treatment order until the applicant had made a full recovery.

Clearly out of desperation, the applicant then asked to remain in psychiatric hospital until his social situation had been settled. As his lawyer noted in a further letter to the hospital, releasing N without adequate support "*would condemn him to vagrancy, destitution and the deterioration of his physical and mental health*" (paragraph 76).

Nothing happened in terms of movement, and N took his case to Strasbourg, complaining that his detention was arbitrary and unjustified, and was based solely on his mental disability, which he claimed was contrary to the requirements of the Court's case-law, to Article 14(1)(b) CRPD and to the decision of the Committee on the Rights of Persons with Disabilities in the complaint brought by Marlon James Noble against Australia.[2] He further challenged the failures of the Romanian authorities (both judicial and administrative) to take appropriate steps to secure his release at the point where it became clear to them that the forensic medical evidence did not justify his continued detention.

III. THE DECISION

A. Article 5(1)

As is now customary, the Strasbourg court did not merely cite the relevant domestic legislation (which made clear that a detention measure could only be imposed on a person if he poses a danger to society) but set out what it considered to be relevant provisions from other international documents. The UN documents cited by the court were:

(a) Articles 13, 14 and 19 of the UNCRPD and the Guidelines on Article 14 noted above;

(b) The 2016 decision on the complaint of Marlon James against Australia, in which the CRPD Committee had held (at paragraph 8.7) that:*[t]he author's detention was […] decided on the basis of the assessment by the State party's authorities of potential consequences of his intellectual disability, in the absence of any criminal conviction, thereby converting his disability into the core cause of his detention. The Committee therefore considers that the author's detention amounted to a violation of article 14 (1) (b) of the Convention according to which "the existence of a disability shall in no case justify a deprivation of liberty.*

(c) The report presented in July 2005 by the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health to the UN Commission on Human Right following his visit to Romania from 23 to 27 August 2004,[3] and the report in April 2016 on Special Rapporteur on Human Rights and Extreme Poverty to the UN Human Rights Council on his mission to Romania from 2 to 11 November 2015,[4] both of which spoke of concerns at the centralised and institutionalised model of mental health care.

[2] Communication No. 7/2012, CRPD/C/16/D/7/2012 (10 October 2016), [2017] MHLR 215.
[3] E/CN.4/2005/51/Add.4
[4] A/HRC/32/31/Add.2

The court set out what is now a standard 'mantra' in relation to deprivation of liberty for purposes of Article 5(1)(e). This mantra has lengthened over time, to add not just the classic *Winterwerp* criteria,[5] but also the observation that:

> 145. … the detention of a mentally disordered person may be necessary not only where he needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 146, ECHR 2012).

And the observation that:

> 146. … in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny (see *Stanev*, cited above, § 153).

In *N*s case, the court considered that the first *Winterwerp* criterion was clearly met, the "applicant having suffered from mental disorders confirmed by a whole series of forensic medical reports" (paragraph 149). The real question was whether N's illness:

> 149. … *was of a kind or degree warranting detention and whether, in the particular circumstances of the case relating to the findings of the latest forensic medical reports, the applicant's detention had been extended validly.* [149]

B. Detention prior to 2016

The Strasbourg court identified two distinct stages to the case. Prior to the recognition by the domestic courts in 2016 that N should no longer be subject to psychiatric detention, the focus of Strasbourg's attention was upon the thoroughness of the first periodic review of his detention in 2007, which occurred after the legislative amendments designed to consolidate the rights of persons with disabilities. This should have warranted:

> 150. …an extremely thorough and complete examination ought to have been conducted in order to ascertain whether the applicant's psychiatric disorder was of a kind and degree warranting detention.

In fact, the ECtHR concluded, this had not happened, and the domestic court had failed to "*conduct a thorough assessment of the aspect which was essential in deciding on the applicant's detention, that is to say his dangerousness*" (paragraph 155). Subsequent reviews were equally "*formalistic and superficial*," nor did the responses to appeals lodged by N provide any kind of clarification (paragraph 156). Finally, "*neither the medical authorities nor the court itself considered whether any alternative*

[5] I.e. that the person reliably be shown to be of unsound mind (on the basis of "objective medical expertise"); secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder, following *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, at paragraph 39.

measures might have been implemented in the present case" (paragraph 157). The Strasbourg court therefore had little hesitation in finding that, at least since 2007, the detention was contrary to the requirement in Romanian domestic law that a detention measure can only be imposed on a person if he poses a danger to society (paragraph 158), devoid of any basis in law and hence contrary to Article 5(1)(e) (paragraph 161).

In a passage to which I will return, the court also observed (at paragraph 159) that the detention was also open to question:

> [p]articularly in the light of the provisions of Article 14 § 1 (b) CRPD, which lays down that the existence of a disability shall in no case justify a deprivation of liberty.

C. 2016 onwards

As the court observed (at paragraph 162), the findings of the forensic medical reports in 2015:

> presented the medical officers with a psychiatric and deontological dilemma as regards the applicant's possible release, given that the provisions of domestic law concerning detention measures required the detainee to pose a danger to society, which did not apply to the applicant.

Referring back to previous case-law,[6] the ECtHR observed (at paragraph 163) that it did not exclude the possibility that:

> the imposition of conditions could justify a deferral of a discharge found to be appropriate or feasible in domestic-law terms, it was of paramount importance that appropriate safeguards were in place so as to ensure that any continued detention was consonant with the purpose of Article 5 § 1 of the Convention.

In N's case, the Strasbourg court noted (at paragraph 166) that his release had been ordered (provisionally) in 2016 and (definitively) in 2017:

> in line with practices which have become quite common at the international level in recent years, geared to promoting, as far as possible, treatment and care for persons with disabilities in the community (see Article 19 CRPD […] above, the Guidelines of the Committee on the Rights of Persons with Disabilities [on Article 14 CRPD] above, the Council of Europe's Disability Strategy 2017-2023 […] and, mutatis mutandis, *W.D. v. Belgium*, no. 73548/13, § 113, 6 September 2016).

However, the blunt fact remained that N had never actually been released, nor had any thorough assessment had been carried out to date of the applicant's practical needs and the appropriate social protection measures. Furthermore, the action taken by the national authorities had been unproductive because of an internationally recognised lack of reception facilities in Romania.

The ECtHR therefore held that N's continued detention after 2016 was arbitrary for purposes of Article 5(1)(e) ECHR.

[6] *Luberti v. Italy* (23 February 1984, Series A no. 75); *Johnson v. the United Kingdom* (24 October 1997, *Reports of Judgments and Decisions* 1997-VII) and *Kolanis v. the United Kingdom* (no. 517/02, ECHR 2005-V).

D. Article 5(4)

The court had little hesitation in finding that Article 5(4) had been breached in N's case, on the basis of:

> (1) lengthy intervals between judicial determinations of the necessity of maintaining the applicant's detention, which did not meet the "speediness" requirement set out in Article 5(4) ECHR;
> (2) the inadequacy of the legal assistance provided him. The court noted that in the great majority of the hearings, the officially appointed lawyers either advocated the maintenance of the detention or left it to the discretion of the courts. The court professed not to be "*dictating how a lawyer should approach cases in which he or she represents a person suffering from mental disorders*" (paragraph 197), but it is clear that it took a dim view of the approach taken by N's lawyers, who were different at each stage, and who entirely failed to consult with him.

E. Remedies

Unusually, the Strasbourg court set out individual measures required in order to execute its judgment, in particular that the authorities should immediately implement the 2017 judgment ordering N's release under conditions consonant with his needs. Further, it noted that:

> the shortcomings identified in the present case are liable to give rise to further justified applications in the future. Accordingly, it recommends that the respondent State should envisage adopting the requisite general measures to ensure that the detention of individuals in psychiatric hospitals is lawful, justified and devoid of arbitrariness. Similarly, detainees should have access to a judicial appeal accompanied by appropriate safeguards ensuring a prompt decision on the lawfulness of the detention.

IV. COMMENT

A. Delayed discharge

The problem of delayed discharge from psychiatric hospitals does not just bedevil countries such as Romania. Whilst *N v Romania* does not represent a dramatic advance in the Strasbourg jurisprudence in relation to this issue, it provides further confirmation that the state is on very thin legal ice when it seeks to rely upon its own failings to provide adequate services in the community to justify the continued detention of a person under Article 5(1)(e) once they no longer meet the domestic criteria for psychiatric detention.

B. Deprivation of liberty – Article 5(1)(e) and the CRPD

As noted at the outset, Article 14(1)(b) CRPD makes clear that "*the existence of a disability shall in no case justify a deprivation of liberty*." Precisely what this implies, however, is hotly contested.

At the UN level, the UN Human Rights Committee (the treaty body for the International Covenant on Civil and Political Rights, which includes its own right to liberty) and the Committee on the Rights of Persons with Disabilities have given differing interpretations of Article 14(1)(b). Both Committees agree that deprivation of liberty

on the basis of disability alone is unlawful.[7] However, the two Committees differ as to whether it is ever permissible to deprive a person of their liberty to secure against risks to them or other people said to arise from their mental health condition (i.e. their disability).

The Committee on the Rights of Persons with Disabilities takes the view, expressed in 'Guidelines' in 2015 that "[t]*he involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty*."[8] Subsequent to the decision in *N*, this view was echoed – in even stronger terms – by a report published in 2018 by the UN Special Rapporteur for Persons with Disabilities, Catalina Devandas.[9]

In General Comment No 35, the UN Human Rights Committee, conversely, expressed the view – which it sees as supported by Article 14(1)(b) CRPD – that "[t]*he existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others,"* and further that "[f]*orced measures must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law*."[10] A similar view was taken by the UN Human Rights Council Working Group on Arbitrary Detention ('WGAD') in the context of a complaint against Japan, [11] the Working Group noting that "*it is contrary to the provisions of article 14 of the Convention to deprive a person of his or her liberty on the basis of disab*ility,"[12] and in relation to the specific facts of the detention of the individual in question that:

> 46. […] neither at the time of his detention nor prior to that there is any evidence of Mr. N being violent or otherwise presenting a danger to himself and/or to others. His subsequent transfer to Tokyo Metropolitan Matsuzawa Hospital had no connection to the initial incident of attempted theft. It is therefore clear to the Working Group that the deprivation of liberty of Mr. N was carried out purely on the basis of his psychiatric disorder, and was thus discriminatory. The Working Group therefore concludes that Mr. N's detention and his subsequent internment in Tokyo Metropolitan Matsuzawa Hospital and Koganei Hospital were discriminatory …. (emphasis added)

[7] UN Human Rights Committee: General Comment No. 35 (2014), on Article 9 - Liberty and security of person, para 19; UN Committee on the Rights of Persons with Disabilities, 2015: "*Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities."* para 6. The differing views of relevant UN bodies as to involuntary detention and treatment are usefully summarised in Martin, W., & Gurbai, S.,'Surveying the Geneva impasse: Coercive care and human rights,' *International journal of law and psychiatry*, 2019: 64:117-128. See also by way of overview Fennell, P.W.H. and Khaliq, U., 'Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law,' *European Human Rights Law Review*, 2011:6:662-674 and Bartlett, P.,'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law,' *Modern Law Review*, 2012:75:752–778.

[8] UN Committee on the Rights of Persons with Disabilities, 2015: "*Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities."* para 13.

[9] Ending *the deprivation of liberty on the basis of disability*, available at www.embracingdiversity.net/report/Deprivation%20of%20liberty%20of%20persons%20with%20disabilitie 1030 (accessed 31 October 2019).

[10] UN Human Rights Committee: General Comment No. 35 (2014), on Article 9 - Liberty and security of person, para 19. See also A/HRC/36/37, para. 55; opinion No. 68/2017.

[11] A/HRC/WGAD/2018/8; opinion No. 8/2018.

[12] Citing in a footnote the UN Human Rights Committee General Comment on Article 9.

What had not been entirely clear until *N v Romania* would be whether the disagreement in Geneva would be echoed at Council of Europe level.

In 2016, in *Hiller v Austria*,[13] the ECtHR had considered a 2014 statement by the United Nations Office of the High Commissioner for Human Rights[14] predating but along very similar lines to the 2015 Guidelines from the Committee. The court did not expressly engage with the statement, as the case in question did not concern Article 5, but rather Article 2, in the context of a contention that the applicant's son had been able to commit suicide as a result of the psychiatric hospital's negligence. It did, though, have it in mind when it came to dismissing the claim, noting (in a passage that should serve as a powerful antidote to the 'risk aversion' model of mental health law[15]):

> 54 […] the hospital did not act negligently in allowing M.K. to take walks on his own once his mental state had improved after 2 April 2010. As evident from the international law sources pertaining to the issue [including the statement above] and as the Government has comprehensively argued, today's paradigm in mental health care is to give persons with mental disabilities the greatest possible personal freedom in order to facilitate their re-integration into society. The Court considers that from a Convention point of view, it is not only permissible to grant hospitalised persons the maximum freedom of movement but also desirable in order to preserve as much as possible their dignity and their right to self-determination.

The Council of Europe's former Commissioner for Human Rights, Nils Muižnieks, expressly endorsed the position of the Committee on the Rights of Persons with Disabilities in August 2017.[16]

Only a very few months later, however (and – perhaps deliberately – making no reference to the Commissioner's statement), the Strasbourg court in *N v Romania* confirmed that it interpreted Article 14(1)(b) CRPD in a different fashion. From the passage at paragraph 159 cited above, it is clear that the court interpreted Article 14(1)(b) CRPD in the same way as does the Human Rights Committee, as prohibiting deprivation of liberty solely on the basis of disability, but not excluding it as a necessary and proportionate response to secure a person of unsound mind against risk to self or others.

At the start of 2019, the Grand Chamber of the European Court of Human Rights returned to the subject in *Rooman v Belgium*[17], making the position even clearer. In this case, the central complaint under Article 5 was that the person detained on the basis of Article 5(1)(e) was not receiving appropriate treatment. The Grand Chamber took the opportunity to "clarify and refine the principles in its case-law" relating to Article 5 so as to be able to take account of the particular circumstances in which an individual is placed in compulsory confinement. The Grand Chamber considered that:

> 205 […] in the light of the developments in its case-law and the current international standards which attach significant weight to the need to provide treatment for the mental health of persons in compulsory confinement ([referring to the CRPD, the Guidelines on Article 14 CPRD the Recommendation REC (2004) 10 of the Committee of Ministers to member states concerning

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[13] Application no. 1967/14, decision of 22 November 2016, [2018] MHLR 21.

[14] www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E (accessed 15 January 2020).

[15] Which remains prevalent: see (in England and Wales): *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2.

[16] https://www.coe.int/es/web/commissioner/-/respecting-the-human-rights-of-persons-with-psychosocial-and-intellectual-disabilities-an-obligation-not-yet-fully-understood (August 2017, accessed 15 January 2020).

[17] Application no. 18052/11, decision of 31 January 2019.

> the protection of the human rights and dignity of persons with mental disorders and explanatory memorandum (adopted on 22 September 2004)]), it is necessary to acknowledge expressly, in addition to the function of social protection, the therapeutic aspect of the aim referred to in Article 5 § 1 (e), and thus to recognise explicitly that there exists an obligation on the authorities to ensure appropriate and individualised therapy, based on the specific features of the compulsory confinement, such as the conditions of the detention regime, the treatment proposed or the duration of the detention. On the other hand, the Court considers that Article 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities in points 6-9 of its 2015 Guidelines concerning Article 14 of the CRPD. (emphasis added)

The decisions in *N* and *Rooman* are hardly surprising, consonant as they are with the approach of member states to the ECHR. By way of example, the Republic of Ireland, which waited until 2018 to ratify the CRPD, until it had passed legislation designed to bring it into compliance with its obligations,[18] entered a declaration upon ratification of the CRPD – in full knowledge of the CRPD Committee's Guidelines – to the effect that

> "*it understand*[s] *that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards*."

The decisions in *N* and *Rooman*, though, means that the 'impasse' at UN level noted by the UN Special Rapporteur in 2017 on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is therefore now replicated at Council of Europe level.[19] The Grand Chamber in *Rooman* left the door open to a possible reinterpretation of Article 5 in due course by noting that it was proceeding on the basis of the "current" interpretation of the Article. It is certainly possible to see how it could in due course move to interpret Article 5(1)(e) ECHR as justifying deprivation of liberty only where the person not only has a mental disorder but that mental disorder renders them functionally incapable of making decisions about their care and treatment. However, not least because of the positive duty under Article 2 to secure the right to life of persons at real and immediate risk of suicide,[20] a duty which may – in extremis – need to be discharged by detaining the person,[21] it is difficult to see how the impasse will ever be fully bridged in legal terms.[22] Even a move to narrow the gap to those who are functionally incapable of decision-making at the relevant moment would not meet with the approval of the Committee who, to date, have challenged the validity of the concept of mental capacity.[23]

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[18] In particular, the Assisted Decision-Making (Capacity) Act 2015.

[19] See Dainius Pūras, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (2017) A/HRC/35/21, para 33.

[20] See most recently *Fernandes de Oliviera v Portugal* (Application 78103/14, decision of 31 January 2019).

[21] Although in *Fernandes de Olivieira*, the Grand Chamber recognised the balancing act in play here, reiterating "*that the very essence of the Convention is respect for human dignity and human freedom. In this regard, the 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 , Mitić v. Serbia , no. 31963/08, § 47, 22 January 2013). The Court has acknowledged that excessively restrictive measures may give rise to issues under Articles 3, 5 and 8 of the Convention (see Hiller* [Application no. 1967/14, decision of 22 November 2016*] § 55)*." (para 112).

[22] Although see, for possible ways forward, Martin, W., & Gurbai, S.,'Surveying the Geneva impasse: Coercive care and human rights,' *International journal of law and psychiatry*, 2019: 64:117-128.

[23] UN Committee on the Rights of Persons with Disabilities, 2014: "General Comment No. 1 on Article 12: Equal recognition before the law." CRPD/C/GC/1, para 14. But it is possible that this is changing –

If the legal impasse is unbridgeable, this means that the pressure is all the greater to find solutions which reduce the relevance of this impasse in practical terms – i.e. by reducing the need to invoke the requirements of Article 5(1)(e) in Council of Europe countries (or its broader equivalent in Article 9 ICCPR in other jurisdictions).[24]

the Concluding Observations on the second report of Australia (CRPD/C/AUS/CO/2-3, 15 October 2019) include a recommendation (at paragraph 24) that Australia adopt the recommendations set out in the Australian Law Reform Commission's 2014 report, 'Equality, Capacity and Disability in Commonwealth Laws' (ALRC Report 124). These recommendations are based, in part, upon a functional model of capacity.

[24] See, for instance, Gooding, P. et al, 'Alternatives to Coercion in Mental Health Settings: A Literature Review' available at https://socialequity.unimelb.edu.au/news/latest/alternatives-to-coercion (accessed 15 January 2020).