



Monitoring of nursing and residential homes - determining factors to decide if they are places of deprivation of liberty or not

Austrian Ombudsman Board (Oct. 2015)

Both the Austrian Ombudsman Board and the Austrian civil society were closely involved in drafting the legislation for the creation of the NPM through the OPCAT-Implementation act. The common goal of the Federal Government and the Parliament was to fully implement the OPCAT into national law. In Austria this was done through the amendment of section 8 of the Federal Constitution Law and the new Ombudsman Act. Which kinds of facilities are defined as “places of detention” has deliberately not been regulated in a conclusive manner in the Ombudsman Act; instead, reference is made directly to Art. 4 (1) and (2) of the OPCAT. Art. 4 of the OPCAT defines a place of detention as follows:

Paragraph 1: A place of detention is a place: where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

Paragraph 2: For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

Whether or not a social facility is a “place of detention” and therefore can be visited unexpectedly at any time depends on 3 factors¹:

1. Are social facilities subject to the jurisdiction of the state or its control?
2. Can the deprivation of liberty be imputed to the State?
3. Are people - at least potentially - deprived of their liberty in these places?

In accordance with the Vienna Convention on the Law of Treaties, a treaty² shall also be interpreted in the light of its aim and purpose. According to Art. 32 of the Convention, in the case of ambiguities recourse may also be taken to the preparatory work of the treaty.³ It can be quite clearly deduced from historic materials of the OPCAT of 18 December 2002, that the definition of the term “place of detention” is to be broadly interpreted and construed. This means that in the understanding of the Austrian NPM, Art. 4 of the OPCAT not only include prisons and classical places of detention in the field of police and justice, but also “social care homes and homes for elderly people whose personal liberty is restricted”.⁴

Not only human rights literature on Article 4 of the OPCAT, but also the national law comprise a number of references which allow for a very broad interpretation of the NPM mandate to include a variety of public or private social services. In Austria, facilities for elderly people and people

¹ Hallo de Wolf, A. „Visits to Less Traditional Places of Detention: Challenges under the OPCAT“, (2009) Essex Human Rights Review 6(1), (Preventing Torture in the 21st Century: Monitoring in Europe Two Decades On, Monitoring Globally Two Years On Part I (Special Issue 2009), page 82.

² Vienna Convention on the Law of Treaties, 23 May 1969, Federal Law Gazette N°40/1980.

³ Human Rights Implementation Centre, University of Bristol, „Deprivation of liberty“ as per Article 4 of OPCAT: the scope (2011), page 2, www.bris.ac.uk/law/research/centresthemes/hric/hricdocs/deprivationofliberty.doc (25.7.2012)

⁴ Nowak, M./McArthur, E., The United Nations Convention Against Torture, S. 926; Human Rights Implementation Centre, University of Bristol, „Deprivation of liberty“, page 3 („social care homes, psychiatric hospitals and centres for children“)

depending on care, facilities for people with disabilities, but also public and private hospitals, may only become operational with the approval of the state; the compliance with licensing requirements is always subject to the supervision of the government.

The Federal Law on the Protection of Personal Freedom for people staying in homes and other care facilities came into force in 2005. The Act regulates in detail the preconditions as well as the investigation of violations of the right to personal freedom. Thereby the Act ensures that such violations are also investigated in facilities for elderly people, people dependent on care, people with disabilities and in hospitals caring for at least three mentally ill or mentally disabled persons.

According to Article 3 (1) of the Nursing and Residential Homes Residence Act, a deprivation of liberty occurs when a change in the location of a supervised or a cared for person is effectuated against or without their will and with the use of physical means. In particular this refers to the use of mechanical, electronic or medical measures, or the threat thereof.

Art. 4 establishes that a restriction of liberty may only occur when:

1. the resident is mentally ill or mentally disabled, and thus puts his life or health or the life or health of other persons at a serious and considerable risk;
2. it is necessary to avoid a danger and the measure is suitable and appropriate in its duration and intensity in relation to the risk involved;
3. the danger cannot be averted by other measures, in particular gentler assistance or care measures.

In Austria it has also been specifically established by law which persons/professional groups are explicitly authorized to instruct the use of measures that restrict liberty in social institutions. The national law expressly authorizes individuals by virtue of their medical, nursing or educational expertise to exercise elements of "governmental authority" themselves.

Therefore both permissible and impermissible custodial measures in care and nursing homes (as defined in Art. 4 (1) of the OPCAT) are always directly attributable to the State. In daily nursing care such measures are always potentially possible since the majority of the residents of care and nursing homes are truly aged and suffer from dementia. Particularly when the disease has progressed, patients often suffer from very serious intellectual, mental and physical impairments.

The NPM has undertaken intensive preparatory work and publicity amongst public and private retirement and nursing home operators and their umbrella organizations in Austria. As a result it is now undisputed that without exception all governmental as well as private nursing homes fall under the OPCAT mandate. In the meantime, this legal opinion is also being supported in legal literature, such as the journal for home and care law. Initial irritations have been settled entirely.

Voluntary or involuntary placement

The UN Convention on the Rights of Persons with Disabilities (CRPD) is based on the fundamental assumption that all people, irrespective of the nature or severity of their illness/disability, have the ability to enjoy full legal capacity and to actively participate in businesses when exercising a self-determined and independent life, if they are given the appropriate support. As a consequence, Article 2, paragraph 12 of the UN CRPD recognizes the enjoyment of legal capacity in all aspects of life without stating any specific capabilities or requirements. Different models exist worldwide on how such "supported decision-making" can be implemented. Canada and Sweden are commonly regarded as best practice models.

Austrian civil law however still provides for different models of decision-making through legal guardians or other authorized representatives, thus actually limiting a person's legal capacity. If a person of full legal age, who suffers from a mental disease or is mentally disabled, is not able to manage some or all of its affairs without the risk of putting itself to a disadvantage, a legal guardian must be appointed for said person by the court either at the person's request or by the court's own motion. In Austria 60,000 people have such a court appointed legal guardian. Each year about 60% of the newly requested appointments for legal guardianship apply to persons over the age of 80. In accordance with Par. 280 lit. 1 of the Austrian Civil Code a person under legal guardianship is not able to act in a legal way within the sphere of activity of the legal guardian without his or her explicit or implicit consent. Appointing a legal guardian therefore automatically leads to a restriction of the individual's legal capacity, which is not consistent with the provisions of the UN CRPD. Court appointed legal guardians manage a person's income and property and they have the right to determine the person's place of residence. This includes – among other things – the closing of contracts with nursing homes or care facilities, to which persons in need of care must move if the care can no longer be provided and mastered by relatives or the person in question can no longer keep an independent household itself. This means that in Austria it is not possible to establish with absolute certainty if a person has really been placed in a nursing home or care facility voluntarily and only on the explicit request of the concerned person itself. It is generally acknowledged that a high need of political and legal action is required in this matter and that models need to be established in order to support the decision-making ability of older people and of people with disabilities and to replace the current model of decision making by legal or authorized representatives. The Federal Ministry of Justice already plans to present an amendment to the law on legal guardianship to Parliament in 2016.