

Restriction of freedom in nursing homes due to risk of COVID-19 infection

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The Supreme Court recently ruled that nursing homes can restrict residents' freedom by isolating them in their room. The resident in question had been isolated in his room in an attempt to prevent the spread of COVID-19 among the other nursing home residents.

Legal background

Section 4 of the Home Residence Act⁽¹⁾ provides for the possibility to restrict the freedom of nursing home residents provided that:

- the resident is mentally ill or disabled and, in connection with this disability, their life or health is in serious danger;
- the restriction is indispensable to preventing this danger and appropriate in relation to the duration and intensity of the danger; and
- the danger cannot be overcome by other means – in particular, more conciliatory methods of care and nursing.

These restrictions must be immediately notified to a patient advocacy organisation, which may challenge these measures in court in the resident's interest.

Facts

On 30 March 2020 the resident, who suffered from dementia and had a strong compulsion to move around, was transferred from hospital to a nursing home after testing negative for COVID-19.

On 3 April 2020 the resident suffered a fever and was taken back to the hospital with suspected COVID-19. After testing negative again, the resident was brought back to the nursing home on the same day. During transport, the resident was not fitted with a filtering facepiece (FFP).

The nursing home isolated the resident in his room and placed a touch-sensitive mat in front of his bed to monitor non-compliance with quarantine and social distancing restrictions. When the resident left his room, the nursing staff led him back. This measure was continued after a further negative COVID-19 test on 8 April 2020 and terminated after a further negative test on 21 April 2020.

Due to his cognitive restrictions, the resident did not understand the quarantine or the need to wear an FFP or keep a minimum distance from others. The measures served to prevent the spread of COVID-19 among the other residents of the nursing home, who were all elderly and had several pre-existing conditions. The restriction of freedom was notified to the patient advocacy organisation on 15 April 2020.

Decisions

District court

On receiving an application from the advocacy organisation, the Donaustadt District Court held that the isolation of the resident in his room and the use of a touch-sensitive mat were formally illicit between 30 March 2020 and 15 April 2020, but materially legitimate between 30 March 2020 and 15 April 2020 and legitimate between 15 April 2020 and 21 April 2020.⁽²⁾ The court held that the restriction was formally illicit until 15 April 2020 because the nursing home had failed to notify the patient advocacy organisation until that date.

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However, for reasons of preventing infection, these measures were materially legitimate until 15 April 2020.

Appellate court

The appellate court partially granted the advocacy organisation's appeal and held that:

- the use of a touch-sensitive mat between 30 March 2020 and 21 April 2020 was illicit; and
- the isolation of the resident in his room was illicit between 30 March 2020 and 15 April 2020 but legitimate between 15 April 2020 and 21 April 2020.⁽³⁾

The court held that the isolation of the resident from 15 April 2020 was legitimate despite the two negative COVID-19 test results because, due to his dementia, the resident was incapable of protecting himself and others by wearing an FFP and keeping the necessary minimum distance from others. The court permitted the appeal to the Supreme Court because of the interaction between restrictive measures in institutions subject to the Home Residence Act and COVID-19 laws.

Supreme Court

The Supreme Court accepted the advocacy organisation's appeal but upheld the appellate court's decision.⁽⁴⁾ It was undisputed that the resident's isolation in his room between 30 March 2020 and 21 April 2020 was a restriction of freedom in the sense of Section 3(1) of the Home Residence Act. According to Section 4 of said act, such restrictions may be imposed only if:

- the restrictions are indispensable to protect residents or third parties from danger;
- the restrictions are appropriate in respect of the duration and intensity of such danger; and
- the danger cannot be prevented by other measures – in particular, more conciliatory measures of care and nursing.

The nursing home in question housed residents with an average age of 84 and several pre-existing conditions. This situation required a particularly effective safety management plan.

The resident was transported to the hospital due to a fever and suspected COVID-19. Although the COVID-19 test was negative, no FFP was applied during his transport back to the nursing home. The resident had therefore had unprotected contact with others while being transported between the hospital and institution and was thus a risk bearer.

At that time, COVID-19 was detected in patients in only 32% to 63% of cases. The negative test results were therefore insufficient to assume safe contact with other residents and the nursing staff. Although more moderate measures (eg, wearing an FFP and maintaining a minimum distance from others) were tried, these attempts were in vain, as the resident needed permanent care and company in all activities of everyday life. From this, it followed that there was a permanent risk of infection which ended only after two weeks had passed between possible infection and first symptoms. The restriction of freedom by isolating the resident in his room was therefore legitimate between 15 April 2020 and 21 April 2020.

Comment

This decision shows the interaction between protecting the freedom of residents of nursing homes and the challenges caused by the COVID-19 pandemic. Nursing homes house highly vulnerable residents who often have a psychological condition which renders them unable to understand and comply with measures necessary to avoid or reduce the risk of infection.

Although the Supreme Court accepted the possibility of restricting residents' freedom by isolating them in their room, it is nonetheless essential that nursing institutions comply with the formal requirements if they impose restrictions on their residents (ie, by immediately notifying a patient advocacy organisation of such restrictions).

It would be interesting to know what the Supreme Court would have said in respect of the touch-sensitive mat placed in front of the resident's bed. However, since the institution did not appeal that part of the appellate court's decision, the Supreme Court could not decide whether the use of the mat was illicit.

For further information on this topic please contact [Rainer Herzig](mailto:herzig@preslmayr.at) at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95) or email (herzig@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) *Federal Law Gazette* I, 11/2004, as amended.

(2) Donaustadt District Court, 18 Ha 2/20d.

(3) Vienna Regional Court for Civil Matters, 44 R 184/20i.

(4) Supreme Court, 7 Ob 151/20m.

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