HØRINGSSVAR VEDRØRENDE DELEGERING OG BRUK AV OC-GASS/PEPPERSPRAY

Det vises til Kriminalomsorgsdirektoratet sitt oversendelsesbrev av 15. mars 2023 hvor det bes om tilbakemelding på Oslo fengsel sin brev av 24.07.2020 samt Kriminalomsorgen region øst sitt oversendelsesbrev til Kriminalomsorgsdirektoratet av 22.06.2021. Hovedpunktene i høringssvaret er oppsummert i oversendelsesbrevet.

I brevene fra Oslo fengsel og Kriminalomsorgen region øst vises det til at det ved behov er «nødvendig at også erfarne fengselsbetjenter – i noen få gitte situasjoner med særlig krevende innsatte – kan få utlevert OC-gass, som oppbevares og medbringes forsvarlig i uniformbelte etter ordre fra operativ førstebetjent/vaktleder. Dette for å sikre et forsvarlig arbeidsmiljø og opprettholde ro, orden og sikkerhet. Dette forutsetter en konkret vurdering i hvert enkelt tilfelle, og det må foreligge ekstraordinære omstendigheter, som tilsier risiko for skade».

Når det gjelder behovet for å utvide den personellmessige gruppen som gis adgang til å ha OC-gass eller pepperspray i beltet begrunnes dette med at tvangsmidlet vil ha en forebyggende effekt på de innsatte og sikre ansatte et forsvarlig arbeidsmiljø. Samtidig erkjennes det at bakenforliggende organisatoriske årsaksforholdene, som mangelfullt innhold i straffegjennomføringen på grunn av manglende bemanning og helseoppfølgning av de innsatte, er det egentlige problemet i forhold til det høye antallet med vold og trusler. Når situasjonsbildet imidlertid er slikt mener lokal leder på Oslo fengsel at hensynet til ansattes sikkerhet må veie tyngst.

Videre bes det om adgangen til å medbringe OC-gass/pepperspray på fremstillinger av innsatte ut av fengselet. Dette behovet begrunnes med en enkeltstående hendelse fra en fremstilling, hvor man i den etterfølgende vurderingen kom frem til at hendelsen ville vært løst på en mindre inngripende måte dersom man hadde hatt tilgang til å medbringe og anvende pepperspray.

Kriminalomsorgsdirektoratet (KDI) ber med bakgrunn i dette om en tilbakemelding fra øvrige regioner og fengsler samt fagforeningene, hovedverneombudet og Kriminalomsorgens høgskole og utdanningssenter (KRUS) om deres syn på de reiste problemstillingene. Det bes om dette blant annet for å kartlegge i hvilken grad etaten har et sammenfallende syn når det gjelder tvangsmiddelet OC-gass/pepperspray. Det legges til grunn at sakens mange sider redegjøres for både av lokalt og regionalt nivå. KDI understreker samtidig at hvorvidt det er hensiktsmessig eller innenfor regelverket å regulere bruken i anmodet retning tar KDI ikke stilling til i denne omgangen.

Det informeres imidlertid om at KDI har anmodet Justisdepartementet om en nærmere vurdering av rekkevidden til å bære og benytte pepperspray. Det vises i den forbindelse til at KDI ønsker at

pepperspray skal kunne medbringes under fremstilling og transport mellom enheter. En slik avklaring fra Justisdepartementet vil kunne ha relevans for problemstillingen i foreliggende sak.

Delegering og bruk av OC-gass/pepperspray i forhold til EMK art 2 og 3.

Generelt om regelverk og utdanning i forhold til EMK art. 2 og retten til liv

Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed.[1]

The first sentence of Article 2 § 1 enjoins the State to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework regarding the use of potentially lethal force. Article 2 does not grant a carte blanche. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, lawenforcement operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident.[2]

This means that authorities must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination. Lawenforcement officiers should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force, in the light of the international standards which have been developed in this respect.[3]

Against this background, the Court will examine not only whether the use of potentially lethal force against the applicant was legitimate but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life.[4] Has the State put in place a legal framework regulating the use of force by officers and providing for training, with the stated objective of complying with the international standards for human rights and policing [5] or

[1] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 56.
[2] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 58.
[3] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 59.
[4] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 60.
[5] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 61.

those the legal framework come across as somewhat slender in providing the level of protection "by law" of the right to life which is required in present-day democratic societies in Europe.[6]

When the legal system in operation did not provide those responsible for applying the laws with clear guidelines and criteria concerning the use of force[7] leaving them with greater autonomy of action and more opportunities to take unconsidered initiatives than would probably not have been the case if they had the benefit of proper training and instructions,[8] The Court has considered that the authorities has not done all that could be reasonably expected of them to afford to citizens the level of safeguards required to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally.[9]

The Court bears in mind the difficulties in policing modern societies, the unpredictability of human conduct and the need to train and keep staff prepared for possible unexpected conduct of prisoners. However, even in the most difficult circumstances, such as the fight against dangerous criminals, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 of the Convention establishes, like Article 2 of the Convention, a positive obligation on the State to train its law enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no-one is subjected to torture or treatment that runs contrary to that provision. This also presupposes that the training activities of law enforcement officials, including officials of the penitentiary institutions, are not only in line with that absolute prohibition, but also aim at prevention of any possible treatment or conduct of a State official, which might run contrary to the absolute prohibition of torture, inhuman or degrading treatment or punishment.[10] Law enforcement agents must be trained to assess whether or not there is an absolute necessity to use potentially lethal force, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.[11]

Article 3 of the Convention establishes a positive obligation on the State to train its lawenforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no one is subjected to torture or treatment that runs counter to that provision.[12] In respect of the use of measures of physical restraint on patients in psychiatric hospitals, the developments in contemporary legal standards on seclusion and other forms of coercive and non-consensual

[6] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 62.
[7] LEONIDIS v. GREECE, application no 37795/13, avsnitt 8243326/05, avsnitt 65.
[8] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 70.
[9] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 71.
[10] DAVYDOV AND OTHERS v. UKRAINE, application no 17674/02 og 39081/02, avsnitt 268.
[11] NACHOVA AND OTHERS v. BULGARIA, application no 43577/98, avsnitt 97.
[12] BOUYID v. BELGIUM, application no. 23380/09, avsnitt 108.

measures against patients with psychological or intellectual disabilities in places of deprivation of liberty require that such measures be employed as a matter of last resort, when their application is the only means available to prevent immediate or imminent harm to the patient or others. Furthermore, the use of such measures must be commensurate with adequate safeguards against any abuse, provide sufficient procedural protection, and be capable of demonstrating sufficient justification that the requirements of ultimate necessity and proportionality have been complied with and that all other reasonable options have failed to satisfactorily contain the risk of harm.[13]

In the case of Tekin and Arslan v. Belgium The Court noted that several international observers had already expressed their concern about the gaps in the training provided for prison staff in Belgium at the material time. It observed that according to the information provided by the Government the prison officers involved in the facts of the present case had received fairly summary training.[14] In particular, the three-day training programme on conflict management did not mention detainees with mental disorders or the possibility of adopting a different approach to such persons. The Court has previously ruled that dealing with mentally disturbed individuals clearly requires special training.[15] In Shchiborshch and Kuzmina v. Russia, the Court observes that dealing with mentally disturbed individuals clearly requires special training, the absence of which is likely to render futile any attempted negotiations with a person with a mental disorder as grave as that of Mr Shchiborshch.[16]

Nærmere om forholdet til pepperspray og OC-gass

The Court is mindful of the potential for violence that exists in penal institutions and accepts that the use of force may be necessary on occasion to ensure prison security. This is particularly so in cases of unruly behaviour by dangerous prisoners, a situation in which it is important to find a balance between the rights of different detainees or between the rights of the detainees and the safety of the prison officers.[17] Recourse to physical force which has not been made strictly necessary diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.[18]

As regards the legitimacy of the use of pepper spray The Court notes that although pepper spray is authorised for the purpose of law enforcement the Court refers to the concerns expressed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or

[13]AGGERHOLM v. DENMARK, application no. 45439/18, avsnitt 84.
[14] TEKIN AND ARSLAN v. BELGIUM, application no 37795/13, avsnitt 96.
[15] TEKIN AND ARSLAN v. BELGIUM, application no 37795/13, avsnitt 97.
[16] SHCHIBORSHCH AND KUZMINA v. RUSSIA, application no 5269/08, avsnitt 233.
[17] TALI v. ESTONIA, no. 66393/10, avsnitt 75.
[18] TALI v. ESTONIA, no. 66393/10, avsnitt 59.

Punishment ("the CPT") in respect of the use of such agents in law enforcement.[19] It is well-known that the use of this product can cause breathing difficulties, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pains, dermatitis and allergies. In high doses it can cause necrosis of the tissue in the respiratory tract and the digestive system, pulmonary oedema and internal bleeding (haemorrhaging of the suprarenal glands).[20]

Pepper spray and other chemical irritant solutions are known to cause a range of health problems including respiratory illness.[21] All RCAs cause intense irritation and pain in the eyes, respiratory tract and skin, which results in crying, coughing, chest tightness, and difficulty breathing. These effects are often accompanied by anxiety and panic. More severe effects such as vomiting and skin blistering can also occur, as well as permanent damage to the eyes, skin and lungs, depending on the degree of exposure. Exposure to high concentrations of such chemicals, or over a prolonged period, can cause severe injury or even death. Therefore, the use of RCAs must be carefully controlled, and they should not be used in confined or enclosed spaces. Even low concentrations can cause serious injuries to vulnerable groups such as children, the elderly or those with sensitivities or medical conditions, such as asthma.[22]

Pepper spray and other incapacitant sprays or potentially dangerous substances should should be governed by principles of subsidiarity and proportionality.[23] Chemical irritants should not be used in closed environments without adequate ventilation or where there is no viable exit, owing to the risk of death or serious injury from asphyxiation.[24] CPT has serious reservations even when used in open spaces. If exceptionally it needs to be used, there should be clearly defined safeguards in place. The CPT recommends that Pava spray should not form part of the standard equipment of a prison officer[25] and that authorities draw up a clear directive governing the use of pepper spray, which should include, as a minimum; [26]

- clear instructions as to when pepper spray may be used, which should state explicitly that pepper spray should not be used in a confined area,

[19] TALI v. ESTONIA, no. 66393/10, avsnitt 78.
[20] ABDULLAH YAŞA AND OTHERS v. TURKEY, application no. 448277/08, avsnitt 30.
[21] First, Do No Harm, Segregation, restraint, and pepper spray use in women's prisons in New Zealand, Dr Sharon Shalev and New Zealand Human Rights Commission, 2021, side 49.
[22] Resource book on the use of force and firearms in law enforcement, United Nations Office on Drugs and Crime (UNODC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), 2017, side 87.
[23] CPT/Inf (2018) 44, Report to the Croatian Government, avsnitt 62.
[24] Office of the United Nations High Commissioner for Human Rights (OHCHR) (2020) Guidance on less- lethal weapons in law enforcement, United Nations, Geneva. At section 7.2.7.
[25] CPT/Inf (2017) 9, Executive summary jfr Tali jfr. CPT/Inf (2009) 25), avsnitt 79 jfr (CPT/Inf (2009) avsnitt 8.
[26] Tali jfr. CPT/Inf (2009) 25), avsnitt 79 jfr (CPT/Inf (2009) avsnitt 8.

- Pepper spray should never be deployed against a prisoner who has already been brought under control and who shows only passive resistance to an order by prison staff,
- the right of prisoners exposed to pepper spray to be granted immediate access to a doctor and to be offered measures of relief;
- information regarding the qualifications, training and skills of staff members authorised to use pepper spray. [27] When it comes to training the CPT recommends that appropriate measures be taken to upgrade the skills of prison staff in handling high-risk situations without using unnecessary force, in particular by providing training in ways of averting crises and defusing tension and in the use of safe methods of control and restraint.[28] The Court shares the CPT's concerns and concurs with the above-mentioned recommendations.[29]

I regelverket til Politi- og fengselsmyndighetene i New-Zealand stilles det krav om at ansatte som skal bruke pepperspray må gjennomgå et årlig oppfriskningskurs hvor de får opplæring «of the risks involved with pepper spray use, including potential health risks.[30]

Forholdet mellom EMK art. 2 og 3 og Straffegjennomføringsloven § 38 med underliggende regelverk.
Etter strgjfl. § 38 jfr. forskrift 3-11, 1. og 2. ledd og retningslinjene 38 kan ansatte benytte fysisk makt overfor innsatte som ikke rette seg etter gjeldene ordensbestemmelser, herunder pålegg gitt av tilsatte, når dette er nødvendig og forsvarlig og mindre inngripende tiltak forgjeves har vært forsøkt eller vil fremstå som utilstrekkelig. Videre kan tilsatte benytte CS-gass og OC-gass (pepperspray), dersom det er strengt nødvendig og mindre inngripende tiltak forgjeves har vært forsøkt eller åpenbart vil være utilstrekkelig. Før gass brukes skal ansatte, hvis situasjonen gjør det mulig, søke å forklare innsatte det ureglementerte i vedkommendes forhold og gjøre innsatte kjent med at gass vil bli brukt hvis innsatte ikke avstår fra handlingen.

Regelverket inneholder ingen uttrykkelig henvisning til oppfordringen i Nelson Mandela Rules (NMR) § 38 om at «prison administrations are encouraged to use, to the extent possible, conflict prevention, mediation or any other alternative dispute resolution to resolve conflicts». Uten en slik uttrykkelig begrensing i regelverk om forutgående forsøk på konfliktdempende kommunikasjon i form av overtalelse, forhandling og mekling er det en fare for at ansatte for raskt vil benytte seg av fysisk makt for å løse en situasjon hvor innsatte nekter å etterkomme pålegg fra de tilsattes, med

[27] CPT/Inf (2018) 44, avsnitt 62.
[28] CPT/Inf (2018) 44, avsnitt 29.
[29] ALİ GÜNEŞ v. TURKEY, 9829/07, avsnitt 41.
[30] New Zealand Police and Department of Corrections, Regulatory Impact Statement: Use of pepper spray in custodial settings, Section 1: Diagnosing the policy problem.

påfølgende fare for eskalering og mulig tvangsmiddelbruk i form av OC-gass eller pepperspray.[31] Dette fordi det er de klare og tydelige ordensdirektivene i regelverket som har størst påvirkningskraft når det gjelder å styrer tjenesteutførselen til de ansatte.[32]

Det foreligger heller ingen klare og tydelige direktiver eller instruksjoner om at pepperspray eller OC-gass ikke må brukes «in confined area», som for eksempel inn på en celle, som følge av faren for dødsfall eller alvorlig skade på grunn av kvelning. Retningslinjene til strgjfl. § 38 inneholder i det hele tatt ingen redegjørelser av de medisinske helsefarene ved å bruke OC-gass eller pepperspray, utover en generell henvisning om at «egenskapene til strålebasert OC-gass er annerledes enn for gass med tåkespredning, og kan passivisere et enkelt individ alene uten større innvirkning på omgivelsene».[33]

Slik undertegnede ser det gir ikke retningslinjene tilstrekkelige rettslige og medisinske føringer for når det er forsvarlig å bruke pepperspray og OC-gass.[34] De åpner således for et betydelig grad av subjektiv skjønnsutøvelse hos den enkelte fengselsbetjent med påfølgende fare for at de vil kunne ta «unconsidered initiatives than would have been the case if they had the benefit of proper training and instructions.[35] When this is the case The Court has considered that the authorities has not done all that could be reasonably expected of them to afford to citizens against whom potentially lethal force was used, the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally.[36]

Delegering og bruk av OC-gass/pepperspray i forhold til EMK art. 8

The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. Any interference in the rights protected under this Article must, in order to be permissible, satisfy the conditions set out in paragraph 2 of Article 8 in terms of lawfulness and necessity, including the requirements of legitimate aim and proportionality.[37]

With regard to general measures taken by the national government, it emerges from the Court's case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial

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[31] Sivilombudsmannens særskilte melding til Stortinget om isolasjon (…), Dokument 4:3, 2018/19, side 57, 59 og 82.
[32] Riksrevisjonens undersøkelse av helse-, opplærings- og velferdstjenester til innsatte i fengsel, Dokument 3:4, 2022 – 2023, side 12.
[33] https://www.kriminalomsorgen.no/getfile.php/3980147.823.wsuslau7qsl7us/%C2%A7%C2%A7%C2%A7%C2%A7+38+-+Bruk+av+tvangsmidler+i+fengsel.pdf
[34] Se også våre merknader nedenfor om forholdet til EMK art. 8.
[35] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 70.
[36] MAKARATZIS v. GREECE, application no. 50385/99, avsnitt 71.
[37] A.-M.V. v. Finland, application no. 53251/13, avsnitt 70.

review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation.[38] The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decisionmaking process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.[39]

The positive obligations may also require measures designed to provide special protection to persons who are in a particularly vulnerable position. The State's margin of appreciation is substantially narrower in such cases.[40]

Delegasjon av delegeringskompetanse og forholdet til kravet om «nn accordance with the law»

Offentlig maktutøvelse i form av inngrep i noens fysiske og psykiske integritet kan etter EMK art. 8 kun skje når dette er «in accordance with the law». "In accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law. There must be a measure of legal protection in domestic law against arbitrary interferences by public authorities, (Malone v. The United Kingdom, § 67). It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power, (Malone v. The United Kingdom, § 68).[41]

Etter undertegnedes syn kan beslutningsmyndigheten om hvem som skal gis adgang til å bruke pepperspray eller OC-gass ikke delegeres ned til operativ vaktleder/førstebetjent. En slik utvidelse av personell som skal gis adgang til å bruke et slikt tvangsmiddel mener jeg må finne sted gjennom en rettslig regulering i form av retningslinjer gitt av KDI.

Er tiltaket sikkerhetsmessig nødvendig i et demokratisk samfunn?

Undertegnede setter for det første spørsmålstegn hvorvidt bruk av pepperspray eller OC-gass er egnet til å løse de bakenforliggende organisatoriske systemfaktorene som både Oslo fengsel og region øst påpeker er det egentlige problemet til det høye antallet volds- og trusselhendelser i Oslo fengsel.

Denne problemstillingen har CPT behandlet i en landrapport i et periodisk besøk til Storbritannina. Der vises det til at de fant «that the low staffing levels in (both) prisons had led to low staff morale and increased work-related stress. Staff felt they did not get sufficient professional training support

[38] A.-M.V. v. Finland, application no. 53251/13, avsnitt 82.
[39] A.-M.V. v. Finland, application no. 53251/13, avsnitt 84.
[40] A.-M.V. v. Finland, application no. 53251/13, avsnitt 71.
[41] Malone mot Storbritannia, application no. 8691/79, avsnitt 68 jfr Silvers og andre mot Storbritannia, application 5947/72 med flere, avsnitt 88 – 89.

or refresher courses. Staff at (both) prisons readily acknowledged that the low staffing complement, resulting in a deteriorating regime for prisoners, with prisoners locked up for longer, had an adverse effect on the overall safety of the prisons». Dette er en situasjonsbeskrivelse som i stor grad må sies å tilsvare problembeskrivelsen slik den er gjengitt fra Oslo fengsel og region Øst.

CPT sitt svar på disse organisatoriske forhold er hva de har gjentatt tidligere i sine standarder.[42] «The CPT has repeatedly stated that there must be enough staff to correctly supervise the activities of prisoners and support each other in the performance of their duties. An overall low staff complement will certainly impede the development of positive relations; more generally, it will generate an insecure environment for both staff and prisoners. In addition to creating a potentially dangerous situation for vulnerable prisoners, it also poses dangers for staff. Equally, a low staff complement will have a negative influence on the quality and level of the activities programme developed and make it nearly impossible to provide an acceptable regime for prisoners.

Moreover, it is clear that continued exposure to highly stressful or violent situations can generate psychological reactions and disproportionate behaviour. In light of the above, the CPT recommends that authorities take measures to ensure that, at both prisons: staffing levels are reviewed in each wing or block to ensure adequate staff numbers , that staff are never alone on a wing, prison staff benefit from adequate psychological support, the training needs of prison officers are met and regular refresher courses provided, management ensure that sufficient staff are allocated to, and actually present on, each wing at all times, the skills set and mix of staff deployed to each wing is adequate for the level of risk assessed and that the allocated budget does not impact the core operational safety of a prison».[43]

Dersom man skal motvirke volds- og trusselhendelser i fengsler som må man ifølge CPT sine standarder adressere «the overall quality of life in an establishment. That quality of life will depend to a very large extent upon the activities offered to prisoners and the general state of relations between prisoners and staff. The promotion of constructive as opposed to confrontational relations between prisoners and staff will serve to lower the tension inherent in any prison environment and by the same token significantly reduce the likelihood of violent incidents and associated ill-treatment.[44]

[42] Imprisonment, https://rm.coe.int/16806ce96b and Developments concerning CPT standards in respect of imprisonment, https://rm.coe.int/16806cd24c
[43] CPT/Inf (2017) 9, avsnitt 74.
[44] CPT standards, Imprisonment, https://rm.coe.int/16806ce96b

I brevet fra Oslo fengsel hevdes det at det å utstyre også erfarne fengselsbetjenter, etter ordre fra operative førstebetjent, med pepperspray og/eller CS-gass vil kunne virke forebyggende på situasjoner. I en evalueringsrapport foretatt av Her Majesty's Prison and Probation Servic (HMPPS) vises det imidlertid til at «much prison violence is impulsive rather than rational and impulsive crime is not deterred by rules, consequences or fear.[45] PAVA should not be expected to be effective as a general deterrent to violence.[46]

Evalueringsrapporten viser også at «the decision-making process of prison officers was at times flawed, and it appears that some staff will use PAVA outside of guidelines for use. There have been a number of uses of PAVA which clearly don't meet with training and or operational procedures. Most worryingly, staff used PAVA to enforce rules and gain compliance when it was not clearly the last resort or when more time could have been spent talking.[47] When PAVA is used too soon or too often, this will have a detrimental effect on prisoners' perceptions of legitimate authority and could damage relationships at individual and collective level.[48]

Det stilles også spørsmål ved hvorvidt bruk av pepperspray er et egnet operasjonelt tiltak til å forebygge eller de-eskalere volds- og trusselsituasjoner. Det vises i den forbindelse til uttalelse fra Nord-Irlands Human Rights Commission vedrørende det «the operational deployment of PAVA hand-held personal incapacitant spray». Der vises det til at det er «queries about the effectiveness of PAVA and about the potential for its use to exacerbate situations. The effectiveness of PAVA depends on contact with the eye and that officers may miss the eyes. The individual's distress or anger may be aggravated by having been sprayed and the situation may worsen.[49] The use of chemical irritants also entails the risk of harming oneself or others, including other law enforcement officials. A chemical irritant is not always effective and may lead to more resistance or aggression on the part of the subject.[50] Tilsvarende er påpekt av «office of the United Nations high commissioner for human rights

[45] PAVA in Prisons Project Evaluation Report, Operational Resilience and Response Unit Security, Order and Counter-Terrorism HMPPS, 2018, side 28
[46] PAVA in Prisons Project Evaluation Report, Operational Resilience and Response Unit Security, Order and Counter-Terrorism HMPPS, 2018, kapitel 6.
[47] PAVA in Prisons Project Evaluation Report, Operational Resilience and Response Unit Security, Order and Counter-Terrorism HMPPS, 2018, kapitel 6.
[48] PAVA in Prisons Project Evaluation Report, Operational Resilience and Response Unit Security, Order and Counter-Terrorism HMPPS, 2018, kapitel 6.
[49] Northern Ireland Prison Service Consultation on Policy and Guidance for the Operational Deployment of PAVA hand-held personal incapacitant spray, Response of the Northern Ireland Human Rights Commission, 2006.
[50] Resource book on the use of force and firearms in law enforcement, United Nations Office on Drugs and Crime (UNODC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), 2017, side 87.

and United Nations office on drugs and crime sin «Resource book on the use of force and firearms in law enforcement.[51]

Dette er også påpekt av vårt eget Sivilombud som i sin særskilte melding til Stortinget om isolasjon (…) i norske fengsler påpeker at «fengslenes gradvise oppskalering av sikkerhetstiltak som en konsekvens av uønsket atferd fungerer dårlig overfor innsatte med psykiske helseutfordringer og lavt funksjonsnivå».[52] Dette er i tillegg en sårbar gruppe med et særskilt krav på rettsbeskyttelse. Det vises til komiteen for rettighetene til mennesker med nedsatt funksjonsevne som, med bakgrunn i konvensjonskravet i CRDP art. 15 nr 1 om at ingen skal utsettes for tortur eller grusom, umenneskelig eller nedverdigende behandling eller straff, at konvensjonsstatene stopper bruken av tvangsmetoder, blant annet tvangsmidler som «taser guns and similar weapons» overfor mennesker med psykiske utviklingshemminger eller psykososiale funksjonsnedsettelser, særlig for de som er frihetsberøvet.[53] Dette er rettskildeuttaleser som Den Europeiske menneskerettighetsdomstolen (EMD) vil se hen til når de vil vurdere om de nasjonale lovgivningsmyndighetene har holdt seg innenfor sin «margin of appreciation». I A.-M.V. v. Finland understreker EMD at «It is for the Court to decide which international instruments and reports it considers relevant and how much weight it should attribute to them in order to interpret the guarantees of the Convention and to establish whether there is a common standard in the field concerned». I saken mot A.-M.V. v. Finland så EMD hentil og la vekt på «the United Nations Convention on the Rights of Persons with disabilities, having also regard to the interpretation given by the UN Committee as well as the related commendations, resolutions and strategy statements adopted by the Council of Europe bodies.[54]

Hensynet til proporsjonalitet tilsier at lovgivningsmyndighetene ikke ensidig kan se hen til ansattes trygghet og vekte det tyngst ved fastsettelsen av et regelverk. Det må finne sted en «balance between the rights of different detainees or between the rights of the detainees and the safety of the prison officers».[55] Dette innebærer blant annet at justismyndighetene må vurdere den potensielle innvirkning en slik personalmessig utvidelse av adgangen til å benytte pepperspray og OC-gass vil ha «on people who have mental health conditions or learning disabilities, which could leave them particularly vulnerable to its (PAVA) use. I en uttalelse vedrørende bruk av PAVA spray i

[51] Resource book on the use of force and firearms in law enforcement, United Nations Office on Drugs and Crime (UNODC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), 2017, side 87.
[52] Sivilombudsmannens særskilte melding om isolasjon i norske fengsler, 2018/19, side 593, 57 og 82.
[53] Concluding observations on the initial report of Norway, CRPD/C/NOR/CO/ 1, 2019, punkt 24 og Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, 2017, CRPD/C/GBR/CO/1, punkt 36 og 37.
[54] A.-M.V. v. Finland, application no. 53251/13, avsnitt 74.
[55] TALI v. ESTONIA, no. 66393/10, avsnitt 75.

engelske fengsler viser «The Equality and Human Rights Commission» i England til at «The PAVA pilot scheme exposed very significant risks of unlawful use of the spray and that significant additional safeguards were needed to mitigate the risk of the spray being used in a discriminatory way. It also uncovered a serious lack of data about the use of force on disabled people in prisons and limited understanding of learning disabilities by prison staff. Individual prisons will have to demonstrate that they understand the trends in the use of force at their establishment, and any areas where it is being used disproportionately, before they are permitted to use the spray».[56]

Når det gjelder behovet for å utvide personalgruppen som skal gis adgang til å bære det potensielt dødelige tvangsmidler fremstår det etter Oslo fengsel sine egne beskrivelser som marginalt. Undertegnedemener at spørsmålet om hvorvidt bruk av pepperspray eller OC-gass er et egnet virkemiddel til å forebygge uønskede hendelser samt sikre et trygt avdelingsmiljø for både ansatte og innsatte i mye større grad må dokumenteres. Det vis i den forbindelse til Nord-Irlands Human Rights Commission sine uttalelser vedrørende «the operational deployment of PAVA hand-held personal incapacitant spray. The Commission considers that a more detailed analysis of incidents should be carried out, preferably including independent research, before concluding that PAVA is an appropriate response to these. In particular, there should be an independent evaluation of whether staff training in conflict management skills is sufficient to allow officers to effectively de-escalate potentially violent situations.[57] The Commission is aware that difficult and dangerous situations can arise in prison settings, and recognises that prison officers have the right to protect themselves, and the duty to protect others, from injury. The Commission is not opposed to the availability of technologies that offer a proportionate means of responding to immediate danger, and where a physical intervention is absolutely necessary a pepper spray could in principle be preferable in circumstances where a baton would otherwise be used. However, a weapon that causes severe pain, which official studies say may last for some hours, is certainly never to be used as a first resort. It calls on the NIPS to obtain independent research on the type of incidents where it thinks that PAVA may be used and to evaluate the response to these, with particular reference to alternatives including de-escalation techniques».[58]

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[56] https://www.equalityhumanrights.com/en/our-work/news/ministry-justice-give-prisoners-greater-protection-during-rollout-pava-spray

[57] Northern Ireland Prison Service Consultation on Policy and Guidance for the Operational Deployment of PAVA hand-held personal incapacitant spray, Response of the Northern Ireland Human Rights Commission, 2006.

[58] Northern Ireland Prison Service Consultation on Policy and Guidance for the Operational Deployment of PAVA hand-held personal incapacitant spray, Response of the Northern Ireland Human Rights Commission, 2006.

Undertegnede stiller videre spørsmål ved hvorvidt den nåværende beslutningsprosessen i tilstrekkelig grad sikre interessene til alle de berørte partene. Den som skal fremme sine meninger og interesser i en sak, har stor interesse av å vite at saken er under behandling. Jo tidligere man får kjennskap til at noe er på gang, desto lettere blir det å påvirke utfallet. For demokratiet og den offentlige debatt er dette viktig kunnskap.[59] En viktig rettssikkerhetsgaranti er åpenhet i forvaltningen, slik at det kan føres folkelig og rettslig kontroll med den. KRUS vil advare mot en utvikling hvor man ikke bare unntar offentlige høringsinstanser fra å komme med høringsinnspill på KDI sine retningslinjer, men hvor man også unntar hele høringsprosessen fra offentligheten. Dette er spesielt bekymringsfullt i forhold til en offentlig myndighetsutøvelse som er potensielt dødelig og som er unntatt den åpne daglige demokratiske publikumskontrollene ved at den finner sted innenfor en lukket institusjon.

Konklusjon

Undertegnede gjentar med dette sitt syn i forbindelse med vårt høringssvar vedrørende rundskriv om innføring av spyttebeskytter i kriminalomsorgen.[60] Der påpekes det at etter KRUS sitt syn er det rettslige rammeverket omkring fysisk makt og tvangsmidler, det vil si strgjfl. § 38, jfr. forskrift 3-11 (2) med tilhørende retningslinjer og rundskrivutkast, strukturert feil og er sannsynligvis menneskerettsstridig. Undertegnede mener derfor at regelsettet krever en fornyet rettslig gjennomgang og revisjon. Dersom man ønsker å utvide adgangen i forhold til hvilket personell som skal gis adgangen til å bære pepperspray og/eller OC-gass må det finne sted etter offentlig lovgivningsprosess, hvor man involverer flere høringsinstanser er kun de organinterne.

Når det gjelder å iverksette umiddelbare tiltak som kan bidra til å hjelpe på situasjonen mener undertegnede at det må settes fokus på opplæring i konfliktdempende kommunikasjon. Det vises i den forbindelse til Sivilombudets særskilte melding til Stortinget om isolasjon i (…) kriminalomsorgen hvor det påpekes at det i mange fengsler er det lav bevissthet om innsattes psykiske helseutfordringer og traumebakgrunn samt hvordan bruke fellesskapet som miljøterapeutisk metode, noe som fører til konflikteskalering.[61] Dette er noe som etterlyses av de ansatte selv. Det vises til Senter for omsorgsforskning sin rapport vedrørende kartlegging av helse- og omsorgsbehov blant innsatte i fengsel.[62] Der forteller ansatte i kriminalomsorgen at de daglig møter innsatte med

[59] Leder, Aftenposten, 24. april 2023; https://www.aftenposten.no/meninger/leder/i/onedvK/stans-forslaget-om-mindre-aapenhet

[60] https://www.krus.no/getfile.php/5024812.2673.spsqqqn7wsjtwq/H%C3%B8ringssvar+om+innf%C3%B8ring+av+spyttbeskytter+i+kriminalomsorgen.pdf

[61] Sivilombudsmannens særskilte melding om isolasjon i norske fengsler, 2018/19, side 53, 57 og 82.

[62] Kartlegging av helse- og omsorgsbehov blant innsatte i fengsel, Senter for omsorgsforskning, rapportserie nr. 1/2022, side 18, 24 – 25.

psykiske, emosjonelle og kognitive utfordringer som de verken har kapasitet eller kompetanse til å ivareta på en tilfredsstillende måte. De ønsker veiledning på hvordan de skal forholde seg til denne innsatt-gruppen, for å unngå konfliktsituasjoner og for å bedre forstå deres adferd. Sivilombudet mener det derfor bør iverksettes tiltak for å styrke og systematisere fengslenes tiltak for å forebygge selvmord ved å gi fengslene mest mulig effektive og kunnskapsbaserte arbeidsmetoder.[63]

Sven-Erik Skotte
høyskolelektor

[63] Selvmord og selvmordsforsøk i fengsel, Sivilombudets forebyggingsenhet 2023, side 22.